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"The chief law-makers in our country may be, and often are, the Judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty; they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the Courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe more to these Judges who hold to a twentieth-century economic and social philosophy and not to a long-outgrown philosophy, which was itself the product of primitive economic conditions."

—THEODORE ROOSEVELT.

VOL. XVIII. TUESDAY, AUGUST 4, 1942 No. 14

LAND TRANSFER: INDEFEASIBILITY OF TITLE.

THE decision of the majority of the Court of Appeal in *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, which was much discussed at the time, and was later referred to in the High Court of Australia in *Clements* v. *Ellis*, (1934) 51 C.L.R. 217, has recently been disagreed with in the Supreme Court of Queensland in *Coras* v. *Webb and Hoare*, [1942] St. R.Qd. 66. The principle involved in the three cases was the same, but the circumstances differed considerably.

In *Boyd's* case the person who was registered as proprietor of land was a Corporation which obtained a registered title by virtue of a proclamation (assumed to be void) whereby land, with a building upon it, had been taken for a tramway; whereas, in the case of land occupied by a building, the previous consent of the Governor-General in Council or the consent in writing of the owner of land was required, and had not been obtained. In *Clements's* case the registered proprietor, a purchaser, obtained title through the registration of a forged discharge of a registered mortgage. In *Coras's* case, the registered proprietor was a mortgagee, whose mortgage had been executed by an infant, no note of infancy having been made on the certificate of title as provided for by the Queensland statute; and the infant, after coming of age, had disaffirmed the mortgage and issued a writ claiming that the mortgage was void.

The question for decision in *Boyd's* case was, stated shortly, the effect of the judgment of the Privy Council in *Mere Roihi's* case, [1905] A.C. 170, N.Z.P.C.C. 275, upon its previous decision in *Gibbs* v. *Messer*, [1891] A.C. 248. Did the Privy Council distinguish the latter judgment on the ground, as Sir Robert Stout, C.J., declared, that it was a case of "fraud and forgery"?; or did it cut down the dictum in the latter case that "the conclusiveness of a registration is, between *immediate parties*, subject to the want of authority of an agent and the invalidity of the document upon which the registration is based"? as Philp, J., put it in *Coras* v. *Webb and Hoare* (*supra*), at p. 71.

In *Boyd's* case the majority, Sir Robert Stout, C.J., and Sim and Adams, JJ., distinguished *Gibbs* v. *Messer*. They held that any person who without fraud succeeds in procuring himself to be registered a proprietor of land under the Land Transfer Act has an indefeasible title, whether he is a purchaser of value or not; and, although the documents which form the basis of his registration are absolutely inoperative in themselves, or—as put more tersely by Salmond, J.—"that the registration of a void instrument or transaction is in itself sufficient to confer an indefeasible title upon the person becoming so registered," and, in consequence, a good registered title can be effectually, immediately, and finally destroyed by the erroneous registration of a void instrument in derogation of that title. Salmond and Stringer, JJ., on the other hand, considered that *Gibbs* v. *Messer* laid down a general rule, which was not limited to the case of forgeries, and which applied to instruments whether on account of forgery, execution by an infant, by an attorney without authority, by mistake, or *ultra vires*; and that an instrument which is null and void before registration remains so *inter partes* after registration and creates no indefeasible title, until and unless the rights of some third person purchasing in good faith and for value on the faith of the registered instrument have supervened.

To quote the words of Salmond, J., after he had dealt with the *dictum* of the Privy Council in *Gibbs* v. *Messer*, that persons dealing with the registered proprietor "must ascertain at their own peril his existence and identity, the authority of any agent to act for him, and the validity of a deed under which they claim," at p. 1203:

> Registration either operates *inter partes* to validate a void instrument, or it does not. I cannot see any difference in this

respect between an instrument which is void because (unknown to the parties) it is a forgery and one which is void because executed by an infant, or by his attorney without authority, or by mistake or *ultra vires*.

The learned Judge continued at pp. 1204 and 1205:

Even, however, if it were true that initial registration is in all cases conclusive and unexaminable at the suit of prior owners of unregistered interests, it would not follow that a subsequent erroneous registration is conclusive and unexaminable at the suit of the prior registered proprietor whose title has been wrongly removed or encumbered by the registration of an invalid instrument. As already indicated, *Gibbs* v. *Messer* shows that this is not the case. The registered title of A. cannot pass to B. except by the registration against A.'s title of a valid and operative instrument of transfer. It cannot pass by registration alone without a valid instrument, any more than it can pass by a valid instrument alone without registration.

In *Clements* v. *Ellis* (*supra*), at p. 258, Dixon, J., said of that passage that it is "an admirable statement of the true position." There the facts were that the registered proprietor, under the Transfer of Land Act, of land subject to a mortgage sold to a purchaser under a contract subject to be "subject to the existing mortgage" though in fact the parties had agreed that the mortgage was to be discharged, and the purchaser was to receive an unencumbered title. The purchaser gave a cheque for the purchase-money to the husband and agent for the vendor, who handed it to B. for the purpose of his paying off and procuring a discharge of the mortgage. B., having misappropriated such part of the money as was required to discharge the mortgage, prepared a discharge of mortgage, forged therein the signatures of the mortgagors, and lodged for registration the forged discharge of mortgage at the Office of Titles, together with a transfer, which disclosed no encumbrance, signed by the vendor and purchaser. An unencumbered certificate of title was subsequently issued to the purchaser.

The Supreme Court of Victoria held that the forged discharge of mortgage was a nullity, and that the purchaser was not protected. On appeal to the High Court, the Court were equally divided, Rich and Evatt, JJ., being of opinion that the appeal should be allowed, and Dixon and McTiernan, JJ., that it should be dismissed; so the decision of the Supreme Court of Victoria was affirmed. The decision of the learned Judges of the High Court were based partly on their interpretation of the relevant sections of Transfer of Land Acts, and partly on the way in which they regarded the facts. What is of interest for the profession in New Zealand is that Dixon, J., and Evatt, J., both adopted Salmond, J.'s statement of the principle enunciated by the minority in *Boyd's* case, while criticizing his view of the *Mere Roihi* case (*supra*), and came to exactly opposite conclusions. Dixon, J., regarded the purchaser as an immediate party affected by the forged discharge and, therefore, not protected; while Evatt, J., considered that the discharge had been registered immediately prior to the mortgage, and that, therefore, the vendor, when the transfer was registered, was the immediate party and the purchaser obtained an indefeasible title from the registered proprietor.

In *Coras's* case, C., an infant, was the registered proprietor of land, without any notice of infancy on the title. He contracted with H. to erect a building on the land, and paid H. part of the contract price and executed a mortgage to secure the balance, the mortgagee's name and date of repayment being left blank. He agreed to arrange finance, and received the balance of the moneys from W., whose name, unknown to C. was put in the mortgage as mortgagee. By mistake, 1941 was inserted as the year of repayment instead of 1942. The mortgage was registered when the building was completed. C. complained of defects, but could not locate H. or find out the name of the mortgagee. Shortly after becoming of age, he ascertained the name of W., and commenced proceedings for a declaration that the mortgage was void, and that W. was not entitled to be registered as mortgagee; for an injunction restraining him from exercising any alleged powers under the mortgage; and for an order that the mortgage be delivered up and cancelled, and that the entry thereof be expunged from the Register. At the trial, the plaintiff's claim for rectification of the Register was abandoned, and the defendant, by counter-claim, claimed that the mortgage be rectified and that the mortgage so rectified be declared valid.

The learned Judge, Philp, J., found himself in agreement with the conclusion of Salmond, J., in *Boyd's* case as to the effect of infancy, want of authority, mistake, and *ultra vires*; and he said that if Salmond, J., be not right, many void instruments would be validated by registration. The learned Judge did not think that the Privy Council in *Mere Roihi's* case (*supra*), intended to cut down the *dictum* in *Gibbs* v. *Messer* (*supra*) that the conclusiveness of a registration is, between *immediate parties*, subject to the want of authority of an agent and the invalidity of the document upon which the registration is based.

