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"I will for ever at all hazards assist the dignity, independence and integrity of the English Bar, without which impartial justice, the most valued part of the English constitution, can have no existence."

—LORD ERSKINE.

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CONTRACT: RECOVERY OF MONEY PAID ON FRUSTRATION.

IN this place, over three years ago,* we summarized the report of the English Law Revision Committee on the following question which had been submitted to them: "Whether, and if so in what respect the rule laid down or applied in *Chandler* v. *Webster*, [1904] 1 K.B. 493, requires modification, and in particular to consider the observations made thereon in *Cantiare San Rocco S. A.* v. *Clyde Ship-building and Engineering Co., Ltd.*, [1924] A.C. 226, by Lords Dunedin and Shaw, at pp. 247, 248, and 259." (Suffice it here to say, that the learned Law Lords said, in the passages from their speeches indicated, that if *Chandler* v. *Webster* had been heard in Scotland it would have been decided the other way, and the rule was described as the "something for nothing rule"; in fact Lord Shaw said that the proposition that "the loss lies where it falls" amounted to a maxim that "works well enough among tricksters, gamblers, and thieves.")

The rule, which is incident to the doctrine of frustration of contract, was to the effect that, after a frustrating event, the loss "lies where it falls"; and this means that sums paid or rights accrued before that event are not to be surrendered, but that all obligations falling due for performance after that event are excused. It not only declared that the contract is at an end and that further performance is excused, but it also said that moneys paid shall remain as they are. The Law Revision Committee, after referring to the criticism this doctrine had received in the Courts and in text-books on contract, said that, on any view, this was making a new contract. The report concluded by suggesting alterations in the law proper to be made by the Legislature.

The facts in *Chandler* v. *Webster* were that the defendant agreed to let to the plaintiff for the sum of £141 15s. a room for the purposes of viewing the Coronation procession of June 26, 1902; the procession was subsequently abandoned owing to the illness of the King, but, before that event occurred, the plaintiff had paid £100 on account of the price of the room, the balance remaining unpaid. The plaintiff argued that the condition on which he had paid the money was that the procession should take place, and that, as it did not take place, there had been a total failure of consideration. The Court of Appeal, affirming the Court of first instance, held that the plaintiff was not entitled to recover the £100 which he had paid, and that the defendant was entitled to payment of the balance, inasmuch as his right to that payment had accrued before it became impossible to hold the procession. The Court of Appeal considered that the balance was recoverable as an accrued right under the contract which stipulated that the whole hire should be paid before the time when, as it happened, the holding of the procession became impossible, thus distinguishing the principle that the loss must lie where it falls, which applied to the money already paid. Without going into the grounds of this decision, which are fully set out in the Law Revision Committee's report, the effect of the decision may be gathered from the judgment of Romer, L.J., as he then was, when he said:

> Where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract, and, through no default by either party, and owing to circumstances which were not in the contemplation of the parties when the contract was made, it happens that, before the time fixed for the event, it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but, except in cases where the contract can be treated as rescinded *ab initio*, any payment previously made, and any legal right previously accrued according to the terms of the agreement, will not be disturbed.

The last clause of this statement enunciates the principle which has bound subsequent Courts of Appeal: it cannot now be deemed to be good law, in view of the recent decision of the House of Lords (Viscount Simon, L.C., and Lords Atkin, Macmillan, Russell of Killowen, Wright, Roche, and Porter), in *Fibrosa Spolka Akcyjna* v. *Fairburn, Lawson, Combe, Barbour, Ltd.*, [1942] 2 All E.R. 122.

The facts in the *Fibrosa* case were that a Polish company had ordered certain machinery to be delivered *c.i.f.* Gydnia, and on July 18, 1939, had paid the Leeds engineering firm responsible for such delivery £1,000 in advance on account of the purchase price. The

* (1939) 15 N.Z.L.J. 165.

invasion of Poland on September 1, 1939, rendered the contract impossible to perform. The short point for the decision of their Lordships was: When the contract became frustrated by the invasion of Poland, could the appellants recover back from the respondents the £1,000 they had paid when placing the order. The main issue became the correctness of the rule in *Chandler* v. *Webster*, which bound the Court of Appeal to hold, as it did, that the payment was not recoverable. In other words, the question to be determined was whether, in the absence of a term in the contract dealing with the matter, the rule in *Chandler* v. *Webster*, *cit. sup.*, should be affirmed. Their Lordships held that a party to a contract for the sale of goods who has made a payment in advance of part of the purchase price may, upon frustration of the contract, recover the amount paid as money paid upon a contract which has wholly failed, thus overuling *Chandler* v. *Webster*.

It is impossible, in the course of a brief article, to consider the whole of the reasoning of their Lordships, and, owing to the importance of the decision and the limitations imposed by their Lordships on the application of the newly stated principle, their speeches must be carefully read. Moreover, the examination of such cases as *Taylor* v. *Caldwell*, (1863) 3 B. & S. 826, 2 E.R. 309, and *Krell* v. *Henry*, [1903] 2 K.B. 740, and nearly fifty similar cases of impossibility of performance considered by their Lordships, including the other "Coronation cases," require careful study.

This much must be said, however, that their Lordships find that *Chandler* v. *Webster* was wrong in purporting to limit the right of repayment of moneys paid to cases where the contract can be treated as rescinded *ab initio*. As Lord Atkin observed, Collins, M.R., was wrong when, in *Chandler* v. *Webster*, he said that if the effect were that the contract was "wiped out altogether," the result would be that the money paid under it would have to be repaid as on a failure of consideration. Lord Atkin said he could find no authority for the proposition that the claim for money paid on a consideration that wholly failed could only be made where the contract was wiped out altogether. It is true, he said, that where a party is in a position to rescind a contract he may be able to sue for money which he has paid under the contract now rescinded; but there are numerous cases, of which he gave examples, in which there has been no question of rescission where such an action has lain. In none of those cases was it suggested that the contract was "wiped out altogether"; indeed, in other cases where it is suggested that the contract was "rescinded," all that is meant is that the party was entitled to treat himself as no longer bound to perform, and to recover what he himself has paid.

To claim the return of money paid on the ground of total failure of consideration is not to vary the terms of the contract in any way. The claim arises, as Lord Simon pointed out, not because the right to be repaid is one of the stipulated terms of the contract, but because, in the circumstances which have happened, the law gives the remedy. The mistake made in *Chandler* v. *Webster* arose, in his opinion, because of the failure to distinguish between (*a*) the action of *assumpsit*, for money had and received in a case where the consideration has wholly failed; and (*b*) an action on the contract itself. Furthermore, there was a failure to appreciate that, when one is considering the law of failure of consideration, and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance, and, if performance fails, the inducement which brought about the payment is not fulfilled. If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance.

Lord Russell of Killowen was content to base his judgment on his finding that there was a total failure of the consideration for which the £1,000 was paid: the delivery of the machinery was the consideration, and no part of that consideration for which part of the price of the machines was paid ever reached the appellants. The right of a person, under the ordinary law, to recover back the money paid, as money had and received to the respondents' use, on the ground that it was paid for a consideration which had wholly failed, in no way depended on the continued existence of the frustrated contract; and the ordinary law should apply.

Lord Macmillan, after putting the issue in its historical setting, said there was no authority for the distinction made in *Chandler* v. *Webster* that the doctrine of failure of consideration only applies, as Collins, M.R., said, where a contract is "wiped out altogether," or, as Romer, L.J., put it, "rescinded *ab initio*" and does not apply where the parties are merely released from further performance. There is ample authority to show that such distinction does not exist; and it has no basis in principle or precedent.

