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"Some people think that a lawyer's business is to make white black; but his real business is to make white white in spite of the stained and soiled condition which renders its true colour questionable. He is simply an intellectual washing machine."

—J. BLECKLEY.

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CONTEMPT OF COURT: NEWSPAPER COMMENT ON PENDING TRIALS.

II.

COMING now to a more detailed consideration of *Attorney-General* v. *Mathison*, [1942] N.Z.L.R. 302. The facts were that the *Star-Sun* (Christchurch), in one part of its issue, gave a narrative account of a breaking and entry of a shop in a suburb. This was told in the words of the victim, the shopkeeper, Denton, who had been severely assaulted. The account of the night's happenings was reported in the form of an interview, and a photograph of the interviewed shopkeeper was published as part of the account. The article concluded by stating that two arrests had been made, and two men had appeared in Court that morning charged with assault with intent to commit theft. In another part of the same issue was a news item, headed "Two Men remanded on Assault Charge," giving the names of the men charged with assaulting the shopkeeper (who had been interviewed) and remanded by the Magistrate.

The publisher of the *Star-Sun* was charged, on a motion for an order for committal, or, in the alternative for the issue of a writ of attachment, for contempt of Court in publishing matter of comment concerning the two accused persons who at the time of publication of such comment were awaiting trial for the offence with which they had been charged and remanded. It was contended by the counsel for the Attorney-General that the publication of the two articles together amounted to contempt of Court, as being calculated to prejudice the trial of the two men. It was submitted that either article by itself would not have amounted to contempt, but the publication of the two articles, in addition to their proximity, might be calculated to prejudice the trial. It was the publication of the statement of one witness, or of a possible witness before the trial, which, it was suggested, did the harm; as the two statements together would give the impression to the ordinary reader that the men were possibly guilty, and this might prejudice a fair trial. It was also submitted that, as some of the narrative account would not be admissible at the trial it would tend to prejudice the fairness of the trial, as being in the minds of jurors who had read the account given by a Police witness, and thus tend to create a bias in such minds.

The learned Judge considered that what was published in this case was hardly comment, as had been alleged in argument for the Attorney-General. It was, he said, a narrative account of the incident for which the named men were arrested and charged. The form and manner of this publication had been criticized, and although it had not been claimed to be a bad case of the type, still it was attacked as belonging to that mischievous form of journalism tending to "newspaper trial" of suspected persons. His Honour proceeded:

> It is not for the Court to attempt to prescribe any rule of conduct for newspapers in the business of publishing matter relating to forthcoming trials in Courts of law. At the same time, I am conscious of the grave harm that may result, and in some cases certainly has resulted, from a determination of certain newspapers to pander for profit to the morbid or salacious interest of some of the public in sensational happenings, and this, at times, with a cynical disregard of the rights of accused persons.

Lest the conclusion the learned Judge had reached in this case should seem to open the door to the dangerous practice just referred to, he thought it not inappropriate to quote from the excellent discussion upon it of Sir John Madden, Chief Justice of Victoria, in the original hearing of *In re Packer, Ex parte Peacock*, [1911] V.L.R. 401, 408, 412, from which the following passages are taken:

> Looking first at the particular proposition as to what may be published in relation to a person by whom a crime is alleged to have been committed, it is very doubtful indeed if any newspaper or any person has any right whatever to publish any alleged fact which is calculated to imperil the freedom or life or interest of an accused or suspected person at his trial. I think that it is very doubtful indeed. It often happens that a newspaper publishes, as alleged facts, what turns out eventually to be of great advantage to the com-

munity by the discovery of a crime and the conviction of a criminal and his punishment. As to that, if a newspaper—or anybody else, for a newspaper proprietor and any other individual are in precisely the same position—chooses to take it upon itself to publish as facts matters not presented to any Court for consideration, and which have not been verified under the sanction of an oath, and which have not been subject to cross-examination or to any of the recognized legal means for testing its truth—if anybody does that, he does it at his own proper peril. He is certainly not entitled to do so by law, although it be for the benefit of the community that crimes should be discovered and punished. But that every citizen has the right to raise a hue-and-cry and pursue a suspected person with public suggestions of his guilt in order that the chances of convicting him may be bettered is, in my opinion, a thing not to be thought of for a single instant in any British community. . . .

This country recognizes no other way of pursuing crime than the constitutional method prescribed in the Courts for dealing with criminal charges. In the Court, when a man is presented for the purpose of trial, the primary proposition is that he is presumed to be innocent. He pleads not guilty, and the presumption of law is that he is not guilty. The proof of his guilt must be built up by a series of facts sufficient to establish his guilt beyond all reasonable doubt. Every fact is supported by sworn testimony or by inferences arising from that testimony, which the jury may draw as the reasonable and proper inferences to be drawn from it. No other means is legitimate to secure the conviction of any man.

The statute gives the right to anybody who chooses, including, of course, a newspaper, to report fairly the proceedings in any Court of justice, and therefore in a Court of preliminary inquiry in respect of an indictable offence. Any publication of that sort is, of course, open to a newspaper which chooses to make it, because the statute permits it. Except that, I know of no privilege or right which anybody has to proclaim what are alleged facts against a man suspected of a crime, either for the benefit of the public, or the benefit of anybody else. . . .

Apart from these general considerations, the particular criticism of what was done in the *Mathison* case was two-fold. In the first place, it was submitted it linked the two men named with the crime described, to their possible prejudice upon their trial; and it was also said to be objectionable as it did not relate facts observed by the newspaper reporter but set out the evidence of the Police witness, Denton, some of which might not be admissible upon the trial of the men in question. This criticism was based upon the Australian cases of *Ex parte Jane Smith*, (1901) 1 N.S.W. S.R. 55, and *Packer* v. *Peacock*, (1912) 13 C.L.R. 577. In *Ex parte Jane Smith* a Sydney newspaper published as an item of news a statement that certain witnesses against the accused were leaving New Zealand for Sydney, and went on to indicate in a manner damaging to the accused woman, not only what the witnesses were to say in evidence, but added comment by way of asserted fact relevant to that evidence. This was held to be a contempt because it had a tendency to prejudice the trial of the accused. His Honour said that case was not an authority for the proposition that any publication of evidence before trial is necessarily a contempt. Each case, he added, must be considered separately and must be judged by its purpose or tendency to interfere with the forthcoming trial. In any event, in the *Mathison* case, the newspaper did not state that it was publishing what was to be the evidence of the assaulted shopkeeper: it merely set out his version of the happening, or of part of it.

Then it was submitted that the *Packer* case forbids publication of anything in a newspaper relating to an incident which is to be the subject of a trial, excepting so much as may be ascertained by the observation of a newspaper reporter. In support of this view His Honour had been referred to the following passage in the judgment of the Court, delivered by Sir Samuel Griffith, C.J., at p. 588:

In our opinion the public are entitled to entertain a legitimate curiosity as to such matters as the violent or sudden death or disappearance of a citizen, the breaking into a house, the theft of property, or any other crime, and it is, in our opinion, lawful for any person to publish information as to the bare facts relating to such a matter. By "bare facts" we mean (but not as an exclusive definition) extrinsic ascertained facts to which any eye-witness could bear testimony, such as the finding of a body and its condition, the place in which it is found, the persons by whom it was found, the arrest of a person accused, and so on. But as to alleged facts depending upon the testimony of some particular person which may or may not be true, and may or may not be admissible in a Court of justice, other considerations arise. *The lawfulness of the publication in such cases is conditional, and depends, for present purposes upon whether the publication is likely to interfere with a fair trial of the charge against the accused person.* Comment adverse to him upon the facts is certainly not admissible.

The learned Judge then observed:

That statement does not limit publication in the manner submitted. It limits publication to facts, but does not limit the method of obtaining those facts nor the publication of them beyond the restrictions set out in the portion I have placed in italics. As was stated earlier in the judgment of Griffith, C.J., in that judgment, at p. 587: "One question is common to all these appeals—namely, 'to what extent is a public journal warranted by law in publishing matter relating to a pending criminal charge?' We were invited to formulate the limits within which such publication is lawful. But this, we think is neither desirable nor practicable. In this, as in many other cases, it may be difficult to lay down a precise line of demarcation, but not difficult to say on which side of the line a particular case falls. One rule, however, may be stated with confidence. A publication which tends to prejudice or bias the public mind, either on one side or the other, and so to endanger a fair trial, is unlawful and a contempt of Court. The whole matter published must be considered, and its tendency must be regarded as a whole."

