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"A very wise man has said that 'short of the multiplication table there is no truth and no fact which must not be proved over again as if it had never been proven, from time to time.'"
—ELIHU ROOT.

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CERTIORARI: DENIAL OF NATURAL JUSTICE.

ONE of the points considered in *R.* v. *Wandsworth Justices, Ex parte Read*, [1942] 1 All E.R. 56, was whether the existence of other remedies excludes the possibility of obtaining a writ of certiorari. To the mind of the ordinary practitioner practising in the lower Courts, the remedy of certiorari rarely presents itself as a possible means of rectifying an injustice that has been done to his client; to seek the remedy by way of appeal is more common. In the usual case, where another remedy is available and proper, the Court to which an application is made by way of certiorari will refuse to quash the conviction except when the lower Court has acted without jurisdiction. But one of the points considered in the *Wandsworth* case was whether the remedy of an application to the higher Court for a writ of certiorari is confined to cases where the lower Court has acted without jurisdiction or in excess of jurisdiction. The Divisional Court (Viscount Caldecote, L.C.J., and Humphreys and Wrottesley, JJ.) held that, where there has been a denial of natural justice, the applicant is entitled to a writ of certiorari quashing the conviction. In other words, even though it would appear that a remedy by way of appeal was available, that was not the proper remedy where there had been a denial of justice, such as arises when the omission of an essential element of jurisdiction results in a denial of natural justice.

In the case under notice the applicant was charged by the London County Council with misrepresentation by means of tickets of the weight of meat offered by him for sale. At the hearing, the tickets complained of were not produced; and objection was taken to the admission of evidence of their contents. The Magistrates retired to consider the question whether the non-production of these tickets had been satisfactorily explained. Upon returning into Court, they inadvertently not only gave their decision upon this evidence point, but at once proceeded to acquit the applicant on one summons and convict him upon the other. The applicant was not heard, and he contended that he had a good answer to the summons on which he was convicted.

The justices, by their counsel, admitted in the Divisional Court that they had made an error, but contended that the Court of King's Bench had no power to correct the error.

It was contended for the informant County Council that certiorari should not issue because the applicant's remedy was by way of general appeal to the quarter sessions, or by way of case stated on a point of law to the King's Bench; and that he had lost his opportunity for appeal because he was out of time. It was further submitted that, where the Court has not given a person the opportunity of giving evidence on his own behalf, an order for certiorari will not be granted by the Court to quash the conviction, on the ground that the position is analagous to the position in a case where there has been full opportunity given to the parties to produce their evidence, but there is an insufficiency of evidence. For this proposition reliance was put on *R.* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128. In that case, as Sir Charles Skerrett, C.J., pointed out in *In re Mulvaney*, [1924] N.Z.L.R. 129, 134, the Privy Council held that a conviction before a Magistrate upon a charge properly before him will not be quashed on the ground that the depositions show that there was no evidence to support the conviction, or that the Magistrate misdirected himself in considering the evidence, or that there was no evidence to support the charge; or, as Kennedy, J., put it in *In re Taylor*, [1937] N.Z.L.R. 768, 769, when an inferior Court has jurisdiction to decide a matter, it cannot be held to exceed or abuse its jurisdiction merely because it admits illegal evidence or convicts without evidence.

Counsel in the *Wandsworth* case referred to the following passage from the judgment of the Privy Council delivered by Lord Sumner, in the *Nat Bell Liquors* case, at p. 151:

> It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the Magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he

is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.

The Lord Chief Justice, Viscount Caldecote, said that, as he understood it, the passage cited from the *Nat Bell Liquors* case had nothing to say about a case where there has been a denial of natural justice to a party who had been convicted. His Lordship then considered the other remedies which, it was said, the applicant could have sought, and showed their inapplicability in such circumstances. At p. 57, he said :

> First of all, let me consider the case stated. It would be ludicrous to suggest that the applicant's request for a case to be stated on any such point as has been suggested could be the right course for him to pursue. To ask this Court to consider as a question of law whether the justices were right in convicting a man without hearing his evidence is so extravagant a statement as not to merit, in my judgment, a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course ; but I am not aware of any reason why, in such circumstances as these, if the applicant prefers to ask for an order of certiorari to quash the conviction obtained in the manner I have described, the Court should be debarred from making an order. In this case, it has been admitted by the justices that a mistake was made. This Court is in a position to remedy that mistake by making an order of certiorari to quash the conviction, and that is the proper order which I think this Court should make.

Humphreys, J., in concurring, as did Wrottesley, J., with the judgment of the Lord Chief Justice, said at p. 58 :

> If a person can satisfy this Court that he has been convicted of a criminal offence as the result of a complete disregard by the tribunal of the laws of natural justice, he is entitled to the protection of this Court. I entirely agree with the description by Viscount Caldecote, L.C.J., of the proceedings of the justices in this case as being a denial of justice to the accused person, who was prevented from taking any part in any discussion, if there was any, as to the rights or wrongs of the matter, and was never heard or called upon in his own defence. That being so, the only other question is whether or not there is some other remedy which, in the language of *Short and Mellor's Crown Office Practice*, is equally convenient, because there is no doubt ample authority for saying that this Court will not grant orders of certiorari or mandamus where there is some other course equally open to the applicant. For the reasons which Viscount Caldecote, L.C.J., has stated, it must be apparent to anybody knowing the facts of this case that the remedy by way of case stated did not exist in this case. It would be ridiculous to state a case upon the only question of law which arose. I take the view that this was not a case which was ever intended to be the subject of appeal to quarter sessions either. Quarter sessions, it is true, may hear appeals on questions of law, but primarily quarter sessions exist in their appellate jurisdiction for the purpose of dealing with disputed questions of fact. The appellant in this case would have gone to quarter sessions and said : " I appeal against my conviction. I do not know why I was convicted. I cannot tell you what it was that actuated the justices. I cannot say that any wrong evidence was heard, because no evidence was given on the subject, and my real complaint is that I do not know any of these things. My complaint is that I was never heard." That would be the one matter which would come before quarter sessions. One can understand the London County Council, who were the prosecutors, saying : " If only you had gone to quarter sessions, we should have had the opportunity of putting our house in order and of giving there the evidence against you which we never attempted to put before the justices." There is no reason why a person who has been wrongly convicted without evidence should assist the prosecution to go to some other tribunal, at which, it may be, the necessary evidence will be adduced. I think that the appellant is perfectly entitled to come to this Court and say, upon precedent and authority : " I was convicted as the result of a denial of justice, and I ask for justice, which can be done only by the quashing of that order."

