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INDUSTRIAL MAN-POWER: SUSPENSION FOR "SERIOUS MISCONDUCT."

THE provisions of Reg. 13 (1) (*a*) of the Industrial Man-power Emergency Regulations, 1942 (Serial No. 1942/296) constitute, in the words of Mr. J. H. Luxford, S.M., in *McCallion* v. *Westfield Freezing Co., Ltd.*, (1942) 2 M.C.D. 462, 466, "A legal knot made to bind master and servant in an essential undertaking, which cannot be untied by them alone, as the consent of a District Man-power Officer has to be obtained." The regulations, however, anticipate circumstances in which, in the interest of the employer, the work, and, may be, fellow-employees, the worker should be summarily suspended. The only ground for such an action is "serious misconduct." Such a suspension must be reported within twenty-four hours to the District Man-power Officer, who may, after due inquiry, direct reinstatement of the worker, or decide that his employment is to be deemed to have been terminated at the time of the suspension; and master or servant has the right to appeal from the District Man-power Officer's ruling: Reg. 13 (1) (*d*). If the worker should be reinstated, either by the District Man-power Officer or by a Man-power Appeal Committee, the employer may be ordered to compensate the employee for all loss of earnings during the period of suspension, including such overtime he might have normally earned if he had not been suspended: Reg. 13 (1) (*e*).

From the foregoing, it is apparent that the meaning of the term "serious misconduct," as used in the regulation, is of importance. It is not defined. Consequently, as any suspension may be in effect a dismissal of the worker without notice, since the District Man-power Officer or the Man-power Appeal Committee, on appeal, may decide that the suspension must take effect as a dismissal from the time of the notice of suspension, the meaning must be sought as if, in fact, the "serious misconduct" alleged were, in itself, the ground for a summary dismissal.

At common law, misconduct on the part of a worker must come within certain generally defined limits before an employer is justified in dismissing him summarily on that account. Where "serious misconduct" is specified in regulations having the force of statute as the ground for summary suspension (which may have the ultimate consequence or effect of summary dismissal) *a fortiori* the common-law tests must be applied in any given case.

The regulations themselves specify certain forms of misconduct for which the worker may be penalized; and, in considering the meaning of the term "serious misconduct" in Reg. 13 (1) (*d*), attention must be given to those forms of misconduct, commonly grouped under the term "absenteeism," for which the worker may be penalized under Reg. 23 (1) by deductions from his pay, or in respect of which he may be prosecuted for a breach of the regulations, and punished by fine or imprisonment, under Reg. 22, subject in respect of certain of such offences to the provisions of Reg. 44 (3). Leaving these various offences to be dealt with by the regulations themselves, though in appropriate circumstances they may justify suspension for serious misconduct, it appears, from all the case law applicable to dismissal or suspension without notice, that the degree of misconduct which justifies summary dismissal is always a question of fact, since the sufficiency of the justification depends upon the extent of the misconduct. The words "serious misconduct" in this relation differ little in meaning from the words "gross misbehaviour" in s. 47 of the Education Act, 1877. In *Wilson* v. *Education Board of Hawke's Bay*, (1890) 9 N.Z.L.R. 257, 261, Edwards, J., said that if there were any evidence of persistent misbehaviour, there was evidence on which the Magistrate would be entitled to find gross misbehaviour.

Wilful disobedience to the lawful and reasonable orders of the employer has often been held to be a ground for dismissal: see, for example, *Turner* v. *Mason*, (1845) 14 M. & W. 112, 153 E.R. 411; *Spain* v. *Arnott*, (1817) 2 Stark. 256, 171 E.R. 638; *Callo* v. *Brounker*, (1831) 4 C. & P. 518, 172 E.R. 807; and *Amor* v. *Fearon*, (1839) 9 A. & E. 548, 112 E.R. 1320; but, as Lord Bramwell said in *Horton* v. *McMurty*, (1816) 29 L.J. 260, it is difficult to lay down any general rule as to what would justify the discharge of the servant which will comprise and be applicable to all cases, since whether or not a servant in any particular case was rightfully discharged might, of course, depend upon the nature of the particular services he was engaged to perform and the terms of his engagement. For instance, smoking by a worker, though prohibited, in an iron-foundry is a very different matter from smoking in a linen-flax factory.

Gross moral misconduct, whether in regard to money or otherwise, that is inconsistent with the fulfilment of the worker's conditions of work and service is a ground for dismissal, though, again, there is no rule of law defining the degree of misconduct which will justify dismissal. Sabotage in a munition-factory, or wilful misconduct which endangers the employer's plant or renders it temporarily inoperative, or actions endangering the lives of fellow-workers, would all appear to be sufficient grounds for suspension under the regulation. Theft, fraud, the taking of secret commissions, and the promotion of insubordination among fellow-employees have all been held to provide justification for dismissal.

Negligence or careless conduct, calculated seriously to injure the employer's business, may be a ground for dismissal in the appropriate circumstances. But the immediate dismissal of an employee is a strong measure, to use the words of their Lordships of the Privy Council in *Jupiter General Insurance Co.* v. *Shroff*, [1937] 3 All E.R. 67, 73. There it was held that it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence. Insolence towards an employer has been held to be a justifiable ground for dismissal if it is of such a degree as to be incompatible with the continuance of the relationship of master and servant. But, in the judgment just cited, their Lordships say they would be very loath to assent to the view that a single act of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground for dismissal. They add that the learned Chief Justice of Bombay stated, in the judgment appealed from, a proposition of mere good sense when he observed that in such cases one must apply the standards of men, and not those of angels, and remember that men are apt to show temper when reprimanded.

Considered generally, the test of "serious misconduct" must be this: Does the misconduct interfere with the business of the employer or with the ability of the worker to perform his duties under the express or implied conditions of service under the award, industrial or other agreement, or contract of employment under which he is working? To justify suspension of a worker under Reg. 13 (1) (*d*) the misconduct must be inconsistent with the due and faithful discharge of the employee's duty.

In delivering the judgment of the Privy Council in *Clouston and Co., Ltd.* v. *Corry*, (1905) N.Z.P.C.C. 336, 341, [1906] A.C. 122, 129, Lord James of Hereford says in a passage that has become a *locus classicus* in master and servant dismissal cases:

> The sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Certainly, when the alleged misconduct consists of drunkenness, there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employers' business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts—and is a question of fact.

It follows that what amounts to "serious misconduct" justifying suspension in one essential undertaking may not be serious misconduct, or any misconduct, in another such undertaking or even in another branch of the same undertaking. The question whether any act or conduct of a worker amounts to "serious" misconduct must, therefore, depend on the particular facts and circumstances of the employment, in the first place; and then, the degree of interference caused by such conduct must be considered in relation to its effect on the employer's business, or to the worker's ability to perform the duties of his employment. The degree of misconduct justifying suspension under the regulation is, in every case, a question of fact.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Wellington. 1942. November 2, 3, 4, 5, 6, 9; December 11. *Myers*, C.J.

INSPECTOR OF MINES v. ONAKAKA IRON AND STEEL COMPANY, LIMITED, AND OTHERS.

Mines, Minerals, and Quarries—Iron and Steel Industry—Appeal from Decision of Warden under s. 13 of the Iron and Steel Industry Act, 1927—Whether Liability to Forfeiture of each of Mining Privileges revoked by Act must be separately and independently decided—Whether s. 201 (b) *of the Mining Act, 1926, applicable—Whether Court entitled to take into consideration "the special circumstances of the case" under s. 193* (d) *of the Mining Act, 1926—"Special circumstances"—Iron and Steel Industry Act, 1937, s. 13—Mining Act, 1926, ss. 193* (a), (d), *201* (b).

On applications made under s. 13 of the Iron and Steel Industry Act, 1937, to the Warden of the Karamea Mining District by "the former holders of the mining privileges" revoked by the said Act, the Warden decided that certain mining privileges were not liable to forfeiture, that water-race licenses and a tramway license were liable to forfeiture for non-user and would have been forfeited, and that a mineral lease and a mineral license were on the day immediately preceding the commencement of the Act, March 14, 1938, liable to forfeiture, but would not in fact have been forfeited if appropriate proceedings for their forfeiture had been duly taken by an officer referred to in s. 193 (*a*) of the Mining Act, 1926.

On appeal from that decision,

Held, 1. That unless the terms of the grant otherwise required (which was not the case here) the liability to forfeiture of each of the mining privileges must be separately and independently decided.

Kingswell v. *Bitera*, (1906) 9 G.L.R. 188, followed.

2. That the water-race licenses, dam licenses, and tramway licenses were not on March 14, 1938, liable to forfeiture.

3. That the major privileges (the mineral lease and mineral licenses) were liable to forfeiture on March 14, 1938, for, broadly speaking, non-user of the said privileges and non-compliance with the labour conditions subject to which the mineral lease and licenses were granted.