His Honour held that the mortgage was void, but that such avoidance was subject to the operation of the Real Property Acts, equivalent to our Land Transfer Act, 1915; that the Register was not conclusive as to the capacity of the registered proprietor, and that a person dealing with the registered proprietor was put upon inquiry; as s. 33 of the Real Property Act, 1861, contemplated that there might be an unnotified incapacity; but that the register is, however, conclusive in all actions where no claim for rectification is made, or where the suit is between the registered proprietor and a third person not being the party from whom he took, or his privy; that if the plaintiff had claimed rectification of the register, he would have been entitled to relief subject to his doing equity by way of the defendant becoming entitled to a charge on the land and the title thereof; and that, on the defendant's counter-claim, the mortgage should be rectified, and, as so rectified, declared valid.

The late Professor Garrow in his *Real Property*, 3rd Ed. 248, said: "It may well be that if the like question ever comes before the Privy Council and the final interpretation of its earlier judgment is pronounced, the opinion of the minority in *Boyd's* case may be upheld." He foresaw, too, the question that arose in *Coras's* case, for he continued:

If, for example, a person effects registration of a memorandum of mortgage from an infant (whose disability, say, happens not to be disclosed on the title), securing money lent and to be lent and, therefore, void *inter partes*, can it be claimed that registration precludes the infant from claiming that the security is void, and from obtaining an order of Court to that effect and directing removal of the instrument from the register? It is submitted that it cannot. The like argument applies to an instrument not *inter partes*, on other grounds—*e.g.*, mistake, absence of authority, and the doctrine of *ultra vires*.

In a recent case, *Percy* v. *Youngman*, [1941] V.L.R. 275 (which reached us since the above was in type), Martin, J., decided that an infant, who has a certificate of title under a statute corresponding with our Land Transfer Act, without the fact of infancy being stated thereon, cannot upon attaining his majority, recover such property from the person to whom he has transferred it for value and who has become registered as proprietor thereof while unaware of the transferor's infancy. The learned Judge referred to the approval by the Privy Council in *Waimiha Sawmilling Co., Ltd.* v. *Waione Sawmilling Co., Ltd.*, [1926] A.C. 101, 106; N.Z.P.C.C. 267, 272, of the dictum of the Court of Appeal in *Fels* v. *Knowles*, (1906) 26 N.Z.L.R. 604, 620, where it was said:

> Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right exercised.

His Honour also applied the judgment of the majority of the Court of Appeal in *Boyd's* case, in following *Mere Roihi's* case. Therefore, he held, the rule of law that an infant who contracts is entitled to avoid the contract before attaining or within a reasonable time of attaining his majority, does not prevail when such contract is followed by a transfer duly registered by one who had no knowledge of the fact of infancy, and who had been granted a title free from incumbrances, which, His Honour said, is a word of wide import.

The questions of infancy and rectification in respect of land under the Land Transfer Act, considered in *Coras's* case and in *Percy's* case, deserve consideration in a later article, as they raise a contest between the privilege of the infant and the conclusiveness of the register. Our present purpose is to indicate to conveyancers and the profession generally that—in view of the attitude of Australian Judges, and the opinion of many of the profession in New Zealand, as to greater reasonableness (especially from the practical standpoint), of the point of view of the minority of the Court of Appeal in *Boyd's* case—it may not be safe to rely upon the decision in *Boyd's* case as being settled law; but any one bold enough to disregard it and go to the Privy Council, may succeed in reversing it.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1942.
March 26, 27, 30; July 2.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

JENSEN v. WELLINGTON WOOLLEN MANUFACTURING COMPANY, LIMITED.
SANDERSON v. SAME.
GRIFFEN v. SAME.

War Emergency Legislation—Labour Legislation Emergency Regulations—Minister empowered by Order in Council to make such Regulations as appear to him to be "necessary or expedient" for Certain Specified Purposes—Order made by Minister pursuant to such Regulations "in order to facilitate the effective conduct of emergency operations arising out of the war" (not being one of such purposes)—Whether Order invalid—Interpretation of Order—Whether Statements of the Minister to show that the expressed Intention of the Order was not his real Intention admissible—Labour Legislation Emergency Regulations, 1940 (Serial No. 1940/123), Reg. 2—Woollen-mills Labour Legislation Suspension Order, 1940 (Serial No. 1940/132), cl. 5.

Regulation 2 of the Labour Legislation Emergency Regulations, 1939 (Serial No. 1939/167), made by Order in Council on September 14, 1939, in purported exercise of the powers conferred by the Emergency Regulations Act, 1939, was in the following words:—

> 2. The provisions of any Act or regulations or orders thereunder, and of any award or industrial agreement, under the Industrial Conciliation and Arbitration Act, 1925, and its amendments, and of any agreement under the Labour Disputes Investigation Act, 1913, or of any voluntary agreement affecting conditions of employment, which prohibit or restrict in any way the working of extended hours on any day or in any week or which relate to the conditions under which extended hours may be worked may, *in order to facilitate the effective conduct of emergency operations arising out of the war*, be suspended by the Minister of Labour by order published in the *Gazette* in respect of any industry or branch thereof or in any particular case, subject, however, to such terms and conditions and from such date as the Minister may prescribe in such order."

This regulation was revoked by the Labour Legislation Emergency Regulations, 1940 (Serial No. 1940/123), on June 18, 1940.

The latter regulations, while extending the scope of what the Minister might do, empowered him by Order in Council to make such regulations as appeared to him "to be necessary or expedient for securing the public safety, the defence of New Zealand, or the efficient prosecution of any war in which His Majesty may be engaged, or for maintaining supplies and services essential to the life of the community."

On June 19, 1940, the Minister made an order, the Woollen-mills Labour Legislation Suspension Order, 1940 (Serial No. 1940/132), commencing "Pursuant to the Labour Legislation Emergency Regulations, 1940, I, Patrick Charles Webb, Minister of Labour, do, in order to facilitate the effective conduct of emergency operations arising out of the war, hereby order as follows."

On case removed from the Supreme Court by workers claiming alleged balance of wages due.

Cleary (for *Cahill*, on war service), for the plaintiffs; *Spratt*, for the defendant.

Held, by *Blair*, *Callan*, and *Northcroft*, JJ. (*Myers*, C.J., and *Kennedy*, J., dissenting), That the said order was invalid on the following grounds respectively,

Per *Blair*, J., That the Minister had not addressed his mind to any of the topics to which he was directed to address himself before he became qualified to exercise the functions entrusted to him under the Labour Legislation Emergency Regulations, 1940 (Serial No. 1940/123), and had not found either necessity or expediency as required by those regulations.

Per *Callan* and *Northcroft*, JJ., That the Minister having declared in his order that he made it to facilitate the effective conduct of emergency operations arising out of the war had proposed to himself a test that was too wide.

Per *Northcroft*, J., further, That correspondence by the Minister subsequent to the order of June 19, amounted to a declaration by him that he did not consider it necessary to do that which had been done in pursuance of the order.

Per *Myers*, C.J. (dissenting), That the words in the order "to facilitate the effective conduct of emergency operations arising out of the war" should be construed as being merely a paraphrase for "in order to assist in securing the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community," but were in any case unnecessary and inserted obviously *per incuriam*.

Per *Kennedy*, J. (dissenting), 1. That the words "pursuant to the Labour Legislation Emergency Regulations, 1940," sufficiently indicated that the order was duly made, although the order did not recite that the conditions precedent to the exercise of the power had been fulfilled.

2. That the words "in order to facilitate the effective conduct of emergency operations arising out of the war," where used as in this case with reference to the industries carried on in woollen mills, conveyed the notion of "maintaining supplies by special measures necessitated by the war."