Even though a statute declares the finality of a judgment or determination, the right to a writ of certiorari is available where there is no jurisdiction. That this is so in New Zealand, if there has been a denial of natural justice is shown also in *Boyes* v. *Carlyon*, [1939] N.Z.L.R. 504, which was an appeal from the judgment of Reed, J. The Court of Appeal, which dismissed the appeal, had to consider whether a writ of certiorari could issue where certiorari had been take away by statute. A Board of Appeal is constituted by s. 13 of the Public Service Amendment Act, 1927, and the decision of such Board is declared by s. 17 to be final, and that no writ of mandamus, prohibition or certiorari lies in respect thereof to any Court. Section 11 gives the person whose conduct is being inquired into the right of being represented by counsel or agent. The Commissioner refused an adjournment to an officer in an inquiry into charges made against him, on his request for reasonable notice to enable him to obtain advice. The judgments of the Court of Appeal show that the same considerations regarding the issue of a writ of certiorari apply to an inquiry made by an administrative officer acting without jurisdiction or in excess of it, as apply to an inferior Court of Justice in the same circumstances. As Sir Michael Myers, C. J., said, in the course of his judgment as to the position when there is a statutory bar to certiorari :

> Where certiorari is thus taken away, it has been held again and again that the Court cannot interfere unless the tribunal whose decision is complained of has acted altogether without jurisdiction : *Ex parte Hopwood*, (1850) 15 Q.B. 121, 117 E.R. 404, is an instance of such a case. And in *R.* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128, Lord Sumner, delivering the judgment of their Lordships of the Privy Council, said : " On this point *Ex parte Hopwood* may also be referred to. In that case, certiorari having been taken away by statute, the Court could only interfere if the justices had convicted without having any jurisdiction at all " (*ibid.*, 152). The Courts in New Zealand have on various occasions had the same question before them in various forms, and have dealt with it in the same way—*e.g.*, *New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689, G.L.R. 139, and *Butt* v. *Frazer*, [1929] N.Z.L.R. 636, G.L.R. 139.

His Honour anticipated the point recently decided in the *Wandsworth* case, when at p. 515, he said :

> I cannot help thinking that, when Parliament propounds a scheme such as is contained in s. 11 of the Public Service Amendment Act, 1927, and as part of that scheme expressly confers upon the person whose conduct is being inquired into the right of being represented by counsel or agent, such a right is conferred for the express purpose not only of having justice done but of enabling the members of that large body of persons comprised in the Public Service and affected by the Act to see for themselves that everything that is done bears the appearance of justice. Where such a right is expressly conferred and an inquiry is so conducted as that the right cannot be exercised, then I cannot help thinking that there has been a denial of justice. And, if there has been a denial of justice, and the Court is not embarrassed by any statutory enactment taking away certiorari, then, in my opinion, certiorari should go. That seems to me necessarily to follow from the decision of this Court in *Reynolds* v. *Attorney-General*, (1909) 29 N.Z.L.R. 24. It seems to me that in such a case the Court should not be too astute to look microscopically at all the facts and say that probably an injustice has not in fact been done : it is sufficient, I think, that there has been a denial of justice in that the person whose conduct is being inquired into has been denied a right which Parliament has expressly laid down for his protection. Behind that, once it appears, in my opinion the Court need not and should not go. If a person treated as the respondent has been treated has no remedy and can obtain no redress, it would certainly not have the appearance of justice to the large body of persons who are affected by the provisions of the Public Service Acts.

And again at p. 516, the learned Chief Justice said:

> I cannot see that a person whose conduct is being inquired into under s. 11 of the Public Service Amendment Act, 1927, can be said to have had "a full, free, fair, and ample hearing" where he has been denied in connection with the inquiry a right which Parliament has expressly conferred upon him. The provision in the statute is a special one enacted by Parliament for the protection of the person affected and to ensure that he may have the assistance of counsel or agent if he desires. If then he is prevented by the tribunal from exercising his statutory right, it seems to me that there is a denial of that justice which Parliament itself has prescribed.

The Court of Appeal (Sir Michael Myers, C.J., Ostler and Smith, JJ., Fair, J., dissenting) held that the provision in s. 11 (7) of the statute that at any such inquiry an officer charged "shall be entitled to be represented by counsel or agent" is a statutory condition of a due inquiry, the nonfulfilment of which amounts to a denial of justice, an act by the Commissioner in excess of his jurisdiction in respect of which certiorari to such Commissioner will lie.

The question of the proper procedure in such a case was considered last year by the Court of Appeal in *Duncan* v. *Graham*, [1941] N.Z.L.R. 535, where a denial of the principles of natural justice was in issue. In substance it was a proceeding for quashing a conviction and sentence for a breach of the Licensing Act, 1908. In form, it was a motion under R. 467 of the Code of Civil Procedure upon a statement of claim under R. 466A. for the issue of a writ of certiorari. Here, the conviction was quashed on the broader ground of denial of natural justice, which implied a want of jurisdiction. It was contended for the Crown that in view of s. 74 (3) of the Justices of the Peace Act, 1927, that a writ of certiorari cannot issue to quash a conviction, and further that the proper procedure and the general practice is to make absolute a rule *nisi* to quash the conviction. Counsel went on to say that under s. 314 of the Justices of the Peace Act, 1927, certiorari is taken away when a case is stated under the provisions of Part IX of that statute. In England, the procedure is set out in the Crown Office Rules. It is assumed in ss. 7, 8, and 9 of the Inferior Courts Procedure Act, 1909, that the writ of certiorari is available; but a legislative mistake as to the existence of law is not law: *R.* v. *Lawry*, [1926] G.L.R. 206, 209. Counsel for the plaintiff submitted that there were two courses open (*a*) to draw up the conviction, lodge it with the Registrar of the Supreme Court, and then move to quash; or (*b*) leave the conviction in the lower Court, and apply to have it brought up by certiorari: Justices of the Peace Act, 1927, s. 74 (3), and that either course was available: *R.* v. *Beetham*, (1872) Mac. 1095, 1097, followed in *R.* v. *Fulton*, (1870) 1 N.Z.C.A. 390, 392, and in *R.* v. *Brookes*, (1873) 1 N.Z. Jur. (S.C.) 104; and that the sections quoted from the Inferior Courts Procedure Act, 1909, could not be disregarded as they amounted to definite statements by the Legislature that certiorari lies in a case where there was no jurisdiction to record or enter the conviction in question. Upon the assumption that there was power to substitute for the offence charged in the information an entirely different offence, counsel for the Crown admitted that the principles of natural justice require that the accused must be informed of the altered charge, and must be given an opportunity of properly stating his defence to that charge. The other members of the Court (Blair, Kennedy, Callan, and Northcroft, JJ.), concurred in the judgment of the learned Chief Justice who said, at p. 551, l. 38, that that had not adequately been done, and he held that the conviction could not safely be upheld. Referring to the preliminary point raised by the Crown that the proceedings were misconceived as a matter of procedure, and the submission that the proper procedure was a motion to quash, the learned Chief Justice, in the course of what was in effect the judgment of the Court, said:

> This is, in my opinion, a technical objection without substance. Undoubtedly the procedure could, and I think should, be by motion to quash, but I see no difficulty in treating the present proceedings as a motion to quash. There is in fact an actual motion before the Court, and, though it refers to the relief mentioned in the prayer of the statement of claim which is also filed, it requires no great ingenuity, as I think, to hold that the proceeding may be regarded as in substance a motion to quash the conviction.

A motion to make absolute an order *nisi* calling upon the convicting Magistrate to show cause why a conviction should not be quashed without a writ of certiorari actually issuing, was the procedure adopted *In re Mulvaney*, [1924] N.Z.L.R. 129, where the motion was also treated by Sir Charles Skerrett, C.J., as a motion to quash the conviction.

