New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

VOL. XIX. TUESDAY, FEBRUARY 2, 1943 No. 2

COMPANY LAW: CONFIRMATION OF REDUCTION OF CAPITAL.

THE principles which should guide the Court in exercising its discretion whether or not a petition for an order confirming a reduction of capital should be granted were considered by Mr. Justice Fair recently in *In re Taupo Totara Timber Co., Ltd.* (to be reported). His judgment is of particular interest in that there were no objecting shareholders or creditors before the Court; nevertheless, the petition was dismissed in the interests of the public.

Section 68 of the Companies Act, 1933, provides, *inter alia*, that where a company has passed a resolution for reducing share capital it may apply by petition to the Court for an order confirming the reduction. Section 69 (1) provides that the Court, if satisfied, with respect to every creditor of the company who is entitled under s. 68 to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as the Court thinks fit. Consequently, the Court must determine whether it has jurisdiction to confirm the resolution, before it can consider the exercise of its discretion to grant or reject the petition.

To the Taupo Company's application, which, in all formal respects was in order, there was no sustained objection by any shareholder before the Court. There were no objecting creditors. Opposition to the making of an order was made by a forestry company, New Zealand Forest Products, Ltd., which did not claim to be a creditor, within the ordinary meaning of that term; but it asserted a right to object inasmuch as it had a special and direct interest in the reduction of the Taupo Company's capital below its present level. It submitted that, if it were not a creditor within the meaning of ss. 68 and 69 of the Companies Act, 1933, it was still entitled to be heard by reason of its special interest, and that the Court has an unfettered discretion under s. 67 whether it should confirm the proposed reduction; and that, in the circumstances it placed before the Court by affidavit, the Court should refuse to confirm the resolution.

The objecting company showed that a very serious fire hazard was created by the light railway operated by the applicant company, at least during the summer months, and that last year, in the period from January 12 to the end of February, not less than nine fires were reported as occurring within the forest area, on each occasion shortly after the Taupo Company's locomotive had passed; and that such railway, however carefully controlled, was a real and very frequent source of danger to the adjoining forests of both companies. It was stated that the Taupo Company, even without any loss of its own assets or their being rendered valueless by reason of a forest fire, would have insufficient capital adequately to indemnify the Forest Products Company in case of a really serious fire occurring as a result of the negligence of the Taupo Company's servants. This, it said, would be the position if none of the Taupo Company's own properties was destroyed or damaged; but, it was added, there was always a risk of a large part of the Taupo Company's own property being so destroyed. The Forest Products Company, therefore, asked the Court to exercise its discretion in favour of refusing to confirm a resolution which would have such an adverse effect on its position in the event of any such misfortune occurring.

The learned Judge first pointed out that demands in the nature of unliquidated damages arising otherwise than by reason of contract, promise, or breach of trust are not provable in the winding-up of any insolvent company—Companies Act, 1933, s. 257; Bankruptcy Act, 1908, s. 98 (1)—and, in such circumstances, the Forest Products Company could not be considered a "creditor." He said it was unnecessary for him to decide, and he expressly refrained from deciding in the petition proceedings, whether proof could be admitted under s. 256 of the Companies Act, 1933, in respect of a possible claim at common law, in the contingency shown to be reasonably likely to arise, in the case of a solvent company. So, he proceeded on the assumption that the Forest Products Company was not a "creditor" within the meaning of ss. 68 and 69.

The question thus became one of jurisdiction: whether the Court has, under the terms of s. 67, a general jurisdiction, independent of the existence of the conditions as to objecting shareholders or creditors adverted to in ss. 68 and 69, under the terms of s. 67.

The functions of the Court in confirming a reduction of capital have been considered in two judgments of the House of Lords.

In *British and American Trustee and Finance Corporation* v. *Couper*, [1893] A.C. 399, a scheme of reduction was put forward for confirmation by the Court, under which the shares of one class of shareholders were to be cancelled, the shareholders withdrawing from the company and receiving, in exchange for their shares, certain of the assets of the company. The creditors of the company either were paid or assented to the arrangement, and when, therefore, the petition for confirmation came on to be heard the interests of the shareholders alone had to be considered. Lord Herchell, L.C., in the House of Lords, said at p. 403 :

> Nor is there any limitation of the power of the Court to *confirm* the reduction, except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured.

Later, he proceeded, at p. 406 :

> The interests of the dissenting minority of the shareholders (if there be such) are probably safeguarded by this : that the decision of the majority can only prevail if it be confirmed by the Court.

Lord Macnaughten, at p. 411, 412, referring to the modification of the memorandum by way of a reduction of capital, said :

> The exercise of the power is fenced round by safeguards, which are calculated to protect the interests of creditors, the interests of shareholders, and the interests of the public. Creditors are protected by express provisions. Their consent must be secured, or their claims must be satisfied. The public, the shareholders, and every class of shareholders, individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion which is *entrusted to the Court*. Until confirmation by the Court, the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed, the memorandum is to be altered in the prescribed manner, and the company, as it were, makes a new departure. With these safeguards, which certainly are not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free.

In the case of *Poole* v. *National Bank of China, Ltd.*, [1907] A.C. 229, 238, Lord Macnaughten cited the foregoing passage, and stated that, speaking for himself, he saw no reason to alter or modify it. He went on to say :

> In the present case, the creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment of any paid-up capital to any shareholder. The only questions, therefore, to be considered are these : (i) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company ? and (ii) is the reduction fair and equitable as between the different classes of shareholders ?

At p. 239, he said, " It has not been suggested that the proposed reduction is open to any objection on public grounds " ; and at p. 240, he said, " I can see not objection to it if it is a prudent, businesslike measure, not unfair to the shareholder and not detrimental to the public."

His Honour next showed that ss. 67, 68, and 69 of the Companies Act, 1933, closely correspond in their language and effect to s. 17 (1) to (5) of that statute. He referred to what he termed " a comprehensive and illuminating examination and interpretation of the similar words in that section " in the judgment of the Court of Appeal, delivered by Mr. Justice Smith in *In re Levin and Co.*, [1936] N.Z.L.R. 558. In determining the question, the Court, at p. 569, adopted, with approval, the decision of Eve, J., in *In re Jewish Colonial Trust (Juedische Colonial Bank), Ltd.*, [1908] 2 Ch. 287, in which he held, for reasons which he gave, that the principles established by the House of Lords in *British and American Trustee and Finance Corporation* v. *Couper* (*supra*) and *Poole* v. *National Bank of China, Ltd.* (*supra*), on the question of the functions of the Court in confirming a reduction of capital, were applicable to an application to confirm an alteration in the objects of the company. Mr. Justice Fair added that the converse is also true, and the decision of the Court of Appeal in *Levin and Co's* case so far as it bore upon the questions which he had to decide, was applicable to the construction of s. 67. At p. 570, the Court said :

> The principles, then, upon which the Court will act in confirming an alteration of the objects of a company are : (i) the Court will first determine whether it has jurisdiction to confirm the alteration ; and (ii) if the Court has jurisdiction, the Court will then exercise its discretion upon principles which require the Court to see (*a*) that the rights of creditors are protected, (*b*) that the alteration is fair and equitable as between the members of the company, and (*c*) that the *interests of those members of the public who may be affected by the alteration will not be prejudiced.*

In that case, the applicant company had acquired a reputation as a stock and station company, a general merchant and woolbroker. It sought power to alter its memorandum of association to extend its business to carrying on the business of a trustee company. With reference to this application, the Court considered, at p. 583, whether the interests of those members of the public who might be affected by the alteration would be prejudiced, and were of opinion that the interests of the public were so affected. In the circumstances of the case, the Court of Appeal refused the application.

Mr. Justice Fair then applied the principles to the application before him. He said :

> These authorities establish, I think, beyond question, that under s. 67 the Court has jurisdiction to exercise its discretion by refusing to confirm the proposed reduction where members of the public who, in the future, become shareholders in or deal with the company may be misled by the alteration proposed to be made. This shows that the Court is bound to have regard to the future position of members of the public who may be contemplating dealing with the company. It seems to me a logical consequence that it is entitled to have regard to possible rights which may be considered as reasonably likely to be acquired by a member or members of the public against the company, owing to their special relationship to it. The powers possessed by a company as a legal entity, and its legal status as a person independent of the shareholders, together with the limitation of its liability to its capital, have led the Legislature to provide certain safeguards against possible loss or hardship that such privileged status might otherwise inflict. It may well be that these safeguards might, in some respects, be extended and enlarged ; although such a course would be difficult without lessening the encouragement that such privileges give to enterprise in the development of new or hazardous businesses. But it is, I think, the duty of the Court to see that the protection now given is not narrowly construed or unduly restricted.