Applying those considerations to the matter before him, the learned Judge was unable to regard the publications complained of by the Attorney-General as a contempt by having a tendency to endanger a fair trial. It was not for the Court, he said, to express approval or disapproval of the manner in which a newspaper presents its news, as long as the administration of justice is not interfered with. In this case the newspaper may have thought the narrative acquired either dramatic effect or greater credibility by its being given as the version of the victim himself. His Honour thought that the public were "entitled to entertain a legitimate curiosity" about the incident, and as in the nature of the case the happening could be described to the reporters only by the storekeeper or by his alleged assailants, and these were not likely to be the informants, it seemed unimportant that the former was expressly stated to be, in fact, the informant.

On the submission of the Crown that the publication linked the two men named with the crime described, to their possible prejudice on the trial, the authorities cited were *Attorney-General* v. *Tonks*, [1934] N.Z.L.R. 141, which in turn applied *R.* v. *Daily Mirror* (*Editor and Proprietors*), [1927] 1 K.B. 845; but the learned Judge held that, as both those cases dealt with the publication of photographs of accused persons in circumstances calculated to prejudice the testimony of witnesses who might be required to identify the accused, His Honour did not think they had any application to the case before him. It is difficult to understand the learned Judge's distinction. Both those cases are authority for the proposition that it is a grave contempt of Court to publish in a newspaper before trial the photograph of a person charged with a criminal offence, where it should have been apparent to the mind of any reasonable persons that the necessity, or possible necessity, of proof of identity of the accused person with the criminal has arisen or may arise, and such

publication is calculated to prejudice a fair trial. Lord Hewart in the *Daily Mirror* case said "What does a newspaper do when it prints a photograph in the circumstances. It invites the whole country to scrutinize the features of the accused who has been arrested." Now we ask, what did the *Star-Sun* do? It would appear that it graphically told the story of the crime; and, elsewhere in the same issue, named the persons who had been arrested and were on remand. If it did not actually invite its readers to accept the persons named in the narrative story as the persons who had been charged with the crime narrated, it surely raised a strong inference in their minds. It is clear that the accused had, at the very least, available to them the defence of mistaken identity or lack of proof of identity. The realistic narrative, coupled with the names of the persons arrested, would tell the public, as a photograph would, who the persons were that had been accused. Perhaps, the matter might be tested by assuming that the narrative was published as it appeared, and that photographs of the accused were inserted in the letterpress, *and* the other news-item of the remand of the named suspects also appeared: would the photograph have added to the identification provided by the letterpress? It would appear to be complete without it. If so, and the question of identity of the named accused persons with the criminals had arisen or might arise, then such publication, on the principle of the cases cited, was calculated to prejudice a fair trial.

It was at first acknowledged by counsel that there had been a "technical" contempt; but upon inquiry this proved to be a submission that, if there were any contempt at all, it was slight and was regretted. The learned Judge said he had been puzzled at the suggestion of a "technical" contempt, as the contempt lies not in the act of publication, but in the tendency of the publication, and that tendency must be judged by the Court. The jurisdiction invoked is to be applied only in the clearest cases and where there is no doubt about the contempt. In His Honour's opinion, it was very doubtful whether the publication had the tendency alleged so as to make it a contempt. He, therefore, dismissed the applications of the Attorney-General.

III.

An examination of the several judgments already cited, shows that the position of an editor in regard to the law of contempt is not, in the present state of the law, an enviable one. The Courts have consistently refused to prescribe any rule of conduct by which he can be guided when supplying to a legitimately curious public the account of a local crime—happening before its perpetrator has come to trial. He is told that every publication of evidence before the trial is not necessarily contempt. He learns that the test of culpability is the tendency of the publication to interfere with a forthcoming trial, which, at the time of the publication, according to the subsequent apprehension or non-apprehension of the person responsible for the crime, may or may not take place. Whatever be the standard by which this "tendency" is to be assessed in any particular case of publication, there is no real test applicable; and, as the law stands, the determination of "contempt" or "no contempt" comes back to a question of degree in each separate case. Since the Court must be the sole judge of "tendency" in each particular case, the editor has no guide as to the degree of "tendency" which transgresses. As we have said, the *Star-Sun* in the Christchurch case, even with the aid of competent advice, felt it had transgressed and apologized; but the Court held otherwise.

Owing to the sometimes vague formulation of the nature of the offence as applied to different sets of facts (though in the *Mathison* case, Northcroft, J., guarded himself in this respect), the decisions on this branch of the law of contempt are not declaratory and creative of the law; yet each judicial pronouncement that assesses the purpose of any one particular article as to its tendency to interfere with a forthcoming trial of accused persons must have the practical effect of circumscribing the legal duty of all newspapers. That difficulty and danger can be averted only by definite and unmistakeable rulings by the Judiciary in terms that can be made applicable to every publication of such news; for, in that way only can certainty of the law be formulated. The nearest approach to such a pronouncement is that of the High Court of Australia in its observations in the *Packer* case on the safety of purely objective reporting, but they are far from explicit. The standard observed by our own newspapers in reporting crimes is, in general, unexceptionable, and we are sure that all would welcome some definite direction as to pre-trial crime reporting, even if it were in general terms. Having received it, we are sure they would dutifully follow it.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Wellington. 1942. March 3; April 30. *Myers*, C.J.

GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA, LIMITED.

Contract—Performance—Currency—Amount expressed in Dollars to be "converted into sterling" at Specified Rate of Exchange—Payment in Melbourne—Whether payment in English Pounds or in New Zealand Pounds at Appropriate Exchange Premium.

A contract provided that settlement of any claim under a life insurance policy should be (*a*) upon a sterling basis, and (*b*) only at the head office (in the City of Melbourne, Victoria) or at any of the branches of the defendant association, and further provided that all amounts expressed in the policy in dollars should be converted into dollars at the rate of 4.866 dollars to the pound sterling.

Hoggard, for the plaintiff; *Young*, for the defendant.

Held, that the contract required the said association on the death of the insured, a domiciled New Zealander, to pay the proceeds of the policy in English pounds converted into New Zealand pounds at the appropriate exchange premium.

De Bueger v. *J. Ballantyne and Co., Ltd.*, [1938] N.Z.L.R. 142, G.L.R. 100, and *Permanent Trustee Co. of New South Wales, Ltd.* v. *Pym*, (1938) 39 N.S.W. S.R. 1, referred to.

Solicitors: *Findlay, Hoggard, Cousins, and Wright*, Wellington, for the plaintiff; *Young, Courtenay, Bennett, and Virtue*, for the defendant.

SUPREME COURT. Auckland. 1942. June 19. *Callan*, J.

C. v. C.

Divorce and Matrimonial Causes — Nullity — Fraudulent Impersonation of Another Person—Whether Case of real Consent Induced by Fraud or no Consent or Absence of Consent.

Fraudulent impersonation of another person is a ground for avoiding a marriage procured thereby only where that fraud procured the form without the substance of the agreement.

Sullivan v. *Sullivan*, (1818) 2 Hag. Con. 238, 161 E.R. 728, and *Moss* v. *Moss*, [1897] P. 263, applied.

Allardyce v. *Mitchell*, (1869) 6 W.W. & A'B. (M.) 45, referred to.

Therefore, where the petitioner met for the first time a man who represented himself as M.M., an Australian featherweight boxer with ample income and good prospects and married him under the name of M.M., and gave her true consent to marry the human being to whom she was married, although the consent was induced by fraud, the marriage could not be avoided.

Semble, Aliter, if a petitioner's true consent was to a marriage to B., but she married C. who impersonated B.

Counsel: *W. W. King*, for the petitioner.

Solicitors: *Keegan and Gray*, Auckland, for the petitioner.

Case Annotation: Allardyce v. *Mitchell*, E. and E. Digest, Vol. 27, p. 39, note p.; *Sullivan* v. *Sullivan*, *ibid.*, p. 38, para. 137; *Moss* v. *Moss*, *ibid.*, p. 36, para. 128.

COURT OF ARBITRATION. Auckland. 1942. April 16; June 8. *Tyndall*, J.

MARTHA GOLD-MINING COMPANY (WAIHI), LIMITED v. INSPECTOR OF AWARDS.