4. That s. 201 (*b*) of the Mining Act, 1926, did not apply to the circumstances of the case.

5. That, in considering the hypothetical question whether the mining privileges would in fact have been forfeited had appropriate proceedings been taken in accordance with the said

Act, the Court was entitled to take into consideration "the special circumstances of the case" that would entitle the Court, in lieu of decreeing a forfeiture, to inflict a fine under s. 193 (*d*) of the Mining Act, 1926.

6. That the circumstances of the case, as reviewed and summarized in the judgment, which the Court could have taken into consideration were such "special circumstances," and the mining privileges would not, in fact, have been forfeited.

In re Cheesman, [1891] 2 Ch. 289; *In re Norman*, (1886) 16 Q.B.D. 673; *Hirst and Capes* v. *Fox*, [1908] A.C. 416; *In re Solicitors*, (1934) 50 T.L.R. 327; *Ewing* v. *Scandinavian Water Race Co.* (1904) 24 N.Z.L.R. 271, 7 G.L.R. 48; *Kingswell* v. *Bitera*, (1906) 9 G.L.R. 188; *Lake Hochstetter Goldfields, Ltd.* v. *Donnelan*, [1918] N.Z.L.R. 1044; *Sligo* v. *Partridge*, [1921] G.L.R. 697; *Wilson* v. *Tinkers Gold-mining Co., Ltd.*, (1913) 32 N.Z.L.R. 360, 15 G.L.R. 289; *Nyberg* v. *McIlroy*, [1918] N.Z.L.R. 1048, [1919] G.L.R. 37; and *Rederiaktiebolaget Amphitrite* v. *The King*, [1921] 3 K.B. 500, referred to.

7. It was held that the Warden's decision was right and the appeal was dismissed.

Counsel: *Solicitor-General* (*Cornish*, K.C.) and *Treadwell*, for the appellant; *Cooke*, K.C., and *Cheek*, for the Onakaka Iron and Steel Co., Ltd.; *Weston*, K.C., and *Kelly*, for the Golden Bay Proprietary Co., Ltd., and the executors of T. A. Turnbull and W. C. Sproule; *Sim*, K.C., and *Tripe*, for Pacific Steel, Ltd.

Solicitors: *Crown Law Office*, Wellington, for the appellant; *Glasgow, Rout, and Cheek*, Nelson, for the Onakaka Iron and Steel Co., Ltd.; *Kelly and McNeil*, Hastings, for the Golden Bay Proprietary, Ltd.; *Perry, Finch, and Hudson*, Timaru, for Pacific Steel, Ltd.

Case Annotation: *In re Cheesman*, E. and E. Digest, Vol. 42, p. 187, para. 2016; *In re Norman*, *ibid.*, para. 2015; *Hirst and Capes* v. *Fox*, *ibid.*, p. 198, para. 2181; *Rederiaktiebolaget Amphitrite* v. *The King*, *ibid.*, Vol. 11, p. 503, para. 58.

SUPREME COURT. Auckland. 1942. November 11. *Fair*, J.

In re **COOPER, EASTWOOD v. COOPER AND OTHERS.**

Will—Construction—Direction to Divide Residue into as many Equal Shares as there were Children living at the Death of the Testatrix, but no Direction as to Distribution—Effect of Direction.

By her will a testatrix, after directing her trustees to permit her husband to have the use and enjoyment of her farm property on certain conditions and devising it after his death in fee-simple to her son, J.W.C., directing the realization of her estate, the payment thereout of her debts, funeral and testamentary expenses, and the investment of the residue upon trust for the repayment of encumbrances on the said farm property, the investment of the remaining moneys, and the payment to her husband of £3 a week during his life, and upon his death the payment to her son J.W.C. of £300, continued—

"To divide the rest and residue of my said estate into as many equal shares as there are children of mine living at my death (excepting however my said son J.W.C. to whom the said sum of £300 has been given as aforesaid."

On originating summons to determine questions arising on the interpretation of the will,

Held, That, on the grounds of reasonable implication from the terms of the will, the children of the testatrix living at the death of the testatrix, other than J.W.C., were entitled to succeed in equal shares to absolute interests in the portion of the estate directed by the said clause to be divided as aforesaid).

Fell v. *Fell*, (1922) 31 C.L.R. 268, applied.

Re Messenger's Estate, *Chaplin* v. *Ruane*, [1937] 1 All E.R. 355; *Burt* v. *Wall*, (1891) 12 N.S.W. (Eq.) 153; *Towns* v. *Wentworth*, (1858) 4 DeG. Mc. & G. 73; *Spence* v. *Handford*, (1858) 27 L.J. Ch. 767; *Gould* v. *Gould*, (1831) 1 L.J.Ch. 60; *Adams* v. *Adams*, (1842) 1 Hare 537, 66 E.R. 1144; and *Re Smith*, (1862) 2 John & H. 594, 70 E.R. 1196, referred to.

Counsel: *King*, for the plaintiff; *Henry*, for the first defendants, other than Mrs. Andrew and Mrs. Wolfe; *Warnock*, for the second defendants.

Solicitors: *Bennett and Jacobsen*, Auckland, for the plaintiff; *Henry and McCarthy*, Auckland, for the first-named defendants except N. S. F. Andrew and H. Wolfe; *A. Warnock*, Auckland, for the second defendants.

Case Annotation: *Fell* v *Fell*, E. and E. Digest, Vol. 44, p. 610, note *e*; *Burt* v. *Wall*, *ibid.*, p. 546, note 3630 iv; *Towns* v. *Wentworth*, *ibid.*, p. 553, para. 3706; *Spence* v. *Handford*, *ibid.*, p. 598, para. 4231; *Gould* v. *Gould*, *ibid.*, p. 598, para. 4231; *Adams* v. *Adams*, *ibid.*, p. 604, para. 4298; *Re Smith*, *ibid.*, p. 385, para. 2200.

SUPREME COURT. Palmerston North. 1942. December 15. *Blair*, J.

In re **DALTON (DECEASED).**

Trusts and Trustees—Executors and Administrators—Notice—Intestate Estate—Distribution after Notice—Whether the Words "Creditors and others" in s. 74 of the Trustee Act, 1908, include Next-of-kin—Sufficiency of Advertisements and Inquiries—Precautions to be taken—Trustee Act, 1908, s. 74.

Section 74 of the Trustee Act, 1908, applies not only to the claims of creditors but also to the claims of beneficiaries and next-of-kin.

When it is a matter of endeavouring to ascertain the next-of-kin, and especially when the inquiries have to go beyond the Dominion, more than the ordinary precautions should be taken as to the sufficiency of the advertisements or of the inquiries made.

The order made was that the Registrar make an inquiry and report to the Court as to the sufficiency of the notices and the inquiries and advertisements already made, and as to what further inquiries or advertisements should be directed as to who were the next-of-kin of the deceased and entitled to share in his estate.

Newton v. *Sherry*, (1876) 1 C.P.D. 246, applied.

In re Barber, [1928] N.Z.L.R. 113; G.L.R. 62; *Re Bracken*, *Doughty* v. *Townson*, (1889) 43 Ch.D. 1; *In re Letherbrow*, *Hopp* v. *Dean*, [1935] W.N. 34; and *In re Holden*, *Isaacson* v. *Holden*, [1935] W.N. 52, referred to.

Counsel: *Cunningham*, for the applicant.

Solicitors: *Christie, Craigmyle, and Tizard*, Wanganui, for the applicant.

Case Annotation: *Newton* v. *Sherry*, E. and E. Digest, Vol. 23, p. 224, para. 2715; *Re Bracken*, *Doughty* v. *Townson*, *ibid.*, p. 330, para. 3695; *In re Letherbrow*, *Hopp* v. *Dean*, *ibid.*, Sup. Vol. 23, para. 3966*a*; *In re Holden*, *Isaacson* v. *Holden*, *ibid.*, para. 3973*a*.

SUPREME COURT. Auckland. 1942. November 20. *Fair*, J.

RICHARDSON AND OTHERS v. MACINDOE AND OTHERS.

Practice—Judgment and Order—Reciprocal Enforcement of Judgments—Plaintiff resident out of New Zealand registering in New Zealand Judgment obtained in Australia—Defendant applying to set aside Judgment—Subsequently applying for Security for Costs—Waiver of Right thereto—Reciprocal Enforcement of Judgments Act, 1934, ss. 4, 5, 6—Reciprocal Enforcement of Judgments Rules, 1935 (1935 New Zealand Gazette, *3600*), *R. 16—Code of Civil Procedure, R. 577.*

The old Chancery rule of practice (subsequently modified in England), that where a plaintiff resides out of the jurisdiction the defendant waives his right to security for costs by taking any step in the action after he becomes aware of his right to security, applied in connection with R. 577 of the Supreme Court Code of Civil Procedure, applies equally to R. 16 of the Reciprocal Enforcement of Judgments Rules, 1935.