The evidence on record on the present application established, in His Honour's view, that in the event of a fire, due to the Taupo Company's activities, resulting in the destruction of a large section of the Forest Products Company's plantations, and causing damage for which the former company would be liable, the Forests Products Company might well have a right to be paid damages for a very large amount—perhaps exceeding

£500,000. By the same fire, a large part of the Taupo Totara Company's assets might be destroyed. The results would be that its remaining assets would be totally inadequate to meet such a liability. To confirm the proposed reduction of capital and allow the sum of £34,203 5s. of its assets to be distributed among the shareholders, as was proposed in the resolution reducing capital, would reduce its assets not in danger of destruction in this way by that amount. The confirmation in such circumstances would, it seemed to His Honour, amount to the Court's sanctioning the company's conducting its finances without retaining adequate provision for a contingent liability for which, the evidence established, it was reasonable to require provision to be made. The Court should, he thought, be careful to see that the courage and enterprise of shareholders who risk their capital in such bold and difficult businesses as that conducted by the Taupo Totara Company should not be hampered or restricted in the management of their affairs by unduly strict limitations. It should, rather, be allowed the utmost freedom in dealing with the company's money, gained as the result of its energy and activities. From the point of view of the Taupo Totara Company, the proposed distribution appeared to be a prudent and reasonable proposal. But it would appear from what His Honour had said earlier that the nature and conduct of its business required the Court, when objection was raised, to consider the position and rights of the Forest Products Company. His Honour proceeded to apply the principles relative to refusal of the petition on the ground that confirmation would prejudice the interests of members of the public. He considered the position of the Forest Products Company in that connection, in that its members were a section of the public. He said:

> If the Forest Products Company's property had been owned individually, as it well might have been, but the thousands of bondholders whom it represents in its incorporation, they would have been a section of the public, the objections of which, upon the authorities I have referred to, the Court would have been bound to consider and protect, and whose interests it would have been bound to have seen were not adversely affected by the proposed reduction of capital. The fact that the property is held by one company, with many shareholders, cannot, I think, alter the nature of its rights, the weight to be attached to them or the duty of the Court in respect of them.

His Honour concluded that the Forest Products Company was entitled to ask that the Court should not confirm the reduction of capital by way of repayment which would reduce the applicant company's capital below that which might be required to meet a reasonable possible contingent claim. Such would, in his view, be the result of such a reduction as was proposed. The application was, therefore, refused and the petition dismissed.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Greymouth.
1942.
November 19;
December 21.
Northcroft, J.

STONEHOUSE v. OWLES.

Justices — Appeal — Informations under Price Stabilization Emergency Regulations, 1939—Sale in excess of Regulated Price—Defendant acquitted in Lower Court—Onus on Appellant —More than One Inference from Facts—Price Stabilization Emergency Regulations, 1939 (Serial No. 1939/122), Regs. 5, 10.

The respondent was prosecuted (upon two informations for breaches of Reg. 5 of the Price Stablization Emergency Regulations, 1939) for having sold Kodak roll films at a price higher than that permitted by the regulation. Both informations were dismissed by the Magistrate, who, on the application of the informant, stated cases on appeal.

The purchasers were B. and H. In each case the purchaser asked an assistant of respondent for a Kodak roll film, was informed that the price was 3s. 1d., and that 1s. would be refunded when the film was brought in for development. In neither case was the film returned for development, nor was a refund of 1s. applied for. It was proved that the price charged by the defendant for this class of film on September 1, 1939, the "fixed day," was 1s. 11d., and that the permitted sale price on November 29, 1941, was 2s. 1d. H., when told about the refund, said: "Suppose I don't want to have it developed?" The saleswoman replied: "I'm sorry, it makes no difference." In giving evidence, H. said he bought the film to return to a friend from whom he had borrowed one, but that he did not inform the vendor of the fact.

The learned Magistrate determined that the matter stated was insufficient to support the information. He held that in each case the purchaser had accepted the condition upon which the respondent was prepared to sell, and that the sale had taken place at 2s. 1d. He therefore dismissed the information.

On appeal from such determination, *Held*, dismissing the appeal, 1. That the prosecution was for a sale in excess of the regulation price.

2. That upon a case stated after an acquittal it is incumbent upon the appellant to show, upon the facts stated that there must have been a conviction.

Stokes v. *Mitchison*, [1902] 1 K.C. 857; *Ex parte Day*, (1872) 4 N.Z. Jur. (N.S.) S.C. 34; and *Gardner* v. *Phair*, (1909) 12 G.L.R. 141, followed.

3. That the facts stated in the case left room for more than one inference by the learned Magistrate, and the appellate Court could only interfere where there was only one true conclusion to be drawn and that was wrongly drawn.

Hewett v. *Knight*, (1907) 9 G.L.R. 363, followed.

Counsel: *Wilson*, for the appellant; *Scully*, for the respondent.

Solicitors: *A. A. Wilson and Son*, Westport, for the appellant; *M. B. Scully*, Westport, for the respondent.

Case Annotation: Stokes v. *Mitchison*, E. and E. Digest, Vol. 33, p. 407, para. 1170.

SUPREME COURT.
Auckland.
1942.
December 11.
1943.
January 11.
Fair, J.

In re **TAUPO TOTARA TIMBER COMPANY, LIMITED.**

Companies—Reduction of Capital—Petition for Confirmation—Objector to Reduction not Shareholder Creditor—Principles applicable—Jurisdiction of Court—Companies Act, 1933, ss. 67, 68, 69.

The Court has a general jurisdiction under s. 67 of the Companies Act, 1933 (independently of the existence of the conditions as to objecting creditors specified in ss. 68 and 69), to protect the interests of the public who may be affected by the reduction of refusing to confirm the said reduction, where a company has, under s. 67, passed a special resolution for the reduction of its share capital and has applied to the Supreme Court under s. 68 by petition for an order confirming the reduction.

A timber company whose tramway-line traversed not only its own forests but a large part of the exotic forests of a forestry company, petitioned the Supreme Court for an order confirming

the reduction of its capital. The risk of fire from the sparks of the petitioning company's locomotives destroying a substantial part of the forests of both companies, especially the exotics, were grave. In that event the remaining assets of the petitioning company would be totally inadequate to meet its liability to the forestry company if the destruction of the latter's forests or part thereof were held to be due to the negligence of the petitioning company's servants.

In refusing the application and dismissing the petition,

Held, That the fact that the property likely to be affected was held by one company with many shareholders did not alter the nature of its rights as a section of the public, the weight to be attached to them, or the duty of the Court in respect of them.

In re Levin and Co., Ltd., [1936] N.Z.L.R. 558, G.L.R. 452, applied and followed.

British and American Trustee and Finance Corporation v. *Couper*, [1894] A.C. 379, and *Poole* v. *National Bank of China, Ltd.*, [1907] A.C. 229, followed.

In re Jewish Colonial Trust (Juedische Colonial Bank), [1908] 2 Ch. 287, referred to.

Counsel: *N. S. Johnson*, for the applicant; *North*, for the New Zealand Forest Products, Ltd.

Solicitors: *Bell and Johnson*, Hamilton, for the applicant; *King and McCaw*, Hamilton, for the New Zealand Forest Products, Ltd.

Case Annotation: *British and American Trustee and Finance Corporation* v. *Couper*, E. and E. Digest, Vol. 9, p. 149, para. 840; *Poole* v. *National Bank of China, Ltd.*, *ibid.*, p. 149, para. 842; *Jewish Colonial Trust (Juedische Colonial Bank)*, *ibid.*, p. 653, para. 4329.

SUPREME COURT. Wellington. 1942. December 7, 22. *Smith*, J.

TAYLOR AND ANOTHER v. HARLEY.