Industrial Conciliation and Arbitration—Wages—Temporary Illness—Implied Condition in Contract of Service for Payment of Wages during any Temporary Illness—Not "inconsistent" with Subsequent Award—Indivisibility of Weekly Wages—Common Law Rule applied—Industrial Conciliation and Arbitration Act, 1925, s. 152.

An inspector of awards took proceedings in the Magistrates, Court to recover from the defendant company bound by an award dated October 29, 1940, a penalty for employing certain workers (hereinafter called "the workers") and failing to pay them the "minimum weekly rates of wages" as prescribed by the award. The workers became subject to the award in November, 1940. Before that date, whenever they lost time through illness they were paid their wages in full, part coming from the Sick and Accident Fund of a society, membership of which was compulsory and the workers, contributions to which were subsidized by the company, and the balance being made up by the company.

In 1941 each of the workers was off work for some days on account of temporary illness. The time off was deducted by the company from his week's pay and the only payment received by the worker for such time off was from the said Sick and Accident Society.

On appeal from the Magistrate's judgment imposing a penalty and costs,

F. L.-G. West, for the appellant.

Held, dismissing the appeal, 1. That before the award came into force there was an implied condition in the contract of service, that, in the event of lost time through sickness, full wages were payable, but the company was entitled to treat any contributions received by the workers from the Sick and Accident Society as a partial set off.

2. That there was no "inconsistency" between the award and the said implied condition, within the meaning of that word in s. 152 of the Industrial Conciliation and Arbitration Act, 1925, and that, therefore, that implied contract (in the absence of any evidence of variation thereof to the award) continued after the award.

3. That, in the absence of any other circumstances from which the duration of the contract of service could be collected, the reservation of wages at so much per week led to the presumption that the employment of the workers was a weekly hiring.

Semble. That the general common law rule as to payment of wages of a servant during absence through temporary illness is correctly set out in *22 Halsbury's Laws of England*, 2nd Ed. 134, para. 222, as follows:

> "A servant is entitled to his wages or salary during absence through temporary illness, provided that the contract of service remains in existence during that time, and that he is ready and willing to carry out his duties save for the incapacity produced by the illness," with the addition of some such words as "Subject to any express or implied term in the contract to the contrary."

Marrison v. *Bell*, [1939] 2 K.B. 187, [1939] 1 All E.R. 745; *Petrie* v. *Mac Fisheries, Ltd.*, [1940] 1 K.B. 258, [1940] 4 All E.R. 281; and *O'Grady* v. *M. Saper, Ltd.*, [1940] 2 K.B. 469, [1940] 3 All E.R. 527, discussed.

Niblett v. *Midland Railway Co.*, (1907) 23 T.L.R. 240, distinguished.

Solicitors: *Jackson, Russell, Tunks, and West*, Auckland, for the appellant.

Case Annotation: Marrison v. *Bell*, E. & E. Digest, Supp. Vol. 34, para. 240c; *Petrie* v. *Mac Fisheries Ltd.*, *ibid.*, para. 635b; *O'Grady* v. *M. Saper, Ltd.*, *ibid.*, para. 635c; *Niblett* v. *Midland Railway Co.*, *ibid.*, Vol. 34, p. 86, para. 639.

SUPREME COURT. Dunedin. 1942. June 10, 15. *Kennedy*, J.

MURPHY v. J. R. BROWN, LIMITED.

Practice—Stay of Proceedings—Arbitration—"Legal proceedings commenced" by Counter-claim by Party to Submission—Plaintiff requiring further Particulars of Defence and Counter-claim—Whether "Step in the proceedings"—Arbitration Act, 1908, s. 5.

The plaintiff claimed money owing as shown by a progress certificate under a building contract. A dispute within the terms of the building contract, which provided for a submission to arbitration of disputes arising out of the contract, emerged on the filing of the counter-claim by the defendant. The plaintiff, after requiring further particulars of the defence and counter-claim, applied under s. 5 of the Arbitration Act, 1908, for a stay of proceedings upon the counter-claim, himself submitting to a stay of proceedings in respect of the claim.

Ward, for the plaintiff; *Neill*, for the defendant.

Held, 1. That the counter-claim was, for the purpose of the said statute, the "commencing of legal proceedings."

Chappell v. *North*, [1891] 2 Q.B. 252, applied.

2. That the requirement of further particulars of the defence and counterclaim did not constitute "taking a step in the proceedings" within the meaning of that expression in the said section.

3. That the plaintiff, submitting to a stay of proceedings in respect of this claim, was entitled to an order that all further proceedings in the action and upon the defendant's counter-claim be stayed pursuant to the said section.

Ives and Barker v. *Willans*, [1894] 2 Ch. 478; *Brighton Marine Palace and Pier, Ltd.* v. *Woodhouse*, [1893] 2 Ch. 486, applied.

Chappell v. *North*, [1891] 2 Q.B. 252, distinguished.

Solicitors: *Ward and Dowling*, Dunedin, for the plaintiff; *Neill, Ross, and Meade*, Dunedin, for the defendant.

Case Annotation: Ives and Barker v. *Willans*, E. & E. Digest, Vol. 2, p. 370, para. 363; *Brighton Marine Palace and Pier, Ltd.* v. *Woodhouse*, *ibid.*, p. 367, para. 347; *Chappell* v. *North*, *ibid.*, p. 362, para. 316.

SUPREME COURT. Auckland. 1942. June 23. *Fair*, J.

In re **BUDGE (DECEASED).** *Ex parte* **PASCOE.**

Will—Devises and Bequests—Rule against Perpetuities—Bequest to Executor to provide for Care and Upkeep of Grave of Testatrix—Trust good for twenty-one Years.

A gift by will for the temporary maintenance of a grave monument and plot of the donor or his family is valid, if it does not infringe the rule against perpetuities.

Re Dean, Cooper-Dean v. *Stevens*, (1889) 41 Ch.D. 552; *Pirbright* v. *Salwey*, [1896] W.N. 86; and *Re Hooper, Parker* v. *Ward*, [1932] 1 Ch. 38, applied.

In re Filshie, Raymond v. *Butcher*, [1939] N.Z.L.R. 91, G.L.R. 41, considered.

Hoare v. *Osborne*, (1866) L.R. 1 Eq. 585, distinguished.

Where the fund for such maintenance is vested in a trustee and the will does not expressly provide for a trust in perpetuity, the trust is good for a period of twenty-one years.

Re Kelly, [1932] I.R. 255, applied.

By her will the testatrix, after a gift to her sister of all her clothes and personal effects and belongings directed:

"All moneys belonging or coming to my estate shall be applied in erecting a suitable tablet over my grave at Purewa to the value of at least twelve pounds (£12) to the approval of Walter Henry Tongue and that the balance of such moneys shall be suitably applied for my funeral expenses and my grave and its surroundings and keeping the same in a neat and tidy state."

The whole of the capital of the residue of the estate available for carrying out the directions approximated £150.

R. E. N. Matthews, Auckland, for the petitioner.

Held, That the construction of the bequest which avoided the objection to the validity as infringing the rule against perpetuities should be presumed to be the intention of the testatrix.

A contract by the executor with the Board of Managers of the burial ground in which the deceased was buried for the maintenance of the deceased's grave, limited to a period of twenty-one years from her death, was therefore authorized.

Solicitors: *Matthews, Clarke, and Burns*, for the petitioner.

Case Annotation: Re Dean, Cooper-Dean v. *Stevens*, E. and E. Digest, Vol. 8, p. 264, para. 259; *Pirbright* v. *Salwey*, *ibid.*, p. 261, para. 230; *Hoare* v. *Osborne*, *ibid.*, para. 238; *Re Hooper, Parker* v. *Ward*, *ibid.*, Supp. Vol. 8, para. 230a.

LICENSING EMERGENCY REGULATIONS.

Holding of License by Wife of Soldier.

Section 72 of the Licensing Act, 1908, forbids a married woman, not separated by separation order from her husband, to hold a license. Subsection (3) of that section reads:

> No license under this Act shall be held by any woman unless she is . . . (*b*) a wife who has obtained a protection order under the Married Women's Property Act, 1908, and such order is not reversed or discharged . . .

The Licensing Act Emergency Regulations, 1939 (Serial No. 1939/205), altered the law in respect of this disqualification by providing for the transfer of the license to the wife of the licensee where the latter had been called up for military service. There was a proviso to Reg. 2 that the Committee may require the license to be transferred to the husband on his discharge from such service.