Lord Wright considered that the *ratio decidendi* of *Chandler* v. *Webster* was based on a misapplication of *Taylor* v. *Caldwell* (*supra*) and *Appleby* v. *Myers*, (1867) L.R. 2 C.P. 651, cases of impossibility, the former of which was a claim for damages, and the latter a claim on a *quantum meruit* for partial performance of an entire consideration, both claims failing; neither was a claim for money had and received. His Lordship's own view was that the right to repayment of advance payments as moneys had and received to the plaintiff's use is not a claim under the contract or for further performance of the contract or for damages, but a claim outside the contract: the ground of the claim is that the contract has been dissolved as to future performance, and hence the consideration has failed.

Lord Porter explained the faulty reasoning of the "Coronation cases" and said he could find no authority for the further argument that had been advanced for the respondents that no recovery was possible except in cases where the contractor who had received the money in advance was in fault in some way. It is true, he said, that in the majority of the cases the consideration fails because one party or the other fails to carry out his contract; but it is the failure of consideration and not the breach of contract which enables money paid in advance to be recovered. He went further, and said that the present case seemed to him to come exactly within the principle of (our) s. 7 of the Sale of Goods Act, 1908, and, had the machinery been destroyed by enemy action, the advance portion of the price would have been recoverable. That the inability of the sellers to implement their contract was due to supervening illegality and not to destruction of the subject-matter, seemed to His Lordship to make the plaintiff's case no weaker; whether it strengthened it or not had not been discussed, and it was unnecessary to be determined.

The decision in the *Fibrosa* case is not, of course, applicable where the contract itself excludes the repayment; or the prepayment is irrecoverable by any

custom or rule of law, or by any express or implied term in the contract itself. It appears to have direct application only in circumstances where the money has been paid in respect of a consideration which has wholly failed: a partial failure of consideration is insufficient except in cases where the contract is severable, and there has been a total failure of consideration referable to one or more of the severed parts. Another exception is where the contract itself on its true construction stipulates for a particular result which is to follow in regard to money already paid if frustration should afterwards occur.

The ancient and firmly-established rule that freight paid in advance is not returned if the completion of the voyage is frustrated (see *Byrne* v. *Schiller*, (1871) L.R. 6 Exch. 319), is unaffected, as this is a stipulation introduced into such contracts by custom, and not, as Lord Simon observed, as the result of applying some abstract principle. So, too, *a fortiori* prepayment is not recoverable if there is a stipulation that the payment is "out and out" (such as, to use the learned Lord Chancellor's example, payment to enter a cricket-ground when supervening rain afterwards prevents play).

In every case, the contract itself, on its proper construction, must be looked at before it is ascertainable whether or not the *Fibrosa* judgment applies to it.

The decision does not go as far as the Law Revision Committee recommended as ground for legislative action; and, as Lord Simon emphasized at the conclusion of his speech, fairness to all parties cannot be achieved under the law of frustration as it now stands, because, as he said, while this result obviates the harshness with which the previous view in some instances treated the party who had made a prepayment, it cannot be regarded as dealing fairly between the parties in all cases, and must sometimes have the result of leaving the recipient who has to return the money at a grave disadvantage. He may have incurred expenses in connection with the partial carrying out of the contract which are equivalent, or more than equivalent, to the money which he prudently stipulated should be prepaid, but which he now has to return for reasons which are no fault of his. He may have to repay the money, though he has executed almost the whole of the contractual work, which will be left on his hands. These results follow from the fact that the English common law does not undertake to apportion a prepaid sum in such circumstances—contrast the provision now contained in the Partnership Act, 1894, s. 40, for apportioning a premium if a partnership is prematurely dissolved. He concludes, as does the Law Revision Committee, that it must be for the Legislature to decide whether provision should be made for an equitable apportionment of prepaid moneys which have to be returned by the recipient in view of the frustration of the contract in respect of which they were paid.

Lord Atkin also stressed as incontrovertible the fact that their Lordships' view of the law may cause hardship when a contract is automatically stayed during performance and any further right to performance is denied to each party. One party may have almost completed expensive work, yet he can get no compensation. The other party may have paid the whole price, and, if he has received but a slender part of the consideration, he can get no compensation. At present, he added, it is plain that, if no money has been paid on the contract, there is no legal principle by which loss can be made good. What was decided in the *Fibrosa* case was that the application of an old-established principle of the common law does enable a man who has paid money and received nothing for it to recover the money so expended. At any rate, it can be said it leaves the man who has received the money and given nothing for it in no worse position that if he had received none. Many commercial contracts provide for various risks. It is always possible to provide for the risk of frustration; but what provision the parties may agree will probably take some time to negotiate. Meanwhile the decision creates a rule of convenience, as by the application of a general doctrine which is independent of the special contract and only comes into play when further performance of the latter is precluded, the man who pays money in advance on a contract which is frustrated and receives nothing for his payment is entitled to recover it back.

Lord Roche was conscious that a conclusion relegating parties in cases of frustration to their contracts may not work out a completely just solution in the pecuniary sense. It happened that in the *Fibrosa* case it would do so, for the appellants, who did not get the goods or the documents, will get their money back, and the respondents have had the machines, which, so far as completed, were said by the respondents themselves to be realizable without loss. In other cases it might turn out otherwise, and the application of the rules of the civil law or of Scots law might work greater justice; but even those rules would not cover the whole ground so as to effect an ideally just distribution of the burden of loss due to the frustration of contracts. At least, or so it seemed to His Lordship, the rule now laid down by the House of Lords is not only more agreeable to the law of England, but is more consistent with justice than the rule in *Chandler* v. *Webster* upon which the Courts below had felt impelled to base their decision. At all events, parties to contracts will know that as the law stands the contract between them is the matter of crucial or final importance; and that, if, as may very well be the case in time of war or impending war, frustration of their contracts is to be apprehended, they may make what contracts they think fit to provide in that event for the adjustment of the position between them.

In view of their Lordships' *dicta*, it is interesting to see what the Law Revision Committee had to say in 1939. The report says that the members had considered the following possible solutions to this problem:—

(1) The payer should be entitled to the return of all moneys he has paid to the payee.

(2) The payer should be entitled to the repayment of all moneys, less the value of any benefits he may have received under the contract.

(3) The payer should be entitled to the repayment of all moneys he has paid to the payee, less one-half of any loss directly incurred by the payee for the purpose of performing the contract.

(4) The payer should be entitled to the repayment of all moneys he has paid to the payee, less the amount of any loss directly incurred by the payee for the purpose of performing the contract.

It is reasonable to assume that in stipulating for prepayment the payee intended to protect himself against loss under the contract; and this intention would be satisfactorily carried out if solution (4) were adopted. It is true that the payee though avoiding loss would fail to make the profit which he hoped to gain by the fulfilment of the contract, but in this respect he would be no worse off than the payer who would not obtain the thing contracted for and might fail to obtain the profit he envisaged. We have, therefore, come

to the conclusion, after considering these four solutions, that the fourth should be adopted.

The Committee then stated their recommendations to the Legislature:

We therefore recommend that, when performance of a contract has been frustrated in whole or in part and any money has been paid, or has been agreed to be paid, at a time prior to the frustration of the contract, the following rules shall apply unless a contrary intention appears from the terms of the contract:—

(1) Money paid by the one party to the other in pursuance of the contract shall be recoverable, but subject to a deduction of such sum as represents a fair allowance for expenditure incurred by the payee in the performance of or for the purpose of performing the contract. In fixing the amount of such deduction the Court shall include an allowance for overhead expenses but shall also take into account any benefits accruing to the payee by reason of such expenditure, and the amount recovered shall not exceed the total of any money so paid or agreed to be paid under the contract. Loss of profit shall in no case be taken into consideration.