Legitimacy—Legitimation—Subsequent Marriage of Parents—Application for Registration—"Every illegitimate person whose parents have intermarried"—"Illegitimate in fact, whether or not presumed Legitimate at Birth"—Duty of Registrar-General or Magistrate—Ascertainment where Presumption of Legitimacy whether subject of Application illegitimate in fact at Birth—Certificate not operating as Estoppel or rendering the Question of Legitimacy res judicata—*Legitimation Act, 1939, ss. 3 (1), 5.*

The term "illegitimate person" in s. 3 of the Legitimation Act, 1939, refers to a person who is illegitimate in fact, whether presumed to be legitimate at birth or not; and it has the same meaning as the phrase "any child born before the marriage of his or her parents" in the Legitimation Act, 1894, and the Legitimation Amendment Act, 1903.

The inquiry authorized by s. 5 (5) (10) of the Legitimation Act, 1939, does not stop at a presumption of legitimacy, but must ascertain whether the person referred to in the application was illegitimate in fact at his birth.

If the Registrar-General, or a Magistrate to whom the application has been transmitted by the Registrar-General, is satisfied that such person was illegitimate in fact, although presumed to be legitimate, at his birth, and that his parents have subsequently intermarried, then an entry should be made in the register showing the legitimated person as the lawful child of his or her parents; and it is the duty of such Magistrate, if so satisfied, to give the certificate specified in s. 5 (10).

The entry made in the register as required by s. 5 (10) showing the legitimated person as the lawful issue of his parents constitutes only *prima facie* evidence of legitimation, and it may be displaced at any time by evidence in another proceeding in a competent Court in which the legitimacy is called in question. Section 5 (9) prevents the Magistrate's decision from operating as an estoppel, and the question of legitimacy from becoming *res judicata*.

Ettenfield v. *Ettenfield*, [1940] P. 96, [1940] 1 All E.R. 293; *Lambie* v. *Lambie*, [1942] N.Z.L.R. 60, G.L.R. 3; *Jones* v. *Jones*, (1929) 45 T.L.R. 293; *Upton* v. *Attorney-General*, (1863) 32 L.J. P.M. & A. 177; *Bednall* v. *Bednall and Shivussawa*, [1927] P. 225; and *Green* v. *Green*, [1929] P. 101, referred to.

Counsel: *Pope*, for the plaintiffs; *Foden*, for the defendant.

Solicitors: *Perry, Perry, and Pope*, Wellington, for the plaintiff; *Crown Law Office*, Wellington, for the defendant.

Case Annotation: Upton v. *Attorney-General*, E. and E. Digest, Vol. 3, p. 370, para. 111; *Ettenfield* v. *Ettenfield*, E. and E. Digest, Supp., Vol. 3, p. 57, para. 6*f*; *Jones* v. *Jones*, *ibid.*, p. 59, para. 130*c*; *Bednall* v. *Bednall and Shivussawa*, *ibid.*, p. 59, para. 130*a*; *Green* v. *Green*, *ibid.*, p. 59, para. 130*b*.

SUPREME COURT. Wellington. 1942. October 27. *Blair*, J.

A. v. A.

SUPREME COURT. Auckland. 1942. November 24. *Callan*, J.

C. v. C.

Divorce and Matrimonial Causes—Evidence—Adultery—Evidence of Penetration—Whether essential—Nature of Proof of Intercourse required—Divorce and Matrimonial Causes Act, 1928, ss. 5, 10 (a).

"Adultery," within the meaning of the Divorce and Matrimonial Causes Act, 1928, means voluntary sexual intercourse between a married person and one of the opposite sex other than the husband or wife, as the case may be.

Evidence of penetration (at least of the labia of the female) is not essential to prove sexual intercourse; but the necessary proof may be afforded by evidence of a complete act of sexual gratification which closely resembles sexual intercourse and is of such a nature that fecundation *ab extra* might have resulted if the female had been of or above the age of puberty.

McKinnon v. *McKinnon*, unreported, see (1942) 16 A.L.J. 129, followed.

Virgo v. *Virgo*, (1893) 69 L.T. 460, considered.

Rutherford v. *Richardson*, [1893] A.C. 1; *Russell* v. *Russell*, [1924] A.C. 687; *Thompson* (*otherwise Hulton*) v. *Thompson*, [1938] P. 162, [1938] 2 All E.R. 727; and *Reg.* v. *Allen*, (1839) 9 C. & P. 31, 173 E.R. 727, referred to.

Case Annotation: Virgo v. *Virgo*, 27 E. & E. Digest, p. 306, para. 2834; *Rutherford* v. *Richardson*, *ibid.*, p. 488, para. 5196; *Thompson* (*otherwise Hulton*) v. *Thompson*, *ibid.*, Sup. Vol., para. 3857a; *Russell* v. *Russell*, *ibid.*, p. 294, para. 2745; *Reg.* v. *Allen*, 15 E. & E. Digest, p. 843, para. 9270.

Will the Goose Quill Return?—Many discarded implements are being brought back into use as a result of war conditions in England, and among them there seems to be a likelihood of the old goose quill becoming popular again. In the old days (and this is not going back more than to the beginning of the present century) members of the Bar upon entering Court always found a clean new quill pen and a sheet of blotting-paper—often some good notepaper—awaiting each comer. Solicitors also, in Courts where they shared audience, found the same provision for their convenience. Judges on the Bench were frequently depicted by artistic briefless juniors as pointing quill pens towards advocates at the Bar or at prisoners in the dock to emphasize their observations.

Alas—all this has gone, and the familiar squeak of the quill is no longer heard in our Courts of Justice. But 'tis said there are exceptions. There are yet a few old-fashioned country Courts here, where the stock of goose-quills still holds out despite the onrush of the fountain pen—that mass-producer of bad penmanship. Whether the shortgage of steel, which has already made havoc with the safety-razor supplies, will take us back before the "emergency period" is over to goose-quills as well as to the old "cut-throats," remains to be seen. Anyway, the old quill was a very convenient and pleasant writing implement, adaptable to any hand; and it has given us many landmarks of purest English literature untouched by any typed-out dictaphone production of the present day.—ARTERYX.

THE LAW IN THE SECOND NEW ZEALAND EXPEDITIONARY FORCE.

By Lieut.-Colonel C. A. L. Treadwell, O.B.E., E.D.

When the 2nd N.Z.E.F. left these shores there was no legal department attached to the Force. At that time provision was made only for the conduct of military law and discipline. I had the privilege to leave as Deputy Judge-Advocate-General, rather a confusing term seemingly. With me I had one warrant officer now Lieut. S. G. Joll and Private K. G. Coombe now a staff sergeant. The latter is a public accountant of Hamilton, while the profession knows Mr. Joll as one of themselves.

On the voyage out on the *Rangitata* we had "the military bible" as it is called, the *Manual of Military Law* and the *King's Regulations*, and with both volumes hundreds of amendments lying loosely between the pages. These we used to paste in, and by the time we reached Port Tewfik the annotation was complete.

Private Coombe was a "find" for us. He kept the files which later grew to great dimensions in order. He has been what the profession would call a chief clerk ever since. The office of D.J.A.G. in the British Army is a very old one. Every unit in the Empire has a J.A.G. and whenever there is an expeditionary force his representative with it is the D.J.A.G. He is responsible to the G.O.C. to see that the courts martial are properly conducted. He advises in the cases of irregularities whether the proceedings should be confirmed or quashed, or whether there ought in certain circumstances be a fresh trial. He is responsible for advising the G.O.C. on legal problems. He delivers lectures to officers on the conduct of courts martial and teaches Adjutants their duties in preparing the cases for trial. The name "Judge-Advocate-General" is very confusing and quite misleading. At no time is he an advocate in courts martial. He does not attend the trials but advises on their conduct, and is available to advise the court during the trial, for which purpose the court adjourns and the members consult him.

When there are questions of legal difficulty or charges of great seriousness involved, and always in the cases where an officer is being tried, a representative of the D.J.A.G. is selected to attend the Court as legal adviser to the Court. He is called a Judge-Advocate. He swears in the Court and at the end of the trial sums up in open court. He also retires with the court when it considers both its verdict and its sentence. He has no vote and he is not entitled to express his opinion as to what the verdict or the sentence ought to be. He is appointed by the D.J.A.G.