One further matter arising out of the judgments in *R.* v. *Wandsworth Justices*: it appears from the judgment of the Lord Chief Justice that the Magistrates admitted they had made a mistake. They did not make an affidavit to that effect, but appeared by counsel who informed the Court that they did not dispute the applicant's submission to the Court that they made an error; this, His Lordship observed, must be taken to amount to an admission that there was a denial of justice to the applicant. This is interesting in view of the comment made by Sir Michael Myers, C.J., in *Duncan* v. *Graham*, *supra*, at p. 555; where, as he did in *New Zealand Sheepfarmers' Agency, Ltd.* v. *Mosley and Hill*, [1932] N.Z.L.R. 949, 964, he deprecated the making by a Magistrate or other inferior judicial officer of an affidavit on disputed matters of fact in proceedings such as certiorari, save in unavoidable circumstances, or where the superior Court requests information from him. The Divisional Court, in the *Wandsworth* case made it clear, however, that although in that case it was unnecessary to consider whether or not there had been a usurpation of jurisdiction, the only way in which a denial of justice can come before the Court in certiorari proceedings in a case of want of jurisdiction, is by way of affidavit of the applicant or on his behalf; and that affidavit can be looked at by the Court to see what the facts are; and, if there has been a denial of natural justice, the Court is in a position to interfere and say that the conviction, in those circumstances, is not to stand.

Judicial Differences.—In *Yorkshire Dale Steamship Co., Ltd.* v. *Minister of War Transport*, [1942] 2 All E.R. 6, the House of Lords unanimously reversed the unanimous decision of the Court of Appeal. The result recalls that Justice Cardozo, who had thought, perhaps, more than any other man the art of judicial reasoning, said that when, after long consideration, he found a solution of a difficult question, it seemed that a light had flashed through his mind and he had no further doubt. Such a flash of light and a touch of common sense seem to have given the solution found by the House of Lords that the stranding of a ship was due to a war risk, not a marine risk. As Lord Macmillan said, in effect, no war, no risk; and so it was a war risk.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1942.
June 12; July 28.
Sir Michael Myers, C.J.
Smith, J.
Johnston, J.

THE KING v. BARRINGTON.

War Emergency Legislation—Public Safety Regulations—Criminal Law—Evidence—"Attempt" to publish Subversive Statement—Whether Evidence that Secretary of Society contributed an Article capable of being construed as Subversive to Society's Bulletin, which Bulletin was held to be Subversive, constituted Evidence justifying conviction of attempt to Publish the Bulletin—"Preparation" or "Overt act"—Public Safety Emergency Regulations, 1940 (Serial No. 1940/26), Regs. 1 (3), 2—Crimes Act, 1908, s. 93.

The prisoner was charged under the Public Safety Emergency Regulations, 1940 (Serial No. 1940/26), with publishing a subversive statement, hereinafter referred to as "the bulletin," alternatively with attempting to publish the said subversive statement. At the trial he was found guilty on the latter charge. In his summing-up to the jury the learned Chief Justice directed the jury that there was evidence upon which, having regard to s. 93 (1) of the Crimes Act, 1908, it was competent for them, if they found that the bulletin was a "subversive statement" to find the prisoner guilty of the offence of attempting to publish it.

The learned Chief Justice, pursuant to s. 442 of the Crimes Act, 1908, stated a case for the opinion of the Court on certain questions, on the last of which only—(*iv*) "Whether on the evidence the prisoner could properly be convicted of an attempt to publish a subversive statement—to wit, the document which has been referred to as "the bulletin,"—this case is reported.

The evidence showed that the prisoner was the secretary and executive officer of the New Zealand Christian Pacifist Society under whose auspices was published the bulletin which bore the prisoner's own address, as its place of origin, and that the prisoner had written one of the articles in the bulletin. Four copies of the bulletin containing such article were posted in sealed envelopes, but intercepted by the censor. The prisoner in evidence said that although there was no public distribution of the bulletin, about eight hundred to one thousand copies would be circulated to members of the Christian Pacifist Society and to sympathizers in their mailing list. In his evidence the prisoner said that since the previous Christmas he had not had anything to do with the actual publication of the bulletin, but that, as secretary, he would know that it was going to be published, and that he was requested to give an article, which he supplied and submitted to the editor in the hope that it would be approved and published in the bulletin. The article was capable of being construed as subversive and was the portion of the bulletin most relied on by the Crown at the trial as being subversive.

Held, per *Smith* and *Johnston*, JJ. (*Myers*, C.J., dissenting), That on the said evidence the prisoner could not properly be convicted of an attempt to publish a subversive statement; that there had been misdirection; and that the conviction be quashed for the following reasons respectively:—

Per *Smith*, J. That there was no evidence upon which it could be held that the accused had any intent to publish the bulletin, and that the sending of the article to the editor with the intention of its being published in the bulletin was not an overt act immediately connected with the act of publication and indicating an intention to commit the offence, and therefore, was not an "attempt."

R. v. *Barker*, [1924] N.Z.L.R. 865, G.L.R. 393, applied.

R. v. *Baker*, (1909) 28 N.Z.L.R. 536, 11 G.L.R. 575, distinguished.

Per *Johnston*, J. 1. That the conviction was of an attempt to publish the whole issue of the bulletin, including other subversive statements than that of the accused, but there was no evidence to go to the jury of an attempt by the accused to publish subversive statements in the bulletin other than his own.

2. That there was no evidence even of preparation.

R. v. *Barker*, [1924] N.Z.L.R. 865, G.L.R. 393, applied.

Per *Myers*, C.J. (dissenting), That the acts done by the prisoner were not mere preparation for the commission of an offence, but they constituted evidence upon which it was competent for the jury to find the prisoner guilty of the attempt under s. 93 of the Crimes Act, 1908; that there was no misdirection; and that the conviction should be upheld.

R. v. *Baker*, (1909) 28 N.Z.L.R. 536, 11 G.L.R. 575, applied.

Counsel: *Cunningham*, for the Crown; *Parry*, for the prisoner.

Solicitors: *Crown Law Office*, Wellington.

SUPREME COURT.
Christchurch.
1942.
June 4, 29.
Northcroft, J.

In re **BROOKS (DECEASED), OFFICIAL ASSIGNEE v. BROOKS.**

Executors and Administrators—Reference—Insolvent Estate—Fraudulent Preference—Whether Executor entitled to prefer one Creditor to Another—Claimants of Unliquidated Damages given Status of Creditors by Law Reform Act, 1936, s. 3 (6)—Executor giving deliberate preference to one Creditor over Another—Estate subsequently insolvent and administered by Official Assignee under Part IV of Administration Act, 1908—Executor not protected by s. 65 of that Act—Form of Order rectifying effect of such Preference and of Payment by Executor to Deceased's Mother of a Claim which should have been determined by the Court—Administration Act, 1908, ss. 64, 65—Law Reform Act, 1936, s. 3 (6).

An executor in New Zealand has no right as between two creditors of equal degree, to prefer one creditor to another.

The defendant, widow of a publican who died as the result of a motoring accident proved his will under which she was executrix and sole legatee and administered his estate until the Official Assignee in Bankruptcy was appointed administrator of the estate under Part IV of the Administration Act, 1908.

The deceased was the driver of a car when the accident occurred and three passengers in the car (hereinafter called "the passengers") were injured by the accident. Their solicitor wrote to the defendant's solicitor that he was instructed to lodge a claim against the estate on behalf of the passengers, who had not then recovered from their injuries. A claim was also made by the mother of the deceased for moneys alleged to have been lent by her to him many years before. The defendant carried on the business of deceased's hotel until the lease thereof ran out, incurring a loss, and received by way of personal drawings a substantial sum.

On receipt of the notice of the passengers' claim, defendant sent circulars to the creditors informing them of the claims of the passengers, which owing to the deceased having no "passengers' risk" insurance, would have to come out of the general estate, and concluding, "If the claims are substantial there may not be sufficient in the estate to pay in full the amounts due to creditors and the amounts recovered by way of damages."