(2) When at the moment of frustration the contract has been performed in part and the part so performed is severable, these rules shall apply only to that part of the contract which remains unperformed, and shall not affect or vary the price or other pecuniary consideration paid or payable in respect of that part of the contract which has been so performed.

(3) For the purpose of these recommendations no regard shall be had to amounts receivable under any contracts of insurance.

The Committee did not recommend any alteration in the law relating to freight *pro rata itineris*, since the rule relating thereto, although frequently criticized, has become so firmly fixed that it would be undesirable to alter it. For the same reason it did not recommend any alteration in the law relating to advance freight except in the case of hire paid in advance under a time charter which should be recoverable in the event of frustration of the adventure in the same manner and to the same extent as other payments in advance made under a contract.

No legislative action was taken, as the War supervened, and, in the meantime, until the Committee's recommendations for a small part of the post-war solution of many current problems, the *Fibrosa* case is a partial palliative only. To use Lord Macmillan's words: "*Chandler* v. *Webster* and its congeners must be consigned to the limbo of cases disapproved and overruled. They will be unwept, save by those to whom for so many years they have furnished a fruitful and enlivening topic of discussion in lecture-rooms and periodicals."

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1942.
September 14, 15;
October 1.
Myers, C.J.
Kennedy, J.
Northcroft, J.

FRY v. HOCKING AND OTHERS.

Land Transfer—Certificate of Title—"Right heirs"—Term used in Transfer under Land Transfer Act registered before Administration Act, 1879, came into Force—Rule in Shelley's Case—*Person entitled to Designation—Real Estate Descent Act, 1874, ss. 18, 20.*

A transfer under the Land Transfer Act, registered on July 24, 1880, before the Administration Act, 1879, came into force (and, therefore, when the Real Estate Descent Act, 1874, was in operation), transferred the land comprised therein to a son, W., of the transferor for life, with remainder to his wife for her life with remainder in fee-simple after the death of the survivor of them to the "right heirs" of the son. W. and his wife both died childless. The appellant, the eldest son of the transferor's daughter, was admitted to be the "heir at law" of W. and therefore, the person entitled as "right heirs" under the transfer, if the Real Estate Descent Act, 1874, did not apply to the circumstances.

Held, That as the rule in *Shelley's Case*, (1581) 1 Co. Rep. 93, 76 E.R. 199, was not in operation in New Zealand, and as the transfer was to the "right heirs" of the tenant for life, the Real Estate Descent Act, 1874, did not apply; therefore, the appellant was the person entitled.

In re Macleay, Treadwell v. *Macleay*, [1937] N.Z.L.R. 230, [1937] A.C. 626, applied.

Wentworth v. *Humphrey*, (1886) 11 App. Cas. 619, distinguished.

Judgment of *Blair*, J., [1942] N.Z.L.R. 191, reversed.

Counsel: *Fell*, for the appellant; *Evans* and *Thorp*, for the respondents, except W. Max and W. V. Rout; *Rout*, for respondents W. Max and W. V. Rout.

Solicitors: *Fell and Harley*, Nelson, for the appellant; *C. W. Thorp*, Motueka, for the respondents other than W. Max and W. V. Rout; *Rout and Milner*, Nelson, for the respondents W. Max and W. V. Rout.

Case Annotation: Wentworth v. *Humphrey*, E. and E. Digest, Vol. 18, p. 5, note *e*; *Shelley's Case*, *ibid.*, Vol. 17, p. 262, para. 750.

COURT OF APPEAL.
Wellington.
1942.
September 10, 11, 29.
Sir Michael Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

In re JACKSON (DECEASED), HOLMES v. PUBLIC TRUSTEE AND ANOTHER.

Adoption of Children—Will—Codicil—Gift by Will to A's Children prior to Adoption of a Child by A.—Will subsequently to Adoption confirmed by Codicils making no Alterations in Gift or Reference to A.'s Children or to Adopted Child—Whether Will or Either Codicil and Instrument by virtue of which the Share in the Gift would devolve upon the Adopted Child—Infants Act, 1908, s. 21 (1).

Paragraph (*a*) of the proviso to s. 21 (1) of the Infants Act, 1908, refers to priority in date as between the deed, will, or instrument and the order of adoption.

In re Horiana Kingi, Thomson v. *Erueti Tamahau Kingi*, [1937] N.Z.L.R. 1025, and *In re Beatty, Beatty* v. *Beatty*, [1939] N.Z.L.R. 954, approved.

A will which contained a gift to A.'s children was made prior to an order of adoption whereby the appellant was adopted by A. Subsequently to such order two codicils to the will were made, not affecting A.'s children or referring to the appellant, the order of adoption, or the devolution of the property to a share in which the appellant laid claim, but (subject to the alterations in the will made by the codicil or codicils) in all other respects confirming the said will.

Held, That the instrument by virtue of which the property claimed would devolve on the appellant was the will, and, as that was prior to the order of adoption, the appellant was not entitled to share in the gift to A.'s children.

Re Elcom, Layborn v. *Grover Wright*, [1894] 1 Ch. 303, followed.

Rolfe v. *Perry*, (1863) 3 DeG. J. & S. 481, referred to.

Judgment of *Smith*, J., [1942] N.Z.L.R., 700 affirmed.

Counsel: *Harker*, for the appellant; *Byrne*, for the first respondent; *Wiren*, for the second respondent.

Solicitors: *Harker, Helleur, and Le Pine*, Napier, for the appellant; *Public Trust Office Solicitor*, for the first respondent; *S. A. Wiren*, Wellington, for the second respondent.

COURT OF APPEAL.
Wellington.
1942.
September 24, 25;
October 6.
Sir Michael Myers, C.J.
Blair, J.
Kennedy, J.
Northcroft, J.

THE KING v. HIRT.

Criminal Law—Evidence—Deposition—Charge of procuring Miscarriage—Manner of taking Deposition—Whether "full opportunity" afforded to Accused to Cross-examine—Whether admission of Deposition at Trial raised Question of Law for Court of Appeal to Determine—Justices of the Peace Act, 1927, s. 170.

No rigid rules can be laid down for determining whether full opportunity has been afforded to cross-examine under s. 170 of the Justices of the Peace Act, 1927. Every case must be considered on its own facts and circumstances. The decision of the trial Judge on this preliminary question is not in every case necessarily a question merely of fact.

Attorney-General of New South Wales v. *Jackson*, (1906) 3 C.L.R. 730; *R.* v. *Downey*, (1900) 25 V.L.R. 582; and *R.* v. *Shurmer*, (1886) 17 Q.B.D. 323, referred to.

Counsel: *Cornish*, K.C., Solicitor-General, for the Crown; *Neill*, for the prisoner.

Solicitors: *Crown Law Office*, Wellington.

Case Annotation: R. v. *Shurmer*, E. and E. Digest, Vol. 15, p. 638, note *n*.

SUPREME COURT.
Wellington.
1942.
Sept. 14, 24.
Ostler, J.

In re **SWINSON (DECEASED).**

Bankruptcy—Proof—Proofs by Secured Creditors—Amendment of Valuation and Proof "at any time"—On proof of mistaken estimate—Power to amend from Time to Time—Condition on which Second Amendment may be granted—Bankruptcy Act, 1908, s. 102 (5).