Therefore, where a plaintiff resident out of New Zealand having obtained judgment in Australia had that judgment registered in the Supreme Court of New Zealand pursuant to the provisions of the Reciprocal Enforcement of Judgments Act, 1934, and the defendant filed a notice of motion asking for an order setting aside the said judgment,

Held, That the defendant having taken a step in the said action had waived his right to security for costs.

Ferrier v. *Bartleman*, (1892) 11 N.Z.L.R. 319, and *Arthur* v. *Bertling*, (1909) 28 N.Z.L.R. 1019, 12 G.L.R. 44, followed reluctantly.

Counsel: *Henry*, for the plaintiffs; *Finlay*, for the defendants.

Solicitors: *Henry and McCarthy*, Auckland, for the plaintiff; *G. P. Finlay*, Auckland, for the defendant.

EQUITY AND GOOD CONSCIENCE JURISDICTION.

Limitations on Exercise.

Subsection (2) of s. 100 of the Magistrates' Courts Act, 1928, provides that where the amount claimed does not exceed £50 the Court is at liberty to give such judgment between the parties as it finds to stand with equity and good conscience. Are there any limits to the exercise of this jurisdiction, or is it of universal application in all cases in which the claim does not exceed £50 ?

It is now proposed to review certain decisions given on this point in order to ascertain if there is any limitation on the exercise of the jurisdiction.

Words similar to those in s. 100 of our statute received judicial interpretation in the case of *Scott* v. *Bye*, (1824) 2 Bing 344, 130 E.R. 338. In giving judgment, Best, C.J., said: "Judgment is to be according to equity and good conscience, that is such as plain men, ignorant of the rules of law, shall think just."

Park, J., said: "It would be unnecessary and improper for these Courts of conscience to proceed according to common law." And Burrough, J., said: "The words 'equity and good conscience' imply a course of proceeding different from that of the common law."

In *Pearson* v. *Clark*, (1864) Mac. 136, 142, Richmond, J., described *Scott* v. *Bye* as:

> A direct authority for the interpretation of the thirteenth section of the Resident Magistrates' Courts Ordinance [which is in this connection identical in terms with the present s. 100] which I feel bound to follow; and I hold accordingly that by its original constitution the Resident Magistrates' Court was not absolutely bound to adjudicate according to the principles which are observed in the Superior Courts whether of law or equity.

Again, at p. 143, "This conclusion . . . falls short of what the appellant must contend for—namely, that the Resident Magistrates' Court can no longer in any case act as a Court of conscience."

Furthermore, the learned Judge proceeded to discuss cases in which the provision should not be invoked. He says:

> When the practical course of litigation in the Resident Magistrates' or any other Court comes to be considered, it is seen that in many cases the moral merits of the litigants are equal; in many others, purely ethical considerations can have no conceivable bearing on the decision. The dispute turns in all such cases on a dry point of law; moral considerations being absent, or *in equilibrio*. In such cases, the Magistrate must of necessity decide according to his view of the legal rights of the parties . . . My opinion, therefore, is that the Act of 1862 does not change the constitution of these Courts as Courts of conscience, but contemplates that, in certain cases, the Magistrate ought not to recur and will not recur, to his power of deciding on grounds of conscience, but will base his decision entirely upon a point of technical law or equity.

This case is an invaluable guide on the interpretation of s. 100 of the Magistrates' Courts Act, 1928; but it should be noted that the cause of action was one for the recovery of rates. The case stated, for the opinion of the Court, certain questions, one of which was "Whether His Worship was right in ruling that under s. 13 . . . he could rule against the defendant and the plaintiff, on the above four points on . . . equity and good conscience."

The learned Judge, in replying to this question, said: "I reply therefore to so much of the fifth query as relates to the Magistrate's power of ultimate decision, that, in my opinion, he might lawfully have decided the case on grounds of equity and good conscience."

The decision on this particular point was not however followed in *Karori Borough* v. *Buxton*, [1918] N.Z.L.R. 730, G.L.R. 472, in which it was held that an action for the recovery of a rate, which is a statutory debt, allows the Magistrate no choice but to decide the case according to law. At p. 734 of the report, Chapman, J., says:

> A question arises, however, in this case which has not heretofore arisen in any of the decided cases—namely whether when a statutory debt of this kind is proved the Magistrate has any power to give judgment otherwise than for the amount of such debt.

Then at p. 732:

> After the machinery of the Magistrates' Court had been considerably amplified . . . the question again came before a Court . . . in *Grey* v. *Chapman*, (1879) O.B. & F. 135, when *Pearson* v. *Clark* was followed . . . The rule thus laid down, however, has not been allowed to stand absolutely without qualification. In *Elliott* v. *Hamilton*, (1874) 2 N.Z. Jur. 95, Richmond, J., in 1874, allowed an appeal from a judgment professedly based on equity and good conscience . . . There was an appeal, and Richmond, J., held that the agreement (it was one connected with a racing sweepstake) was illegal, and that it was beyond the power of a Magistrate to give such a judgment as would have the effect of enforcing it, and he allowed the appeal. That was a case of conscience, and nothing else; but it was not allowed to be decided, even in a Court of conscience, in defiance of the statute law.

At p. 737, the learned Judge makes a quotation from *Elliott* v. *Hamilton*, part of which is as follows:—

> In my opinion the Magistrate mistook the law, either supposing that there was nothing unlawful in the sweepstakes or that the agreement sued or was separable from the illegality; or, if the law on these points was rightly apprehended by him, he was still wrong in law in not deciding the case upon a strictly legal basis.

After making the quotation, the judgment proceeds:

> The importance of this judgment lies in the recognition of a set of circumstances in which the Magistrate no longer has the choice, but must decide the case according to law. It seems to me that this reasoning applies in principle here.

Later in the same year the same learned Judge had occasion again to consider the same provision in *Peachey* v. *Duncan and Co.*, [1918] N.Z.L.R. 821, 823, 824, G.L.R. 734, 735, and he fixes the limits of the equity and good conscience jurisdiction in the following terms:

> These cases only show that where as a matter of State policy and of substantive law the Legislature has either made a particular contract illegal and void and consequently unenforceable, or has declared in explicit terms that a certain sum shall be paid and recovered, the Magistrate has no power to ignore these commands. Apart from these statutory exceptions the law stands exactly as it was laid down in *Pearson* v. *Clark*, and this Court has no authority to question the decision of the Magistrate.

In *Grey* v. *Chapman*, (1879) O.B. & F. (S.C.) 135, 137, the Court (Johnston and Williams, JJ., in a judgment delivered by Johnston, J.) said:

> From that we gather that where, in the opinion of the Magistrate, ethical considerations appear in any case, he is at liberty to set aside rules of law and of technical equity, and to do what he considers justice. Then, if in his judgment he states that he decides, not on legal points, but on grounds of equity and good conscience, there is no appeal from his decision. The judgment in *Pearson* v. *Clark* shows that the discretion . . . is not limited to setting aside rules of adjective

law, but also that it extends to interfering with substantive law; in other words, that the Magistrate can, if he chooses, interfere with the rights of parties on considerations of a so-called moral nature.

This interpretation of the statute appears to have been adopted by the Court of Appeal in *Purcell* v. *Jones*, (1875) 1 N.Z. Jur. (N.S.) C.A. 45.

At p. 138:

Different people may have vastly different ideas as to what would constitute an ethical consideration. A hard bargain, the folly of one of the parties, almost any imaginable circumstance, might appear to some persons a reason for interfering with legal or equitable rules.

At pp. 135, 136, it was said:

It is not competent for a Magistrate to call a case of equity and good conscience, and decide accordingly. What is competent for the Magistrate is to say: "I am not going to decide upon strict law, but upon the merits of the case, those merits not depending upon any legal document."

The facts in that case were that the plaintiff sued the defendant to recover £50 10s., being proportion of the rent paid to the defendant in advance for the Grange Farm, Waihola, returnable on March 19, 1878, at which date the plaintiff became the owner of the farm. On December 11, 1877, he gave notice of his intention to purchase the farm subject to a rebate on the half-year's rent. The final arrangements for the conveyance were not completed till March, 1878, when the whole purchase-money was paid. At the settlement the plaintiff demanded a rebate of the rent from March 19 to June 1, as the defendant would receive the interest of the capital sum for that time. The demand was refused, the price paid under protest, and an action brought to recover the sum claimed as rebate.

The Magistrate held that, according to equity and good conscience, the defendant was not entitled to both rent and interest on capital, and he gave judgment for the plaintiff.

There is, however, the case of *James* v. *Crockett*, [1920] G.L.R. 368, which Sir Robert Stout, C.J., held (*inter alia*) that the equity and good conscience clause gave the Magistrate no jurisdiction to dispense with the provisions of s. 13 of the Land Agents Act, 1912. Speaking of that clause, the learned Chief Justice said, at p. 369:

That it is enough to say that the words "to give such judgment between the parties as it finds to stand with equity and good conscience" do not permit a Magistrate to inaugurate or allow a procedure which is not sanctioned by the Act under which his Court is constituted—nor does it authorize him to repeal a statute.