Nevertheless, the defendant paid deceased's mother the amount claimed by her and all the other creditors (except the passengers) in full. The passengers in actions recovered damages to an amount that made the estate insolvent. The Official Assignee in Bankruptcy was appointed administrator of the estate under Part IV of the Administration Act, 1908, and brought an action against the defendant, claiming that she should make good to the estate the loss occasioned by carrying on deceased's business, the return to the estate of her drawings, the refund to the estate of the amount paid to deceased's mother, and the rectification of the preference given to the creditors other than the passengers.

Held, 1. That carrying on the business was a breach of trust against the interests of the creditors to whom the defendant owed a duty, and that she must repay to the estate the amount of her drawings and make good the loss resulting from the carrying on of the business.

2. That s. 3 (6) of the Law Reform Act, 1936, gave the passengers a status as creditors, even though at the time the matters complained of were done there was only a demand in the nature of unliquidated damages.

3. That the effect of making the order under Part IV related back to the date of deceased's death.

In re John McDougall, [1927] N.Z.L.R. 587, G.L.R. 404, and *In re Coote*, [1939] N.Z.L.R. 1008, G.L.R. 636, followed.

4. That the defendant, having no right to prefer the other creditors to the passengers, was not entitled to the protection of s. 65 of the Administration Act, 1908, as the payments made by her to the said creditors were made with a deliberate intention to prefer them to the disadvantage of the passengers; there must be an inquiry as to the effect of this preference and the defendant must pay to the plaintiff such a sum as was necessary to provide an equal dividend to the passengers as would have been payable to them had the defendant not preferred the other creditors.

5. That, as the claim of deceased's mother was one of such a nature that the defendant should not have paid it without a judgment of the Court, the order should be that, in ascertaining the amount which had to be brought into the estate in respect of the complaint of preference, the defendant should treat the amount paid to deceased's mother as still being available and should not be entitled to include her among the creditors of the estate.

Counsel: *E. S. Bowie*, for the plaintiff; *M. J. Gresson*, and *Lee*, for the defendant.

Solicitors: *E. S. Bowie*, Christchurch, for the plaintiff; *Jones and Lee*, Christchurch, for the defendant.

SUPREME COURT. Christchurch. 1942. July 10, 15. *Northcroft*, J.

In re **R.**

Aged and Infirm Persons—Estate of Mental Defective in Mental Hospital—Whether a Manager thereof other than Public Trustee can be appointed—Aged and Infirm Persons Protection Act, 1912, s. 27—Mental Defectives Act, 1911, s. 88.

Section 27 of the Aged and Infirm Persons Protection Act, 1912, which enables the Court to appoint a manager of the estate of a person who is a mental defective, overrides the provisions of s. 88 of the Mental Defectives Act, 1911, which (if and so long as no committee or administrator is in office) gives the custody and administration of the estate of a patient in a mental hospital to the Public Trustee.

Therefore, an order may be made under the Aged and Infirm Persons Protection Act, 1912, appointing a person other than the Public Trustee manager of the estate of a mental defective who is a patient in a mental hospital.

Counsel: *Clarke*, for the petitioner; *Reid*, for the Public Trustee.

Solicitors: *Weston, Ward, and Lascelles*, Christchurch, for the petitioner.

FREEDOM—THE RULE OF LAW.

Sir Norman Birkett Addresses the Ontario Bar.

By R. M. WILLES CHITTY, K.C.*

We have had Sir Norman Birkett with us again. None of the old charm that wrung our hearts when through Toronto's first blackout last summer he told us of tales of London in the blitz, was missing. Although he had spent six strenuous weeks in the States talking on an average more than once a day from coast to coast, there was no weariness in his voice. The inspiration of his message was all there, too, and we felt that, if that were possible, he touched a higher peak than ever before, although it was just the same simple talk unadorned by any flowery oratory. Sir Norman has all the Churchillian gift of saying simple things in simple language and making of them greater speeches than all the art of oratory ever produced. We were only sorry that our brethren of the other Provinces could not be there to hear him, and that more Ontario lawyers—though there was a wonderful attendance of out of town men—missed the inspiration of his address to the Ontario section of the Canadian Bar Association. That his address on the following evening at the Bencher's dinner must go unheard by more than the score or so who were privileged to hear it is even a greater pity, for it was the complement of the other. We had hoped to make some report of both speeches, but after more than one attempt we have given up the task as hopeless. We have not the artistry to make live again those inspiring messages, and in our flat prose they cannot live again. Better to try and tell you the thoughts they inspired in us and draw fire from the torch he bears so high than try and give you any picture of the torch itself, lacking all the colour and fire of the original.

Sir Norman spoke to us of freedom, of freedom as the rule of law. Not a new order or an old order, but just order couched in the language of the eternal truths, day although almost eight centuries since it was first put on parchment for an unwilling tyrant to subscribe. The expression of the truth of Lincoln's statement of the equality of man, that is as old as Arthur's round table, symbol of that same equality just as Arthur's Excalibur is the sheathless sword with which to-day the language of Magna Charta, as vibrant and fresh to-we fight and through the ages have fought for world freedom. Then he spoke of those shrines of freedom and the law that the barbarian in his fury against freedom has laid waste, and we thought of the feet of those greater and lesser lights who trod those halls and temples whose mortal bodies have perished like the shrines they raised but whose spirits live and sustain us still, a ghostly crowd living yet in the shadowy frames of those buildings that even as they built them they knew could not outlast the ideal of that freedom to which they gave their lives. Those men are gone and now the shrines that they built and adorned are gone, too, but the faith that they professed and in the service of which they built those buildings still lives; and that great company look down on us from the rooms that are no longer there and smile upon us as we pass, carrying forward their torch to pass it to those who press behind, when our turn, too, comes to join those who having lived in the service of freedom have earned the right to live in eternal freedom.

To us is given the right to-day to take again Excalibur, the magic sword of freedom. Down through the ages the Lady of the Lake, clothed in white samite, mystic, wonderful, has been ever ready to give the King that cross-hilted blade of victory in the cause of freedom, engraved on one side "Take me" and on the other "Cast me away." Many times in our long history have we taken up that magic weapon, and when freedom has been won for a time cast him away in the fond hope

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that the far-off time when freedom in the rule of law had come. But each time the need to take him back has come all too soon, but the arm that rose out of the lake to draw him under when we cast him away has always been at our side to give him back again. Because that invincible blade is the spirit of freedom itself, and freedom living in the souls of men cannot be conquered. The gaps in the ranks of those who fight for freedom fill up from the eager host who press behind, and the spirits of the multitude who have died in its service fight on till at last freedom will be secure beyond assail. Then will come the time to cast away the faithful sword because the sword will no longer be the symbol of freedom. In its place will be the scales of justice, and the Lady of the Lake will become the figure of justice, that justice which is freedom whose true weapon is the law.

But what of the buildings that the barbarian in his hate has destroyed, thinking thus to destroy the spirit they have so long enshrined? We always like to think that in the stones of those symbols of the greater temple that our race has always striven to build in the hearts of men was carved the motto that Kipling speaks of in "The Palace." That motto was as you will remember "After me cometh a Builder. Tell him, I too have known." Those who built the fabric of those halls and temples where the great work of building freedom should go on knew that the ideal they served would outlive the works of their hands. They knew that the work would still go on, though their buildings would return to the dust from whence they came. But they knew that after them would come successors in the great tradition of the building of freedom in the hearts of men, and that that tradition which had inspired them would inspire all real men for all time. So when they built those historic buildings that they knew could not outlive the ideal that inspired them they carved upon the stones their knowledge that the spirit was greater than the mere fabric that they built to enshrine it, and that the tradition they served was founded upon the eternal truths. So they wrote on those stones: and even as they cart away the precious rubble of the Temple you can see it written on every stone and even on the dust itself, "After me cometh a Builder. Tell him, I too have known." The great tradition lives, though all perish, and builders in that tradition will never cease.