Per *Myers*, C.J., and *Kennedy*, J., That it was not open to the Court to investigate and determine whether the Minister—assuming that he acted in good faith—could properly be of

opinion that the suspension ordered by the order was " necessary or expedient " for the purposes named.

Liversidge v. *Anderson*, [1941] 3 All E.R. 338, applied.

Held, by *Myers*, C.J., *Blair*, and *Kennedy*, JJ., That the Court must interpret the Minister's order according to the language used therein; and that statements by the Minister going to show that the expressed intention of the order was not his real intention were inadmissible for the purpose of the interpretation or construction of the order.

The case is reported on the above points only.

Solicitors: *Devine, Crombie, and Cahill*, Wellington, for the plaintiffs; *Morison, Spratt, Morison, and Taylor*, Wellington, for the defendant.

SUPREME COURT.
Napier.
1942.
June 16, 17, 26.
Northcroft, J.

NAPIER BOROUGH
v.
NAPIER HARBOUR BOARD AND OTHERS.

Municipal Corporations—" Pleasure-ground "—Whether a Motor Camping-ground is a " Pleasure-ground "—Municipal Corporations Act, 1933, s. 308 (1) (a).

A motor camping-ground is a " pleasure-ground " within the meaning of that term in s. 308 (1) (*a*) of the Municipal Corporations Act, 1933; and a Municipal Corporation has the power to take under the Public Works Act, 1928, lands for the purposes of a motor-camping ground.

Bluff Harbour Board v. *Campbelltown Borough*, (1904) 23 N.Z.L.R. 126, G.L.R. 43, applied.

Melanesian Mission Trust Board v. *Tamaki Road Board*, [1925] N.Z.L.R. 415, G.L.R. 258, referred to.

Counsel: *L. W. Willis*, for the plaintiff; *M. R. Grant*, for the Napier Harbour Board; *A. L. Martin*, for the second and third defendants, the Minister of Public Works and the Attorney-General.

Solicitors: *Kennedy, Lusk, Willis, and Sproule*, Napier, for the plaintiff; *Sainsbury, Logan, and Williams*, Napier, for the first defendant.

COURT OF APPEAL.
Wellington.
1942.
Mar. 31; May 22.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.

ARNERICH v. THE KING.

Crown Suits—Friendly Alien Resident in New Zealand—Whether he may Present and Proceed with a Petition under the Crown Suits Act, 1908—Whether such Alien can describe Himself as " His Majesty's faithful subject "—Crown Suits Act, 1908, ss. 25 (1), 29, and Third Schedule.

An alien friend resident in New Zealand may present and proceed with a petition under the Crown Suits Act, 1908.

Holt v. *Abbott*, (1851) 1 Legge 695; *Porter* v. *Freudenberg*, (1915) 1 K.B. 857; *Jefferys* v. *Boosey*, (1854) 4 H.L. Cas. 815, 10 E.R. 681; *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262; and *Re Sawers, Ex parte Blain*, (1879) 12 Ch.D. 522, applied.

Per Myers, C.J., and *Blair*, J. That such an alien should not describe himself as " faithful subject " but should adopt some other proper and respectful form of address, stating his actual circumstances and condition in the body of his petition.

Per Callan and *Kennedy*, JJ.: That any one, who, for the time being, owes allegiance to the Sovereign and enjoys his protection, is fairly described as a " subject," so long as the duty of allegiance and the right to protection exist.

In re von Frantzius, (1858) 2 DeG. & J. 126, 44 E.R. 936; *De Dohsè* v. *The Queen*, (1886) 66 L.J.Q.B. 422n; and *Rederiaktiebolaget Amphitrite* v. *The King*, [1921] 3 K.B. 500, referred to.

Counsel: *Taylor*, for the respondent in support of the motion; *Mazengarb*, for the suppliant, to oppose.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the suppliant; *Crown Law Office*, Wellington, for the respondent.

Case Annotation: Holt v. *Abbott*, E. and E. Digest, Vol. 2, p. 125, note 31 iii; *Porter* v. *Freudenberg*, *ibid.*, p. 140, para. 155; *Jefferys* v. *Boosey*, *ibid.*, p. 133, para. 94; *Johnstone* v. *Pedlar*, *ibid.*, Vol. 38, p. 10, para. 39; *Re Sawers, Ex parte Blain*, *ibid.*, Vol. 11, p. 306, para. 1; *In re von Frantzius*, *ibid.*, Vol. 16, p. 243, para. 390; *De Dohsè* v. *The Queen*, *ibid.*, p. 242, para. 372; *Rederiaktiebolaget Amphitrite* v. *The King*, *ibid.*, p. 238, para. 341.

COURT OF ARBITRATION.
New Plymouth.
1942.
May 20; July 7.
Tyndall, J.

TARANAKI AMALGAMATED SOCIETY OF PAINTERS, DECORATORS, AND LEAD-LIGHT WORKERS' INDUSTRIAL UNION OF WORKERS v. JONES AND SANDFORD, LIMITED.

Industrial Conciliation and Arbitration — Award — Whether Employer bound by Painters' Award—Worker not Member of Painters' Union, doing about Two Hours per Day Painting, and about Eleven and a Half Hours per Day Carpentering and Joining Work—Doctrine of " Substantial employment "—Whether applicable—Industrial Conciliation and Arbitration Amendment Act (No. 2), 1937, s. 5.

The defendant, a builder contractor company, building farm-cottages under a contract with a Government Department, with instruction to push on the work, built the cottages in sections and gave them one coat of priming at its factory. The sections were taken by lorry to the sites of their erection, where they were bolted together and given a second coat of paint by four employees of the company who went out and returned by the lorry. They were not members of the plaintiff union. The work of painting and erecting a cottage took four men about twenty-seven hours each, working for two days up to thirteen and a half hours each. The bulk of the work was carpentering and joining, and the painting occupied about two hours per day per man.

In an action for the recovery of, *inter alia*, a penalty for a breach of the New Zealand (except Westland) Painters and Decorators Award ((*1940*) *40 Book of Awards*, 737), in that the defendant, being bound by the said award, did employ certain workers upon painting-work whilst such members were not members of the plaintiff union, the learned Magistrate applied the test of " substantial employment " and held that the defendant was not, by reason of such painting-work as the workers did, connected with or engaged in the painting and decorating industry in terms of s. 89 (3) of the Industrial conciliation and Arbitration Act, 1925, and therefore was not bound by the said award.

On appeal from that judgment,

Tonkin, for the appellant; *Sheat*, for the respondent.

Held, 1. That, by force of s. 5 of the Industrial Conciliation and Arbitration Amendment Act (No. 2), 1937, the defendant was a party to and bound by the said award.

Wilson v. *Dalgety and Co., Ltd.*, [1940] N.Z.L.R. 323, G.L.R. 273, applied.

2. That there was no necessity to invoke the doctrine of " substantial employment " as there was no conflict to be resolved; under both the Carpenters' and the Painters' Awards the employment was on an hourly basis and the wages were at hourly rates.

3. That the painting was too substantial in amount to be treated as merely incidental to the main employment.

Wilson v. *Dalgety and Co., Ltd.*, [1940] N.Z.L.R. 323, G.L.R. 273, distinguished.

McBrearty v. *Amalgamated Theatres, Ltd.*, [1941] N.Z.L.R. 1081, G.L.R. 565, referred to.

Solicitors: *O'Dea and O'Dea*, Hawera, for the appellant; *Nicholson, Kirby, and Sheat*, New Plymouth, for the respondent.

STAMP DUTY ON AGREEMENTS GENERALLY.

And Disqualified Person acting as Agent in Sale of Land subject to Provisions against Aggregation.

By E. C. ADAMS, LL.M.

(*Concluded from p. 150.*)

4.—AGREEMENTS WITHIN THE DEFINITION OF GUARANTEE.

These are dealt with by s. 20 of the Stamp Duties Amendment Act, 1924. They are liable to a fixed duty of 3s.