We disembarked at Port Tewfix, the port of Suez, and took train to Maadi. Near Cairo we ran down a sideline and pulled up by the camp site. We arrived in the black of night and woke up next morning to find ourselves in a desert camp. Within the camp limits there was not a blade of grass, no vegetable life at all. There were crows, some sand rats, and a few scorpions; but nothing to worry about. The worst animal was the native or pariah dog. A wretched half-breed, rather like a collie, very nervous, and a great thief. A good many were shot in the camp.

At first our office was in a tent and then in a marquee. For about six months we carried on in the marquee under some degree of discomfort. During the months of April and May, the khamseen period, it was very uncomfortable. The heat was intense and the wind filled the great tent with the sand of the desert. 'Khamseen' is the Arabic word for fifty, and the period is so called on account of the fact that the wind blows steadily and hard for that period of time.

Files of court-martial papers, correspondence, fresh wills, and piles of other papers would have to be weighted down to prevent their being whirled away. We had to keep the tent flaps down otherwise we could not have kept the office intact, but that aggravated the discomfiture caused by the heat. Later, we moved into a hut and that was much better. It is true that the sand used to pour in, and, when it rained, the rain poured in, yet it was vastly better than the marquee.

At first we concerned ourselves with courts-martial proceedings. We were kept busy at first in settling forms of charges for C.O.'s and their Adjutants, until they became more expert. In addition, too, I used to overhaul the summary of evidence on which the court martial is ordered. It is a matter of great difficulty for laymen to prepare charges and keep the evidence relevant to the charges. But they soon got a good idea of the requirements. As often as possible, I used to have a solicitor appointed to prosecute or to defend in more or less serious cases. Of course the accused had the right to ask for an officer to be detailed to defend him. It is the custom of the service for such officer to be drawn from the man's unit, though this is not a firm rule. Often the news got round that some officer was very successful in defending accused and frequent applications were made for his services, no matter what unit the accused came from. This had to be stopped, for in one instance it was interfering with the ordinary duties of the officer in question. On one occasion an accused was charged with theft and he was attached to one unit, and in his application he asked for an officer to defend him but stipulated that he should not be selected from his unit. Perhaps he thought local knowledge would not be an advantage!

After trial the Brigadier who had convened the court usually sent me the papers before he confirmed the findings, so that he could be assured that the findings were justified on the evidence. Often, too, he would ask my opinion as to the sentence imposed. A convening officer has the power to reduce, but not to increase the sentence.

The power of a convening officer to suspend a sentence was sometimes invoked and usually worked well. With a sentence hanging over his head an accused usually behaved himself; and, in time, if his conduct was exemplary, he used to have all or part of the sentence cancelled.

It was not long after we had become established that the work increased in every direction, and it became clear that a legal office would have to be set up.

The G.O.C. required me to overhaul all minor sentences imposed by C.Os.—that is, cases not serious enough for court martial and which the C.Os. had

power to deal with. There were a great number of these and Mr. Joll had the responsibility of perusing the records of these petty crimes.

Then the N.Z.E.F. started to acquire an interest in buildings and to lease land. My office was the natural one to fix up such transactions. We took a lease of some land on which we built a swimming-pool, and we took over the Italian Fascist Club for our own club premises. Then soldiers found that their businesses in New Zealand called for attention. I prepared a general power of attorney and by now several hundreds have been sent to New Zealand to enable the interests of the soldiers to be safeguarded in their absence.

Wills had to be altered. In many cases proposed beneficiaries predeceased the soldier testators; and, in some cases, sweetheart beneficiaries had lost their attraction, so wills were changed.

The profession knows of the arrangements that the Chief Justice made with the J.A.G. for the purpose of serving divorce papers on New Zealand soldier respondents with the Force. The papers used to come to my office, and, if the soldier was not in the line, we used to have him sent to us, and there he would receive the papers; and I always took care to see that he was duly advised of his legal rights. If the soldier was in the line, I used to wait till he came back to the Base Camp before worrying him with the papers.

One of the interesting duties for the D.J.A.G. was to attend conferences with the other British D.J.A.Gs. The English Army, Air Force, the Indian Army, Australian and South African and New Zealand D.J.A.Gs. used to confer every now and then on matters of general interest. It was indeed a truly Imperial Conference.

As can be gathered from what I have said the office gradually developed into a general legal office. Even the motor-car cases put in their appearance; and I suppose, before I left, I must have overhauled about six hundred motor-car accidents. Every occasion of a collision involving a New Zealand vehicle had to be reported; and, if there was negligence, then the driver had to face the music. There were claims to be investigated by civilians for injuries received from colliding with New Zealand driven motor-vehicles. I remember one claim for £3,000. A woman claimed that she had lost one eye and was paralysed down one side through having been knocked down on the road by a vehicle driven by one of our drivers. The facts showed that she had been knocked down as claimed, and it was equally clear that the driver had been negligent. It was then a question of how much to pay. As the injuries were apparently very grave, I arranged for the patient to be admitted into a private hospital and two of our physicians and an eye-specialist from Auckland examined her. Their report was that it was true that she had lost an eye through the accident, but that it was blind before the occurrence. The paralysis claimed was in fact a stiffened right knee due to post-operational neglect by the hospital authorities. So she got £50 instead of £3,000, and I think she was completely satisfied. I imagine that she thought that it was worth trying.

Finally, let me say that my office grew and I soon had the assistance of Captain Forder and a N.C.O. on Divisional Headquarters. Captain Forder is from Auckland and is now a POW. Then at my office I secured the service of Lieut. C. B. Barrowclough, a Dunedin solicitor. He succeeded me, when I returned this year to New Zealand, and received his majority. Since my leaving, I understand Captain Pleasants, of Wanganui and Samoa, has joined the staff. Mr. Joll who was with me from the beginning was granted his commission, and now has two stars on his shoulder.

HIRE-PURCHASE AGREEMENTS.

Stabilization and Price Control.

It is provided by Reg. 8 of the Control of Prices Emergency Regulations, 1939, Amendment No. 3 (Serial No. 1942/336), that the disposition of any goods by a hire-purchase agreement entered into after December 15, 1942, is to be deemed for the purposes of the Price Control Emergency Regulations, 1939 (Serial No. 1939/275), and of the Price Stabilization Emergency Regulations, 1939 (Serial No. 1939/122), to be a sale of those goods from the vendor to the purchaser on the date on which possession of the goods is delivered to the purchaser. The purchase price of any goods subject to a hire-purchase agreement as aforesaid is to be deemed to be the total amount of the moneys required to be paid by the purchaser under the agreement and the value or other consideration provided or required to be provided by the purchaser.

It has been held by a Divisional Court (Viscount Caldecote, L.C.J., and Tucker and Birkett, JJ.) in *Micheff* v. *Springett*, [1942] 2 All E.R. 349, that the word "sell" where used in a price fixation order must bear the same meaning as is given to it by the Sale of Goods Act, 1893. In both our Price Stabilization Emergency Regulations, 1939, and in Control of Prices Emergency Regulations 1939, "sale" is defined as including "barter and every other description of goods for valuable consideration." The word "sale" in those regulations must accordingly be given the meaning it bears in the corresponding s. 3 (4) of our Sale of Goods Act, 1908, in contradistinction to "an agreement to sell," which, by s. 3 (5), becomes a "sale," "when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

The purpose of Reg. 8 of the recent amendment, as detailed above, is to deem the giving possession of goods under a hire-purchase transaction as a "sale" of those goods, for the purpose of fixing the moment of time when the sale price is to be controlled. It is clear that goods subject to a hire-purchase agreement cannot be said, in law or in fact, to be "sold" until the whole of the purchase-money has passed from the hirer (or purchaser) to the owner (or vendor); and, if the regulations remained as they were originally drafted, the price could not be fixed until the conditions of the hire-purchase agreement had been

fulfilled—namely, the full payment of the price, subject to which the property in the goods was to be transferred to the hirer (or purchaser). Consequently, for the purposes of the regulations mentioned, the law of hire purchase is modified by Reg. 8 to the extent that the "sale" is deemed to take place on the date on which possession of the goods is delivered to the purchaser.