To us it will be given to rebuild the Temple, when the victory for freedom is won. We can build no more magnificent edifice than the old hallowed buildings that stood there before. It is not a question of form. The greatness of those buildings came from the spirit that lived within their walls, and our new walls will still enshrine that spirit and draw their greatness from it. It may be given to us that our work will last for longer than the buildings it replaces: and we must make it worthy of that hope. But even our Temple though it mark the final victory of victory over the forces of all evil, cannot outlast the spirit in which it is built. It will be the Temple of the law, the jewel hilted Excalibur of freedom, the Magna Charta of the world. Its stones will be washed white in the blood of all those who have fought for freedom. As long as we remember to serve that freedom, we may exchange Excalibur for Magna Charta, but if the people forget the battle will have to be fought again. Looking back to the years between we see now how dim the light of freedom has grown down that road to Endor when we followed after false gods. But the flame of that torch never went out and so long as one spark remains we shall always find Excalibur to turn back the foe from the last citadel of liberty and to restore the living breath of Magna Charta as the perpetual pledge that slavery can no more rule among the free peoples.

Eight hundred years after Arthur and the legendary foundation of the temple of freedom, came Magna Charta the keystone of the first arch of our national freedom. Almost another eight centuries after Magna Charta, while that arch still holds firm the Anglo-Saxon peoples, true to the tradition of the freedom they have won for themselves, have framed the Atlantic Charter, the Magna Charta for the world. Just as Magna Charta was simply the pledge of justice to all men within the nation, so the Atlantic Charter pledges justice to all peoples throughout the community of nations. The scales of justice held high to an expectant world, but still the sword in the other hand for those who are not content with justice. The time for that sword is still with us. The inscription still reads "Take me." When men are ready to accept the pledge of justice in the Atlantic Charter the other side of the sword will turn and the inscription will read "Cast me away," and the arm clothed in white samite, mystic, wonderful, will rise once more from those grey eternal waters and brandishing the flashing blade thrice draw it once more into the depths. But instead of the funeral barge and the sound of mourning, there will be the paean of justice at last triumphant and freedom secure against all assault. Then in the places laid waste by those who would destroy freedom because they hate justice, we can turn and build again the Temple to the eternal truth that inspired Arthur and wrote Magna Charta in ever living words. But as we dig our new foundations if we look we shall find on the stones that Arthur carved and all that great company that followed after him to build the spiritual temple of freedom that other motto "After me cometh a Builder. Tell him, I too have known." After us will come that greatest Builder of all who made the spirit itself and who, we pray, will find worthy the work we dedicate in humility to His service.

This may be a far cry from what Sir Norman said to us. But it is a sketch of the wonderful thoughts that he inspired in at least one of his hearers. The picture may have been different for each one of us, but we are sure that for none was it less inspiring. Indeed now that we have finished trying to give you our impressions of some of the thoughts our friend Sir Norman conjured up, we rather feel that it would have been better to try once more and make a report of his address even if our flat prose did entirely kill its effect. Perhaps, however, we may be pardoned for having made the attempt to spread in some small measure the gospel that he preached. He did show so clearly how our profession stands in the forefront of the battle for freedom, and that is much comfort for those whose job lies far from the sound of the guns. We like to know that those also serve who only stand and wait. We also are among the watch dogs of freedom though our role lacks the glamour of carrying the sword to the foe. The torch of freedom that we keep burning at home is the same torch that the gallant defenders for freedom carry all over the world. And when the smoke of battle clears and the victory is won, we shall join with all those, who according to their opportunity have fought the war of freedom, in building the new Temple of freedom and of justice. Sir Norman has pointed out the way for all of us. We are sure all who heard him will echo our words when we say, thank you, Sir Norman!

"DRUNK IN CHARGE."

Essential Ingredients of the Offence.

(*Concluded from p. 189.*)

Reference may here be made to an article appearing in (*1933*) *97 Justice of the Peace and Local Government Review*, 657. The article is headed "Drunk in Charge of a Car," and reads as follows :—

> At Salford . . . a motorist was summoned for being under the influence of drink while in charge of a car. The case for the prosecution was that : (*a*) the defendant was stooping in front of the radiator of a motor-lorry, as if trying to start the engine ; (*b*) on being approached by a constable, the defendant fell to the ground, being too drunk to stand up. The drunkenness was admitted, but it was pointed out that there was no evidence that the defendant was even trying to start the car, and the fact of his stooping in front of the radiator did not imply that he was in charge of the car, within the meaning of the Act. Mr. Percy Macbeth (Stipendiary Magistrate) held that : (1) while a car was on the road, the owner was responsible, whether actually inside or not ; (2) the defendant was lucky not to have been able to start the car, and was fined £5 and £2 2s. costs.

It is there suggested that "there should be something before the Court to show that he had or has had or will, in reasonable possibility, have the power or intention to do so"—*i.e.*, drive the car.

And the following appears on p. 699 of the same volume :

> As to being in charge of a car, the Road Traffic Act imposes very heavy penalties on those who while so far under the influence of drink or a drug as to be unable to have control of a vehicle, are either driving or in charge of it. The case before Mr. Bingley—most careful of our London Magistrates—was that of an owner who was driven on business to an address in Paddington by his secretary. Together they entered a house and the owner . . . left the conelave before it was over. He got into his car, to await the return of his secretary, who was concluding the business in hand. He was found asleep in it by the police and the evidence of his drunkenness was merely he own admission to the police surgeon. He contended, however, that he was not in charge of the car as he had no intention of driving it. The learned Magistrate held the offence proved but, in view of the circumstance, exercised his statutory powers of clemency.

The authors of the article express the view that this decision should not be followed. The article then proceeds :

> It is, of course, obvious that a man need not be driving or even trying to drive in order to be convicted of an offence against s. 15 ; but we do submit that, if he is not doing either at the material moment, there should be something before the Court that he had or has had or will, in reasonable possibility, have the power or intention to do so. We doubt very much whether it was the intention of Parliament to penalize everyone who is found alone and not sober in a stationary car.

It will have been noted that the article does state that it should at least be shown that the person charged should have the power to drive. Power is the ability to do or act (*7 Oxford English Dictionary*, Pt. 2, 1213) ; ability to act, faculty of performing or doing something ; capability of producing . . . an effect (according to *Webster's New International Dictionary*, 1687). We may well agree ; there must be proof that the power to drive the car existed ; and we may go further and say that it must be proved that the vehicle was one capable of being driven. On this view there is no reason for any fear that it was the intention of Parliament to penalize every one found alone and not sober in a stationary car. No ; Parliament intended to penalize the person in charge of the car, not merely a person who happened to be in it.

In *McCord* v. *Cemmell* (*supra*) it is asked : "Now what is the section meant to guard against" ? And the answer is : "The danger to an employee of a company from the moving of a train from place to place along the line. That is the source of danger—the only way in which an accident could happen." In that case there is no suggestion of intoxication—a feature that exercises considerable and far-reaching effects on the question of the construction of our own section. If a person is in charge of a car in a public place then, it is submitted, Parliament requires him to be in a fit state (so far as liquor is concerned) to take care of his vehicle and to be ready for any emergency. He must, if called upon, be ready for "action." Moreover there is always the danger of an intoxicated person setting his car on fire by carelessness with cigarettes or matches.