The instrument in *Harper's* case was called a guarantee and the duty of 3s. was actually paid thereon, but it would appear from the judgment that it did not come within the definition in said s. 20, but instead was liable to 1s. 3d. only, as an agreement not by deed and not otherwise chargeable: s. 154.

To be stampable as a guarantee, the *leading* object of the instrument must be a guarantee, as defined; therefore, for example, a guarantee by C. embodied in a mortgage from A. to B., if relating to the mortgage debt, will be exempt; but if appended or added to an instrument, it will be liable, for then there are two instruments: s. 60 of the Stamp Duties Act, 1923; *Prudential Assurance Co., Ltd.* v. *Commissioners of Inland Revenue,* [1935] K.B. 101.

5.—AGREEMENTS WHICH ARE BILLS OF EXCHANGE OR PROMISSORY NOTES.

(Part VII of the Act.)

6.—AGREEMENTS BY DEED, NOT COMING WITHIN THE CLASSIFICATION OF 1 TO 5 ABOVE.

(Section 168 of the Act.)

7.—AGREEMENTS NOT BY DEED, AND NOT COMING WITHIN THE CLASSIFICATION OF 1 TO 6 ABOVE.

(Section 154 of the Act.)

It is convenient to consider together 5, 6, and 7, because for stamp-duty purposes it is not always easy to determine into which of the above categories a particular instrument falls. The most convenient example to take is the very common IOU.

Now we all know that an IOU *simpliciter* is not liable to any stamp duty. Almost one hundred years ago, Pollock, C.B., said in *Melanotte* v. *Teasdale,* (1844) 13 M. & W. 216, 153 E.R. 90:

> The doctrine that an IOU, simply, does not require a stamp has been so long established, and so many instruments have been drawn on the faith of it that it must be considered settled law. It is a doctrine older than the last Stamp Act: and, as that does not notice it, we may infer that the Legislature did not mean the Act to apply to such documents.

The reason why an IOU is exempt from stamp duty is that it is a mere acknowledgment of an antecedent debt and does not in itself contain the terms of a contract between the parties: the law will imply a promise to pay and a mere undertaking to perform a duty, which the law implies, is not liable to stamp duty.

But an IOU, by the addition of special matter, may be liable to stamp duty either as a receipt, a promissory note, or an agreement: *Horne* v. *Redfearn,* (1838) 4 Bing. N.C. 433, 132 E.R. 854, per Bosanquet, J. This may be illustrated by an important Privy Council case (on appeal from India), *Nawab Major Sir Mohammad Akbar Khan* v. *Attar Singh,* [1936] 2 All E.R. 545, which appears to overrule some old English cases declaring certain instruments informally drawn to be promissory notes. The plaintiff deposited the sum of R.'s 43,900 with the defendants and received a deposit receipt in the following form, "This receipt is hereby executed by [*defendants*] for R.'s 43,900 received from [*a firm*] for and on behalf of [*the plaintiff*]. This amount to be payable after two years. Interest at the rate of R.'s 5-4-0 per cent. per year to be charged." This document was stamped as a receipt: the defendant contended it was a promissory note, and, if it had been, it was improperly stamped, and could not have been received in evidence. But this contention failed. At p. 550 their Lordships said:

> Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. The document plainly is a receipt for money containing the terms on which it is to be repaid.

The one rule which can be safely deduced from this Privy Council case is that an instrument not in the customary form of a bill of exchange or promissory note will not be regarded as a negotiable instrument, unless intended by the parties themselves to be a negotiable instrument.

The instrument in *Nawab Mohammad Akbar Khan* v. *Attar Singh* (*supra*) was stamped as a receipt. Their Lordships, however, did not decide that it was correctly stamped; all that they decided was that it did not require to be stamped as a promissory note. At p. 550 they said per Lord Atkin:

> Once it is decided that the document has not to be stamped as a promissory note, their Lordships are not called upon to decide whether the document otherwise bears a sufficient stamp. If that question had been raised it is sufficient to say that if improperly stamped it could have been stamped after execution under a penalty.

It is submitted that in New Zealand an instrument in that form would be liable to a duty of 1s. 3d., under s. 154, as being an agreement not by deed. Two cases may be cited in support. In *Welsh* v. *Forbes,* (1885) 12 Court Sess. Cas. 851, a document, "Received from A.B. a loan £400," was held to be an agreement. *Alpe,* 22nd Ed. 61, cites an unreported decision of Talbot, J.: *Cooper* v. *Phoenix Hosiery Manufacturing Co., Ltd.,* where the instrument stamped as a receipt could not be received in evidence until agreement duty and penalty thereon had been paid. "We thank you for your cheque for £100 on loan to the above company to be repaid to you on or before October, 1926, with interest at one per cent. over bank rate."

Thus, although a mere IOU is exempt, any instrument which discloses a contract by way of loan must be stamped as an agreement.

As it takes at least two parties to make an agreement, it is sometimes thought that an instrument cannot be liable to stamp duty as an agreement unless it is signed by both parties. But this by no means follows. Such old but unassailable cases as *Knight* v. *Barber,* (1846)

16 M. & W. 66, 153 E.R. 1101, and *Chanter* v. *Dickinson*, (1843) 5 Man. & G. 253, 134 E.R. 560, show that a document *confirming* an agreement previously made by word of mouth, or one made with the intention of containing the terms of a contract *already made* between the parties, is chargeable as an agreement, although signed by only one of them. And the ostensible receipt in *Fleetwood-Hesketh* v. *Inland Revenue Commissioners*, [1936] 1 K.B. 351, was held liable as an *agreement* of sale and purchase, although signed by the vendor only.

6 AND 7.—AGREEMENTS BY DEED and AGREEMENTS NOT BY DEED.

It remains to conclude this article by comparing agreements in the form of deeds, which are liable to 15s. under s. 168, with agreements not by deed, which are stampable under s. 154, at 1s. 3d.

Agreements in the form of deeds must be presented for stamping at a Stamp Duties Office. Agreements not in the form of deeds and exigible under s. 154 may be stamped by the Stamp Duties Office, or by one of the parties affixing and duly cancelling adhesive stamps of the required value at the time of the first execution thereof that has the effect of making the agreement valid or binding on any of the parties (s. 11 of the Finance Act (No. 2), 1935); unless stamps to the appropriate value are properly cancelled, the agreement is not duly stamped, and is not receivable in evidence (*Fox* v. *Holmes*, (1869) 1 N.Z. C.A. 167), unless it can be proved *aliunde* that the appropriate stamps appearing on the instrument were affixed thereto at the proper time: s. 54 and s. 57 of the Stamp Duties Act, 1923.

Two curious anomalies in connection with ss. 154 and 168 may be noted.

An agreement by deed falling under s. 168 is exempt if the Crown (as defined) is a party thereto, but an agreement not by deed and coming under s. 154 is not exempt simply because the Crown is a party thereto, the stamp duty of 1s. 3d. falling on the other party to the agreement.

An agreement by deed, the leading object of which is the hypothecation of chattels, or the charging of property other than lands for security, or an "instrument by way of security over chattels" within the meaning of the Chattels Transfer Act, if in the form of a deed, is exempt from all stamp duty; but an instrument with a similar purpose not couched in the form of a deed, is liable to 1s. 3d. under s. 154.

It is not the purpose of this article to explain what is, and what is not, a deed according to New Zealand law; in this connection the reader may be referred to *Goodall's Conveyancing in New Zealand*, 8–12. It will be observed in passing that in *Harper* v. *Commissioner of Stamp Duties*, His Honour the Chief Justice declined to rule that the instrument was a deed.

The practitioner who desires to obtain the full benefits conferred by a deed would do well to take the advice of the late Mr. T. F. Martin, and commence the instrument with such words as, "This Deed": *Martin's Conveyancing in New Zealand*, 37.