A similar modification of the Hire-purchase Agreements Act, 1939, appears in Reg. 2 (3) of the Debtors Emergency Regulations, 1940 (Serial No. 1940/162), where the purchaser of the goods is, for the purposes of those regulations, deemed to be the "owner" of them, in order that the goods may come within the expression "any property," so as to bring the purchaser within the expression "any other person," in respect of whose goods it is not lawful for any one to do any of the acts referred to in Reg. 4 (2) without leave of the appropriate Court.

CLAIMS AGAINST DECEASED ESTATES.

The Protection given by Statutory Notice.

By ROBERT LEE MOSSE, a Master of the Supreme Court.*

Not all the difficulties of personal representatives and trustees arising from unknown or uncertain claims as they affect distribution are concluded by s. 27 of the Trustee Act, 1925(1)—the statutory protection by advertisement which that section gives goes a long way, but by no means all the way.

A LIMITED PROTECTION.

A timely reminder of the limitations of this protection is afforded by the decision of the Judicial Committee of the Privy Council in *Guardian Trust and Executor Co. of New Zealand, Ltd.* v. *Public Trustee of New Zealand*, [1942] A.C. 115, [1942] 1 All E.R. 598(2). The Guardian Trust and Executor Co. were the executors of the will of a Miss Smith by which pecuniary legacies were given amounting to a little over £12,000, some of the legatees being persons who would be entitled to share in the event of an intestacy. The residue was given to the company on certain charitable trusts. The evidence showed that as soon as the will had been proved the executors were plainly aware that some of the kin contemplated attacking the validity of the will on the ground of want of testamentary capacity. Now what did the executor company do? Instead of anticipating the attack by themselves applying for proof in solemn form, they had recourse to the New Zealand Trustee Act, 1908, under s. 74 of which the Court may, on the application of an executor or administrator, make an order directing creditors "and others" to send in claims by a certain date pursuant to such notices as the Court might direct to be published, with consequent protection to the personal representative except as to claims of which he should then have had notice. This section corresponds to s. 27 of the English Act except that it requires an order of the Court to bring it into operation. The expression "and others" includes next-of-kin: *Newton* v. *Sherry*, (1876) 1 C.P.D. 246—a decision which, in principle, would cover all classes of beneficiaries—and bearing this decision in mind, the executor company's officers naively seemed to have argued thus: "If, therefore, we issue notices under s. 74 and at the expiration of the time named in such notices no claims have been sent in by any of the next-of-kin, we can safely pay the legacies." Lord Romer, who gave the judgment of the Board, characterized this reasoning as being based upon a complete misapprehension of the object and effect of the section and of *Newton* v. *Sherry* (*supra*). His Lordship referred to Mr. Justice Lindley's observation in that case that "If proper advertisements are issued for 'creditors and others' . . . to come in and substantiate their claims, the executor or administrator is not liable for parting with the assets *in a due course of administration* amongst those of whose claims he has notice" (p. 258), from which the learned Law Lord drew the obvious conclusion that "the only persons who are to be affected by the notices are those whose claims against the estate are to be met by the executor or administrator as the case may be in a due course of administration, and not persons whose claims are that the executor or administrator has no right to administer the estate at all." The key to the situation, therefore, lies in the phrase "in a due course of administration"; were it otherwise an executor could secure immunity by the purely negative act of completely disregarding a claim, of which he was aware, that the will was valid, even if such claim was not sent in pursuant to the notices issued—as was the fact in the New Zealand case we are discussing.

The executor company did not, apparently, have very solid reason for belief in the testamentary capacity of the testatrix, otherwise it would presumably have taken steps for proof of the will in solemn form, instead of which it endeavoured to shelter itself under the plausible but entirely fallacious argument above quoted, and being thus erroneously fortified, proceeded to pay out legacies on the strength of their mistaken conviction, with the direful consequence of having to refund over £8,450 as the result of the subsequent judgment recalling the probate on the ground of want of testamentary capacity.

THE EQUITABLE PRINCIPLE.

The success of the action for the recovery of this misguided payment of £8,450 and interest was based on the well-established equity principle—as stated by Lord Romer in the course of his judgment—that "if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A., he will be liable to A. if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded," adding that "In all such cases, as in the present one, the question is whether the person acting in a fiduciary capacity has had notice of the claim, and not whether he formed

* In the *Law Journal* (London).

(1) Trustee Act, 1908, s. 74.

(2) [1942] N.Z.L.R. 294.

a favourable or unfavourable view as to the prospect of the claim succeeding."

The case is a judicial warning that personal representatives and trustees are not to take the law into their own hands—their proper course is to apply to the Court for directions; and if, after full disclosure of the relative claims, certain directions are given, a full compliance therewith is a complete protection.

Other illustrations of parallel situations to that of which the *Guardian Trust and Executor Co.* case is typical occur—*e.g.*, where an administrator receives notice of a subsequently discovered will, or an executor gets to hear of the existence of a later will; in such instances the grantee, as the above case shows, gets no protection by advertisement. Until, however, the grant is revoked all acts done thereunder *in good faith* are protected (Administration of Estates Act, 1925, s. 27 (1))([3]), but obviously knowledge of the existence of some fact or claim inconsistent with the footing on which the original grant was obtained would destroy the prerequisite of good faith and deprive the grantee of the right to indemnity which the section otherwise gives him, although the purchaser's title would not be defeated (s. 37 (1) *ibid*)([4])—a new enactment giving legislative sanction to the decision of the Court of Appeal in *Hewson* v. *Shelley*, [1914] 2 Ch. 13.

From the concluding paragraphs of the judgment of the *Guardian Trust and Executor Co.* case it would seem that the company also sought to justify what they had done by the contention that the grant of probate under which they acted was an order of the Court involving an obligation on them to pay the legacies. That a grant of probate is an order of the Court none will deny (*Hewson* v. *Shelley* (*supra*)), but even conceding this it does not order the grantee to do anything, and in any event acts done under an order of the Court are only valid as against a purchaser (s. 204 of the Law of Property Act, 1925)([5])—an expression which means, "a purchaser in good faith for valuable consideration," s. 205 (1) (xxi)([6])—and no beneficiary, be he a legatee or a next-of-kin, can fulfil that category.

Personal representatives and trustees occupy an unenviable position and their lot is often a hard one, but they are not called upon to take avoidable risks, and if they find themselves in honest difficulties they will always receive the ready sympathy and assistance of the Court in that remedial relief which only the Court can give, and which it is its helpful function to exercise in every appropriate case.

([3]) *Cf.* Administration Act, 1908, s. 26.

([4]) *Cf.* Property Law Act, 1908, s. 104.

([5]) *Cf.* Property Law Act, 1908, s. 117; Trustee Act, 1908, s. 76.

([6]) *Cf.* Property Law Act, 1908, ss. 2 ("purchaser"), 104.

LEGAL LITERATURE.

Native Custom and Law affecting Native Land. By NORMAN SMITH, Research Officer, Native Department. Published under the authority of the Maori Purposes Fund Board, Wellington, New Zealand. Pp. viii + 135.

A Review by H. F. VON HAAST, M.A., LL.B.

This unpretentious little volume is an admirable and much needed book, free from technicalities, with a conspicuous clarity and terseness. For the lawyer who has not by long and painful experience got to know his way about in the jungle of Native Land Laws and in the tangle of confused and conflicting grounds for customary title it is a simple and reliable textbook and guide, setting out the types and nature of the rights upon which the Natives rely in establishing their claims to customary land, the principles upon which relative interests are determined, the law as to succession, adoption of children, and marriage of Natives.

For the layman who wants to know what the original Maori idea of ownership and tenure of land really was, how far it became modified by contact with the pakeha, what the real effect of the treaty of Waitangi was, the difficulties that Governments and Legislatures had to face in endeavouring to facilitate white settlement and yet be fair to the Maori, it gives a true picture of the past and forms a useful corrective of the impression given by writers who describe the dispossession of the Maori by the pakeha without calling attention to the complications that arose and resulted in war, from the difficulty of ascertaining with certainty who were the real owners of any particular block of land.