Under s. 102 (5) of the Bankruptcy Act, 1908, which provides that where a creditor has valued his security in accordance with the preceding subsections, "he may at any time amend the valuation and proof on showing to the satisfaction of the Assignee or the Court that the valuation and proof were made *bona fide* on a mistaken estimate," the creditor may amend his valuation and proof from time to time, but if he asks for a second amendment on that ground the onus lies strongly upon him to show that the amended valuation was itself made *bona fide* on a mistaken estimate.

In re Fox and Jacobs, Ex parte Discount Banking Co. of England and Wales, [1894] 1 Q.B. 438, distinguished.

Counsel: *S. A. Wiren*, in support; *Cleary*, on behalf of the District Public Trustee, to oppose.

Solicitors: *Luckie, Wiren, and Kennard*, Wellington, for the plaintiff; *Barnett and Cleary*, Wellington, for the defendant.

Case Annotation: In re Fox and Jacobs, Ex parte Discount Banking Co. of England and Wales, E. and E. Digest, Vol. 4, p. 378, para. 3485.

SUPREME COURT.
Auckland.
1942.
September 30;
October 1, 2, 5, 6.
Smith, J.

WRIGHT v. BRADY.

Criminal Law—Brothel—"Knowingly permits premises to be used as a brothel"—"Brothel"—Facts to be Proved—Justices of the Peace Act, 1927, ss. 186, 214 (1) (b).

A person "knowingly permits premises to be used as a brothel" within the meaning of those words in s. 214 (1) (*b*) of the Justices of the Peace Act, 1927, if he is in immediate occupation thereof and knowingly permits their habitual use for purposes of prostitution with more than one woman; and it is sufficient to prove that, with the knowledge of the occupier, persons of both sexes are permitted there to have illicit sexual intercourse.

It is unnecessary for the prosecution to prove that some agreement ensuring profit to the occupier exists between him and the women who prostitute themselves on his premises, or that such women are prostitutes known, as such, to the Police, or that they received payment for acts of fornication or indecency committed by them with men.

Cassells v. *Hutcheson*, (1908) 27 N.Z.L.R. 763, 10 G.L.R. 701; *Siviour* v. *Napolitano*, [1931] 1 K.B. 636; *R.* v. *Holland, Lincolnshire Justices*, (1882) 46 J.P. 312; and *Winter* v. *Woolfe*, [1931] 1 K.B. 549, followed.

Abel v. *Goodson*, [1924] N.Z.L.R. 444, G.L.R. 247, mentioned.

Counsel: *A. H. Skelton* and *G. H. Skelton*, for the appellant; *Meredith*, for the respondent.

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

Case Annotation: *Winter* v. *Woolfe*, E. and E. Digest, Supp. Vol. 15, para. 8143 (*b*).

COMPENSATION COURT.
Hamilton.
1942.
August 17, 24;
September 11.
O'Regan, J.

STRICKLAND
v.
MATAMATA COUNTY AND ANOTHER.

Workers' Compensation—Liability for Compensation—Loan of Worker—Regular County Employee injured while temporarily lent and engaged in same Capacity as Shot-firer to Company doing Highway Work for County—Whether Contract of Service with County continued—County's Liability for Compensation—"Worker"—Workers' Compensation Act, 1922, s. 3.

The second-named defendant (hereinafter called "the company") had taken a contract from the first-named defendant (hereinafter called "the county") to do work on a highway necessitating blasting operations. The county agreed at the request of the company that the latter should have the temporary services of the plaintiff as a shot-firer, he being a regular employee of the former in that capacity. His wages as well as the cost of the explosives were paid by the county and the amount thereof debited to the company. He was injured as the result of an accident arising out of the said operations.

On a claim against both defendants for workers' compensation, the plaintiff's right to compensation being admitted,

Held, That the contract of service between the plaintiff and the county was subject to no interruption; that the claim against the county must succeed, and that there was no liability on the company.

Williamson v. *Ross*, [1933] N.Z.L.R. s. 186, G.L.R. 805; *Reed* v. *Smith, Wilkinson, and Co.*, (1910) 3 B.W.C.C. 223; *Huscroft* v. *Bennett*, (1914) 110 L.T. 494, 7 B.W.C.C. 41; and *Oates* v. *Thomas Turner and Co.*, (1916) 86 L.J.K.B. 24, 9 B.W.C.C. 447, referred to.

Counsel: *F. H. Haigh*, for the plaintiff; *A. L. Tompkins*, for the first-named defendant; *H. T. Gillies*, for the second-named defendant.

Solicitors: *F. H. Haigh*, Auckland, for the plaintiff; *Tompkins and Wake*, Hamilton, for the first-named defendant; *Gillies, Tanner, and Fitzgerald*, Hamilton, for the second-named defendant.

ALLIED ARMED FORCES IN NEW ZEALAND.

Some Aspects of the Law Applicable to them.

By R. O. McGechan, B.A., LL.B., Professor of Jurisprudence and International Law, Victoria University College.

(*Concluded from p. 224.*)

The facts before the Court in *Tucker* v. *Alexandroff*[19] were: Alexandroff was a conscript in the Russian Naval Service and was detailed as one of fifty-three men to the United States to become part of the crew of a ship being built. He deserted, renounced allegiance to Russia, and announced his intention to become a citizen of the United States. He was arrested as a deserter by United States Police and applied for a writ of *habeas corpus*. The majority of the Court refused his release relying on a treaty with Russia (having in the United States the force of law) which in their view empowered the arrest. They were of the opinion that apart from treaty the detention could not have been justified. The decision means that at international law there was no obligation to hand over deserters from visiting forces. The law, international apart from treaty, and municipal apart from statute, is set out in the judgments of both majority and minority in that case: Brown, J., delivering the judgment of the majority, at p. 433, said:

> The case [*i.e.*, *The Exchange*] however is not authority for the proposition that, if the crews of such vessels, or the members of such military force, actually desert and scatter themselves through the country, their officers are, in the absence of treaty stipulation, authorized to call upon the local authorities for their reclamation. While we have no doubt that, under the case above cited, the foreign officer may exercise his accustomed authority for the maintenance of discipline, and perhaps arrest a deserter "*dum fervet opus*," and to that extent this country waives its jurisdiction over the foreign crew or command, yet if a member of that crew actually escapes from the custody of his officers, he commits no crime against the local government, and it is a grave question whether the local Courts can be called upon to enforce what is in reality the law of a foreign sovereign. The principle of comity may imply the surrender of jurisdiction over a foreign force within our territory but it does not necessarily imply the assumption by our Courts of a new jurisdiction, invoked by a foreign power, for the arrest of persons who have committed no offence against our laws, and are perhaps seeking to become citizens of our country. Our attention has been called to no such case.

Gray, J., who spoke for the minority was even more emphatic: "Even permission to march a foreign armed force through the country does not imply a duty to arrest deserters from that force"—and the minority based their judgment on that principle.

In the United Kingdom legislation exists to secure to our Allies powers to recover deserters. This is the Allied Forces Act, 1940, s. 1 (3), which enables His Majesty by Order in Council to apply certain sections of the Visiting Forces (British Commonwealth) Act, 1933, which in turn incorporates s. 154 of the Army Act, dealing with the apprehension of deserters.[20] Australian Regulations (National Security (Allied Forces) Regulations, 1941 (1941/302)) are to the same effect. In New Zealand, there is no statute or regulation on the British or Australian model, and the view of the minority in *Tucker* v. *Alexandroff* is a correct statement of the law applicable here so far as allied military forces are concerned.[21]

When we turn to naval forces we find the same difficulty with the precedents. In *The Exchange*, Marshall, C.J., took the view that since the entry into port of a foreign armed vessel "was not attended by similar inconvenience and dangers no special license was required." There could be express exclusion, otherwise there was implied permission to enter port. Quite obviously then allied vessels of war have implied authority to enter New Zealand harbours. What immunities are then to apply? There may be special provision by treaty or agreement, but apparently we have made none. Apart from this, certain rules have been generally inferred.