It was held in *In re Wade Hotel*, (1942) 2 M.C.D. 301, that a certificate of fitness was not required on the part of the wife, because the Committee should have seen that she was a fit and proper person to hold the license. It was further held that she became what was termed a "special transferee" only as she could not transfer the license to any third person without the authority of her husband. That ruling applied to the 1939 regulations.

It is to be noted that in both the regulation and the proviso the word "may" is used.

Now by the Licensing Act Emergency Regulations, 1942 (No. 2) (Serial No. 1942/186) the 1939 regulations have been revoked and the following provisions substituted therefor:

> 14. Notwithstanding anything to the contrary in section 72 of the Licensing Act, 1908 . . . any married woman whose husband is for the time being either rendering continuous service as a member of any of His Majesty's . . . Forces . . . may, if the Licensing Committee thinks fit, hold a license under the Licensing Act, 1908.

There follows a proviso that if the married woman is not qualified to hold a license (as she would be if she had obtained a protection order) the Licensing Committee may require the license to be transferred to the husband on his discharge. Here again "may" is used in both the regulation and the proviso.

Is then a married woman required to obtain a certificate of fitness and is she also obliged to comply with the Act in respect of transfer, &c., of the license?

To answer these questions we must ascertain what is the scope and effect of Reg. 14 of the said regulations. To do this we are entitled to consider the state of the law which it proposes or purports to alter: *Craies on Statute Law*, 4th Ed. 95–96; and, also, we are entitled to assume that the Legislature knows the existing state of the law (*ibid.* 96).

It is plain that the purpose of the regulation was to remove the bar to the holding of a license by a married woman where she would otherwise be debarred through the absence of her husband on military service.

A discretion is vested in the Committee, but, once it is established that the married woman is a fit and proper person to hold the license, she is then entitled to a transfer of the license. The jurisdiction vested in the Committee is a judicial one (*31 Halsbury's Laws of England*, 2nd Ed., 529, para. 692; *Craies on Statute Law*, 241 *et seq.*). "'May' always means may. 'May' is a permissive or enabling expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it": per Talbot, J., in *Sheffield Corporation* v. *Luxford*, [1929] 2 K.B. 180, cited in *Campbell* v. *Dominion Building Society*, [1932] N.Z.L.R. 1666, 1669.

That is the position under Reg. 14: once the wife is proved to be a satisfactory person from a point of view of holding a license, she is entitled to the transfer of the license. This does not mean that the regulation is to be read as though the wife is automatically entitled to a transfer. All the regulation says is that the wife of a soldier may hold a license if the Committee thinks fit: the prohibition against her holding the license is removed: that, and nothing else. It will be observed, too, that a married woman may hold "a" license—the indefinite article is used. It is not confined (as was Reg. 2 of the former regulations) to the particular hotel of which the husband was the licensee; in other words, it does not contemplate or require that the husband was the licensee of the premises of which the wife asked to hold the license. Nor does the proviso mention any transfer "back" of the license as did the 1939 regulations. What then is the procedure to be followed by a woman to obtain a license under the 1942 regulations? She must proceed in simply the same way as any other applicant. The regulations have not touched the machinery sections of the Licensing Act: all that has been done is to remove the prohibition against a married woman not separated from her husband by a separation order, obtaining a license.

THIRD-PARTY COSTS IN MAGISTRATES' COURT.

Is there Power to award Costs?

Since the publication of the previous article in which was expressed the view that the Magistrates' Court has no jurisdiction to order the payment of costs of a third party, attention has been drawn to the case of *Tolhurst* v. *King*, (1941) 2 M.C.D. 59, in which it was held that the Magistrates' Court has such power. In so holding the Court considered that s. 173 of the Magistrates' Courts Act, 1928, is wide enough in its terms to award costs to a third party.

Section 173 reads as follows :—

> (1) All the costs of an action, or of any application or other proceeding in the Court, shall be paid or apportioned between the parties in such manner as the Court thinks fit; but in default of any special direction, such costs shall abide the event of the action.
>
> (2) Where costs are allowed to a plaintiff they shall be computed on the amount for which judgment is given and when allowed to a defendant they shall be computed on the amount sued for, unless in either case the Court specially orders otherwise . . .

Section 172, which must be considered in connection with the following section reads, as follows :—

> (1) A party having a judgment carrying costs shall, for his solicitor's charges in the action, be entitled, as against the other party to charge on such judgment, in addition to any moneys paid out of pocket by the solicitor for fees of Court or other necessary payments or disbursements, such fees as may be prescribed by Order-in-Council.
>
> (2) The disallowance of all or any part of any costs shall be in the discretion of the Court.

The important words in s. 173 are "the parties," and it seems that in order to put a true construction upon this subsection, regard must be had to the context in which they appear. Further, "A statute must be read as a whole, therefore the language of one section may affect the construction of another": *Craies on Statute Law*, 4th Ed. 147.

In *Tolhurst* v. *King* the Court made reference to several Supreme Court decisions, but it seems to be material to compare s. 173 with rule 555 of the Code of Civil Procedure, under which costs were allowed to a third party by the Supreme Court, and ascertain if the respective provisions are commensurate. Rule 555 reads :

> In addition to any special powers as to costs hereinbefore conferred by these Rules upon the Court, it is hereby expressly provided that the costs of and incidental to any action or other proceeding shall be in the discretion of the Court . . .

It will be noted that there is no reference to "party" in the rule, which, it is submitted makes all the difference. Nor is there similar context limiting the interpretation of "party."

In *J. Montgomery and Co.* v. *Kermode*, [1916] N.Z.L.R. 384, 386, Denniston, J., said ;

> I think that the third party is a defendant within the interpretation of s. 2 of the Judicature Act, 1908, as a person served with notice of and entitled to attend a proceeding.

The Magistrates' Courts Act, 1928, has no similar definition.

In the English rule referred to in *Morland* v. *Hales* (*No. 2*), (1910) 12 G.L.R. 689, 690, the language is as follows :

> Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court.

It may be mentioned with regard to the Supreme Court decisions that, where the third party is a third party strictly as such, the plaintiff would not be ordered to pay his costs : see *Moreland* v. *Hales* (*supra*) at 691, but the position is different if, as in the case of *J. Montgomery and Co.* v. *Kermode* (*supra*) he was to all intents and purposes a defendant. It would seem that if a person has been brought in as a third party, when, in fact, he is really a defendant, the Court should order him to be joined as defendant and then any difficulty as to costs would be removed. It may be mentioned that in *Balting* v. *Sharp*, (1909) 11 G.L.R. 703, it was held that the Court can only order that the third party shall be bound as the amount of damages or otherwise, leaving any question of liability between the defendant and the third party to a subsequent action. It was further decided that the Court can make no order in respect of the costs of the third party in the original action, and it is open to the latter to dispute his liability, in a subsequent action, to pay the costs of the first action.

It is perhaps regrettable that the section in the Magistrates' Courts Act, 1928, is not wider in its terms ; but the question of power to award costs to a third party was overlooked by the Legislature. Perhaps, on the other hand, it was considered that any question of costs could be dealt with in litigation between the defendant and the third party ; but it seems that the position is simple : if a third party is really a defendant, then it seems that at the hearing he should be added as a party under s. 59 of the Magistrates' Courts Act, 1928. Then no question arises. If, on the other hand, he is really a third party, then of course the question of costs can be settled in the action between the defendant and the third party.

While it would appear that there is power to award a third party his costs, nevertheless, it is submitted that, in the case of the plaintiff being unsuccessful, the Court has power to award to a defendant the costs incurred by bringing in the third party. There can be no question that such costs are incurred in an action and the third party is entitled to costs. It is fitting therefore that the plaintiff should bear the costs ultimately of the third party. But, under the Magistrates' Courts Act, the third party must look, in the first instance to the defendant for his costs. After all, it is the defendant who brings in the third party, not the plaintiff.

One last word as to the construction of s. 173. As stated by the Lord Chancellor in *Barbard* v. *Gorman*, [1941] 3 All E.R. 45, 48 :

> Our duty is to take the words as they stand and to give them their true construction, having regard to the language of the whole section and, as far as relevant, of the whole Act,

always preferring the natural meaning of the word involved, but none the less always giving the word its appropriate meaning according to the context.

The remedy lies with the Legislature.