The difficulty in determining whether or not an instrument is a deed is caused by the provision in the Property Law Act which provides that except in the case of execution by a corporation sealing is not necessary: what is necessary is the addition by the attesting witness of his occupation or calling and his address. In England sealing is essential and sealing is the act of the party executing, whereas our statutory requirements are ostensibly the acts of the attesting witness. It would appear, however, that if an instrument is intended by the party executing it to be a deed, and the attesting witness inadvertently omits to add after his signature the statutory requirements, the instrument can at any time thereafter at the request of the person executing it be made a deed by the attesting witness duly adding the statutory requirements: *Deacon* v. *Auckland District Land Registrar*, (1910) 30 N.Z.L.R. 369, 13 G.L.R. 351. If I have correctly applied the principle of this last case, it may be that attestation by the witness with the statutory requirements is to be deemed the act of the party executing (as sealing is in England). It appears to follow as a necessary corollary that, if the party executing does not intend the instrument to be a deed, the addition of the statutory requirements by the attesting witness will not in itself make the instrument a deed.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

(*Continued from p. 153.*)

Jurisdiction of Supreme Court.—Arising out of certain statements reported to have been made at the Labour Conference held in Wellington at Easter the Chairman reported the action taken on behalf of the profession in making a suitable protest to the Minister of Justice and in having the views of the profession made known through the press. A letter from the Auckland Society was also read in which they supported the action and expressed the thanks of the Society. Members felt that everything possible had been done and it was decided to leave it to the Standing Committee to take appropriate action if further occasion arises.

Society of Comparative Legislation.—The following letter was received from the Society of Comparative Legislation:—

"The common principles of law and justice are the greatest bonds of Empire and among the English speaking peoples. The Society of Comparative Legislation is the only legal Society giving expression to that great unity of aim and government. It is supported by the Law Society, the Inns of Court and the governments throughout the Empire. Owing to the terrible destruction in the Inns it is not possible for them to continue their grants. The President and Committee hope that the Dominion Law Societies will make good the loss suffered from enemy attacks by making a grant to its work or at least by becoming subscribing members. Experience shows that the work of the Society has an added value in time of war so the Committee hope to have the assistance of your Society in continuing it in spite of the difficulties due to the destruction of its offices on two occasions."

It was resolved that the New Zealand Law Society subscribe to the Journal and also that a donation of £20 be made. It was decided that the copy of the Journal received should be kept in the Wellington Library.

Women Jurors' Bill.—The Chairman reported that the Standing Committee had informed the Minister of Justice that the Society would strongly oppose the principle set out in the Bill that such women *who desired* should be eligible to act as jurors. The Minister was also informed that, when the subject of the eligibility of women as jurors was considered by the Society on a previous occasion, members unanimously disapproved of any change being made in the present system.

It was decided that the Council was of opinion that women should continue to be ineligible to act as jurors. A member was of opinion that the Council should be prepared to offer some alternative suggestion if necessary.

It was decided to leave the matter for the Standing Committee to take whatever action was considered necessary.

Time for Sealing Probate.—The following letter was received from the Auckland Society:—

"Copy of a letter received from an Auckland solicitor is attached for your information.

"This matter was considered by my Council at its last meeting, and I was instructed to forward it for consideration by the Council of the New Zealand Law Society.

"*Enclosure*:

"There is a matter which your Committee might consider worth referring to the New Zealand Law Society. When any revision of the Code is made, a lengthening, from one to three months, of the period in which it is necessary to file Probate of Letters of Administration, might be considered.

"Under Rule 531m, the period allowed is one month, which I submit is too short. In a case where the Easter vacation occurs in the period, and still more when the Christmas vacation intervenes, the period is, of course, materially shortened. Added to this is the delay from the day probate is granted to when notice thereof is received.

"The notice is sent, I think, as second class matter which is subject to quite a considerable delay in the post owing to war conditions. In country applications these difficulties are accentuated.

"It seems that in the computation of a month, no allowance is made for either vacation, unless the expiry day of the month falls during it. I submit that a case might occur when the Christmas vacation, together with delay in notification, might preclude the sealing within the time specified, particularly in the case of country practitioners.

"I think a case is made out for extending the month to three months, or at least two months."

It was thought that the present period—one month—was insufficient; and it was resolved that representations be made to the Rules Committee to give effect to the proposal as outlined in the letter from the Auckland Society.

Death Duties Act: Deceased Soldiers' Estates.—The Gisborne Society wrote enclosing the following letter from one of its members.

"We have noticed in recent correspondence from the New Zealand Law Society that the question of interest on deceased soldiers' estates after the lapse of three months from date of death has been deferred until there are cases to support an amendment. We have such a case. The soldier was reported missing and believed drowned as on December 5, 1941, and the Court of Inquiry on March 4, 1942, found that he was now 'presumed dead.' Upon this information and supporting evidence by letters probate was ultimately granted on April 20, 1942. It is clear from these facts that in such a case it is impossible to have Stamp Duty accounts filed within three months of date of death and the result is that interest at 5 per cent. has accrued since March 5. Actually in the case quoted, we were able to file the accounts by May 8 and there must necessarily be some time before the duty can be arranged. There is a question of principle at stake, namely, that a man who has served his country is inflicted with a penalty which it is manifestly impossible to avoid however expeditious one is. We think therefore a move should be made to have the law amended so that a penalty in such cases should not be inflicted until, say, three months after either probate is granted or a final death certificate is issued. Perhaps you will be able to bring the matter up in the proper quarter."

A member of the Wellington Society also wrote as follows:—

"I am enclosing herewith copy of part of a letter I have written to the Stamp Office. The facts are as stated in the letter. The soldier concerned was reported 'killed in action,' but our information was that he was in hospital at any rate for some days and was still alive when a man who returned to New Zealand last saw him. Apparently he died the day this man left the hospital. In the welter of regulations that have poured forth surely another little one would not matter to prevent interest being charged on soldiers' estates till say three months after probate has been obtained.

"*Enclosure*:

"Extract from letter to Assistant Commissioner of Stamp Duties.

"We note with surprise that interest has been charged commencing three months from the date of death of the soldier. The facts in this case were that the deceased was reported as 'killed in action.' His father then heard from a friend who had returned to New Zealand that his son had certainly got to hospital and was alive some two or three days after he had been wounded. Under the circumstances Mr.———— had to make inquiries. Mr. ————'s other son in the Middle East was contacted and from him was obtained confirmation of the death of this soldier. We then immediately applied for probate. In this matter any delay was caused by following out the obvious duty of an executor to make sure that the deceased had died. It seems a shocking thing that interest should be charged while these inquiries were being made. You will appreciate that it is not the amount of interest that causes this protest but the mere fact that interest was charged."

To this letter the Commissioner of Stamp Duties had replied that he had no authority to grant a remission of interest. Delegates referred to similar instances that had arisen.

When the matter was referred to the Attorney-General last year he had given a very sympathetic hearing to the representations made, and had asked that should any instance arise, the matter be again referred to him.

It was therefore decided that the cases in question should be brought to the attention of the Attorney-General.

Land Transfer Forms.—The following letter had been received from the Southland Society:

"You will recollect that our suggestion of November, 1940, regarding the cutting of size of Land Transfer forms was approved by the meeting of your Council of December, 1940, and referred to the Registrar-General of Land who rather evaded the issue on the grounds that there was no shortage of suitable paper. At the December meeting Mr. Sheat had made an additional suggestion as to "blanket forms" which also appealed to us as a possible mode of economy.

"It can hardly be denied, we think, that the position with regard to paper supplies has very much degenerated since the matter was last brought up, and it appears to us that the time is now ripe for a further approach to the Registrar-General on the subject. There appears little doubt that a considerable saving can be made if the suggestions are adopted, and I should be glad if you would again submit the matter to your Council for appropriate action."

The Wanganui Society also wrote as follows:—

"It will be remembered that the District Land Registrar recently refused a request by your Society to accept for registration documents typed on single sheets of hand made paper.