First of all the foreign vessel of war is not subject to proceedings *in rem* in our Admiralty Courts: *The Exchange*[22], *The Constitution*[23], *The Parlement Belge*[24], *The Cristina*[25].

No action lies to recover possession of such a vessel, nor against her for collision or wages, towage or salvage.

Immunity in respect of crimes committed on board was recently the subject of decision by the Privy Council in *Chung Chi Cheung* v. *The King*[26]. There a British subject on board a Chinese war vessel then about one mile from the coast of Hong Kong murdered another British subject. The Hong Kong Courts had jurisdiction to try only crimes committed within the territory of Hong Kong, which for this purpose included the three-mile marginal belt. It was argued for the accused that the Chinese vessel was a floating portion of the territory of China and that the murder had been committed in China not in Hong Kong. The Privy Council rejected the fiction of exterritoriality urged upon them and held that a foreign armed vessel was entitled to certain immunities arising by implication from the circumstances, but that when, as in this case, the accused has been handed over by the commander of the public

[19] (1902) 183 U.S. 424.

[20] See *Re Amand*, [1942] 1 All E.R. 236.

[21] The decision in *Re Amand* deals with the case of a Dutch national resident in England who was conscripted by legislation of the Dutch Government carrying on in London and raises questions at both international and municipal law (both common law and under the Allied Forces Act) as to the power of Allied Governments to conscript their nationals in British territory and the effect of the exercise of that power. In England a conscript who has served in the forces of our Allies can be apprehended as a deserter, but only under the Allied Forces Act. As we have no such provision in New Zealand law it is probable that conscript deserters could not be arrested in New Zealand. The whole subject of conscription of aliens and allies is sufficiently extensive to warrant separate treatment. Merchant seamen of allied powers who desert may be punished by British Courts under the Merchant Shipping Act, 1894, s. 238, or by Allied Maritime Courts established in England under the Allied Powers (Maritime Courts) Act, 1941, or by New Zealand Courts under the Merchant Shipping Act, 1908, Part XIV.

[22] *Supra.*

[23] (1879) 48 L.J. (N.S.) P.D. & A. 13.

[24] (1880) L.R. 5 P.D. 197.

[25] [1938] A.C. 485.

[26] *Supra.*

vessel to the local authority for trial, these immunities have been waived and the crime having been committed in Hong Kong in circumstances not giving immunity, the Hong Kong Court had jurisdiction.

You can see from this case that the immunity from jurisdiction is not that of the accused, it is that of the sovereign in whose armed forces he is. The government of the State concerned can clearly waive the immunity. Oppenheim speaking of the servants of diplomatic agents grants that the diplomat may waive the immunity from civil proceedings against them, but not that from criminal proceedings. This can only be waived by the "home State" itself. One might well doubt whether the commander of naval or military force has not greater power of waiver since he exercises jurisdiction under his own State's military law over the members of the force. The Privy Council in *Chung's* case[27] speak of waiver by the "Chinese Government." What happened there was that the accused was landed for hospital treatment, that the Chinese then made no request to hand him over for trial as they might have done, but brought extradition proceedings which failed, and thereafter still made no request. On the other hand they permitted four members of their service to give evidence before the British Court, handed over the revolver, &c., to the Hong Kong Police, making "it plain that the British Court acted with the full consent of the Chinese government." All of this means that there can be an implied waiver by the government of one of our allies in these cases. It seems probable that if the local commander were to hand over one of his men for trial and the Allied Government stood by without demur (probably what would happen) that our Court could imply waiver and would then on the authority of *Chung's* case have jurisdiction.

Not very much was said in the judgment of the Privy Council on the extent of the immunity of naval forces:[28]

> The sovereign himself, his envoy, and his property including his public armed ships, are not to be subjected to legal process. These immunities are well settled. In relation to the particular subject of the present dispute—the crew of a warship—it is evident that the immunities extend to internal disputes between the crew. Over offences committed on board ship by one member of the crew upon another, the local Courts would not exercise jurisdiction. The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interferred with, and members of the crew withdrawn from its service, by local jurisdiction. What the precise limits of the immunities are it is not necessary to consider. Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offences on land. It is not necessary for their Lordships to consider these.

Let us consider the case of the naval seaman who commits an offence against New Zealand law while ashore. It has been suggested that he has no immunity ashore. Oppenheim calls it an "unsettled question"[29] Hall[30] is emphatic that there is no immunity at all: "if members of her crew go outside the ship or her tenders or boats they are liable in every respect to the territorial jurisdiction. Even the captain is not considered to be individually exempt in respect of acts not done in his capacity of agent of his State. Possessing his ship, in which he is not only protected, but in which he has entire freedom of movement, he lies under no necessity of exposing himself to the exercise of the jurisdiction of the country, and if he does so voluntarily he may fairly be expected to take the consequences of his act."[31] Hyde recognizes only one limitation to this, that of an organized force landed—*e.g.*, for a local parade—which has its immunity as a military force entering by permission. Wheaton does not make the distinction. As the Privy Council have left the matter at large, and text-writers at international law are not very decisive it is perhaps material again to suggest that the case of an allied warship entering our ports is distinguishable from that of a friendly power during peacetime. None of the cases cited against immunity of sailors ashore seem to be cases of allied ships in port. And the reasons for not imprisoning a sailor for a crime committed ashore are as cogent as those for not imprisoning a soldier for the same on leave; in either case the national purpose is hindered by withdrawing him from the service of our ally.[32]

Incidentally, I may add that the jurisdiction of the visiting authorities to punish their own drunken sailors has always been admitted.[33]

The Conventions I have previously referred to did not make any distinction between sailors on board and ashore. The Allied Forces Act, 1940, does not grant exclusive jurisdiction to our Allies, but neither does it make any distinction along these lines and it seems probable that recent British legislation relating to American naval forces makes no such distinction. The matter at present is certainly obscure.

The general conclusion I draw, as to naval as well as military forces of our allies, is that they are completely immune. There can be no doubt as to immunity in respect of offences within camp or on board ship, or as to offences committed away from camp or ship while carrying out orders. Offences committed while on leave present a debatable question where the division of opinion among text-writers and the inconclusiveness of the international precedents, throw us back on the practice of allied States and "the reason of the thing"; each of these points to complete immunity in the case of allies whatever may be the position of peacetime friendly visitors.

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[27] Pp. 176, 177.
[28] Pp. 175, 176.
[29] 1, 668.
[30] *International Law*, 251.
[31] See, to the same effect, *2 Moor's Digest*, 236; *1 Hyde*, 255.
[32] If sailors of a visiting ship in peacetime are not immune from local jurisdiction it would follow that (since military law can be administered on the vessel) mere presence of a military Court in the local territory is not sufficient in itself to imply consent of the local authority to waive jurisdiction; it does not follow that it is not a circumstance which with others would be material to be kept in mind in determining whether there was an implied consent to waive jurisdiction.
[33] *2 Moor's Digest*, 589.

"From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge, or of the defence, he assumes the character of the Judge: nay, he assumes it before the hour of judgment, and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumption and which commands the very Judge to be his counsel."

—LORD ERSKINE.