In *Trebeck* v. *Croudace*, [1918] 1 K.B. 158, the statute there under review mentions "drunk while in charge of any carriage, horse, cattle, steam-engine." Would a man cease to be in charge of a horse merely because the animal was stationary and the rider had no intention of driving it ? Or would a man cease to be in charge of cattle because he left them grazing on the road while he went to sleep ? Of course, the animals are animate, unlike the car ; but, in so far as the section is concerned, this fact cannot make any difference to the interpretation of the section.

In *Maxwell on the Interpretation of Statutes*, 7th Ed. 236, it is said :

> The sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the Legislature.

Now what was the policy and object of the Legislature in enacting the particular section ? It appears to have been designed to prevent intoxicated people being in charge of a car, irrespective of whether or not the car was stationary or in motion. It sought to anticipate—prevent—the danger that would almost certainly follow from the fact that an intoxicated person was in charge of a car with power to put it into motion. It sought to ban the intoxicated motorist. It says, in effect, if you are in charge of a car, with power to put it in motion, you must be sober. And can any one seriously question the wisdom of such course ?

If a constable finds an intoxicated motorist asleep in his car, what is he to do ? The man does not, of course, manifest any tendency to drive. What is the constable to do ? Stand by until the motorist awakens and shows an intention to drive ?

These questions are answered by Swinfen Eady, L.J., in *Trebeck* v. *Croudace*, [1918] 1 K.B. 158, 164, 165 :

> Now what is the duty of a police officer when he sees a man whom he believes to be drunk in charge of a motor-vehicle on a highway ? Manifestly to arrest him at once, primarily, in order to prevent the man from injuring himself or anyone else ; and, secondly, to procure him to be punished for his offence.

And later on:

> The cases mentioned in the section are all matters where it is reasonable to apprehend danger to life or limb of innocent persons unless the man who appears to be drunk is immediately apprehended.

In the same case, Bankes, L.J., says, at p. 166:

> When the alleged offender is in charge either of a loaded gun, or of a motor-vehicle, both being very dangerous instruments from the point of view of the public safety when in the hands of a drunken person.

In *Terrell's Law of Running-down Cases*, 2nd Ed., it is said under the heading of the section quoted:

> Under this section it will not be necessary for the prosecution to establish actual drunkenness on the part of the driver as was necessary under s. 40 of the Criminal Justice Act, 1925, which is now repealed. It is necessary to prove that he is under the influence of drink or drug so as to be incapable of having proper control. Two facts must therefore be shown—first, that the driver is under the influence of drink or drug, and, secondly, that the effect of such drink or drug is to render him incapable of proper control of it (*R.* v. *Hawkes*). Further, the person charged need not of necessity have been driving provided he was in charge of a motor-vehicle.

But with respect to the last sentence of this quotation, we are, in regard to our own section, bound to take into account the peculiar language and construction of that section. All reference to driving disappears, and instead there is mention of being "in charge." In our case, we are not to give the words a narrower meaning because we think that without such view the section might operate too harshly. "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 construction according to the context," per the Lord Chancellor in *Barnard* v. *Gorman*, [1941] 3 All E.R. 45, 48. If on the proper construction of the section it appears that an enactment is too severe in its operation, the remedy lies with the Legislature (*ibid.*). Had it been the intention of the Legislature to make driving or the intention to drive a necessary ingredient of the offence, it could have easily done so, as have the other Legislatures referred to. Moreover there is nothing inherently impossible in a person's being in charge of a stationary vehicle. The Legislature did not mean to give a person a chance to do mischief, but sought to prevent his doing so by making it an offence to be even in charge of a motor-vehicle in a public place. One can easily conceive that the Legislature did not view with favour a person having charge of a motor-vehicle while he was in an intoxicated condition. It no doubt took the view that such a person, even when not actually driving or attempting to drive, was a potential menace to the public generally as well as to himself; and it sought by penalty to dissuade persons from taking liquor if they were to be in charge of a car. It no doubt foresaw that at some time or other such person would attempt to drive; and it, one may assume, conceived that a person even after a period of sleep, was in no proper form to have charge of what, as has been judicially described, is a dangerous vehicle. For the protection of the public then, it decreed that no person while in a state of intoxication was to have charge of a car; and so far as it was concerned, it was immaterial whether or not the car was in motion, or an attempt was made to put it in motion.

In *Provincial Motor Cab Co.* v. *Dunning* (*Kynaston's Case*), (1909) 78 L.J.K.B. 822, 824, it is said:

> We have previously had occasion to point out, in connection with this class of cases for offences against the Motor-car Acts, that they are not to be regarded as criminal offences in the full sense of the word; that is to say, there may be a breach of the Motor-car Acts without there being a criminal intent or *mens rea*, in the ordinary sense of the word, because the statutes and the regulations have been made for the protection of the public.

It seems that if we seek to make driving or the intention to drive an ingredient of the offence, then we are improperly qualifying the language of Parliament and restricting its meaning. The Legislature, though earlier in the section it talks about driving, merely mentions "in charge," and says nothing in the creation of the offence about driving or attempting to drive; why then should we? This seems to be clearly a case where, if we seek to introduce such elements, we do what Sir Frederick Pollock complained of—namely, what was done by the majority of the Court in *R.* v. *Tolson*, (1889) 23 Q.B.D. 168:

> If the Judges are to qualify the plain language of a statute by the introduction of limitations and provisoes, as to which not a hint is to be found in the Act, statutory legislation must necessarily become hopelessly confused. If the Court holds that Parliament cannot mean what Parliament says, then how is any one to make sure what an Act really means.

(Quoted by MacGregor, J. in his judgment in *R.* v. *Carswell*, [1926] N.Z.L.R. 321, 341).

A person is in charge of a car, or he is not; and "in charge" is shown by his power or ability to put the car in motion should he so decide. If all the elements necessary to put it into motion are there, then the offence has been established. There is no justification, it is submitted, for whittling down the natural meaning of the words; but on the contrary there is every reason for giving them such construction. The Legislature itself has, in creating the offence, eliminated all reference to driving; and this significant fact cannot be over-emphasized in the construction of the section.

In conclusion, therefore, it seems that a person commits the offence of being intoxicated in charge of a car provided the following elements co-exist:

(1) That the alleged offender must be the person in charge of the car—that is to say, he must have the power, should he choose to exercise it—to drive or attempt to drive the vehicle.

(2) That the vehicle must be capable of mobility (if owing to the absence of some material part of the machinery or of petrol, or other driving substance, the vehicle could not be made to move, then the offence would not be committed).

(3) That the vehicle must be in a public (and not private) place.

Senator wants Women removed from Bar.—Arguing that a woman's place is in the home, Senator Ahmed Ramsy urged the Egyptian Senate to amend the law governing the legal profession in Egypt in order to prevent women from being called to the Bar, according to the *Egyptian Mail* (Cairo), January 21, 1942.

"God," said the Senator "has given woman the special duty of bringing up children and making a home. Any departure from this is going against the law of the Almighty and against the traditions of man.

"The fact, that women have not been given the vote is a further argument against including them in the legal profession," he concluded.

The Senator's proposal was referred to the Proposals' Committee of the other House.

About a dozen Egyptian women lawyers are now practising at the National Bar.