There is a very interesting judgment relating to third parties, *McDonald* v. *Scoon*, (1941) 2 M.C.D. 58. The question there arose as to what principles should be invoked on an application for the issue of a third-party notice. These principles can be found in the books mentioned in the judgment. One interesting point dealt with in the judgment related to the giving notice of the application. As pointed out, notice should be *ex parte*, but the Court has power to direct notice to be given. The form of the application should be as set out in the Magistrates' Courts Amendment Rules, 1940 (Serial No. 1940/142) and the procedure is governed by such rules.

DEED OF FAMILY ARRANGEMENT.

Partial Distribution to a Remainderman with Consent of Life-tenant.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

This precedent may be usefully compared with that in (1936) 12 NEW ZEALAND LAW JOURNAL, 312. In this precedent the exact terms of the family arrangement are not embodied in the deed itself, but are set out in an annexed memorandum. The facts are a little more complicated inasmuch as one of the remaindermen has died (the life tenant still surviving), and the legal personal representative of such deceased remainderman has prudently limited his covenants to the assets of the deceased remainderman and taken a covenant of indemnity from the beneficiaries.

For gift-duty purposes the life-tenant has in substance made a gift of her life-interest in the money or assets to be transferred to I.J., now one of the beneficial remaindermen. The value of this life-interest so surrendered will be actuarily calculated, and if such value together with the value of all other gifts made by her within twelve months previously or subsequently exceeds £500, the instrument will be liable to gift duty. If it is liable to gift duty in the first instance, the stamp duty will be 15s.

The instrument will be liable to *ad valorem* stamp duty, only if some specific asset (not by reason of its nature exempted from conveyance duty) is being transferred to I.J., and only, if in the first instance, the instrument is exempt from gift duty; if liable to *ad valorem* stamp duty it will be assessed in accordance with the principles laid down in such cases as *Hammond* v. *Minister of Stamp Duties*, [1918] N.Z.L.R. 968; G.L.R. 683. Probably, however, cash or money is being handed over to I.J., in which case no conveyance duty will be payable. If no conveyance duty is payable, the instrument will be liable to a stamp duty of 15s. under s. 168 of the Stamp Duties Act, 1923.

I.

DEED OF FAMILY ARRANGEMENT.

THIS DEED made the day of nineteen BETWEEN A.B. of widow (who together with her executors administrators and assigns is hereinafter referred to as the "life-tenant") of the first part C.D. of E.F. of and T. of (as executor in the estate of G.H. deceased) (who together with their executors administrators and assigns are hereinafter referred to as "the remaindermen") of the second part and the said A.B. and C.D. (who and the survivor of them and the executors and administrators of such survivor or their his or her assigns are hereinafter where the context so requires or admits referred to as "the trustees") of the third part and I.J. of Wellington, law student of the fourth part WHEREAS K.L. of solicitor now deceased (hereinafter referred to as "the testator") duly made his last will and testament bearing date the day of WHEREBY the testator gave devised and bequeathed unto the trustees therein named all his real and personal estate of whatsoever kind and wheresoever situate including his life insurance policies and the moneys thereby assured to be paid UPON TRUST for sale and conversion and after payment of debts and duties to invest the residue of such moneys as by the said will directed and to stand possessed of the residuary trust moneys and the investments representing the same UPON TRUST to pay the income therefrom to his wife the life-tenant until her death or remarriage and subject thereto UPON TRUST for all his children by his said wife the life-tenant who should being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry before attaining that age in equal shares AND WHEREAS the said testator died on or about the day of without having altered or revoked his said will and probate thereof was granted by the Supreme Court of New Zealand the day of to the trustees therein mentioned AND WHEREAS the trustees herein described are the present trustees of the said will AND WHEREAS the said testator left him surviving the life-tenant who has not remarried and three children by his wife the said A.B. namely the said C.D., E.F. and G.H. each of whom attained the age of twenty-one years AND WHEREAS the said G.H. survived the testator but died on leaving him surviving a widow O.P. and one child the said I.J. AND WHEREAS the said G.H. died intestate and by virtue thereof his widow was entitled to one-third share of his estate and the said I.J. to a two-thirds share thereof AND WHEREAS the said O.P. died on or about the day of and probate of her will was duly granted to T. the executor therein named AND WHEREAS the said O.P. in and by her said will gave devised and bequeathed the whole of her estate (subject to the payment of her just debts funeral and testamentary expenses) to her son the said I.J. AND WHEREAS T. is the administrator of the said G.H. deceased AND WHEREAS the said I.J.

has now attained the age of twenty-one years and is entitled to call upon the said T. for the transfer of the one-third share to which he is entitled through his father's estate and his mother's estate as aforesaid by virtue of the will of the testator subject however to the life interest of the life-tenant AND WHEREAS the said I.J. is desirous of taking up the practice of law and requires funds for the purpose of his legal studies AND WHEREAS the life-tenant and the remaindermen desire that a present distribution should be made to the said I.J. in part satisfaction of the interest which he will be entitled to under the will of the testator AND WHEREAS the trustees at the request of the remaindermen and of the said I.J. and upon the remaindermen and the said I.J. entering into and executing these presents have agreed to realize part of the assets of the estate of the testator for the purpose of making a partial distribution as aforesaid to the said I.J. AND WHEREAS the said T. as such administrator and executor as aforesaid and as one of the remaindermen has agreed to enter into and execute this deed BUT as such administrator and executor only and pursuant to a written request by the said I.J. AND WHEREAS the terms of such arrangement are set out in a form of memorandum dated the day of signed and confirmed by the life-tenant and the remaindermen and the said I.J. and annexed hereto NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the premises and of the trustees agreeing to realize part of the assets of the estate of the testator in the terms of the said memorandum dated the parties of the first second and fourth parts (the said T. covenanting only as administrator in the estate of the said G.H. and to the extent of the assets in his hands of the estate of the said G.H. as hereinafter appears) DO AND EACH AND EVERY OF THEM DOTH covenant with the trustees and each of their executors administrators and assigns that they the life-tenant and the remaindermen and the said I.J. and each of them and their and each of their executors administrators and assigns shall and will from time to time and at all times hereafter save harmless and keep indemnified the trustees and each of them their and each of their executors administrators and assigns and their her and his estate and effects from and against all costs charges claims and demands of any nature or kind whatsoever which may at any time or times hereafter be made against the trustees or either of them their or either of their executors administrators and assigns by any beneficiary under the will of the said K.L. or any other person or persons whomsoever for or by reason of the trustees carrying out and giving effect to all or any of the things and matters mentioned and agreed to be done by virtue of these presents PROVIDED ALWAYS and it is hereby agreed and declared by and between the parties hereto that the covenants by the said T. herein contained or implied shall bind the said T. only to the extent of the funds and assets of the estate of the said G.H. which shall be in the hands of the said T. as administrator of such estate as aforesaid and available in the ordinary course of administration for the payment of or satisfaction of the liability or obligation thereby created or thereunder arising at the time or respective times when such payment or satisfaction is formally demanded by notice in writing to the said T. PROVIDED FURTHER that nothing herein contained shall be deemed to require or compel the said T. to retain in his hands the whole or any part of the funds or assets whether capital or income of the estate of the said G.H. for any period at all AND LASTLY I the said I.J. my executors administrators and assigns DO HEREBY CONSENT to and ratify and confirm the arrangements hereby and in the said annexed memorandum set forth and do hereby request the trustees and the said T. (as administrator in the estate of the said G.H.) to enter into and execute these presents and to give effect to the terms thereof to the intent that such sum or sums (together with any costs which may be incurred incidental to these presents) which shall be paid to me from time to time pursuant to these presents shall be accepted by me on account of my share in the estate of the testator derived as aforesaid and for the consideration aforesaid I HEREBY for myself my executors administrators and assigns covenant with the trustees and each of their executors administrators and assigns and with the said T. his executors administrators and assigns that I will hereafter save harmless and keep indemnified the said trustees and the said T. from all actions claims suits or demands which can or might arise thereout.

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

[N.B.—As this is a deed each signature to be witnessed by a witness who shall add to his signature his place of abode and calling or description: see s. 26 of the Property Law Act, 1908.]

[N.B.—The letter annexed states the amount to be handed over to I.J. and how it is to be effected. It also states that the person affected is the life tenant whose income will be reduced accordingly.]