PENALTIES AND LIQUIDATED DAMAGES.

A Circumvention of the Equity Rule as to Penalties.

A recent case in the Chancery Division of the High Court of England, *Re Apex Supply Co., Ltd.*, [1941] 3 All E.R. 473, 166 L.T. 264, the former report being slightly fuller, supplies an interesting illustration of ways in which the rule of equity about penalties can in some circumstances be legitimately circumvented.

A hire-purchase agreement contained the usual clause entitling the hirer to return the goods at his option, the deliberate effect of this being of course to prevent the contract being one of sale and purchase, with all consequences that flow under the bankruptcy law and otherwise if the hirer be in law the owner of the goods: *Lee* v. *Butler*, [1893] 2 Q.B.D. 318, and *Helby* v. *Matthews*, [1895] A.C. 471.

There was also a clause providing that if the hirer should return the goods within nine months, he should pay a sum which with any instalments theretofore paid should amonut to a sum specified. (It is recognized that the drop in value of goods from new condition to second-hand condition is, during the early part of a hire-purchase term, frequently greater than the sum represented by the first few of the regular instalments. Towards the end of the term the position is reversed, and the hirer has acquired an asset he will not lightly abandon.)

A similar amount (the specified sum less instalments) was also made payable on the happening of any one of what the Court called a "multitude of circumstances," which can be classified thus:—

(1) Matters directly in the power of the hirer—*e.g.*, if the hirer being a company should go into liquidation voluntarily; if he should execute a bill of sale of his effects; if he should fail to comply with conditions of the contract negative in character; if he should enter into a composition with his creditors.

(2) Matters capable of happening to the hirer *per invitum*—*e.g.*, if the hirer being a company should go into liquidation compulsorily; if a receiving order in bankruptcy were made against him; if any execution or distress were levied against him.

(3) Matters intermediate in character, nominally in his power to bring about or prevent, but practically liable to happen *per invitum*—*e.g.*, if the hirer should suffer a judgment for money to remain unsatisfied, or if he should fail to comply with conditions of the contract positive in character, and perhaps requiring expenditure beyond his resources.

The event that happened was that the hiring company went into liquidation (whether compulsorily or voluntarily does not appear), and the question before the Court was the owner's right to prove for the balance required to make up the specified sum. The resumption of the goods by the owners was a factor in the amount they sought to prove for, and incidentally they were held effectively to have retaken the goods into constructive possession by process against a third party in whose possession they actually were at the time of liquidation. One of the objections to the proof was that the specified sum was a penalty, and not a genuine pre-estimate of damage.

It was pointed out that so far as the payment was one to become due on the hirer's return of the goods, it was neither. The money became payable not if the hirer broke the contract, but if he exercised a right that the contract expressly conferred upon him. On this point the Court followed certain previous cases curiously referred to as "unreported," but actually reported in full detail in the second edition of *Jones and Proudfoot's Notes on Hire-purchase Law*—namely, *Elsey and Co., Ltd.* v. *Hyde*, *Chester and Cole, Ltd.* v. *Avon*, and *Chester and Cole, Ltd.* v. *Wright*, pp. 107, 115, 124. As these cases put it, there were two contracts, one an agreement for hire and purchase, the other an agreement that if the first contract came to an end in certain circumstances, a certain sum of money would be payable.

The way to avoid awkward questions about penalty or damages is thus made clear. Do not set out what a party is to pay if he breaks the contract. Give him the right to terminate the contract, but stipulate that if he avails himself of this right a specified sum shall be payable by him.

In the formative days of equity, the Courts of chancery were of sterner stuff, and such a device might have stood a good chance of being brushed aside as an attempt to evade the jurisdiction of the Court; but once the Courts meekly accepted the position that in a covenant to pay a larger sum (as for interest or rent), reducible on prompt payment to a smaller sum, there is no element of penalty, even though "penal rate" exactly, as well as popularly, describes the real position, their power of asserting themselves in such a way had gone for ever.

In the form of contract examined, the hirer was not made expressly to covenant that he would not suffer an execution, or allow any of the other catalogued events to happen. The owners' right to the specified payment if, for instance, an execution issued, was therefore a right which did not arise consequently upon breach of contract. Accordingly this was another case in which, as no right to damages for breach of contract would lie, the question of whether the payment was penalty or damages could not arise.

Here then is another point for the commercial draftsman to ponder. An impersonal provision about payments that are to follow future happenings may well be more satisfactory than the benefit of an express covenant not to commit or permit such happenings.

On some other points covered, *Re Apex Supply Co., Ltd.*, and the cases it follows may not be of quite so much value. In *Elsey and Co., Ltd.* v. *Hyde* the judgment said (*supra* at p. 112):

> It appears to me to be a strange conclusion, if this money is to be regarded as a penalty where it was payable in one event and not regarded as a penalty where it was payable in another event. I think, therefore, as it is to my mind not a penalty where it is payable on the return of the article by the hirer, it ought not to be regarded as a penalty where it was payable on the retaking of the article by the owner.

It is submitted, however, that it is a still stranger conclusion if, merely because a sum of money is payable as a term of a contract in certain events, where the rule of equity cannot reach it, and the identical sum is selected as that which is made payable in other events where the question of penalty or damages is clearly open, the Court is precluded by the existence of the first-mentioned arrangement, though it calls it a separate contract, from exercising its right to decide whether the payment under the second arrangement be

penalty or damages, according to the established tests for elucidating that issue.

Finally, it should be pointed out that the value of these cases in New Zealand lies in their general principles. The actual rights of an owner under a hire-purchase agreement in New Zealand law would in similar circumstances be substantially restricted by the operation of the Hire-purchase Agreements Act, 1939.

LOST INSTRUMENTS OF TITLE UNDER THE LAND TRANSFER ACT.

Application to Registrar for a New or Provisional Title.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

In *Goodall's Conveyancing in New Zealand*, at page 189, there is a precedent for declaration of loss of registered title deed (old system); it is thought that the following precedent dealing with the loss of a Land Transfer certificate of title might also be of interest and use to conveyancers. The similarity in essentials between the precedent in *Goodall* and the one given here will at once be perceived.

The relevant provision is s. 80 of the Land Transfer Act, 1915, as amended by the Schedule to the Land Transfer Amendment Act, 1925. Subsection (1) provides that in the event of any grant or certificate of title being lost, mislaid, or destroyed, the registered proprietor, together with other persons (if any) having knowledge of the circumstances, may make a statutory declaration stating the facts of the case, the names and descriptions of the registered owners, and the particulars of all mortgages, incumbrances, or other matters affecting such land and the title thereto, to the best of the declarant's knowledge and belief.

Mutatis mutandis the provisions of s. 80 apply also to lost, destroyed, or mislaid leases or licenses, or memoranda of lease or memoranda of mortgage: s. 100 of the Land Transfer Act, 1915, as amended by the Schedule to the Land Transfer Amendment Act, 1925.

A statutory declaration by the registered proprietor, or if he is dead, by his legal personal representative, is always necessary: one should also be obtained from the first mortgagee, if the land is mortgaged, for he is entitled to the custody of the certificate of title: Land Transfer Act, 1915, s. 121. Corroborative evidence is always desirable and sometimes essential—*e.g.*, if the certificate of title has been in the possession of any person—such as a solicitor—for safe custody, such person should explain by statutory declaration the loss, &c., of the certificate. The general requisites of the evidence to be tendered to the District Land Registrar may be thus stated:—

1. The certificate of title should be traced step by step from its being uplifted from the Land Registry Office (and this involves an examination of the Receipt Book kept by the Registry) to the person last known to have had possession of it.