"My Council is considering the present position decided that in view of the present acute shortage of paper the District Land Registrar should be requested to review his decision. It was further suggested that paper could in some cases be further saved by using both sheets of the present double sheeted forms as separate forms.

"If you consider the time opportune for fresh representations, my Council would be obliged if the District Land Registrar could be approached as suggested."

Mr. Buxton, who had interviewed the District Land Registrar, reported as follows:—

"I interviewed the District Land Registrar this morning on the economy of paper for Land Transfer Forms.

"The District Land Registrar stated that when the matter had been brought up previously the shortage of paper was not as acute as it now is and he opposed any alteration in the present forms because it was found in practice that under his system of filing where the documents are folded endways and placed on long shelves from which single documents are constantly being removed and replaced, a thin document consisting of a single sheet was very likely to be crumpled up, pushed in and lost.

"On account of the acute shortgage of paper he is now prepared to accept documents such as transmissions and partial releases of mortgages on a single sheet of demy (that is Land Transfer size) paper of good quality provided the back of the sheet is used for nothing except the endorsement. He will also approve a memorandum of transfer printed on a single sheet of good quality paper of the required size provided again that the back is used only for endorsement purposes and provided it is understood that the practice is to continue only during the war period and care is taken not to accumulate stocks in expectation that they will be accepted after the war. When submitting a form of transfer for his approval it would be apparently necessary to submit the draft on the type of paper which it was proposed to use for the engrossment of the form.

"The District Land Registrar would not approve of a blanket form as with the exception of the documents above mentioned he was satisfied that no other Land Transfer document, such as a mortgage or a lease, could be contained on a single sheep of paper."

The matter was left to Mr. Buxton to deal with.

(*To be concluded.*)

ADOPTION OF ILLEGITIMATE CHILD.

Is the Consent of the Putative Father Necessary?

The short point is whether the consent of the putative father is necessary in the case of the adoption of his illegitimate child; in other words: Is he a "parent" within the meaning of Part III of the Infants Act, 1908? The question cannot be regarded as settled; and it is hoped that what follows may be of some service in the solution of the problem.

The effect of an adoption is to "terminate all the rights and legal responsibilities and incidents existing between the child and his natural parents." (Section 21 (2) of the Infants Act, 1908.) As therefore the statute is one encroaching on rights, it is subject to a strict construction. "It is a recognized rule that statutes should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire . . . to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt." *Maxwell on the Interpretation of Statutes*, 7th Ed. 245.

It therefore becomes necessary to ascertain (1) if any rights exist between a putative father and his child; and, if so, (2) does the statute manifest expressly or by clear implication and beyond reasonable doubt an intention to encroach on such rights?

In connection with the first branch of this inquiry, it may be advisable to set out a statement on the point taken from *Eversley on Domestic Relations*, 5th Ed. pp. 508-510. In regard to the custody of an illegitimate child, it is set out as follows:—

> As regards the custody of the child the Courts carry out in part the spirit of the maxim *partus sequitur ventrem*, and assign primarily to the mother the care and control of her infant child . . . It has accordingly been held that the mother is entitled to the custody of her infant child in preference to the father, though from his circumstances he may be better able to educate it . . . And if the putative father obtains possession of the child by fraud or force, the Court on *habeas corpus* will order it to be restored to the mother . . . The right of the father to the custody has been recognized, though not fully at first; thus, where he had the custody of the child fairly, the Court was loath to take it away from him . . . In an Irish case (*Re Crowe*, (1883) Ir. L.T. Rep. 72), the father's right to custody has been maintained. Indeed, this *natural* relationship between the child and its parents and other relatives is largely recognized both in law and equity . . . This claim is not based upon any strict legal right arising out of the legal position of parent and child, or upon any title in the parents to the legal guardianship of the infant child, for the relationship between them forbids that claim, a bastard has no legal status as a child, even though by repute he may come to have the name of his father, but is founded on equitable doctrines, and "that sort of blood relationship, which, though not legal, gives the natural relations a right to the custody of the child. It must be borne in mind that in the case of bastards, as in that of legitimate children, their interests and welfare are the first consideration of the Courts.

It will be noted that the "welfare and interests of the child" are vital matters in connection with adoptions (Infants Act, 1908, ss. 18 (1) (c)).

The following citations from *Simpson's Law of Infants*, 4th Ed. 169, are of great assistance. It is stated:

> The Court will pay much regard to the wishes of the father, and will appoint as guardians those whom he has professed to appoint, though informally—*e.g.*, by a will not duly executed, or where the children are illegitimate.

And at p. 100:

> In the eye of the law an illegitimate child is *filius nullius*, and consequently has no legal guardians, not even the mother or the putative father. The mother's legal rights to its custody are not the same as those of the father of a legitimate child . . . and the Court will prefer the mother to the father.

In *1 White and Tudor's Leading Cases*, 8th Ed. 521, it is said:

> If the child is illegitimate, the mother has a *prima facie* not an absolute right, to its custody . . . in preference to the reputed father, or any other person, and this right must be recognized, unless there are strong grounds for displacing her.

In his judgment in *R.* v. *Nash*, (1883) 10 Q.B.D. 454, 455–56, Jessel, M.R., says:

> In a reported case Maule, J. . . . . is said to have asked whether the mother of an illegitimate child was anything but a stranger to it. I am disposed to think that this was said ironically—but if not, the Judge . . . must have been referring only to the strict legal rights as to guardianship. In many cases the law recognizes the right of a mother to the custody of her illegitimate child . . . The Court is now governed by equitable rules, and in equity regard was always had to the mother, the putative father, and the relations on the mother's side.

The position as to custody and education of an illegitimate child is summarized in the *1940 Yearly Practice*, 2328, as follows:—

> With regard to illegitimate children, there does not appear to have been ever any difference between the rules of equity and those of common law, as to their custody and education. At common law the putative father had no such right to their custody as the father of a legitimate child . . . nor had the mother (per Lords Herschell and Field in *Barnardo* v. *McHugh*, (1891) A.C. 388), and equity followed the law; but the Court now has regard primarily to the wishes of the mother . . . She cannot, however, legally transfer her rights and liabilities to any other person: *Humphrys* v. *Polak*, [1901] 2 K.B. 385.

In *Stone's Justices Manual*, 73rd Ed. 476, the same subject is treated as follows:—

> The wishes of the mother of an illegitimate child as to its custody are primarily to be considered, and unless it can be shown that it would be detrimental to the interest of the child, the Court will order it to be delivered to any person she desires. . . . By committing the child to the custody of another person for the purpose of education, the mother does not lose her rights over the child . . . She cannot by contract transfer her duties and rights to another person. . . . But she can do so by an adoption order made under the Adoption of Children Act, 1926.

See *2 Halsbury's Laws of England*, 2nd Ed., pp. 578–580, paras. 795–799; also the article "Bastard" in *2 Encyclopaedia of the Laws of England*, 3rd Ed. 202, and article "Parent and Child" in *10 Encyclopaedia of Laws of England*, p. 269.

The above citations show that the father of an illegitimate child has certain rights in respect of such child, though very limited in character; and they further show that the mother of such child is preferred to the father.

Is there then anything in the Act showing that the Legislature has interfered with or encroached upon such rights?

In s. 15 of the Act, "deserted child" is defined as meaning

> Any child who, in the opinion of the Judge . . . is deserted and has ceased to be cared for and maintained by

its parents, or by such one of them as is living or by the guardian of such child or by the mother of such child if the child is illegitimate.

In this definition it is clear that "parents" mean the father and the mother of a legitimate child, because when reference is made to an illegitimate child, the mother only is referred to, and by name; she is not described as a parent.

The definition contemplates three classes of persons: (1) parents, (2) guardians, and (3) mother of an illegitimate child.