A Distinguished Law-clerk.—To commemorate the epic deeds of British airmen in the Battle of Britain, there hangs in the Art Gallery of the British Air Ministry the picture of a typically rugged, dare-devil pilot, with the title underneath it of "The Man Who Won the Battle for Britain." When the Air Ministry commissioned its portrait-artist to paint a picture of a typical member of the R.A.F. in that prolonged battle, says the *N.Z. Observer* (Auckland), the choice of a subject fell on the Wanganui pilot, Squadron-Leader Alan C. Deere, D.F.C. and bar. Alan Deere certainly looks the part; but, in addition to that, he has had a number of remarkable adventures. He has been Squadron-Leader of 602 (City of Glasgow) Auxiliary Squadron, and has been in the thick of the toughest air fighting since the beginning of the war.

An English writer, describing some of the exploits of "one of the finest aces in the R.A.F.—the fair-haired New Zealander with a great mop of wavy hair, a fighter through, with D.F.C. and bar, seventeen Germans to his credit, to say nothing of nine lives," records that in the nine times he has been shot down, Deere has baled out four times.

Before the war, Squadron-Leader Deere was a member of the staff of Messrs. Treadwell, Gordon, Treadwell, and Haggitt, Wanganui.

THE LATE MR. PHINEAS LEVI.

Tributes to his Memory.

There was a very large gathering of members of the profession at the Supreme Court, Wellington, on June 16, to honour the memory of the late Mr. Phineas Levi, who had practised in Wellington for nearly fifty-five years, until shortly before his death on June 12, in his eighty-fourth year.* On the Bench, with His Honour the Chief Justice, Sir Michael Myers, were Mr. Justice Ostler, Mr. Justice Blair, Mr. Justice Smith, and Mr. Justice Fair.

The Solicitor-General, Mr. H. H. Cornish, K.C., who spoke on behalf of the Hon. the Attorney-General, addressing their Honours, said that the Attorney-General had asked him to express to them and to the members of the Bar his regret at being unable to be present. He continued:

"We are met this morning to pay tribute to the memory of Phineas Levi, a man learned in the law, upright in life, and very dear to his brethren. He has passed on, after a long life of varied and honourable services rendered quietly and cheerfully.

"Phineas Levi was a good and unselfish man. He spent little, if any, part of his life in seeking personal rewards or preferment. He set no great store by money—most of what he earned he gave to others. He had no wish for power, and no taste for display. But though he did not seek to accumulate material possessions in his own hands, he was none the less a practical man. He knew his world, understood business, was a sagacious adviser, and a wise counsellor. The influence of his qualities was felt beyond his profession. He interested himself particularly in higher education, and students of Victoria University College and Massey Agricultural College owe much to the care that he gave to the conduct of their affairs.

"He was a man of wide culture as well as of many interests. Books, pictures, and above all, music, were to him an unfailing source of joy, recreation, and, when it was needed (as at times it was) of consolation. But the quality that we esteemed most in him was his gift for friendship—a gift that came to him because he was not a self-seeking man, and because he was loyal. He rejoiced in the advancement of his friends, and was often the silent author of it.

"Those that were privileged to call Phineas Levi friend, will not forget the choice and rare spirit that he was."

Wellington Law Society.

The President of the Wellington District Law Society, Mr. A. B. Buxton, said that the members of the Wellington District Law Society had assembled to pay a tribute to the late Mr. Phineas Levi, who was particularly associated with the Society: he had commenced practice at Palmerston North in 1885, within the Society's district, and had practised continuously in the City of Wellington since 1887. But he was more than the Society's senior member in years. During the forty years from 1896 to 1935, he had served no less than fourteen years on the Council of the Society; he was its president in 1919, and, in the intervals between his years on the Council, had served for eight years as its auditor. During that period his great learning and long experience were frequently called on and unstintingly given in the investigation of, and advice on, the various questions which affect the profession and no man ever gave greater service to the Society.

"Whenever we think of Mr. Levi in association with others, we will recall his long association with the late Sir Thomas Wilford in the firm of Wilford and Levi," Mr. Buxton continued: "At a gathering of the Society held a few years ago in honour of Mr. Levi's eightieth birthday, Sir Thomas Wilford revealed that this partnership had been commenced without a scratch of the pen, and had continued without a single quarrel for thirty years until Sir Thomas left New Zealand. This would be equally true of Mr. Levi in all his dealings with his fellow-practitioners. He enjoyed their fullest trust and confidence; and, although his great ability was always at the service of and exerted for his client, he never made an enemy in the profession or probably among his fellow men. The knowledge that he had earned, and the feeling that he had deserved, the respect and affection of his fellows would be valued more by Mr. Levi than any more material rewards his profession could give him."

The President added that Mr. Levi had been well recognized as a scholarly and deeply learned lawyer, and, though he himself did not appear as often as his great ability as a lawyer would seem to warrant, his opinions and the arguments based on his opinions were frequently submitted to the Court.

"For us the memory of Mr. Levi as a lawyer will probably be overshadowed by our memory of him as a man," the speaker concluded: "We have all lost a friend, and we share in the loss suffered by his family to whom the members of this Society tender their deepest sympathy."

New Zealand Law Society.

The President of the New Zealand Law Society, Mr. H. F. O'Leary, K.C., added the tribute of practitioners throughout New Zealand, who, he said, would wish to be associated with their brethren in Wellington in the public expression of the deep regret they all felt at the passing of Mr. Levi. He was personally known to many of them—he had in fact qualified when in Otago, and for a time he practised in North Otago: and he was certainly known to all the other Societies on account of the great amount of work which he did, the great sacrifice of his time that he made for the profession generally. He had long been Treasurer of the New Zealand Law Society, and had acted as a member of the Management Committee of the Guarantee Fund since its inception. The President, therefore, on their behalf, associated them with those present on that sad occasion. He continued:

"They must agree with me when I say that Mr. Levi was, as a lawyer, able and learned. He was an honourable and a just practitioner, a man in whom you could have trust at all times and in all circumstances, and it is no platitude to say that the profession is the poorer for his passing.

"Might I be permitted to add a personal note, as I commenced my legal work with him; and, as an employee, and, later, as a friend and fellow practitioner, I had an unusual opportunity of seeing him in other aspects than as a lawyer, and I knew him to be kindly, considerate, and generous. He had no enemies, he never consciously hurt anyone; he was a good man, his life was blameless."

Mr. O'Leary went on to say that he had had the privilege and pleasure only recently of spending a little time with him in his sick room. He knew his end was approaching, he had no regrets: he was quite prepared to go, and he discussed the position quite cheerfully.

"To my friends I have since then expressed the hope," the President added, "that when our ends are approaching we will face it with cheerfulness, courage, and resignation, in short the serenity with which Mr. Levi approached his. He was indeed a lovable man. To his relatives I offer, for the practitioners throughout New Zealand, our very deepest sympathy in their loss. To his friends, too—and they were many—and to the profession which has lost one of its most cherished members, I express the sympathy of us all."

His Honour the Chief Justice.

The Chief Justice, addressing the large assembly of members of the Bar, said:

"It is fitting that a tribute should be paid in this Court to the memory of one whom we all knew, respected, and regarded with affection. Mr. Levi, over a very long period of years, had a notable career in both branches of the Profession. Although in his day he appeared quite a good deal in Court, it was not in the hurly-burly of an advocate's life that he shone most; the very defects of his virtues—his gentleness, and modest and unassuming nature—militated against his taking a place in the very front rank as an advocate. But his services were always in great demand by the leaders of his day, and by none more than that great advocate and lawyer who was my own immediate predecessor in the office that I now hold. Mr. Skerrett, as he then was, as well as the other leaders of the day, had the highest opinion of Mr. Levi's qualities and ability. And well was that opinion deserved, for Mr. Levi as a consultant had few equals, particularly in the field of real property law and equity. We knew him, however, not only as the soundest of lawyers, but as a man of sterling character and scrupulous integrity—

* On the occasion of Mr. Levi's eightieth birthday, he was the recipient of a presentation from his fellow-practitioners in Wellington. An account of his career was given at the time in 14 New Zealand Law Journal, 350, 362.

so much so that in all my years in practice (and I believe each one of you can say the same) I never heard an ill word spoken of him. On the other hand, one has heard many juniors acknowledge with gratitude their indebtedness for his advice and assistance, while he, on his part, always held it an obligation upon him as an elder in the Profession to help any younger practitioner who sought his advice and assistance. His passing leaves a void which it will be difficult to fill. To your tribute to his memory, we, the members of the Bench, would add our own; and we join with you in your expression of sympathy and condolence with the relatives who mourn his loss."

A Touching Tribute.