After referring to several cases, the judgment proceeded:

In *Gray* v. *Chapman*, the Magistrate actually made a contract for the parties, as he gave to the plaintiff something which the latter was not entitled to under the contract. I doubt if that decision was right.

It would seem, however, that if there is a right of waiver of the authority to sell, then the Court could exercise its equity and good conscience jurisdiction.

The Land Agents Act, to which the learned Judge was referring, provided that a land agent was not entitled "to sue for or recover" any commission unless (*a*) he was the holder of a license, and (*b*) his engagement is in writing. It will be noted that so far as condition (*a*) is concerned, there can be no question of waiver by the person liable as there is a question of public policy concerned: see *Maxwell on the Interpretation of Statutes*, 7th Ed. 329. But in so far as (*b*) is concerned, there does not appear to be any reason why the conditions could not be waived as the rule seems to be made for the benefit and protection of an individual in his private capacity: see *Connell* v. *Phoenix Aerated Water Co., Ltd.*, (1915) 34 N.Z.L.R. 666, 676, 17 G.L.R. 558, 562, as to waiver. There cannot of course be any question of waiver of the license not only for the reason stated, but because one of the objects of the Land Agents Act being "the protection of the public and the prevention of improper persons acting as land agents"—see *Cope* v. *Rowlands*, (1836) 2 M. & W. 149, 150 E.R. 707; *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, [1905] 2 Ch. 624, 630—the contract being absolutely void. The same position obtains in respect of recovery of loans made by an unregistered money-lender, the transaction being absolutely void: *Bonnard* v. *Dott*, [1906] 1 Ch. 740, 745. Thus, an action brought by an unregistered land agent or money-lender would be an attempt to recover under an illegal and void contract; and so would be outside the scope of the equity and good conscience jurisdiction.

In regard to *Peachey* v. *Duncan* (*supra*), the learned Chief Justice said: "It has been suggested that a contract which does not fulfil the requirements of the Statute of Frauds might be given effect to under that clause"; but he added, "there was no necessity for a decision to that effect."

It will now be convenient to collect a few expressions from the cases regarding the effect of s. 100:

"Judgment—such as plain men, ignorant of the rules of law . . . shall think just, different from that of the common law. Moral merits of litigants, purely ethical considerations, deciding on grounds of conscience, not allowed to be decided, even in a case of conscience, in defiance of the statute law."

"Apart from statutory exceptions the law stands exactly as it was laid down in *Pearson* v. *Clark*." "Ethical considerations apart, he is at liberty to set aside rules of law of technical equity," and to do justice.

"The Magistrate can interfere with the rights of the parties on consideration of a so-called moral nature."

"Deciding not on strict law but upon the merits . . . those merits not depending upon any legal document."

The principles thus gleaned make it clear that in the absence of any statutory provision that a certain contract is illegal and void, and consequently unenforceable or that a certain sum shall be recovered (as in the case of rates) the Magistrate is entitled in cases where the sum claimed does not exceed £50, and the moral merits of the litigants are unequal to disregard legal principles and give a decision based on purely ethical considerations. This view may be in conflict with *James* v. *Crockett*, [1920] G.L.R. 368; but the great weight of judicial opinion, in my opinion, clearly supports it.

By way of conclusion reference may be made to the latest case dealing with the equity and good conscience jurisdiction: *Taranaki Hospital Board* v. *Brown*, [1941] N.Z.L.R. 586, G.L.R. 330. In that case, which shows that the jurisdiction is of limited character, it was held that there is no jurisdiction in the Magistrates' Court to hear an action that necessarily involves rectification of an agreement; and that therefore a Magistrate cannot give himself jurisdiction, in the case of claims not exceeding £50, by hearing the action, and deciding on the grounds of equity and good conscience.

We must conclude, therefore, that the jurisdiction is of a limited character, and is not of universal application, in respect of claims not exceeding £50.

CANCELLATION OF ADOPTION ORDER,.

Guiding Considerations for the Court.

Section 22 of the Infants Act, 1908, is as follows :—

(1) Any Judge for the time being exercising jurisdiction within the district where any order of adoption was made, whether by himself, or by any other Judge, may in his discretion, vary, reverse, or discharge such order, subject to such terms and conditions as he thinks fit.

(2) Where an order of adoption is discharged, then, subject to the conditions (if any) named in the discharging order, the child and its natural parents shall be deemed for all purposes to be restored to the same position *inter se* as existed immediately before the order of adoption was made :

Provided that such restoration shall not affect anything lawfully done whilst the order of adoption was in force.

The Act has not specified any grounds upon which an order may be cancelled, but has left the matter solely to the discretion of the Magistrate. That discretion must be a judicial discretion. In *Gardner* v. *Jay*, (1885) 29 Ch.D. 50, 58, Bowen, L.J., says that when a tribunal is invested by Act of Parliament with a discretion, " that discretion, like other judicial discretions, must be exercised according to common sense and according to justice," and, if there is no indication in the Act of the ground upon which a discretion is to be exercised, " it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run."

" Discretion," as Lord Mansfield in *R.* v. *Wilkes*, (1770) 4 Burr. 2527, 2539, 98 E.R. 327, 334, " when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour ; it must not be arbitrary, vague and fanciful, but legal and regular."

It will be noticed that the section uses the term " may," a word which, in rules of Court, has been held to mean may or may not : to give a discretion which is called a judicial discretion, but which still is a discretion : *Attorney-General* v. *Emerson*, (1889) 24 Q.B.D. 58 : " but it [*i.e.*, the term ' may '] gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word ' may ' it becomes his duty to exercise it "—*i.e.*, whether the discretion is judicial or absolute, fettered or unfettered—as Cotton, L.J., said in *In re Baker, Nichols* v. *Baker*, (1890) 44 Ch.D. 262, 270. See also *Craies on Statute Law*, 2nd Ed. 561 ; and *Stroud's Judicial Dictionary*, 2nd Ed. 1173 *et seq.* ("it seems a plain conclusion that ' may ' . . . ' it shall be lawful ' . . . give . . . an enabling discretionary power ").

The application we are considering involves an attack on the fitness of the adoptive parents to have the custody of the child ; and it will therefore be appropriate to consider the matter as though it were one concerning guardianship under the Guardianship of Infants Act, 1925.

Under that Act the Court should take into account, if at all possible, the wishes of either parent. Section 2 of the Act quoted has been judicially interpreted in England and Scotland ; and the net result of the authorities is that though the child's welfare is the paramount consideration, it is not the sole consideration ; amongst the other conditions, the parental right of an unimpeachable parent stands first : *Re Thain, Thain* v. *Taylor*, [1926] Ch. 676, and in Scotland it has been held that the effect of the section is not to abolish the rights and preferences in the parents, but to provide that they shall not be enforced if the result would be adverse to the child's welfare : *Hume* v. *Hume*, [1926] S.C. (Ct. of Sess.) 1008 ; *M.* v. *M.*, [1926] S.C. (Ct. of Sess.) 778.

In *Thain's* case it was held on appeal that the question of the custody of the infant was entirely a matter within the discretion of the Judge to be exercised judicially ; and that s. 1 of the Guardianship of Infants Act, 1925 (which is identical with s. 2 of our Act) introduced no new principle of law, but merely enacted the rule which had hitherto been acted upon in the Chancery Division. In that case Sargant, L.J., said at p. 691 : " It is not necessary for me to say much more than that s. 1 of the Guardianship of Infants Act, 1925, does not affect what was and is the law, that the first and paramount consideration is the welfare of the child."

In *M.* v. *M.* a wife left her husband clandestinely and without adequate reason, taking with her the only child of the marriage. In a petition for custody brought by the father it was established that charges made against him by the mother, who was somewhat neurotic and had conceived an inveterate ill-will towards him, were not substantiated, and that the father, in spite of his wife's conduct, bore no ill-will towards her. The Court, holding that it was in the best interests of the child, awarded custody to the father.

In *Hume* v. *Hume*, Lord Sands said at p. 1015 :

> In one view, indeed, the first part of the section is only declaratory of the common law in such a case. Where it is alleged that the circumstances of the parent are such as regards morals and surroundings that it would manifestly be injurious to the child to enforce the parent's right under the common law, the Court may entertain the question of whether this right should be enforced ; and, if the question arises in this way, the welfare of the child is the first and paramount consideration.

" The High Court of Justice, on being satisfied that it is for the welfare of the infant, may remove the mother or any testamentary guardian from the office of guardian " : *17 Halsbury's Laws of England*, 2nd Ed. 695, para. 1436. Again : " The mother, after being appointed guardian, was removable for misconduct, or if she was an unfit person ; and it is presumed that any reason sufficient for the interference of the Court with the exercise of his powers by a testamentary guardian will be sufficient in the case of the mother " : *Simpson on the Law of Infants*, 4th Ed., p. 97.