Now under s. 18 (1) (*f*), requiring certain consents, it is provided that no consent is necessary in the case of a "deserted child"—that is, in the case of an illegitimate child, a child deserted by its mother. In the case of an illegitimate child not deserted by its mother, the consent of the mother is obviously necessary, as she is by law entitled to its custody during her lifetime. (See also *Brand* v. *Shaw* (1888) 16 S.C. (Ct. of Sess.) 315, 320, particularly the judgment of Lord Shand, at p. 323.) In mentioning the mother of an illegitimate child, and not the father, the Legislature has had regard to this right of the mother, which includes the right to say to whom she desires the custody of the child to be given. But for the Infants Act she could not contract to transfer her rights and duties in respect of the child to persons named by her; and therefore it is that the consent given by her must show the names of the adopting parents: see *In re Carroll*, [1931] 1 K.B. 317, 329, per Scrutton, L.J.). It would seem, therefore, that the "parents" mentioned in s. 18 (*e*) mean the parents of a legitimate child, and in the case of an illegitimate child, its mother as in the definition of "deserted child."

The necessity for the consent of the mother of an illegitimate child arises not only from statutory requirement, then, but from the fact that the Legislature has recognized her, and her right to custody; otherwise it would not have mentioned the mother in such association—namely, with parents and guardians. The mother is the only parent recognized by the Act. Had it been the intention to include the father, then the Legislature could have defined parent as in s. 27. But the Legislature has deliberately ignored him.

If this view is not correct, that the parents mentioned in ss. 15 and 18 (*e*) are the father and the mother of a legitimate child, then we may have the anomalous position in the case of an illegitimate child of the mother agreeing to the adoption, but the father not consenting; and thus they would be placed on an equal footing, notwithstanding the mother's prior right to custody. It is, of course, true that parents of a legitimate child are placed on an equal footing so far as consent is concerned; but their case is entirely different from that of the father and the mother of illegitimate children. The statute apparently has recognized her rights over that of the father; and it appears it would require plain language on the part of the Legislature to show that in enacting Part III, the father of an illegitimate child was within the contemplation of Parliament.

This view is, it seems, supported by other statutory enactments—*e.g.*, s. 12 of the Destitute Persons Act, 1910. (It can scarcely be suggested in such case that if the order of affiliation is made subsequent to the adoption order and at a time when the putative father is resisting the former, the latter order lapses because the consent of the father had not been obtained); and see also the definition of "parent" in Part IV of that statute.

Further, in the schedule to the Guardianship of Infants Act, 1926, infants have been placed in one of two classes—legitimate or illegitimate. In the former class the consent of the parents is required; while in the latter the mother only is mentioned and the father absolutely ignored. And so if the mother of an illegitimate child is alive she is the one to give consent to the marriage of the infant, unless she has been deprived of custody by order of the Court, in which case the person to give consent is the one to whom custody has been given by order of the Court. Then if the mother is dead, the person to give consent is not the father, but the guardian appointed by the mother. These provisions would seem to be absolutely confirmatory of the principle embodied in Part III of the Infants Act: see *In re A., S.* v. *A.*, [1940] W.N. 271.

Sections 51 and 52 of the Administration Act, 1908, also appear to confirm this view.

In *Stone's Justices Manual*, 73rd Ed. 600, in discussing the effect of an English adoption order, and in particular the words "upon an adoption order being made, all rights, duties . . . of the parent . . . shall be extinguished it is said, in a footnote:

> The mother of a bastard child is a "parent" within this subsection, but not the putative father, he, if so ordered, &c., as mentioned in note (*a*) p. 599, being a person "liable to contribute" within s. 2 (3).

The reference to note (*a*) is this—that an adoption order shall not be made except with the consent of anyone "who is liable to contribute to the support of the infant." And note (*a*) is: "Seemingly this includes the putative father . . . if a bastardy order has been obtained."

Thus it follows that the consent of the father of an illegitimate child is not necessary in the case of the adoption of such child.

The only decision on the point is that of Mr. Kettle, D.J., and S.M., *In re A.B.*, (1909) 4 M.C.R. 154. On any view that decision cannot with respect be regarded as satisfactory. In the second last paragraph of the judgment it is set out that if the mother of an illegitimate child deserts the child, the child is a "deserted child." "If she has not deserted the child her consent and the consent of the father must, it seems, be obtained, unless it is proved that he has deserted the child, in which case the mother's consent is sufficient." The weakness of the decision lies in this, that if the child has been deserted by its mother the consent of the father is not necessary, but contrariwise if the child is not deserted. This is most illogical. Moreover, on the facts of that case, it would seem to be necessary to obtain the consent of the father, though he did not even know of the birth. But suppose he does not admit paternity, what then? And, too, the consent could only be required on the ground that he is a parent; and he must be a parent whether the child is deserted or not. Thus the decision cannot be regarded as satisfactory.

To summarize—the only rights a putative father has in respect of his illegitimate child are merely equitable ones. Section 98 of the Judicature Act,

1908, provides that in questions relating to the custody and education of infants, the rules of equity are to prevail. Therefore a putative father has certain rights. One of the effects of an order of adoption is to terminate all rights existing between the natural parents and their child. It is a canon of construction that a statute which encroaches on rights should if possible be interpreted to respect such rights. If the Legislature intends to interfere with rights, then it will manifest such intention either by express provision or by necessary implication and beyond reasonable doubt. The Infants Act, 1908, has so manifested, inasmuch as in defining "deserted child" it has completely ignored the father. It follows, therefore, that a putative father is not a "parent" within the meaning of Part III of the Infants Act, 1908; and accordingly his consent is not necessary; see also *Stroud*, 2nd Ed. 1402, that the father of an illegitimate child is not its parent; and see *Butler* v. *Gregory*, (1902) 18 T.L.R. 370.

Finally, it may be observed that when the putative father has the custody of the child it would seem that the Courts are reluctant to disturb such custody. Therefore, if an application is made to adopt an illegitimate child that is in the custody of its father, either his consent should be obtained, or a notification be given him of the application, in order, in the latter case, that the Magistrate be in a proper position to judge if the adoption would promote the "interests and welfare" of the child—which is the primary consideration.

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. Death Duties.—*Ante-nuptial Marriage Settlement affecting Land Transfer Mortgages in New Zealand—Settlor dying domiciled in England—Death Duty Payable.*

QUESTION: Deceased's domicil of origin is English. In 1883, whilst on a visit to New Zealand, she married a man domiciled in New Zealand: just before the marriage she entered into an ante-nuptial marriage settlement (reserving to herself a life-interest); the property settled was a legacy due to her, but not then received, under the will of her father, who died domiciled in England. The trustees of the marriage settlement are all resident in New Zealand. Shortly after the marriage the legacy was received by the trustees, who invested it in New Zealand Land Transfer mortgages. On the death of her husband the settlor returned to England: she resumed her English domicil and died there. The settled funds remain in New Zealand. What death duty, if any, is payable in New Zealand in respect of the settlement?

ANSWER: The local situation of the settled funds is undoubtedly New Zealand (the trustees residing in New Zealand and the forum for administration being the New Zealand Courts): *Adams's Law of Death and Gift Duties in New Zealand*, 79–81. Therefore, the corpus of the settlement is liable to estate duty under s. 5 (1) (*j*) and to succession duty under s. 16 (1) (*g*): in addition, unpaid income *apportioned* to date of death comes in under ss. 5 (1) (*a*) and 16 (1) (*a*) or (*b*): *ibid.*, p. 262.

2. Natives and Native Land.—*Aboriginal Native owning Leasehold Interest in Native Land and Fee-simple of European Land—Title to Successor.*

QUESTION: A., an aboriginal Native of New Zealand, dies owning a leasehold interest in Native land and freehold of European land, both under the Land Transfer Act. He appoints B. his executor and trustee, but wills the leasehold and European land to C. The Native Land Court grants probate of his estate to B. and a succession order to C. How does C. become the registered proprietor?