Take, for instance, the following statement in Professor Sutherland's classic, *The Maori Situation*: "When Europeans first came to this country every portion of New Zealand was owned by the tribes according to Native custom and every feature of the country was known and named down to the last hill and stream." While this may be taken as a correct rough generalization of the position prior to the Maori tribal wars, it is distinctly misleading unless qualified by the following statement from Judge Maning's letter to the Chief Judge, Native Land Court, on the Nature of Title to Land according to Custom (quoted by Mr. Smith):

> The question as to the nature of title to land according to Native custom I am unable to answer in any way except by giving examples, as I have done, of some of the principal grounds of the manner in which lands are held; but, though these grounds of title appear at first sight obvious enough, yet the constant state of war in which the Natives lived for a long period of time having confused all titles, both ancient and modern, the conquests, reconquests, and alleged and doubtful conquests set up as grounds of title, the obliteration and alteration of boundaries, the unreliability of evidence, and through all the ancient claim of discovery and first occupation sometimes feebly struggling to the front, makes often confusion more confounded to appear broad daylight in comparison with the wilderness a Judge has to wade through in the endeavour to ascertain what the rights of parties really are; and I am obliged to acknowledge that I do not at all know what the nature of Maori title is if it be not the same nature as the good old plan of "Let them take who have the power, and let them keep who can."

The author's close study of the Native land laws of the past leads him to the conclusion that their underlying principle was "that the interests of the Natives were to be given adequate protection. That principle . . . the Legislature attempted to carry out, though at times the complexities of Native tenure of

land, based as it is on complicated customs, conspired to render the efforts of the Legislature somewhat nugatory, and to force it to seek remedies for the ills, which practical application of its measures had revealed, by the introduction of further legislation which in many cases only aggravated the evil it was intended to remove or prevent, and hedged the laws round with technicalities that proved to be pitfalls."

Mr. Smith's references to the Judges of the Native Land Court gives those who hear little of its operations some idea of the valuable work that Court is performing with little or no limelight falling upon it but meriting the gratitude of Maori and pakeha alike. The missionaries accomplished a great achievement in collating and combining the various Maori dialects into a classical Maori language with a uniform spelling and simple phonetic pronunciation. The Native Land Court Judges have to their credit the successful performance of a still more difficult task; the ascertainment, classification, and consolidation of uncertain, varying, and conflicting customs into what may be termed a code of Native custom and law. In so doing, they had to shed many of the fundamental rules of English law and replace them by Maori customs which are repugnant to our ideas of law. As Maning points out: "Amongst the established principles by which the Native Land Court is guided in determining the rights of claimants and counter-claimants is that of scrupulously respecting the rights of a successful murder and treachery." Not only this, but they had to keep that Native custom abreast of Maori development by modifying and extending it by judgments of the Court through the changes which the advent of the pakeha brought about in Maori life and society. Not the least interesting section of the book is the author's citation of extracts from judgments of the Court illustrating the principles upon which it proceeds. An article by Mr. Smith on this modification or extension would be of intense interest for comparison with the way in which our own pakeha Courts gradually bring the law into harmony with changes in the social and economic system.

A further difficulty that the Native Land Court encounters is not only the determination of who are the owners of any piece of land, but also what are their relative interests in it, in view of the fact that nothing could have been further from the mind of a Native in former days than the idea of attaching an exact quantitive value to his interest in tribal property, and as the necessity was never felt, it is not surprising that no customary rule was ever established.

One can fairly say that despite all these difficulties and the continuance of strong tribal feeling the Native Land Court has stated and administered the Native customary law with such sympathy and impartiality as to command the respect and confidence of both the Maori and pakeha.

Now that Mr. Smith has dealt so successfully with Native law, a book showing us the Native Land Court in action from the social point of view and revealing something of the folk-lore and customs as to agriculture, fishing, hunting, &c., of ethnological value recorded in the evidence taken before the Court that could be disclosed without violating any rule of Court procedure, would be much appreciated.

Colenso gave us a graphic description of the arguments and demeanour of the Maoris during the discussions that preceded the signing of the Treaty of Waitangi. Mr. Smith should be able to give us as vivid and accurate a picture of the Native Land Court trying a cause *célèbre*.

As for the folk-lore, the late Major N. G. Mair contributed to Vol. 22 of the *New Zealand Transactions* a paper in which he explained that in disputes before the Court as to tribal preserves or hunting-grounds in country not permanently occupied, claims thereto were supported by reference to the sites where the ancestors of the claimants snared or hunted birds, made pits for rats, or weirs for fish. Yet in the thousands of pages that he had written from the mouths of Maori witnesses there was not one word about the Moa. Now then, Mr. Smith!

SETTLEMENT OF A LIFE INTEREST ON A SPINSTER.

Determinable on Marriage.

By E. C. Adams, LL.M.

Explanatory Note.

In *Goodall's Conveyancing in New Zealand*, only one form of settlement is given—a simple marriage settlement of personalty. In practice, however, settlements of many varieties are encountered.

The purpose of the following settlement is obvious. A person has died, leaving his property to his five children equally. One, F.G., a spinster, is insufficiently provided for, and the others are desirous of conferring on her a life interest (determinable on marriage) in the whole of their father's estate.

The only criticism one can offer of this form is that cl. 3 rather restricts the trustees' discretion as to the forms of investment of the trust funds.

As *Goodall*, at p. 375, states: "A deed of settlement is liable according to its form and the value of the settled funds to conveyance duty, declaration of trust duty, or gift duty."

For gift-duty purposes, ss. 21 and 47 of the Death Duties Act, 1921 (dealing with contingencies), apply to this settlement.

The Commissioner in the first instance will probably assume that F.G. will not marry. Assuming she is in normal health, the value of her life interest in the whole trust fund will be actuarily calculated; this sum, divided by five, will give the value of the gift which A.B., C.D., E.F., and G.H., the donors, are each making to F.G. If the value of each gift so calculated, together with the value of all other gifts made within twelve months, previously or subsequently, by each respective donor does not exceed £500, then no gift duty is payable.

But, if any donor dies within three years of the date of the settlement, the value of the gift, so calculated, will be added to the donor's estate for death-duty purposes under s. 5 (1) (*b*). On the death of each donor, the *then* value of his interest in the corpus will also come into his estate under s. 5 (1) (*a*). But note that neither s. 5 (1) (*c*) nor s. 5 (1) (*j*) operates: see *In re Adams, Adams* v. *Commissioner of Stamp Duties*, [1932] N.Z.L.R. 741, G.L.R. 482.

On the death of F.G. her one-fifth share in the corpus comes in for death duty under s. 5 (1) (*a*); also the unpaid income from the whole trust fund, duly apportioned to date of her death.

Should F.G. marry, then the value of each respective gift will be recalculated according to the actual duration of the life interest of F.G., and all necessary adjustments in gift and death duty made. But no adjustment will be made merely because F.G., dying a spinster, should die before or after the period of the normal expectation of life, upon which the value of each gift has in the first instance been assessed: *Weldon (Commissioner of Taxes for Victoria* v. *Union Trustee Co. of Australia, Ltd.*, (1925) 36 C.L.R. 165.

Subject to the provisions of s. 87 of the Stamp Duties Act, 1923, which exempts any instrument from conveyance duty in respect of any property on which gift duty is payable, the transfer of the mortgage will be liable to conveyance duty at the rate of 5s. 6d. for every £100 or part thereof, the transfer of the fee-simple at 11s. for every £50 or part thereof. The transfer of the chattels will be exempt from stamp duty under ss. 81 (*a*) and 168.

If conveyance duty has been paid or is payable in respect of the transfer of the mortgage and of the fee-simple, the declaration of trust will be exempt from *ad valorem* duty as to the mortgage and land, but will be liable to such duty in respect of the chattels at the rate of 5s. 6d. for every £50 or part thereof: see s. 101; and see *White* v. *Commissioner of Stamp Duties*, [1934] G.L.R. 312.

PRECEDENT.