At the request of many practitioners, the following touching tribute delivered at Mr. Levi's funeral service by Rabbi A. R. Astor, is included. The Rabbi, after expressing his regret at the absence of the Rabbi who, owing to ill health, had been prevented from conducting this service, said that Rabbi Katz was a personal and devoted friend of Mr. Levi's, and he alone could have done justice to this occasion. He continued:

"I know I could safely speak of Mr. Levi's merits and many qualities without restraint of words and without fear of exaggeration, but I feel that I would be fulfilling his wish if I were to speak of him in the simplest of words. For, if I were asked what were the things he most loved, I would say 'simplicity and informality.' It is common knowledge that his modesty formed in large measure the strength and greatness of his noble character. To him may be justly applied the words of the Psalmist: 'The meek shall inherit the earth.'

"In his contact with his fellow men, Phineas Levi may be described as a gentle soul. Those who knew him recognized him as a man apart because of his intellectual insight. Those who were privileged to have his personal friendship realized that he could not harbour a mean or petty thought. In his life, he made not an enemy nor lost a friend. He rejoiced in doing good deeds, and to all he endeared himself by his kindly ways. He was unique in his sense of humour and renowned for his almost boyish joyousness. To have lived the life and enjoyed the esteem and love of his fellow-men in the measure he did, is ample evidence of what moral and ethical equipment man needs to make his stay on earth a successful one.

"In his professional calling, he was a tireless worker. To him the field of work and service held no limitations. With all that, he followed closely in the path laid down by Jewish dictum and Biblical formula. He was guided primarily by that famous concept which has enriched the ethical treasures of humanity: 'Justice, Justice shalt thou pursue.' But Mr. Levi followed this Biblical dictum, not only in its apparent meaning, but in its deeper Rabbinical interpretation. Our Sages ask why this double expression of 'Justice'; and the answer is given that, whilst, in theory, there can only be one form of justice, in application there can be many. The Bible here, according to this interpretation, means to stress and advocate the importance of this guiding principle; to apply the justice to others as we wish others to apply it to us. Phineas Levi carried out this interpretation to the fullest possible extent.

"As a Jew, he embodied all that is noble and lofty in our idealism. He fulfilled God's requirements as tabulated by the Prophet Micah—he lived justly, he loved mercy, and walked humbly with his God. He followed keenly all the activities of our community, and his wise counsel was always forthcoming. He was a generous supporter of our charitable and educational institutions. His loss will be sadly felt by all.

"To the mourners we extend our sympathy. May God spare them from further trouble. May they find comfort in the perpetual light of so radiant a memory. May the influence and example of Phineas Levi ever be to us a source of strength and inspiration. May his memory be a shining example of an honourable and selfless way of life."

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. Mortgagors and Lessees Rehabilitation.—*Mortgage extended for Term and Interest reduced—Rate of Interest after Expiry of extended Term.*

Question: An Adjustment Commission extends a mortgage for five years and reduces the interest to four per cent. At the end of the five-year period, the mortgagee claims interest at the statutory rate of £5 12s. per cent. Is he entitled thereto?

Answer: This question is so vague that it cannot be answered in a completely satisfactory manner. Section 47 of the Mortgagors and Lessees Rehabilitation Act, 1936, clearly contemplated that part at least of the adjusted mortgage should be made repayable by instalments; but orders of Adjustment Commissions did not always keep within the four corners of the statute, and, moreover, were expressed in an infinite variety of terms so that the exact wording of the relevant partition of the order should be studied.

All that can be said is that the statute made provision for varying the terms of a mortgage. If, as would appear, this was done, the varied mortgage, with its varied terms, became the new mortgage contract, and would subsist at the rate of interest at which it was varied if not repaid on the new due date.

2. Chattels Transfer.—*Bailment—Execution by Grantor and Grantee at different towns—Form of Affidavit.*

Question: The footnote to the form of affidavit in the Third Schedule of the Chattels Transfer Act, states the third, fourth and fifth paragraphs must be made to relate to the execution by both grantor and grantee. Accordingly, two separate affidavits as to execution will be required.

It would appear the copy instrument to be annexed to the affidavits will differ. If the grantor first executes, then a copy instrument showing his signature alone should be annexed to the affidavit as to his execution, then, on execution by the grantee, the affidavit in respect of execution by him will have annexed a copy instrument showing as executed by both parties.

If the affidavits are sworn after both parties have executed, then it could not be said that the paper writing marked "A" is a true copy as executed by both grantor and grantee.

Answer: The reference to the Third Schedule should obviously be to the First Schedule.

If there are different witnesses to the signatures of the grantor and grantee, it is clear that each will have to make an affidavit; but if there is one witness to both signatures, paras. 3 and 4 of the prescribed form can be enlarged to make them relate to execution by the grantee also.

Although the form of affidavit prescribed refers to "every attestation of the execution thereof," it does not say that the copy shows only the attestation at the date of the witnessing. Nor, even if the signature of the grantor, and the signature address, and description of the attesting witness are omitted is the instrument void solely on that account if the matter omitted from the filed copy can be supplied by reference to the affidavit: *Coates* v. *Moore*, [1903] 2 K.B. 140; *Hammond* v. *Geurlay*, (1880) 1 N.S.W.L.R. 142.

Accordingly, it seems immaterial whether the witness attesting the signature of the grantor does so before or after the grantee executes; and, even if the execution of a party is not in the copy, it will be supplied by the affidavit so saving the instrument.

3. Real Property.—*Tenants-in-common—One missing and Whereabouts Unknown—Method of Selling Share of Other Tenant-in-common.*

Question: A. and B. are registered proprietors of a piece of land, A. as to two-thirds and B. as to a one-third share. This piece of land is subject to two mortgages. A. and B. arranged to meet on a date in 1931. B. did not keep his appointment

and has not been heard of since. A., who is now an old man, wishes to dispose of the property. How can he give title to a subsequent purchaser ?

ANSWER: A. may, on the application *ex parte* of the Public Trustee to a Judge of the Supreme Court, seek an order, on such terms as such Judge thinks fit, authorizing the Public Trustee to sell the property or any part thereof; see the Public Trust Office Act, 1908, s. 87 (*c*).

4. War Emergency Regulations.—*Company—Whether indictable for Breach of Regulations—Election of Trial by Jury.*

QUESTION: May a company charged with a breach of an Emergency Regulation, the penalty for which is imprisonment for twelve months or a fine of £100, or both, be charged on indictment, or, if charged summarily, may it elect to be tried by a jury: see the Justices of the Peace Act, 1927, s. 124, and the Statutes Amendment Act, 1936, s. 42 ?

ANSWER: No. Persons committing offences against Emergency Regulations are liable to punishment under s. 9 (1) of the Emergency Regulations Act, 1939, "on summary conviction" only.

5. Appeal.—*Payment of amount of Judgment—Effect of Payment—Benefit taken under Judgment—Effect as to Appeal.*

QUESTION: Does the payment of the sums awarded by a judgment, destroy the right of appeal ? Can a party appeal from a judgment after he has taken any benefit under it ?

ANSWER: Payment under a judgment destroys the right of appeal: *Metropolitan Real and General Property Trust, Ltd.* v. *Slaters and Bodega, Ltd.*, [1941] 1 All E.R. 310. After a party has taken a benefit under a judgment, he can still appeal *Lissended* v. *Bosch (C. A.V.), Ltd.*, [1940] A.C. 412.

6. Magistrates' Court.—*Confession—Given before Date of Hearing—Taking of Judgment.*

QUESTION: If a confession of claim is given before the date of hearing does a plaintiff have to wait till such date to obtain judgment ?

ANSWER: No. "A confession may be given at any time" (s. 108 (5)); and provided application is made, judgment may be entered. That is why jurisdiction is given to the Clerk to enter judgment on confession (s. 108 (1)). See also R. 24. The only conditions necessary for entry of the judgment are: the written confession and the application of the plaintiff (and of course, payment of the judgment fee by the plaintiff).

7. Probate.—*Executrix married between Date of Application and Grant.*

QUESTION: An executrix under a will made application for a grant of probate, but between the date of application and the grant she married. The grant has not yet been sealed, and it is desired to have the married name of the executrix appearing in the probate. What procedure will be necessary to effect this ?

ANSWER: Under R. 531M of the Code of Civil Procedure the grant expires unless the probate is sealed within one calendar month from the date on which such grant was made. Accordingly, unless there is urgency, the present grant could be vacated by effluxion of time under R. 531M, and a fresh application then made.