As to the removal of such guardians : " the Court will not interfere (with testamentary guardians) unless it be really necessary for the infant's advantage " (p. 263). " The ground of interference is, of course, the benefit of the infant (*ibid*).

In *In re Besant*, (1879) 11 Ch.D. 512, Jessel, M.R., said :

> It is quite plain that if, after separation, a mother having the control of a child took to evil courses, which rendered her an unfit person to have the control and education of the child, it would not be for the benefit of the child to remain with the mother. I had to deal with that state of things in *Carnegie's Case* (unreported) ; that was the case of a little boy . . . in which the lady . . . took to immoderate drinking to such an extent as to incapacitate her for considerable periods of the day from exercising any control

over herself or her actions. There I thought it was right . . . to take away the custody of the child from the mother.

These authorities are useful as showing in what circumstances guardianship may be withdrawn from a mother; but in all these cases the Court is influenced by considerations relating to the welfare of the infant.

Now, under the Infants Act, the Judge, before making an order of adoption, must be satisfied "that the welfare and interests of the child will be promoted by the adoption": s. 18 (1) (*c*). And it seems to follow that the main consideration which must exercise the mind of the Judge in dealing with an application for cancellation of an adoption order must be this: "Will the cancellation of the order promote the interests and welfare of the child?"

Thus the test under Part III of the Infants Act, as formulated, is identical with the principle upon which the Courts have invariably acted in considering questions relating to infants.

A Magistrate has power not only to cancel an order of adoption, but may impose "terms and conditions." Any "terms or conditions" that may be imposed must be such as are reasonable and appropriate to the circumstances of each case, but always subordinate to the consideration that the welfare of the child must not be prejudiced.

Thus it would be proper, in all cases before the cancellation of an order, for the Court to be satisfied that the child had some place to go to when the rights of the adopting parents had ceased; that it should be provided with suitable clothing; or that in an appropriate case a sum should be provided for its maintenance and education. But of course every application must be decided in the light of its own circumstances, and in every case regard must be had to the welfare of the child. If the condition were not observed, then the order would still stand with the consequent responsibility of the adoptive parent for maintenance: s. 22 (2) of the Infants Act, 1908. A child can always, in appropriate circumstances, be removed from an unsuitable home, by virtue of the provisions of the Child Welfare Act, 1925.

TRANSFER OF LAND AND MORTGAGES.

In Partial Satisfaction of a Pecuniary Legacy.

By E. C. Adams, LL.M.

Explanatory Note.

A legal personal representative, with the consent of a pecuniary legatee, can transfer deceased's assets *in specie* to the legatee, in full or partial satisfaction of the legacy: *In re Beverley, Watson* v. *Watson*, [1901] 1 Ch. 681, 686. Where such appropriation is not authorized by the testamentary instrument, there is an intendment of *sale* about the transaction, or "the element of contract," as Mr. Justice Lawrence put it, in *Jopling* v. *Inland Revenue Commissioners*, [1940] 3 All E.R. 279, 281. The legal personal representative is assumed to have paid the pecuniary legatee in money, and the legatee to have paid the money back to him, for the assets appropriated. Therefore, in such circumstances both in New Zealand and in England, *ad valorem* conveyance duty is payable, if the assets transferred are of the nature attracting *ad valorem* conveyance duty, and it is payable on at least the amount of the pecuniary legacy or on so much thereof as is satisfied by the appropriation: *Dawson* v. *Inland Revenue Commissioners*, [1905] 2 I.R. 69; *Jopling* v. *Inland Revenue Commissioners* (*supra*).

In the following precedent pecunary legacies totalling £4,000 are satisfied to the extent of £1,800, £300 in respect of the land transferred, which attracts £3 6s. duty, and £1,500 in respect of the mortgages appropriated, on which duty of £4 2s. 6d. is payable. *Ex abundanti cautela*, the consent of the other beneficiaries has been obtained, but that can make no difference to the amount of stamp duty payable, for the real bargain in such a case is between the legal personal representative and the pecuniary legatee.

But *ad valorem* conveyance duty is not payable if by the terms of the testamentary instrument the executor can make the appropriation without the legatee's consent, for then the legatee acquires title to the asset transferred to him, pursuant to the will alone, and not by virtue of any contract with the executor: such a transfer is exempt under s. 81 (*d*) of the Stamp Duties Act, 1923, and liable only to deed not otherwise charged duty under s. 168, whether or not the legatee in actual fact consents to the transfer. It will be observed that in *Dawson* v. *Inland Revenue Commissioners* (*supra*), and in *Jopling* v. *Inland Revenue Commissioners* (*supra*) (in both of which *ad valorem* duty was held payable), the executor could not have made the appropriation without the legatee's consent.

Precedent.

WHEREAS A.B. of Auckland clergyman and C.D. of Auckland builder (hereinafter called "the transferors") being registered as the proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in all that piece of land situated in the Provincial District of containing be the same a little more or less being [*set out here the official description*] AND WHEREAS the transferors are registered as proprietors of an estate as mortgagees in *firstly* Memorandum of Mortgage No. : Registry over all that piece of land containing [*set out here official description of land*] and *secondly* in Memorandum of Mortgage No. over all that piece of land [*set out here official description of land*] AND WHEREAS the transferors are registered proprietors of the land firstly above described and of the said Memoranda of Mortgage Registered Numbers and as executors under the will of E.F. of Auckland widow deceased probate whereof was granted to the executors therein named out of the Supreme Court of New Zealand (Registry) on the day of 194 AND WHEREAS G.H. of Palmerston North widow and I.J. late of Gisborne married woman were each entitled under the will of the said deceased to a legacy of £2,000 AND WHEREAS K.L. of Palmerston North farmer (hereinafter called "the transferee") is executor under the will of the said G.H. deceased under probate of her will which was granted to him out of the Supreme Court of New Zealand District on the day of 194 AND WHEREAS the transferee is administrator of the estate of I.J. under letters of administration granted out of the Supreme Court of New Zealand

District on the day of 194 AND WHEREAS the transferors at the request of the beneficiaries under the will of the said E.F. deceased including the transferee as legal representative of the said G.H. and I.J. agreed to distribute a portion of the estate *in specie* and as part of the said distribution the transferors agreed to transfer the said land firstly hereinbefore described and the said mortgages to the transferee on account of the said legacies to which the said G.H. and I.J. were entitled under the will of the said E.F. deceased it being agreed that the transferee would accept the said land firstly hereinbefore described in lieu of payment of three hundred pounds in part satisfaction of the said legacies and that he would accept the said mortgages in lieu of payment of one thousand five hundred pounds in part satisfaction of the said legacies NOW THIS MEMORANDUM WITNESSETH that in pursuance of the premises and in consideration of the transferee giving the transferors credit for the total sum of one thousand eight hundred pounds (£1,800) on account of the said legacies which the transferee hereby acknowledges they the transferors DO HEREBY TRANSFER to the transferee all their respective estates and interest in the land hereinbefore firstly described and in the said Memoranda of Mortgage registered Number and AND the transferee HEREBY ACCEPTS the within transfer.

IN WITNESS whereof the transferors and the transferee have hereunto subscribed their names this day of one thousand nine hundred and forty

SIGNED by the said A.B. in the presence of— } A. B.
J. S.
Solicitor,
Auckland.

SIGNED by the said C.D. in the presence of— } C. D.
J. S.
Solicitor,
Auckland.

SIGNED by the said K.L. in the presence of— } K. L.
T. U.
Solicitor,
Palmerston North.

LONDON LETTER.

Somewhere in England,
November 16, 1942.

My dear EnZ-ers,

The Press has reminded us that it is fifty years since Tennyson died. "Sunset and evening star" heralded his passing, and, while Lord Bowen's famous witticism fixed the lines in the memory, it did not detract from their pathos. It has also been recalled that it is a hundred years since Tennyson's own poems first appeared; then or about that time in "Alymer's Field" he wrote the lines which aptly described our system of case law :—

"*The lawless science of our law,*
That codeless myriad of precedent."

And that remains true, although in the hundred years the methods of law reporting have greatly changed. Another twenty years were to pass before the Council of Law Reporting was established. This reform, however, did not deprive independent reports of their value and that value has been recognized in the recent report on Law Reporting. And whatever doubt and difficulty the poet might find in case law, he well knew the value of precedents, and named them for all time as the great mark of English politics :—

"*Where Freedom slowly broadens down*
From precedent to precedent."