SUB-MORTGAGE UNDER LAND TRANSFER ACT.

By Way of Transfer of Mortgage.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

Under the "old system" a sub-mortgagee of land, (if the head mortgage is a first one), has vested in him the legal estate, and his rights and powers are as set out in *Goodall's Conveyancing in New Zealand*, 291. A sub-mortgage executed on or since March 1, 1914 (the date of the coming into operation of the Land Transfer Amendment Act, 1913), of land under the Land Transfer Act, operates, however, merely as a charge against the head-mortgage (see *Goodall*, 323, note (*c*) where, however, the date stated November 7, 1913, should be March 1, 1914), and the practical inconvenience of this from the sub-mortgagee's point of view, may be gleaned from a study of *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Registrar-General of Land*, [1935] N.Z.L.R. 726; G.L.R. 652, which has been reported since *Goodall's Conveyancing in New Zealand* was published. It may be noticed that a Land Transfer sub-mortgage executed *before* March 1, 1914, operates as a *transfer* of the mortgage, and these ancients are still occasionally encountered in practice, usually to the discomforture of the younger law and Land Transfer clerks: see *Pott* v. *District Land Registrar of Taranaki*, (1906) 26 N.Z.L.R. 141, and the second proviso to s. 3 of the Land Transfer Compilation Act, 1915.

In *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Registrar-General of Land* (*supra*), A. mortgaged an estate in fee-simple under the Land Transfer Act, to B., and B. sub-mortgaged his mortgage to C. Both A. and B. got into default, and C. put up the fee-simple for sale by auction through the Registrar of the Supreme Court, and bought in the property himself. The Registrar of the Supreme Court executed a memorandum of transfer of the fee-simple to C., but the District Land Registrar refused to register the transfer, holding that C. had no power to sell the fee-simple through the Registrar of the Supreme Court. The Court upheld the District Land Registrar. Besides the additional delay caused by two Registrar's sales instead of one, the practical inconvenience of the decision was that before C. could get the fee-simple vested in him, he would have to pay two lots of *ad valorem* conveyance duty, one on the transfer of the head-mortgage by the Registrar to him, and the other on the transfer of the fee-simple to him by the Registrar, after the head-mortgage had been duly vested in him. It is to be remembered that in New Zealand, apart from the surrender of the equity of redemption by the mortgagor himself, the only way a mortgagee of land can get the land mortgaged vested in him, freed from the mortgagor's equity of redemption, is by sale through the Registrar of the Supreme Court: *Hamilton* v. *Bank of New Zealand*, (1904) 24 N.Z.L.R. 109, 115, per Stout, C.J.

Thus the practice is growing up in New Zealand (it is already very prevalent in Australia, see for example *Kerr's Torrens System*, 397), of a sub-mortgagee taking an absolute transfer of the mortgage which is duly registered, the real nature of the transaction *inter partes* (that of sub-mortgage only) being set out in a contemporaneous collateral deed. Precedent No. 1 hereafter printed is the transfer of the mortgage. Precedent No. 2, a suitable collateral deed. The latter of course is not registrable, although the sub-mortgagor could probably register a caveat to protect his equity of redemption, if it is permissible to use that term with reference to land under the Land Transfer Act.

If the absolute transfer and collateral deed are adopted, the legal position appears to be as follows:—

1. The sub-mortgagee may sue the sub-mortgagor on the personal covenant in the collateral deed, for payment of the sub-mortgage moneys.

2. The sub-mortgagee (who so far as the rest of the world is concerned becomes the head-mortgagee) may sue the head-mortgagor on his personal covenant for payment of the head-mortgage moneys.

3. The sub-mortgagee may on default by the sub-mortgagor, in pursuance of the collateral deed exercise his power of sale and sell the head-mortgage by public auction or private contract. He would confer title on the purchaser by simply transferring the head-mortgage by memorandum of transfer. Any surplus moneys arising from the sale would in equity belong to the sub-mortgagor.

4. The sub-mortgagee may on default by the head-mortgagor, sell the land comprised in the head-mortgage, in exercise of his power of sale in the ordinary way, or through the Registrar of the Supreme Court, for all the rights and remedies of the head-mortgagee (the sub-mortgagor) have been vested in him by registration of the transfer (Precedent No. 1). In lieu of para. 3 above, the sub-mortgagee in pursuance of the statutory provisions, could have a Registrar's sale of the head-mortgage and at such sale the sub-mortgagee could purchase the head-mortgage. This would have the effect of effectually extinguishing the sub-mortgagor's equitable interest in the head-mortgage: *Public Trustee* v. *Wallace*, [1932] N.Z.L.R. 625; G.L.R. 254.

In other words the sub-mortgagee's rights and remedies will then be substantially those of a sub-mortgagee under the "old system," as summarized by *Goodall* at p. 291. The relative rights of the parties will also be as outlined by Cooper, J., in *Pott* v. *District Land Registrar*, (1906) 26 N.Z.L.R. 141, 143.

The objection to this procedure (from the sub-mortgagor's point of view) is that it leaves no *registrable* or legal interest vested in him. He could doubtless assign, mortgage or otherwise deal with his equitable interest off the Register by instrument under the general law.

As to the incidence of *stamp duty*, despite s. 62 of the Stamp Duties Act, 1923, extrinsic evidence is admissible to establish that a transfer absolute in form is by way of security merely, and so exempt from *ad valorem* conveyance duty by virtue of s. 81 (*b*) of the Act. In Precedent No. 1 (the memorandum of transfer) we have the additional fact that the collateral deed is expressly referred to therein, and therefore both instruments for the purpose of stamp duty must be read together: *St. Mark's Parish Trust Board* v. *Minister of Stamp Duties*, [1924] G.L.R. 183. The transfer is therefore a mortgage for stamp-duty purposes

and liable only to the mortgage duty of 5s., plus 1s. mortgagee indemnity fee. The collateral deed (Precedent No. 2) is liable under s. 168 to a duty of 15s., as a deed not otherwise charged.

One curious effect of the fact that a Land Transfer sub-mortgage operates only as a charge and of the reasoning in *Re Bennett and Jacobsen*, [1924] G.L.R. 44, is that we can have a registrable mortgage of a sub-mortgage and so on *ad infinitum*. Thus P. M., Ltd. (the sub-mortgagee), in Precedent No. 13 in *Goodall* at p. 322, could mortgage its interest under the sub-mortgage by a registrable mortgage to a third person. And J. S. (the sub-mortgagor) in the same precedent could give subsequent registrable sub-mortgages of his interest in the head-mortgage, *subject* of course to the sub-mortgage in favour of P. M., Ltd.

(*Precedents follow in next issue.*)

PRACTICAL POINTS.

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1. Nationality.—*Illegitimate Child—Born in New Zealand—Mother's Nationality Unknown—Status as to Nationality.*

QUESTION: A., aged 18 years, was born in New Zealand, and is illegitimate. He does not know his mother's nationality. His father was a British subject. It is necessary, for a position he is seeking, that he proves his British nationality. Can this be done without the necessity of finding out his mother's nationality, he being illegitimate?

ANSWER: A. is a natural-born British subject. Any person born within His Majesty's Dominions and allegiance is deemed to be a natural-born British subject: British Nationality and Status of Aliens Act, 1914 (Imp.) s. 1 (1) (*a*), which is declared to be a part of the law of New Zealand by s. 6 of the British Nationality and Status of Aliens (in New Zealand) Act, 1928. This expresses the fundamental principle governing the law of British nationality that every person born in any part of the British dominions is at and from birth a natural-born British subject. This character attaches to him irrespective of his parentage, or his legitimacy.