THIS DEED made the day of one thousand nine hundred and forty-one BETWEEN A.B. C.D. E.F. G.H. of Wellington farmers and F.G. of Wellington spinster (together hereinafter called "the settlors") of the one part and H.I. and J.K. of Wellington solicitors of the other part WHEREAS the settlors are possessed of a sum of two thousand pounds which is secured by memorandum of mortgage bearing date the day of *made* by L.M. in favour of O.P. now deceased and now vested in the settlors as tenants in common in equal shares and which said memorandum of mortgage is now registered in the office of the District Land Registrar at under No. AND WHEREAS the settlors are the owners of an estate of inheritance in fee-simple as tenants in common in equal shares in all that parcel of land [*set out official description and reference to volume and folio of the Register-book*] AND WHEREAS the settlors are the owners in equal shares of the household furniture set out in the schedule to a certain instrument under the Chattels Transfer Act 1924 bearing even date herewith and made by the settlors in favour of the said H.I. and J.K. AND WHEREAS the settlors being desirous of making such settlement of the estate and effects belonging to them as are set out in the foregoing recitals have by a memorandum of transfer and by an instrument under the Chattels Transfer Act both bearing even date herewith and made by the settlors in favour of the said H.I. and J.K. transferred conveyed and assured unto the said H.I. and J.K. the moneys land and household furniture of the said settlors referred to in the foregoing recitals AND WHEREAS the said H.I. and J.K. have at the request of the settlors agreed to be the trustees of the said intended settlement NOW THIS DEED WITNESSETH that the said settlors do and each of them doth hereby irrevocably direct and declare AND IT IS HEREBY AGREED as follows:—

1. The said H.I. and J.K. or the survivor of them or the executors or administrators of such survivor or other the trustees or trustee for the time being of these presents (hereinafter called "the trustees or trustee") shall at their or his discretion either retain the said land and mortgage and household furniture or convert the same or any part thereof into money and shall at such discretion as aforesaid invest the moneys produced by such sale in some or one of the modes of investment hereinafter authorized with power from time to time at such discretion as aforesaid to vary the said investments into or for others of the same or a like nature AND SHALL stand possessed of the said land mortgage and household furniture and the investments for the time being representing the same (hereinafter called "the trust funds") UPON the TRUSTS hereinafter declared and contained.

2. The trustees or trustee shall pay the income of the trust funds to the said F.G. during such time as she shall remain unmarried and subject to the foregoing trust the trustees or trustee shall stand possessed of the trust funds IN TRUST as to one-fifth part thereof upon trust for the said A.B. his executors and administrators and assigns as to one-fifth part thereof UPON TRUST for the said C.D. his executors administrators and assigns as to one-fifth part thereof upon trust for the said E.F. his executors administrators and assigns as to one-fifth part thereof upon trust for the said G.H. his executors administrators and assigns and as to the remaining one-fifth part thereof upon trust for the said F.G. her executors administrators and assigns.

3. All moneys liable to be invested under these presents may be invested in or upon any stocks funds or securities of or guaranteed by the Government of New Zealand the Government of the Commonwealth of Australia or of any Australian State or upon real or leasehold securities in the Dominion of New Zealand and also in manner hereinafter mentioned.

4. The trustees or trustee may at his or their discretion convert into money all or any part of the trust funds for the time being subject to the trusts of these presents and invest the moneys arising by such sale in one or other of the investments *hereinbefore authorized or in the purchase of any freehold or* leasehold lands in the Dominion of New Zealand with liberty in the case of purchase to accept such title or evidence of title as the trustees or trustee shall think fit and the lands so to be purchased as aforesaid shall be assured to the trustees or trustee and shall be held by them or him UPON TRUST that they or he shall at their or his discretion sell the same and stand possessed of the proceeds to arise from such sale after paying thereout the expenses attending such sale upon the trusts and with and subject to the powers and provisions (including the power of purchasing freehold and leasehold lands) by and in these presents declared concerning the trust premises which or the proceeds thereof shall have been laid out in the purchase of such lands as aforesaid or such of them as shall be then subsisting and capable of taking effect AND SHALL in the meantime and until resale of the purchased lands pay the rents and profits thereof to the said F.G. during such time as she shall remain unmarried AND IT IS also hereby declared and agreed that it shall be lawful for the trustees or trustee at their or his discretion to lease all or any part of the freehold or leasehold lands forming part of the trust fund either from year to year or for any term of years or for any period less than a year at the best rents that can be reasonably obtained for the same without taking anything in the nature of a fine or premium and under such covenants and conditions as the trustees or trustee shall think proper and to accept surrenders of leases and tenancies AND ALSO at the like discretion to exchange the whole or any part of the lands (whether freehold or leasehold) for the time being forming part of the trust funds for any other lands in New Zealand whether freehold or leasehold and upon any such exchange to give or receive money for equality of exchange.

5. The trustees or trustee may at their or his discretion borrow by way of mortgage or other charge over all or any part of the trust funds for such term of years and at such rate of interest as they or he shall think fit any sum or sums of money for the purpose of enabling them or him to purchase any freehold or leasehold lands which he or they may consider it advantageous to acquire.

6. The said H.I. or J.K. or any future trustee of these presents who may be a solicitor shall be entitled to charge and shall be paid out of the trust funds for all business done by him in relation to the trust funds in like manner as he would have been entitled to charge the trustees or trustee of these presents for the same if not being himself a trustee he or his firm had been employed by them or him to do such business as their or his solicitor.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands the day and year first above written.

STABILIZATION OF RENTS.

The Regulations summarized.

The general purpose of Part III of the Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), which deals with the stabilization of rents, is to establish a basic rent for all land or buildings or parts of buildings, other than dwellings, let on or after December 15, 1942, and to provide the means, in case of disagreement between landlord and tenant, for fixing the fair rent.

"Property," as defined, means any land or interest in land or any building or part of a building that, on December 15, 1942, or at any time thereafter, is let for any purpose under a separate tenancy, except where two or more properties are for the time being let under the same tenancy they are deemed to be one property. The term "property," however, excludes from the regulations any dwellinghouse to which the Fair Rents Act, 1936, for the time being applies.

The "basic rent," beyond which rent cannot be increased except by the means provided in the regulations, is (*a*) the rent payable on September 1, 1942, in respect of any property then let: or (*b*) the rent last payable before September 1, 1942, if the property was not let on that date, or the rent first payable after that date when the property is let for the first time. If, however, a greater or less rent is payable in respect of any property for any period after September 1, 1942, in pursuance of an agreement made before that date, the basic rent is the rent so payable for that period.

If the basic rent has been increased in the period between September 1, 1942, and December 15, 1942, or any increase made after the latter date, the excess is, notwithstanding any agreement to the contrary, irrecoverable; but, if a fair rent has been fixed by the regulations for any period, such rent, but nothing in excess of it, may be recovered. Any such irrecoverable rent, if paid, may be recovered from the landlord as a debt, within six months of payment, or, during that period, may be deducted from any rent then due.

The fair rent of any property may be determined by an order of the Court, on application made by or on behalf of the landlord or the tenant. The order takes effect from the date specified in it, but not earlier than the date of the application. If, however, the fair rent fixed by the order exceeds the rent for the time being, the order is not to take effect before the expiration of fourteen days after the date of the order. If the application was made within one month after December 15, 1942, then the order fixing the fair rent might be made retrospectively to September 1, 1942, but to no earlier date.

The fair rent may not exceed the basic rent, unless the Court is satisfied, by evidence produced by the landlord, that in the special circumstances of the case it is fair and equitable that the fair rent should exceed the basic rent. On the hearing of an application to fix the fair rent, the Court may not have regard to the circumstances of the landlord or of the tenant or to any general or local increase in values since September 1, 1942; but, after taking the general purpose, the regulations, any improvements to the property, and all other relevant matters into consideration, the Court is to fix, as the fair rent, such rent as in the opinion of the Court it would be fair and equitable for a tenant to pay for the property.

No rent in excess of the fair rent fixed by the Court is recoverable for any period during which the order is in force.