The New Judge.—The appointment of Mr. Gonne St. Clair Pilcher, K.C., to be a Judge of the Probate, Divorce, and Admiralty Division in the room of the late Mr. Justice Langton came as no surprise to those members of the profession best qualified to form an opinion as to who was likely to be selected, and will be received with universal approval. Born in 1890, and educated at Wellington and at Trinity College, Cambridge, he was called by the Inner Temple in 1915 whilst serving in the Army during the last war. He attained a very substantial practice at the Admiralty Bar and was Junior Counsel to the Admiralty in that Court in the period immediately preceding his taking silk in 1936; and as a leader he increased the enviable reputation he had acquired as a junior. Since the outbreak of the present war, Mr. Pilcher has been working at the War Office. The late Mr. Justice Hill, who had himself been an Admiralty lawyer before he became a Judge, once described himself, in reference to the diverse jurisdictions which the Judges of his Division are called on to exercise, as sitting with one foot in the sea and the other in a sewer. Mr. Justice Pilcher will now have to undertake duties some of which he may find as distasteful as many of his predecessors have done; but justice has to be administered and many judicial duties are both distasteful and distressing. The new Judge commences his duties with the cordial good wishes, and the complete confidence, of the legal profession.

A Leading Case Recalled.—The retirement of Judge Sir Artemus Jones, K.C., from the County Court Bench, which was announced last week and which took effect as from the end of October, recalls the famous libel action in which he was the plaintiff and which was largely, if not entirely, responsible for the note which writers of fiction now commonly insert at the commencement of a novel, that no reference is intended to any actual person. The case is always referred to as *Jones* v. *Hulton*, though in the House of Lords it became, in the inconvenient way they have there, *Hulton* v. *Jones*, and it is reported in [1910] A.C. 20. Mr. Artemus Jones, as he then was, had been at one time on the staff of the *Sunday Chronicle* and had contributed signed articles to the publications of Messrs. E. Hulton and Co. Some years later there appeared in the *Sunday Chronicle* an article which was clearly defamatory of a person described as "Artemus Jones" and Mr. Jones brought an action for libel. The defendants, the editor of the paper and the writer of the article, all said that they had no idea of the existence of the plaintiff, and this was accepted by his counsel, the then Mr. Gordon Hewart. But Mr. Artemus Jones nevertheless recovered damages and the jury's verdict was upheld in the Court of Appeal and in the House of Lords, the principle being finally established in that case that, in an action for libel, it is no defence to show that the defendant did not intend to defame the plaintiff if reasonable people would think the language to be defamatory of the plaintiff. Sir Artemus Jones has been a Judge of County Courts since 1929 and his retirement will be widely regretted. He is succeeded as Judge of the North Wales Circuit by Mr.

Ernest Evans, K.C., M.P., who was called by Lincoln's Inn in 1910 and who has been the member for the University of Wales in Parliament since 1924.

Education for the Forces.—It has for some time been fairly widely known that the War Office was administering through the Directorate of Army Education a Scheme of Correspondence Courses for the Forces. These courses are classified as Vocational Correspondence Courses, which aim at training the student for a civil occupation, or as Postal Study Courses, which provide instruction in a variety of general educational subjects. The Scheme is administered by a branch of the Directorate of Army Education on behalf of the War Office, Admiralty, and Air Ministry and its facilities are available for all men and women, officers and other ranks, serving in the Army, Navy, and Air Force in Great Britain, Northern Ireland, Iceland, Gibraltar, and West Africa. While prisoners of war cannot be enrolled as students, copies of the Syllabuses (Study Notes) of the courses are supplied to the Educational Book Department of the British Red Cross and St. John's Prisoners of War Organization, through whom supplies are sent on request, to the camps, together with a number of text-books. Members of Dominion Forces serving in the areas covered by the Scheme can be enrolled on special terms for any of the vocational, but not for the postal study, courses. Text-books are loaned to students in the case of Army and Navy students by the Services Central Book Depot, and in the case of R.A.F. students by the R.A.F. Central Library. The vocational courses include accountancy, banking, estate management, insurance, and law, and the general postal courses cover a very wide variety of subjects indeed, including not only languages, economics, literature, and philosophy, but such things as biochemistry for brewing students, printers' costs, and zoology. The fees are very low, only 10s. for all or any of the courses in any vocational group.

The Courses in Law.—The legal courses are stated to be designed primarily for students working for the Bar or solicitors' examinations or a law degree and for persons engaged in legal work in any capacity; they are available in contract, negotiable instruments, bankruptcy, tort, the English legal system, sale of goods, company law, criminal law and conveyancing. The Law Society, the Council of Legal Education, and the Society of Public Teachers of Law are all co-operating with the Directorate of Army Education in this matter; and, as stated above, the scheme operates for the benefit of members of any of the Forces, including the women's services. At the beginning of October, 2,391 enrolments of students for courses in the legal group had been made, of whom 1,711 belonged to the Army, 584 to the Royal Air Force, and 96 to the Royal Navy. It is interesting to observe how the various legal subjects in which courses are available appeal to students in the Forces. Contract heads the list with 543 enrolments, criminal law is a good second with 458, and company law a close third with 447. The English legal system takes fourth place with 407 enrolments, and then comes a heavy drop to tort 252 and a further heavy fall to bankruptcy with 104. It is, perhaps, not surprising that "negotiable instruments" takes lowest place with only thirty enrolments; but we are surprised to see that conveyancing has attracted only 58 students out of 2,391, and that of these none are serving in the R.A.F. and only one in the Navy. For all the vocational courses, more than twenty-five thousand students in the Forces had enrolled a month ago—a most encouraging sign.

Pedestrian-crossings.—The judgment of Mr. Justice Croom-Johnson in *Sparks* v. *Ash*, [1942] 2 All E.R. 214, is restoration of the rights of pedestrians when they are run down on pedestrian-crossings. *Bailey* v. *Geddes*, [1937] 3 All E.R. 671, put those rights very high, but not higher, we think, than a strict reading of r. 3 in the Pedestrian-crossing Places Regulations of 1935 requires. Under this rule a driver approaching a crossing must, unless he can see that there is no foot-passenger on it, proceed so slowly that he is able to stop before reaching it. The decision of the Court of Appeal in *Chisholm* v. *L.P.T.B.*, [1938] 4 All E.R. 850, appeared to weaken the force of this rule—especially a passage in the judgment of Lord Justice Scott (at p. 859), which appears to mean that a pedestrian only has his precedence if the vehicle approaching is far enough away "conveniently" to check its speed. If that were taken as a universal rule little would be left of *Bailey* v. *Geddes*. Mr. Justice Croom-Johnson did not refer to *Chisholm's* case in his judgment, but followed *Bailey's* case, and held that the duty there asserted is not diminished or abolished when the blackout regulations have reduced the driver's field of vision. The common-law duty to take care is, of course, always there. It is not changed by the blackout, though the efforts which are required to discharge it are changed. But blackout or no blackout, the Pedestrian-crossing Places Regulations stand, and the learned Judge refused to hold that the results of war-time lighting diminish them. With due respect let us say that we think he was quite right; and hope he will be upheld if *Chisholm's* case should tempt the defendant to appeal.

The Temple Libraries.—The work of clearing debris from the Temple goes steadily forward, and it is now possible to get a fairly complete view of what will need reconstruction: a view also of possibilities pointing to the final removal of much that was unsightly and out of date—due allowance, of course, being made for old associations which (to be quite candid) were the only justification for allowing ugly and inconvenient and completely out-of-date buildings to stand so long. The Church, the Cloisters, the Halls and Libraries were the outstanding features of the Temple buildings. Their restoration must come before everything, though it may well be that the space occupied by the Cloisters could in future be turned to better use without diminishing architectural amenities. What does appear to many members of the two honourable societies, however, is that, with the complete destruction of the splendid library of the Inner and a good deal of inconvenient damage done to the Middle, an excellent opportunity is offered for the amalgamation of the two libraries into one common to both the Inns and ranking as the world's finest law library. Surely the necessity for two separate libraries can no longer be justified? It is true that each of the Inns has its own traditions in regard to its library, but the destruction of the contents of the Inner and the practical difficulty (if not impossibility) of replacing many of its literary treasures would be a substantial reason for joining forces and creating a library that could be assessible to members and students of both the Inns.

Yours as ever,
APTERYX.

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. Companies.—*Annual License Fee—Company selling its undertaking to another Company—Balance of Purchase-money in Debentures—Whether Company liable for Annual License Fee.*

QUESTION: A company, which has hitherto paid annual license duty under the Stamp Act, has sold its undertaking to another company and in part payment of the purchase-money has taken debentures from the purchaser company. The debentures are to secure payment of the unpaid purchase-money over a period of twenty years. One clause in the vendor company's memorandum is: "To sell improve develop lease mortgage dispose of turn to account or otherwise deal with the undertaking or with all or any part of the property and rights of the company for such consideration as the company may think fit and in particular for shares debentures or securities of any other company having objects altogether or in part similar to those of the company." The debentures give the vendor power to re-enter and to take possession of the undertaking on default being made by the purchaser. Is the vendor company still liable for annual license?