(The inquirer has confused the case of A.'s birth with that of a person born within a foreign country. If a person has not been born in New Zealand, or elsewhere in a British country, his status as a natural-born British subject would be derived only from his father's status as a British subject, since British nationality cannot be inherited through a woman; and, as the word "father" in s. 1 (*b*) and (*c*) of the first-mentioned statute means a father of a child legitimate at date of birth, such a child would be an alien: *Abraham* v. *Attorney-General*, [1934] P. 17. But those considerations do not apply to A.).

2. Divorce.—*Adultery—Signed Admission by Respondent—Corroboration.*

QUESTION: In a divorce suit on the ground of adultery the petitioner has obtained from the respondent a signed admission of the adultery alleged in the petition. This admission has been witnessed by an independent solicitor, and it is proposed to file it in the proceedings. Is further corroboration of the alleged adultery necessary?

ANSWER: It is quite possible that such an admission has been accepted in some cases; but in a divorce suit recently heard in Wellington, the Chief Justice required further corroboration. In the present instance, if further corroboration is available it would certainly be advisable to obtain it.

3. Criminal Law.—*Appeal against Sentence—Procedure in Court of Appeal—Crimes Amendment Act, 1920, s. 2.*

QUESTION: In an appeal to the Court of Appeal against sentence under s. 2 of the Crimes Amendment Act, 1920, to the Court of Appeal, is it usual for the prisoner to be represented by counsel, is the prisoner present at the hearing, and what is the general procedure?

ANSWER: In the great majority of applications for leave to appeal against sentence, the prisoner is not represented by counsel; and, whether represented or not, he is not present at the hearing. When represented, a fixture for the hearing of the application is given by the Court of Appeal, and on the date so fixed the application is duly called, and leave to appeal is formally given. Counsel for the prisoner then addresses the Court on his behalf, and the Crown being represented can be called upon by the Court to reply.

4. Fencing.—*Land taken under Public Works Act—Three Unfenced Sides of Quarry—Owner's land surrounding on Three Sides—Whether claim against the Crown for Fencing.*

QUESTION: The Public Works Department has taken part of our client's property for a quarry; the piece taken forms a square with a fenced road boundary at one end, and the other three sides being survey lines, with our client's remaining land surrounding them. Is the total cost of fencing the new boundary part of the claim to be made under the Public Works Act; or should such claim be limited to half the cost, on the assumption that the Crown and the owner each, under Fencing Act, will bear cost of new fence equally.

The Department seemingly does not intend to fence; and, although owner does not need to fence immediately, some day he must, to keep his stock from damage in the quarry. Is it not necessary, therefore, for us to ask for fencing in our client's claim?

ANSWER: The Crown is not bound by the Fencing Act, 1908, but it is the usual practice of the Department to bear half the cost of fencing land taken under the Public Works Act with the same quality of fence as the fence on an existing boundary at the time the land was taken.

In the present case, in answer to the question, there should be a claim for the whole fencing of the three sides of the piece of land taken on the ground of injurious affection of the owner's remaining land. The claim will then be on record, and the owner and the Department can then come to terms as to the nature and quality of the fence, and the time for its erection.

5. Stamp Duty.—*Formation of a one-man Business into a Private Company—Stamp Duty Payable.*

QUESTION: A., the owner of a long-established business, converts it into a limited company, with a capital of £25,000. According to the last balance-sheet the assets and liabilities are: *Assets*—Land and buildings, £ 8,000; Plant, £500; Stock, £11,000; Book debts, £4,100; Fixed deposits, £1,800; and Cash at bank, £600. Total: £26,000. *Liabilities*—Sundry creditors, £3,000; Owing on mortgage of land, £3,000 (£6,000); Surplus of assets over liabilities, £20,000. Total: £26,000.

The consideration for the transfer of the assets to the company is the allotment of 24,999 fully paid-up shares to A. and one such share to his son. What is the correct stamp duty payable in connection with the sale? All the liabilities are being assumed by the company.

ANSWER: The above facts *prima facie* disclose a goodwill of £5,000 for the company in consideration of £25,000, *plus* assumption of liabilities £6,000 = £31,000, is getting tangible assets valued at only £26,000. Goodwill is assessable at the highest rate. The stamp duty will be as follows, it being assumed that the plant (£500) and stock (£11,000) constitute property transferable by delivery and that the company has not been over-capitalized: Land and goodwill, £13,000 (11s. per £50), £143; Plant and stock, £11,500, Nil; Book debts, fixed deposits, cash at bank, £6,500 (5s. 6d. per £100), £17 17s. 6d. Total duty: £160 17s. 6d. If, on the other hand, the company has been over-capitalized, then the total consideration (£31,000), must be apportioned between the various classes of assets in accordance with s. 58 of the Stamp Duties Act, 1923, and duty paid accordingly: as to the principles of apportionment see also the judgments of Salmond and Reed, JJ., in *Zealandia Soap and Candle Co., Ltd.* v. *Minister of Stamps*, [1922] N.Z.L.R. 1117; G.L.R. 505.

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CRIMINAL LAW.

Appeal—Acquittal—No Appeal from Acquittal Unless by Express Provision—Payment of Costs—"Penal or Other Sum"—"Person Aggrieved."

A right of appeal from a decision dismissing a criminal charge can only be given by statute and, in that case, only by words which are clear, express and free from ambiguity.

BENSON *v.* NORTHERN IRELAND ROAD TRANSPORT BOARD, **[1942] 1 All E.R. 465.**

As to appeal in criminal matters: see HALSBURY, vol. 9, pp. 263–266; paras. 375–380; and for cases: see DIGEST, vol. 14, pp. 500–503, Nos. 5513–5528.

Appeal—Criminal Cause or Matter—Arrest as Deserter from Allied Forces Conscripted in England—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31.

An appeal relating to the arrest of the appellant as a deserter from one of the allied forces after conscription in England is one relating to a criminal cause or matter.

Re AMAND, **[1942] 1 All E.R. 480.**

As to criminal cause or matter: see HALSBURY, vol. 9, pp. 740, 741, paras. 1261, 1262; and for cases: see DIGEST, vol. 14, pp. 551–554, Nos. 6271–6298.

WILLS.

Incorporation of Declaration of Trust—Existing Declaration "or any Substitution therefor or Modification thereof or Addition thereto which I may hereafter Execute"—Validity of Disposition.

A gift to trustees under a declaration of trust "or any substitution therefor or modification thereof or addition thereto which I may hereafter execute" is invalid for uncertainty.

Re JONES' WILL TRUSTS, JONES *v.* JONES, **[1942] 1 All E.R. 642.**

For the law on the point: see HALSBURY, vol. 34, pp. 183–185, para. 235; and for cases: see DIGEST, vol. 44, pp. 237–245, Nos. 624–712.

RULES AND REGULATIONS.

Price Order No. 104 (Potatoes). (Control of Prices Emergency Regulations, 1939.) No. 1942/262.

Transport (Goods-service Vehicle) Emergency Order, 1942. (Transport Legislation Emergency Regulations, 1940.) No. 1942/263.

Superannuation (Definition of Salary) Order, 1942. (Finance Act, 1941.) No. 1942/264.

War Loan and War Gift Emergency Regulations, 1940. Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1942/265.

Air Force Superannuation Order, 1942. (Finance Act (No. 2), 1939.) No. 1942/266.