ANSWER: The succession order affects only the equitable or beneficial ownership. Subject to registration under the Land Transfer Act, A.'s interests have become vested in B., whose duty it is to pay A.'s debts, administer his estate, get on the Register by applying for transmission in the usual way, and then transfer to the person appointed successor by the Court—*i.e.*, to C.: see *McCormack* v. *Lee*, [1941] N.Z.L.R. 114, G.L.R. 27, as to duties of legal personal representative. The important point to remember is that (except in the case of Native land) a succession order is *subject* to the title of the legal personal representative, and must therefore affect only the equitable estate, which is not sufficient to support a transmission under the Land Transfer Act. The position will be otherwise if the Court does not grant administration or a personalty order, for then the succession orders will affect the legal estate.

3. Land Transfer.—*Trustees not on Title—Vesting in New Trustee—Transmission.*

QUESTION: A. dies, owning Land Transfer land. B. and C. are his executors and trustees and prove his will; but they do not take title to the land. B. retires from the trusteeship and D. by deed (containing the usual vesting clause) is appointed in his stead. Can C. and D. get on to the Land Transfer Register by transmission?

ANSWER: No; B. and C. must first get on the Register by virtue of the probate—*i.e.*, they must apply for transmission and then transfer to C. and D. The vesting provisions on the appointment of a new trustee do not apply to Land Transfer land, except when the Public Trustee is appointed the new trustee: see *Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839, G.L.R. 529, and s. 43 (*b*) of the Public Trust Amendment Act, 1921.

4. Magistrates' Court.—*Assistant Clerk of Court—Deputy Clerk of Court—Powers.*

QUESTION: Has an Assistant Clerk of Court all the powers of a Clerk of Court or a Deputy Clerk of Court?

ANSWER: Yes; so far as the Magistrates' Courts Act, 1928, is concerned; but not outside the provisions of such Act. The powers of a Clerk of Court are set out in s. 17 of the statute, and s. 19 provides that the Assistant Clerk is to have those powers. Some Acts prescribe that the Deputy Clerk of Court may exercise certain powers under those Acts—*e.g.* s. 369 of the Justices of the Peace Act, 1927; but a Deputy Clerk of Court derives his powers from s. 25 (*e*) of the Acts Interpretation Act, 1924. The only powers enjoyed by an Assistant Clerk of Court are those given by the Magistrates' Courts Act. He has therefore no power to issue a summons under the Justices of the Peace Act, nor under the Imprisonment for Debt Limitation Act. The language of 21 (2) of the Magistrates' Courts Act providing for the appointment of a Deputy Clerk of Court is almost identical in terms with that of s. 19, providing for the appointment of an Assistant Clerk of Court; but, as has been pointed out, a Deputy Clerk of Court derives his powers under other Acts either by the express terms of such other Acts or from the Acts Interpretation Act.

LEGAL LITERATURE.

The Law Relating to Negligence on the Highway, by O. C. MAZENGARB, M.A., LL.D. (Part I: The Law of Negligence; Part II: The Action of Negligence), pp. xliv+468. Wellington: Butterworth & Co. (Aus.), Ltd.

A REVIEW BY H. F. VON HAAST.

Counsel learned in the law of running-down cases, after a perusal of Part I (The Law of Negligence) of Dr. Mazengarb's work, *Negligence on the Highway*, with its historical treatment of the doctrine of contributory negligence, which, he says, is the failure of the plaintiff to exercise care for his own safety rather than for that of the other fellow, and which he considers, when once the facts are known, is merely a question of law to be decided in accordance with established principles, will come to the conclusion that this scholarly, philosophical, and practical analysis of causation well deserved the encomiums bestowed upon it by the examiner upon whose recommendation the author was granted the degree of LL.D. by the University of New Zealand.

But, after studying all the tests of liability submitted by perplexed Courts to bewildered juries, "real" "substantial," "proximate" cause, "last opportunity," actual or constructive, "last clear chance," and all the exceptions grafted upon what appeared at first to be a comparatively simple and well-settled rule—when the jury in despair is apt to cut the Gordian Knot and ask itself, "Whose fault was it?"—the reader will be surprised to find that the author's scheme of reform, which is well worth consideration, proposes the retention of the common-law rule of negligence, contributory negligence, mode of proof, and trial by jury of claims for damages. He has pointed out that millions of pounds have been expended on litigation concerned in the application of "the Donkey Case" (he might have added for donkey's years). In these days of Social Security, the public will surely insist that—as in the case of Workers' Compensation and Motor-vehicles Insurance (Third-party Risks)—the first consideration shall be the welfare of the injured person and his dependants, and that millions of pounds shall no longer be spent in the Courts over the "nice sharp quillets of the law"; but shall in future go, not in costs of litigation, but towards the compensation of victims of motor accidents.

While Part I, with its historical approach to the subject in the past and suggestions for remedial action in the future, will command the attention of the scholar and the legislator, Part II (The Action of Negligence) will be eagerly turned to by legal practitioners all over the country, who wish to get the latest tips from a recognized strategist and tactician on how to launch and defend a claim for damages; how to conduct it before a jury, and how to set aside its verdict; how to deal with intricate questions of right-hand rule, insurance, indemnity, joint tort-feasors, contribution, subrogation; and where to find precedents of pleadings and interlocutory applications on which to base their own drafts. All these matters, as well as the practical application of the principles of law in actions for negligence, are dealt with as far as they can be compressed into 225 pages.

One precedent should be carefully considered by practitioners, the petition of right against the Crown claiming damages for the negligence of a servant or agent of the Army Department in driving a military truck insured under the Motor-vehicles Insurance (Third-party Risks) Act, 1928, and colliding with a motor-cyclist. This appears to be based on the relationship of master and servant, but s. 5 (*c*) of the Crown Suits Amendment Act, 1910, appears to rule out a claim against the Crown for damages for the negligence of any member of the Defence Forces as its servant. Whether, in view of s. 18 of the Motor-vehicles Insurance (Third-party Risks) Act, a claim can be made directly by petition of right against the Crown for the negligence of a member of the Defence Forces, being a licensed driver, when driving an insured army motor-vehicle as the "deemed authorized agent" of the owner, the Crown, under that Act, or whether the correct procedure should be a suit against such driver and his indemnification, as if he were the owner, so that the injured person could eventually recover from the insurer, is a question still awaiting determination. Perhaps Dr. Mazengarb will blaze the trail here, as he did recently in *Arnerich's* case.

It seems likely that *Mazengarb on Negligence* will soon be discussed in the law schools, considered in practitioners' studies, and cited in the Courts in every part of the British Commonwealth, for cases are cited from the Law Reports of Great Britain, Canada, Australia, and New Zealand, and the statute law of those countries is referred to.

RULES AND REGULATIONS.

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Shipping Safety Exemption Order. (Shipping Safety Emergency Regulations, 1940.) No. 1942/223.

Sunday Entertainments Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/224.

Bicycle Tire and Tube Control Notice, 1942. (Factory Emergency Regulations, 1939.) No. 1942/225.

Fertilizer Control Order, 1942. (Primary Industries Emergency Regulations, 1939.) No. 1942/226.

Dairy Supply Control Order, 1942. (Primary Industries Emergency Regulations, 1939.) No. 1942/227.

Motor-spirits Prices Regulations, 1942. (Motor-spirits (Regulation of Prices) Act, 1933.) No. 1942/228.

Soldiers' Wills Emergency Regulations 1939, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1942/229.

Traffic Emergency Regulations, 1942 (No. 3). (Emergency Regulations Act, 1939.) No. 1942/230.

Closing of Shops (Late Night) Emergency Regulations 1942, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1942/231.

Motor-vehicles Impressment Emergency Regulations 1941, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1942/232.

Fishing-boats Emergency Regulations, 1941, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1942/233.

Sea-fisheries Regulations, 1939, Amendment No. 14. (Fisheries Act, 1908.) No. 1942/234.