The jurisdiction conferred on the Court may be exercised (*a*) in every case, by the Supreme Court; and (*b*) where the basic rent does not exceed an annual rent of £520, by a Magistrate where the parties agree in writing that a Magistrate or any specified Magistrate shall have jurisdiction. The Supreme Court, therefore, has a concurrent jurisdiction with the Magistrates' Court up to £520, if the parties confer jurisdiction on a Magistrate up to that greatly increased jurisdiction in tenement case allowed by the regulations; if they do not agree, then the Supreme Court has sole jurisdiction, whatever be the amount. Any application for an order to determine the fair rent of a property is to be made by motion, with notice to the landlord or tenant, as the case may be, and to such other persons as the Court considers entitled thereto. Any such application may be disposed of in Chambers. Costs of the application do not "follow the event." No party to any such proceedings is liable to pay the costs of any other party, unless the Court makes an order for such payment on the ground that the conduct of the former has been for the purpose of causing delay, or vexatious, or on the ground that it is desirable for any other special reason to make such an order. No appeal lies from any decision fixing the fair rent; and, except upon the ground of lack of jurisdiction, no such decision may be challenged, reviewed, quashed, or called into question in any Court.

There can be no covenanting out of the regulations. Nevertheless, a Rents Commission, or an authorized person, may approve any agreement in writing made by the landlord and tenant fixing the fair rent of a property; and, in such case, the fair rent so fixed is deemed to be the fair rent as if it had been determined by an order of the Court.

Offences under the regulations are (*a*) the requirement or acceptance by any person of any premium or other sum in addition to the rent, in consideration of the grant, renewal, or continuance of the tenancy of any property. (*b*) The stipulation for, demand, or acceptance by any other person, for himself or any one else, any bonus, fine, premium, or other like sum in consideration of obtaining, offering to obtain, or doing anything for the purpose of obtaining any property for another's occupation. (Any sums so paid may be recovered in the same manner as rent paid in excess of the fair rent.) (*c*) By any threat endeavouring to dissuade or prevent a tenant from making or prosecuting any application to fix the fair rent. (*d*) Stipulating or demanding or accepting for himself or any other person on account of the rent of any property any sum that is irrecoverable under the regulations. (*e*) Stipulating for or demanding or accepting for himself or any other person on account of any dwellinghouse any sum that is irrecoverable by virtue of the Fair Rents Act, 1936.

Where any dwellinghouse to which the Fair Rents Act, 1936, applies, or any "property" within the meaning of the regulations was let on September 1, 1942, or between that date and December 15, 1942, or at any time thereafter, the landlord must keep a register in respect of each tenancy of the property containing the particulars specified in Reg. 25 (1), which must be completed forthwith after December 15, 1942, or the commencement of the tenancy, whichever is the later, and it must be kept posted up as soon as possible after the occurrence to which the new entry relates. Such register must be produced by the landlord, on demand, to the Court or any Rents Commission, or for inspection by any authorized person or by any tenant of the premises. Any landlord who fails to comply with the foregoing provisions, or makes or causes to be made any false entry in the register, commits an offence.

The regulations also provide for the establishment of Rents Commissions, for the purposes of the Fair Rents Act, 1936, and the regulations, to which the Court may refer, for investigation, any application made to fix the fair rent of any dwellinghouse or property. The Commission, after investigation, will report to the Court with such recommendations as it sees fit to make, after having regard to all the relevant considerations, including any matters that the Court is expressly required or authorized to take into consideration. If the parties fix the fair rent by agreement in writing and the Rents Commission approves it, the Commission is to report accordingly to the Court, which will thereupon dismiss the application. The Commission may also approve any agreement in writing made by the landlord and tenant, whether or not any application has been made to the Court to fix the fair rent.

The Fair Rents Legislation.—Since the passing of the Fair Rents Act, 1936, this legislation has undergone many changes, with the result that a number of judgments, given mostly in the *Magistrates' Courts*, have become of little value. Further amendment of the Act last year again extended the provisions of the legislation; and the references to the Fair Rents Act, 1936, in the Stabilization Emergency Regulations, 1942, have further widened its scope.

It is interesting to learn that Mr. W. W. Heine, M.A., LL.B., whose textbook on the original Fair Rents Act proved of such use to practitioners, has in hand a new edition of that work, which will present the subject as it stands to-day, with annotations of all relevant judgments that remain in full effect.

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. Probate and Administration.—*Application for Probate—One Executor in New Zealand—Other Executors Overseas.*

QUESTION: We have a will in which the testator appointed three executors, two of whom are now overseas. Those overseas have appointed A., the remaining executor in New Zealand, their attorney. Can A. apply for probate on his own behalf, and as attorney for the two executors overseas?

ANSWER: A. can apply for probate on his own behalf, with leave reserved to the remaining executors to apply, or the three executors can apply for a grant; but A. cannot apply for a grant of probate to himself and as attorney for the two executors overseas.

2. Divorce. — *Petition — Service on Respondent — Member of Imperial Army Forces Overseas.*

QUESTION: The respondent in a divorce suit is a New Zealander serving in the Imperial Army Forces. Could you indicate the practice, if any, with regard to service of the petition and citation in such circumstances?

ANSWER: Although not aware of any practice or case dealing with service on a domiciled New Zealander serving in the Imperial Army Forces, an application could be made to the Court for an order fixing the time within which an answer may be filed and for directions as to service. It might be suggested to the Court that the mode of service follow, *mutatis mutandis*, the procedure laid down in *A.* v. *A.*, [1940] N.Z.L.R. 394. There is a Judge-Advocate-General in London, with Deputy Judge-Advocate-Generals attached to the Imperial Army Forces in various places where such forces are situated. The documents for service, no doubt, could be sent to the Judge-Advocate-General, New Zealand, with a request that they be forwarded by him to the Judge-Advocate-General, London. It would be as well to inquire from the former whether such request could be complied with, and, if so, advise the Court accordingly when making the application as to the nature and source of the information so obtained. Provided the Army authorities in England are agreeable, there should be no difficulty in arranging service along the lines indicated in *A.* v. *A.* (*supra*).

3. Road—*Closed Road— Acquisition of Title—Owner of Adjoining Land.*

QUESTION: My client, who has a Land Transfer certificate of title for the adjoining land, has been in possession of a closed road for many years, but has no title thereto. How can he acquire title to same?

ANSWER: The question is not very explicit. If the road was originally one which intersected the land comprised in a Crown grant and was closed in accordance with law before the first enactment vesting highways in the Crown—*i.e.*, before the coming into operation of the Public Works Act, 1876—your client may avail himself of the principle of *Clemison* v. *Mayor of West Harbour*, (1895) 13 N.Z.L.R. 695 (mentioned in *Mueller* v. *Taupiri Coal Mines, Ltd.*, (1900) 20 N.Z.L.R. 89, 110). That is to say, on the closing of the road it automatically vested in the then owner of the land included in the Crown grant, and, on the necessary evidence as to possession being adduced, the District Land Registrar would amend your client's title, by including therein the closed road. If, however, the road was closed since the coming into operation of the Public Works Act, 1876, or was one which formed the *external* boundary of land granted, then it belonged to the Crown (assuming it is not situated in a Borough, City, or Town Board District), and in order to obtain title thereto your client would have to prove sixty years' continuous possession as against the Crown. If he can do so, he must lodge an application for the issue of a Land Transfer title under the Land Transfer Act, 1915. The District Land Registrar has no authority to issue a title in these circumstances without the consent of the Surveyor-General and the Governor-General. This provision ensures that in practice the Law Officers of the Crown may advise the Land and Survey Department on the question of title. If title as against the Crown (or, as the case may be, against the local body) cannot be established by your client, he had better see the Receiver of Land Revenue for the district, and endeavour to purchase the closed road. If a purchase is effected in this manner, the closed road will be vested in your client by Governor's Warrant, which will authorize the District Land Registrar to issue a certificate of title for same to your client.

RULES AND REGULATIONS.

Second-hand Fruit-case Notice, 1943. (Supply Control Emergency Regulations, 1939, and Timber Emergency Regulations, 1939.) No. 1943/1.

Price Order No. 121 (Honey). (Control of Prices Emergency Regulations, 1939.) No. 1943/2.

Traffic Control Corps Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/3.

Lemon Marketing Regulations, 1940, Amendment No. 1. (Marketing Act, 1936, and Agriculture (Emergency Powers) Act, 1934.) No. 1943/4.

His Majesty's Forces (Mileage-tax) Emergency Order, 1943. (Transport Legislation Emergency Regulations, 1940.) No. 1943/5.

National Service Emergency Regulations, 1940, Amendment No. 14. (Emergency Regulations Act, 1939.) No. 1943/6.

Anniversary Day Observance Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/7.