ANSWER: Yes. Although in a business sense the vendor company may not be carrying on business, it is still carrying on business for the purposes of the Stamp Duties Act, 1923. Moreover, its business activities, although quiescent, may at any time be quickened into activity again: see *Inland Revenue Commissioners* v. *Korean Syndicate, Ltd.*, [1921] 3 K.B. 258, 269 *et seq.*, per Lord Sterndale, M.R., and *Inland Revenue Commissioners* v. *South Bahar Railway Co., Ltd.*, [1924] 1 K.B. 411, 418; see also *Oceanic and Oriental Navigation Co.* v. *The King*, [1931] N.Z.L.R. 304, [1930] G.L.R. 670.

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2. Social Security.—*Life-tenant—Rent-free Tenancy—Whether Value taken into Account.*

QUESTION: A beneficiary has a life interest in an estate on which she is residing rent free. Would any value on account of the free rent be taken into account in assessing the Social Security benefit.

ANSWER: It is not considered that "free" rent is received by a beneficiary from an estate in which she has a life interest, and in such a case other income up to the full amount allowed may be enjoyed without affecting the right to full benefit.

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3. Divorce.—*Evidence—Petition on Ground of non-compliance with decree for Restitution—Corroboration of Petitioner's Evidence—Whether required.*

QUESTION: In a divorce suit—the ground of the petition being non-compliance with a decree for restitution of conjugal rights—is it necessary at the hearing to have corroborative evidence as to non-compliance with the decree?

ANSWER: In such cases evidence of the petitioner alone has been accepted, although some Judges require corroboration. The safest course is to have corroborative evidence available.

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4. Stamp Duty.—*Evidence—Unstamped Letter Promising to Pay.*

QUESTION: A. orally agrees with B. to supply board and lodging to C., B.'s child, at a stipulated amount per week. B. gets in arrears with his payments under the agreement, and writes a letter to A., promising to remit arrears to A. and makes excuses for his past neglect. Can this letter be received in evidence without a stamp?

ANSWER: Yes; because the letter was not written with the intention of containing in itself the terms of the prior oral agreement, it is not liable to stamp duty: *Beeching* v. *Westbrook*, (1841) 8 M. & W. 411, 151 E.R. 1099; *cf. Knight* v. *Barber*, (1846) 2 Car. & Kir. 333, 153 E.R. 1101, where the memorandum was signed by the defendant and accepted by the plaintiff as containing the terms of the prior contract.

5. Originating Summons.—*Change of Solicitor—One Party desiring Change—Practice.*

QUESTION: The plaintiff in an originating summons desires to change his solicitor. No particular mention is made in the rules as to the procedure in this instance. Would the procedure for such a change be similar to that in a civil action?

ANSWER: Yes. Although the rules under the Code of Civil Procedure dealing with originating summonses make no particular reference to the procedure for change of solicitor to one of the parties, R. 549 provides: In all other respects such a summons shall be treated as and shall have the effect of an action commenced in the ordinary way. Application by notice of motion could be made to the Court for an order changing the solicitor on the record.

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6. Nullity of Marriage.—*Nullity Suit—Setting Down during Session.*

QUESTION: A petition for nullity of marriage has been filed and the respondent served. However, the time allowed the respondent for filing an answer will not expire until the first day of the next Supreme Court sitting. Is it possible to obtain leave to set down a nullity suit for hearing, where the time, as in this case, does not expire before the first day of the sitting?

ANSWER: In a suit for *divorce*, leave could not be given where the time for filing an answer has not expired before the first day of the sitting: see R. 51 of the Divorce Rules. However, in this instance, the petition is one for nullity of marriage, and the principles applied in the applications for leave to set down divorce cases possibly do not apply, or, at least, not to the same extent. In a restitution suit leave was given where the time had not expired, and the respondent consented, although no appearance had been entered or answer filed: *Nicholson* v. *Nicholson*, [1926] N.Z.L.R. 111. It would seem, though there does not appear to be any authority regarding nullity suits, that if the respondent consents to the setting-down, an application for leave to set down could be made.

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7. Death Duty.—*Life Policy—Assignment—Valuable Consideration—Value at Date of Assignment, whether Value at Insured's Death part of his Estate.*

Gift Duty.—*Life Policy—Gift Duty paid on Surrender Value at Date of Gift—Whether Policy at Insured's Death part of his Estate.*

QUESTION: Referring to Practical Points, Vol. 18, p. 262, under Gift Duty (No. 4) and the answer, kindly advise on the following:—

1. If A. assigns absolutely his life policy to B. for valuable consideration the value being taken as its surrender value at date of assignment, and B. thereafter pays all premiums, is the value, at death of A., part of A.'s estate for estate duty?

2. Further, if A. makes a gift of his life policy to B. and gift duty is paid on the surrender value at date of gift, and B. thereafter pays all premiums out of his own funds for, say, ten years, is that policy still part of A.'s estate for duty?

There is perhaps a distinction between your reply at p. 262 and the above cases and your answer will be appreciated. Surely the consideration under No. 1 above extinguishes A.'s interest in the Policy and in No. 2 the payment of the premiums would have that tendency.

ANSWER: The answer to both questions is in the negative: *Attorney-General* v. *Hawkins*, [1901] 1 K.B. 285, 296; *Lord Advocate* v. *Inzievar Estates*, [1938] 2 All E.R. 424, 429, [1938] A.C. 402, 412.

As regards question 2, the position for death duty would be entirely different if A. had *settled* the policy: *Attorney-General* v. *Robinson*, [1901] 2 I.R. 67; *Attorney-General* v. *Hawkins* (*supra*); and *Adams's Law of Death and Gift Duties in New Zealand*, 53, 54.

All practitioners should carefully read *Attorney-General* v. *Robinson* (*supra*) in order to understand the respective applicability of ss. 5 (1) (*f*) and 5 (1) (*g*) of the Death Duties Act, 1921, to life-insurance policies.

8. Public Works.—*Claim—Extension of Time—Mode of Application.*

QUESTION: It is intended to bring a claim under the Public Works Act, 1928, for certain damage to property caused by a public work, but for good reason the claim cannot be made within the time allowed by s. 45 of the Public Works Act, 1928—*viz.*, a period of twelve months after the execution of the work concerned. What is the procedure in making an application for extension of time for bringing the claim?

ANSWER: Section 63 of the Statutes Amendment Act, 1939, makes provision for application for extension of time in such a case. The procedure is by way of notice of motion with supporting affidavit, the notice of motion and affidavit being served on the Government Department or local body concerned.

9. Vendor and Purchaser.—*Sale of House with "all blinds and electric fittings—Whether Electric-light bulbs included.*

QUESTION: A house property is sold and the sale contract states that the sale includes all blinds and electric fittings. The vendor removes the electric-light bulbs when vacating. Do the electric-light bulbs come within the term "electric fittings"?

ANSWER: Assistance in answering this question is obtained from *British Economic Lamp Co., Ltd.* v. *Empire Mile End, Ltd.*, (1913) 29 T.L.R. 386, concerning electric-light bulbs as trade fixtures, in the judgment of Lush, J., where he says: "A filament lamp, though fitted or fixed in its socket, is only temporarily fixed with a view to the efficient use of the chattel itself, and that being so it does not cease to be a chattel or pass to the landlord when the term comes to an end merely because it happens to be in the socket at the time. . . . The lamps were not, I think, parts of the installation. The installation is complete, though no lamp may be supplied or be in the socket. The lamp is placed there to be operated upon by the wire installation. It is really in the nature of fuel for the installation. The installation produces no heat or light without the fuel. The filaments in the lamps are consumed by the electric current in the installation as the fuel is consumed by the furnace. But, as the fuel is not part of the furnace, so, in my opinion, the lamp is no part of the installation. That which is attached for the purpose of being consumed cannot, as it seems to me, be said to be part of that which is intended to consume it." (The other member of the Court, *Lawrence*, J., differed not only as to the effect of the attachment in the particular circumstances of the case, but also in his reasons for his decision.) Citing this case as authority, the learned author of the title, "Landlord and Tenant" in *20 Halsbury's Laws of England*, 2nd Ed. 102, para. 110, says: "Where an article is a fixture, portions of it which are removable, but which are an essential part of it, are also fixtures. But electric lamps have been held *not to form part of an electric-light installation and so not to be fixtures.*"

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, on Friday, December 4, 1942.

The following Societies were represented: Auckland, Messrs. A. H. Johnstone, K.C., J. Stanton, J. B. Johnston, and W. H. Cocker; Canterbury, Messrs. A. W. Brown and R. L. Ronaldson; Gisborne, Mr. L. C. Parker; Hamilton, Mr. H. M. Hammond; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. A. E. L. Scantlebury; Nelson, Mr. G. Samuel; Otago, Mr. J. B. Thomson (proxy); Southland, Mr. G. C. Cruickshank; Taranaki, Mr. J. H. Sheat; Wanganui, Mr. A. B. Wilson; and Wellington, Messrs. H. F. O'Leary, K.C., A. B. Buxton, and G. G. G. Watson.

The President, Mr. H. F. O'Leary, K.C., occupied the chair, and welcomed those members who were attending the Council meeting for the first time.