2. Unless the destruction of the certificate of title can be established beyond all reasonable doubt, the applicant (or, as the case may be, the first mortgagee) must satisfy the District Land Registrar that he has searched in all likely places and has made inquiries of his bankers or other persons who may possibly have or have had possession of the certificate.

3. The applicant (and also the first mortgagee, if the land is mortgaged) must declare that he has not mortgaged, pledged, or lodged, to or with, any person, the certificate, as security for a loan or for any other purpose whatever.

The statute provides that before issuing a new or provisional title, the District Land Registrar must give at least fourteen days' notice of his intention so to do in the *Gazette* and in at least one newspaper published in New Zealand. If, however, the dealing desired to be registered is a partial or total discharge of mortgage, the District Land Registrar has discretionary authority to dispense with production of the outstanding duplicate of mortgage, thus rendering the issue of a new or provisional mortgage unnecessary (and consequently advertising also); but in every such case, the usual evidence must be tendered as to the loss, &c., of the outstanding duplicate mortgage: see s. 116 (3) of the Land Transfer Act, 1915, which forms an exception to s. 40 of that statute.

The following fees are payable to the Land Registry for issuing a new or provisional certificate under s. 80: (*a*) advertising, 30s.; (*b*) issue of certificate, 20s.; total, 50s.

Additional fees—according to the number of folios—will be payable, if the instrument lost is a lease, license, or mortgage: see schedule to Land Transfer Regulations, January 22, 1914 (*1914 New Zealand Gazette*, 302).

Stamp duty of 3s. is payable in respect of each person who makes a statutory declaration.

PRECEDENT.

IN THE MATTER of the Land Transfer Act 1915

AND

IN THE MATTER of certificate of title vol. folio : Registry, in the name of A. B. of Auckland dealer.

I A. B. of Auckland dealer do hereby solemnly and sincerely declare as follows:—

1. THAT I am the registered proprietor of all that parcel of land situate in the City of containing be the same a little more or less being [*Set out here official description of land*] and being the whole of the land comprised and described in the certificate of title vol. folio : Registry.

2. THAT following the registration of release of memorandum of mortgage registered No. to the corporation the said corporation forwarded the said certificate of title vol. folio to me at my residence at Street Auckland on the day of 19 .

3. THAT the said certificate of title was then placed by me in a drawer of a sideboard at my residence in my rooms above my shop at Street Auckland.

4. THAT I was under the impression that upon my subsequent removal to other residential premises I placed the said certificate of title for safe-keeping in a box.

5. THAT following my said removal I destroyed a considerable quantity of papers by fire.

6. THAT the said certificate of title was not found by me in the said box and I have made diligent search among my personal effects and in every place likely or unlikely and have made inquiries of my bankers but have been unable to find or locate the said certificate of title vol. folio .

7. THAT I have not pledged mortgaged or lodged as security the said certificate of title vol. folio and that no person or persons have any rights registered or unregistered at law or in equity against the said certificate of title vol. folio other than myself as registered proprietor.

8. THAT I desire a new or provisional certificate of title to be issued to me in place of the said certificate of title vol. folio.

AND I make this solemn declaration conscientiously believing the same to be true and under and by virtue of the Justices of the Peace Act, 1927.

Declared at, &c.

Before me, &c.

A Solicitor of the Supreme Court of New Zealand.

IN THE MATTER of the Land Transfer Act 1915

AND

IN THE MATTER of certificate of title vol. folio : Registry in the name of A. B. of Auckland dealer.

I, C. D. of Auckland solicitor do hereby solemnly and sincerely declare as follows :—

1. THAT I am custodian of deeds for the corporation at .

2. THAT said certificate of title vol. folio was held by the said corporation as security under memorandum of mortgage registered number .

3. THAT the principal moneys and interest secured by the said memorandum of mortgage registered number were repaid in the year .

4. THAT following registration of the release of the said mortgage the said certificate of title vol. folio was uplifted from the Land Transfer Office at by an officer of the said corporation on the day of 19 .

5. THAT the said certificate of title vol. folio was forwarded to the said A. B. at Street Auckland on the day of 19 .

6. THAT the said A. B. acknowledged receipt of the said certificate of title on the day of 19 .

7. THAT the said certificate of title vol. folio has not since come into the possession of the said corporation.

AND I make this solemn declaration conscientiously believing the same to be true and under and by virtue of the Justices of the Peace Act, 1927.

Declared by the said C. D. at this day of 19 . .

Before me :

A Solicitor of the Supreme Court of New Zealand.

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. Inquest.—*Quashing of Inquisition—Order for Another Inquest.*

QUESTION: An inquest has been held and the Coroner has delivered his finding, but, owing to irregularity of proceedings, it is desired to have another inquest. What is the procedure in making an application to the Supreme Court in such case?

ANSWER: Under s. 2 of the Coroners Amendment Act, 1930, application to the Supreme Court can be made by or under the authority of the Attorney-General, if the latter is satisfied as to matters set out in paras. (*a*) and (*b*) of that section.

Assuming that the application can be made with the authority of the Attorney-General, the procedure in the Supreme Court would be by way of motion with supporting affidavit or affidavits, the latter exhibiting the written authority of the Attorney-General. The motion would be to quash the inquisition, and for an order for another inquest. In a recent application before the Court the motion was *ex parte*.

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2. Divorce.—*Petition—Adultery—Co-respondent Overseas with Armed Forces—Motion to Dismiss Co-respondent from Suit.*

QUESTION: A divorce petition has been filed on the ground of adultery with a person, who is now overseas with the Armed Forces. A citation has not been extracted for service on the co-respondent, as he is overseas, and it is desired to dismiss him from the suit, relying upon an admission by the wife as to the adultery alleged, any claim for damages or costs against the co-respondent being abandoned.

In such circumstances is it possible to obtain an order dismissing the co-respondent from the suit?

ANSWER: In a recent case (unreported), at Wellington in similar circumstances an order for dismissal of the co-respondent was refused.

It is possible to serve the co-respondent, although he is with the Armed Forces overseas; and he should be served. Procedure for service would be the same as laid down in *A.* v. *A.*, [1940] N.Z.L.R. 394.

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3. Probate.—*Expeditionary Force—Soldier killed Overseas—Proper Registry for filing Motion for Probate.*

QUESTION: A soldier, who has been killed overseas, before leaving New Zealand resided at New Plymouth, although for some months immediately preceding his departure from New Zealand, he was training in camp at Wellington. At which Registry, New Plymouth or Wellington, should the motion for probate be filed?

ANSWER: Rule 547 of the Code of Civil Procedure makes provision as to where application for probate or administration is to be made. The filing is to be in the Registry nearest to which the deceased *resided* or was *domiciled at the time of his death*. In the case mentioned, New Plymouth would be the proper Registry.

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4. Land Transfer.—*Mortgage—Principal Sum Expressed to be advanced in Unequal Shares—Powers of Surviving Mortgagee to deal with Mortgage.*

QUESTION: B. and C. have advanced £500 to A. who is the registered proprietor under the Land Transfer Act, and in the mortgage it is expressed that £400 has been advanced by B. and £100 by C. There is in the mortgage a clause like this: "It is hereby agreed between the mortgagor and mortgagee that the said aggregate sum of £500 shall be considered as belonging to the mortgagees on a joint account and accordingly that the mortgagees *or the survivor* of them shall be considered as entitled to the said aggregate debt of £500 and interest and their his or her receipt shall be an effectual discharge for the same and that all powers and remedies for recovering payment of the moneys hereby secured shall be exercisable by them him or her without the concurrence of any other person or persons who may be beneficially entitled to any such money." C. has died, and A. desires to repay the debt. Can B. alone give a valid registrable discharge, so as to clear the title of the mortgage?