If, however, time is a consideration, application could be made by motion for leave to vacate the grant, and for a grant in the present name of the executrix. A supporting affidavit would be necessary. In preparing the probate (Form No. 36) a slight addition would be necessary. Line 7 of that form says: ". . . granted to . . . the executrix in the said will and testament," (here, it would be necessary to add additional words such as "she being mentioned and referred to therein as . . .)"

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ARBITRATION.

Appointment of Arbitrator—Failure of One Side to Appoint—Notice Requiring Appointment within Seven Days—Necessity for Appointment of Sole Arbitrator after Default—Arbitration Act, 1889 (c. 49), s. 6 (*b*).

Where, after the failure of one party to appoint an arbitrator, the other party gives notice requiring such an appointment within seven days, it is essential, in the event of a default of appointment, that the party giving the notice shall expressly appoint his arbitrator to act as sole arbitrator in the submission.

DRUMMOND *v.* HAMER, **[1942] 1 All E.R. 398.**

As to appointment of sole arbitrator: see HALSBURY, Vol. 1, p. 646, para. 1095; and for cases: see DIGEST, vol. 2, pp. 402, 403, Nos. 588–592.

Stay of Legal Proceedings—Repudiation of Contract containing Arbitration Clause—Repudiation accepted by other Party—Arbitration Act, 1889 (c. 49), s. 4.

Where there has been a total breach of a contract by one party so as to relieve the other of his obligations under it, an arbitration clause, if its terms are wide enough, still remains effective, and this is so even where the injured party has accepted the repudiation, so that in such circumstances, either party may rely on the clause.

HEYMAN AND ANOTHER *v.* DARWINS, LTD., **[1942] 1 All E.R. 337.**

As to staying an action under Arbitration Act, 1889, s. 4, see HALSBURY, Vol. 1, pp. 636, 637, para. 1083; and for Cases, see DIGEST, Vol. 2, pp. 365–375, Nos. 337–394.

BILLS OF EXCHANGE.

Acceptance—Bills Expressed to be Payable in Dutch Currency at Named Bank in Amsterdam—Bills Accepted in London—Whether Local Acceptance—Absence of Statement that Bills were Not Payable Elsewhere than at Named Place—Bills of Exchange Act, 1882 (c. 61), s. 19 (2) (*c*).

It is essential, for an acceptance to be a local acceptance within the Bills of Exchange Act, 1882, s. 19 (2) (c), to state expressly that the bill is to be paid at a named place only and not elsewhere.

BANK POLSKI *v.* K. J. MULDER AND CO., **[1942] 1 All E.R. 396.**

As to qualified acceptance of bills of exchange: see HALSBURY, Vol. 2, pp. 635–637, paras. 875–877; and for cases: see DIGEST, Vol. 6, pp. 63–65, Nos. 510–527.

COMPANIES.

Directors—Sale of Shares in Subsidiary Company—Fiduciary Relationship—Right of Company to Profit on Sale.

Where a director subscribes and pays for shares in another company which it is intended should be held by the company of which he is a director, he is in a fiduciary relationship to his company and must account for any profit made on a sale of the shares.

REGAL (HASTINGS), LTD. *v.* GULLIVER AND OTHERS, **[1942] 1 All E.R. 378.**

As to fiduciary position of director: see HALSBURY, Vol. 5, pp. 319–325, paras. 533–538; and for cases: see DIGEST, Vol. 9, pp. 491–503, Nos. 3224–3301.

Winding-up—Scheme of Arrangement—Meeting of Creditors—Proxies—Appointment of Official Receiver to Act as Proxy—Companies (Winding-up) Rules, 1929, r. 150.

Where a company is being wound up by order of the Court the creditors have a right to appoint the Official Receiver to be their proxy at meetings convened by the Court.

Re GENERAL MORTGAGE SOCIETY (GREAT BRITAIN), LTD., **[1942] 1 All E.R. 414.**

As to proxies at meetings of creditors of a company: see HALSBURY, vol. 5, pp. 792, 793, para. 1362; and for cases: see DIGEST, vol. 10, pp. 1058, 1059, Nos. 7408–7411.

JUDGMENTS.

Order—Correction—Omission of Remuneration of Trustees of Debenture Trust Deed—Matter Not in Mind of Court when Order Made—Fund from which Remuneration to be paid still in Hand—Correction of Date—R.S.C., Ord. 55, r. 71.

The Court has power to amend an order where the amendment asked for follows the intention of the Court at the time of the-making of the original order and it is still possible to vary it effectively.

Re CITY HOUSING TRUST, LTD., KOLB *v.* CITY HOUSING TRUST LTD., **[1942] 1 All E.R. 369.**

As to amendment of orders: see HALSBURY, Vol. 19, pp. 261–263, para. 561; and for cases: see DIGEST, Practice, pp. 472–477, Nos. 1530–1580. See YEARLY PRACTICE OF THE SUPREME COURT, pp. 449, 450.

MEDICINE.

Liability of Hospital—Professional Duties—Negligence of Radiographer—Insufficient Screening.

A hospital is not liable for the negligence of a radiographer in the execution of his professional duties.

GOLD AND OTHERS *v.* ESSEX COUNTY COUNCIL, **[1942] 1 All E.R. 326.**

As to liability for the negligence of a nurse: see HALSBURY, vol. 22, pp. 358, 359, para. 737; and for cases: see DIGEST, vol. 34, p. 550, Nos. 86, 87.

SETTLEMENTS.

Construction—Beneficial Trusts—Accruer Clause—Trusts for Children and Grandchildren in unequal shares—Accruing Share accrues to other Beneficiaries equally.

In the absence of any indication in a settlement to the contrary, an accruing share accrues to the other beneficiaries equally, even though their interests in the trust fund are unequal.

Re BOWER'S SETTLEMENT TRUSTS, BOWER *v.* RIDLEY-THOMPSON, **[1942] 1 All E.R. 278.**

As to Accruer Clauses: see HALSBURY, vol. 34, pp. 366–368, para. 413; and for cases: see DIGEST, vol. 44, pp. 1215–1217, Nos. 10507–10533.

RULES AND REGULATIONS.

Housing Act, 1919. Housing Regulations, 1942. No. 1942/176.

Sales Tax Act, 1932-33, and the Customs Act, 1913. Sales Tax Regulations, 1933. Amendment No. 2. No. 1942/177.

Sale of Food and Drugs Act, 1908. Sale of Food and Drugs Amending Regulations, 1942. No. 1. No. 1942/178.

Emergency Regulations Act, 1939. Egg Marketing Emergency Regulations, 1942. No. 1942/179.

Emergency Regulations Act, 1939. Primary Industries Emergency Regulations, 1939. Amendment No. 3. No. 1942/180.

Emergency Regulations Act, 1939. Oil Fuel Retail Hours Emergency Regulations, 1942. No. 1942/181.

Emergency Regulations Act, 1939. Accommodation Emergency Regulations, 1941. Amendment No. 1. No. 1942/182.

Emergency Regulations Act, 1939. Alienage Emergency Regulations, 1942. No. 1942/183.

Emergency Regulations Act, 1939. Billeting Emergency Regulations, 1942. No. 1942/184.

Emergency Regulations Act, 1939. Motor-vehicles Emergency Regulations, 1940. Amendment No. 1. No. 1942/185.

Emergency Regulations Act, 1939. Licensing Act Emergency Regulations, 1942 (No. 2). No. 1942/186.

Emergency Regulations Act, 1939. Emergency Reserve Corps Regulations, 1941. Amendment No. 3. No. 1942/187.

Emergency Regulations Act, 1939. National Service Emergency Regulations, 1940. Amendment No. 12. No. 1942/188.

Emergency Regulations Act, 1939. Emergency Shelter Regulations, 1942. Amendment No. 2. No. 1942/189.

Emergency Regulations Act, 1939. Transport Control Emergency Regulations, 1942. No. 1942/190.

Emergency Regulations Act, 1939. Delivery Emergency Regulations, 1942. No. 1942/191.

Medical Supplies Emergency Regulations, 1939. Medical Supplies Notice, 1942. No. 7. No. 1942/192.

Control of Prices Emergency Regulations, 1939. Price Order No. 94 (Seed Potatoes). No. 1942/193.

Primary Industries Emergency Regulations, 1939. Sale of Potatoes Control Order, 1942. No. 1942/194.