Mr. F. Wilding, K.C.: The President reported that the congratulations of the society had been expressed to Mr. F. Wilding, K.C., on the attainment of his ninetieth birthday.

Legal Education: Attention was drawn to the fact that s. 45 (*e*) of the Law Practitioners Amendment Act, 1935, had now been repealed: see s. 25 of the Statutes Amendment Act, 1942. It was also noted that s. 26 of the Statutes Amendment Act, 1942, now amended the existing provisions concerning the admission to the profession of graduates from overseas.

Benevolent Fund.—Attention was drawn to s. 27 of the Statutes Amendment Act which provided for the benevolent fund to be used in assisting an ex-member of the society or the wife or children of such member.

Post-war Aid to Practitioners and Law Clerks Returning to New Zealand from War Service.—The following letter was received from the Auckland Society:—

"I acknowledge receipt of your circular letter in this connection. At the last meeting of my Council a sub-committee was set up to deal with the matter, and I shall communicate its views at a later date."

The Chairman of the Wellington Committee wrote as follows:—

"In terms of your letter of the 25th September last the Wellington Society has already set up a sub-committee hereon which has held its first meeting.

"The attention of the Committee was particularly directed to the consideration of making the University syllabus as adaptable as possible in favour of returning law clerks.

"That every consideration should be given to the advisableness of marking examination papers of returned law students as leniently as is possible was also agreed to.

"It was also decided that Wellington practitioners and law clerks should be interviewed as soon as possible after their return to New Zealand from war service so that their wishes may be considered and the services of the Society made available to them. It was realized that a constant check on the returning personnel will be necessary to give this service maximum efficiency, and in this connection the Returned Servicemen's Association are being asked to co-operate so that any information received by that body might be made available to this Committee.

"It is realized that in so far as obtaining positions for returning law clerks is concerned the maximum success can only be reached with the co-operation of all the District Law Societies."

It was reported that recommendations had already been made to the Senate that where, by reason of overseas service, a student on his return might suffer hardship in respect of his examinations, the question of granting concessions should be considered, and particularly in respect to the Arts subjects.

The Standing Committee were appointed a committee of the New Zealand Society to act as a liaison committee who would endeavour to make any necessary representations recommended by the District Societies.

Solicitors' Audit Regulations, 1938, Amendments.—Mr. A. E. Currie, Crown Solicitor, asked for the views of the Law Society and of the Accountants Society as to what was considered the most suitable date for the proposed amendments to the audit regulations to come into force, and also whether it was desired that a reprint in consolidated form of the principal regulations, No. 1 Amendment and the present amendments, should be prepared.

It was resolved that the amendments should come into force as from April 1, 1943, and that the regulations should be printed in consolidated form and if possible bound with a semi-stiff cover.

This decision was also reached by the New Zealand Society of Accountants.

Resolutions of Thanks.—At the conclusion of the business of the meeting, the President wished all present the compliments of the season and thanked the members for their attendance and for the interest taken in the business of the Society.

He also thanked the Secretary for the way in which she had carried out her duties throughout the year and the support she had given him at all times. The members of the staff were also thanked for their services.

Mr. Johnstone proposed a hearty vote of thanks to the President for the services rendered the Society by him at all times. The vote was carried with acclamation.

Mr. Lusk stated that a great amount of work had been done for the Society by Mr. Watson, and also by the Wellington members on the Standing Committee, to whom he proposed a vote of thanks, which was also carried with acclamation.

Other Business.—A number of other matters were the subject of discussion, but, being still under consideration or awaiting action, they are not reported here.

RECENT ENGLISH CASES.

Noter-up Service
FOR
Halsbury's "Laws of England"
AND
The English and Empire Digest.

CARRIERS.

Carriage of Persons—Alighting from Vehicle—Signal for Bus to Proceed already Given by Passenger—Conductress not on Platform.

It is no part of the duty of a conductor of a trolly-bus to go down to the platform to see that people who are trying to make their way off the bus can do so safely.

MOTTRAM *v.* SOUTH LANCASHIRE TRANSPORT CO., **[1942] 2 All E.R. 452.**

As to injuries to passengers when boarding or alighting from vehicles: see HALSBURY, vol. 4, pp. 64, 65, para. 98. For cases: see DIGEST, vol. 8, pp. 80–85, Nos. 554–585.

CRIMINAL LAW.

Indictments—Two Indictments tried together—Nullity.

It is the duty not only of the Clerk of the Court to see that the proceedings are regular, but also of the presiding Judge and all counsel engaged to see the actual indictments under which they are proceeding.

R. *v.* OLIVO, **[1942] 2 All E.R. 494.**

As to indictments: see HALSBURY, vol. 9, pp. 125–139, paras. 162–183. For case: see DIGEST, vol. 14, p. 245, No. 2365.

DIVORCE.

Disclosure of Adultery by Petitioner—Duty of Solicitor.

Solicitors in a divorce case should ask the petitioner whether he or she has been guilty of any adultery, or at least call the attention of the petitioner to the vital necessity of disclosing any adultery on his or her own part.

SHIERS *v.* SHIERS (KING'S PROCTOR SHOWING CAUSE), **[1942] 2 All E.R. 417.**

As to disclosure of adultery: see HALSBURY, vol. 10, p. 690, para. 1024. For cases: see DIGEST, vol. 27, pp. 482, 483, Nos. 5115–5134.

Service—Dispensing with Service—Respondent Resident in Enemy Territory—Matrimonial Causes Act, 1857 (c. 85), s. 42.

Service of a divorce petition founded on desertion cannot properly be dispensed with where the respondent is resident in enemy territory.

READ *v.* READ, **[1942] 2 All E.R. 423.**

As to service of divorce petition: see HALSBURY, vol. 10, pp. 705–707, paras. 1055–1060. For cases: see DIGEST, vol. 27, pp. 391–393, 396, Nos. 3854–3856, 3860–3883, 3928, 3929.

NEGLIGENCE.

Highways—Collision of Motor Vehicles—Shock from Noise of Collision—Injury Reasonable Forseen by Negligent Driver.

A negligent driver is not liable for an injury he could not reasonably have foreseen.

HAY OR BOURHILL *v.* YOUNG, **[1942] 2 All E.R. 396.**

As to nervous shock: see HALSBURY, vol. 23, pp. 730, 731, para. 1022. For cases: see DIGEST, vol. 36, pp. 123, 124, Nos. 816–824.

Volenti non fit injuria—Workman working in House damaged by Blast—Voluntarily incurring risk of Latent Defect—Duty of Employer—Workman working on Property not owned by or in Occupation of Employer.

The doctrine of volenti non fit injuria *applies where an employee voluntarily incurs a risk which he takes by entering a house damaged by bomb blast and by continuing to work there without question and with full knowledge of the risk.*

TAYLOR *v.* SIMS AND SIMS, **[1942] 2 All E.R. 375.**

As to defence of *volenti non fit injuria*: see HALSBURY, vol. 23, pp. 715–719, paras. 1006–1009. For cases: see DIGEST, vol. 36, pp. 92–97, Nos. 608–649.

RULES AND REGULATIONS.

Price Order No. 116, Amendment No. 1 (Potatoes). (Control of Prices Emergency Regulations, 1939.) No. 1942/333.
Price Order No. 119 (Bananas). (Control of Prices Emergency Regulations, 1939.) No. 1942/334.
Economic Stabilization Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/335.
Control of Prices Emergency Regulations, 1939, Amendment No. 3. (Emergency Regulations Act, 1939.) No. 1942/336.
Price Order No. 120 (Candles). (Control of Prices Emergency Regulations, 1939.) No. 1942/337.
Shipping Control Emergency Regulations, 1939, Amendment No. 4. (Emergency Regulations Act, 1939.) No. 1942/338.
General Harbour (Safe-working Load) Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/339.
Public Service Amending Regulations, 1942. (Public Service Act, 1912.) No. 1942/340.
Foreign Seamen (Netherlands) Notice, 1942. (Shipping and Seamen Act, 1908.) No. 1942/341.
Customs Import Prohibition Order, 1942, No. 2. (Customs Act, 1913.) No. 1942/342.
Practising Opticians Regulations, 1942. (Opticians Act, 1928.) No. 1942/343.
Dogs Registration Emergency Regulations, 1942 (No. 2). Emergency Regulations Act, 1939. No. 1942/344.
Government Railways Classification and Pay Regulations, 1942. (Government Railways Act, 1926.) No. 1942/345.
Teachers Emergency Regulations, 1941, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1942/346.
Education Amending Regulations, 1942 (No. 2). (Education Act, 1914.) No. 1942/347.
Marketing Department Advances Order, 1942. (Finance Act, 1941.) No. 1942/348.
Soil Conservation and Rivers Control (Payment of Fees) Regulations, 1942. (Soil Conservation and Rivers Control Act, 1941.) No. 1942/349.
Police Offences Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/350.