ANSWER: No. The legal personal representative of C. must procure himself to be registered as proprietor of C.'s interest in the mortgage, because so far as the *registered* interests are concerned B. and C. hold the mortgage as tenants in common there being an expression to the contrary within s. 57 of the Land Transfer Act: see also *Drake* v. *Templeton*, (1913) 16 C.L.R. 153, 158, per Griffiths, C.J. Whatever the effect in equity of the clause cited, the *legal* charge created by registration under the Land Transfer Act can be extinguished only by *legal* means. Thus, in a mortgage so framed, both mortgagees would have to execute a transfer in exercise of power of sale. If the mortgage were silent as to the proportions in which the sum of £500 had been advanced by B. and C., they would be joint tenants at law, and on the death of one the other could deal with the mortgage.

RECENT ENGLISH CASES.

Noter-up Service

COMPANIES.

Winding-up — List of Contributories — List Settled by Liquidator—Death of Liquidator—Jurisdiction of Subsequent Liquidator to Include Name Excluded by First Liquidator—*Res judicata*—Companies Act, 1929 (c. 23), ss. 203, 220—Companies (Winding-up) Rules, 1929, rr. 78–83.

When a liquidator has complied with the Companies (Winding-up) Rules, 1929, in settling the list of contributories, the matter is res judicata *and cannot be reopened by him or any successor of his, even though his decision was erroneous.*

Re WESTWAYS GARAGE, LTD., **[1942] 2 All E.R. 147.**

As to settling list of contributories: see HALSBURY, vol. 5 pp. 660–663, paras. 1090–1095; and for cases: see DIGEST, vol. 10, pp. 912–917, Nos. 6239–6279.

CONTRACT.

Impossibility of Performance—Supply of Electricity for Public Lighting—Black-out—Contract Containing Composite Provision for Supply of Current and Other Services—Provision for Abatement in certain Events, and "from any other unavoidable cause over which the company has no control."

Where in a contract there is provision for abatement in the amount payable in certain specified events of very varied type, the ejusdem generis *rule is not applicable to general words which follow such as "or from any other unavoidable cause over which the company has no control."*

EGHAM AND STAINES ELECTRICITY CO., LTD. *v.* EGHAM URBAN DISTRICT COUNCIL, **[1942] 2 All E.R. 154.**

As to public utility contracts and impossibility of performance: see HALSBURY, vol. 7, pp. 218–219, para. 297; and for cases: see DIGEST, vol. 12, p. 403, Nos. 3251, 3252.

EMERGENCY LEGISLATION.

Mortgage—Purchase of Equity of Redemption by Mortgagee—Whether Mortgagee can take Possession of Property Without Leave of Court—Courts (Emergency Powers) Act, 1939 (c. 67) s. 1.

A mortgagee who has purchased the equity of redemption of freehold property may not take possession without leave of the Court under the Courts (Emergency Powers) Acts.

SUN LIFE ASSURANCE SOCIETY *v.* RELTON, **[1942] 2 All E.R. 94.**

For the Courts (Emergency Powers) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, vol. 32, p. 946, and BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, p. 206.

RULES AND REGULATIONS.

Waikato Coal-mines Control Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/293.

Price Order No. 113 (Woolpacks). (Control of Prices Emergency Regulations, 1939.) No. 1942/294.

Defence Emergency Regulations, 1941, Amendment No. 4. (Emergency Regulations Act, 1939.) No. 1942/295.

Industrial Man-power Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/296.

Emergency Shelter Regulations, 1942, Amendment No. 3. (Emergency Regulations Act, 1939. No. 1942/297.

Obsolete Judicial Records Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/298.

Companies Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1942/299.

Bills of Exchange Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/300.

Licensing Act Emergency Regulations, 1940, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1942/301.

Hairdressers (Health) Regulations Extension Notice, 1942, No. 1. (Health Act, 1920.) No. 1942/302.

Women's Auxiliary Air Force Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/303.

Price Order No. 114 (Cheddar Cheese). (Control of Prices Emergency Regulations, 1939.) No. 1942/304.

Price Order No. 115 (Apples). (Control of Prices Emergency Regulations, 1939.) No. 1942/305.

THE NEW ZEALAND CRIPPLED CHILDREN SOCIETY (Inc)

ITS PURPOSES

THE New Zealand Crippled Children Society was formed in 1935 to take up the cause of the crippled child—to act as the guardian of the cripple, and fight the handicaps under which the crippled child labours; to endeavour to obviate or minimize his disability, and generally to bring within the reach of every cripple or potential cripple prompt and efficient treatment.

ITS POLICY

(*a*) To provide the same opportunity to every crippled boy or girl as that afforded to physically normal children. (*b*) To foster vocational training and placement whereby the handicapped may be made self-supporting instead of being a charge upon the community. (*c*) Prevention in advance of crippling conditions as a major objective. (*d*) To wage war on infantile paralysis, one of the principal causes of crippling. (*e*) To maintain the closest co-operation with State Departments, Hospital Boards, kindred Societies, and assist where possible.

It is considered that there are approximately 5,000 crippled children in New Zealand, and each year adds a number of new cases to the thousands already being helped by the Society.

Members of the Law Society are invited to bring the work of the N.Z. Crippled Children Society before clients when drawing up wills and advising regarding bequests. Any further information will gladly be given on application.

NEW ZEALAND CRIPPLED CHILDREN SOCIETY (Inc.)

BOX 25, TE ARO, WELLINGTON.

Dominion Executive:

Sir Alexander Roberts, Brigadier Fred. T. Bowerbank, Dr. Alexander Gillies; Messrs. Frank Campbell, J.P. (Chairman), J. M. A. Ilott, J.P. (Wellington), B. R. Dobbs (Wanganui), W. G. Black (Palmerston North), S. L. P. Free, J.P. (Masterton), J. K. Edie (Associate Member), Malcolm Fraser, C.V.O., O.B.E., and Ernest W. Hunt, J.P. Secretary: C. Meachen, J.P.

Trustees of Nuffield Trust Fund:

The Rt. Hon. Sir Michael Myers, G.C.M.G., Chairman.
Sir Charles Norwood, Vice-Chairman;
Sir James Grose;
Sir Donald McGavin, C.M.G., D.S.O.;
J. M. A. Ilott, Esq., J.P.

ESTABLISHED 1849

A SPRING OFFENSIVE ON THE HOME FRONT

WITHOUT venturing into the realms of prophecy, and without giving away any military secrets, we think we can safely say that this spring will see something in the nature of a general awakening right along the democratic front.

The Allies are marching, and if we of the Home Front cannot march along with them we can at least see that they get the fullest support that it lies in our power to give.

Don't let there be any misunderstanding about this, there can be no evading the responsibility. It's up to every man, every woman, every business.

The A.M.P. Society's business is the conservation of the savings of its members for the easement of their old age, and for the care of their families. Today a large proportion of those conserved savings is being loaned to the Nation to lighten its financial burden. £500,000 was its contribution to the recent Liberty Loan, the A.M.P. Society being the largest contributor, and already it has subscribed £250,000 in advance to the next one. Month by month it is regularly putting all it can spare of its members' Life Assurance Savings into New Zealand Government and Australian Commonwealth Loans.

There can be no let-up until Victory is assured.

A.M.P. SOCIETY

A sure friend in uncertain times.

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