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DECLARATORY JUDGMENTS AND ORDERS.

SECTION 10 of the Declaratory Judgments Act, 1908, gives the Supreme Court a discretionary jurisdiction as to giving or making a declaratory judgment or order; and the Court may, on any grounds which it deems sufficient, refuse to give or make such judgment or order. The section has been construed and acted upon on several occasions, as for instance in *Wellington Harbour Ferries, Ltd.* v. *Wellington Harbour Board*, (1910) 29 N.Z.L.R. 729, where it was held that the Court will not answer hypothetical questions; and in *Young* v. *New Zealand Insurance Co., Ltd.*, (1909) 29 N.Z.L.R. 50, where the Court exercised its jurisdiction by refusing to make a declaration where the document in question could be construed more conveniently in an ordinary action. The most recent case in which the section was discussed came before Mr. Justice Johnston last month, when an application was made for the striking out of an action in which a declaratory judgment was sought without any other relief being asked for: *New Zealand Theatres, Ltd.* v. *J. C. Williamson Picture Corporation, Ltd.*, [1943] N.Z.L.R. 383. To this judgment we shall refer later.

The general principles respecting the exercise of the Court's discretion under the section are enunciated most fully in the considered judgment of Sir Charles Skerrett, C.J., and Reed, J., in *Dairy Proprietary Association (Inc.)* v. *New Zealand Dairy-produce Control Board*, [1926] N.Z.L.R. 535, where the Court, on several grounds, refused to make a declaratory order as to the construction of a then recent New Zealand statute. There, the question whether the Court should, in the exercise of its discretion, decline to determine the questions raised in the originating summons, arose on an application for directions as to service, and was disposed of by their Honours on that application on the ground that it would be futile and putting the parties to useless expense to make an order for service if the Court would in the end decline to make a declaratory order.

The originating summons in that case asked for the determination by the Court of numerous questions arising under the Dairy-produce Export Control Act, 1923, and was, in the words of the judgment of the Court, delivered by the learned Chief Justice, "in short a catechism which traverses generally the provisions of the statute and seeks to obtain an abstract opinion from the Court as to the general powers conferred by statute—whether the powers should or should not in the future be exercised." No concrete facts had been placed before the Court to show that a question of right had arisen between either of the plaintiffs and the Board as to specific produce intended to be exported.

In declining to determine the questions raised by the originating summons, their Honours gave grounds for their decision, which may be summarized as follows:

(*a*) The Court ought not to place itself (as it was invited to do) practically in the position of counsel advising the owners of proprietary factories or exporters of dairy produce upon the interpretation of the statute. In other words, the Court should not encourage anticipatory interpretation, in the nature of an abstract opinion in the nature of advice, on the whole statute. In this respect they cited the statement of Isaacs, J., as he then was, in *Attorney-General of Queensland* v. *Attorney-General of the Commonwealth*, (1915) 20 C.L.R. 148, 166, where he said: "But were this Court to encourage suits for anticipatory interpretation of Commonwealth legislation, a vista of judicial occupation would present itself of which the limits are not easy to discern." This dictum, we might add, followed a citation from the opinion of the Privy Council in *Perhi Pal Kunwar* v. *Gurnan Kunwar*, (1905) 17 Ind. App. 107, where their Lordships said:

> It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under the circumstances, to grant the relief prayed for. There is so much more danger than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.

(*b*) The application for a declaratory order, as asked for, was open to the grave objection that the Court, if it granted it, would be compelled to define statutory powers in the abstract without knowledge of the facts and circumstances under which such powers might be exercised, and without any certitude that many of the powers about which questions were asked would ever be exercised. Their Honours observed that, if the Court were to yield to such an application it might be called upon to give an anticipatory interpretation of many kinds of documents, such as deeds, wills, memoranda and articles of association, by-laws of local authorities, and regulations made by Governor-General in Council.

(*c*) The plaintiffs were not the only persons, nor even the most numerous body of persons, interested in the questions raised as to the interpretation of the statute; and if those persons were not made parties to the proceedings, they would not be bound by the Court's

determination. In the face of the numerous conflicting interests, the joinder of all interested parties would be a most inconvenient proceeding.

(*d*) Applying *Lewis* v. *Green*, [1905] 2 Ch. 340, the Court ought not, on an originating summons, decide a question of construction which, whichever way it was decided, did not necessarily put an end to the litigation.

In deciding that the Court in its discretion should refuse to answer the questions asked in the summons, their Honours said that decision placed no real difficulty in the plaintiffs' way, as they could obtain the decision of the Court upon any action contemplated by the Board which they claimed to contravene their rights in an action claiming a declaration of right, with or without an injunction; but they could not, in such an action, obtain the opinion of the Court on the interpretation of substantially all the provisions of the statute.

Since the Court is given a discretion by s. 10, it is clear that the grounds given by their Honours for declining to entertain the application for the order sought in the *Dairy Proprietary Association* case cannot be exhaustive. They were, however, adopted as conclusive on the position which arose later in the same year in *New Zealand Educational Institute* v. *Wellington Education Board*, [1926] N.Z.L.R. 615, where, in exercise of the discretion vested in him by s. 10, MacGregor, J., declined to make the declaratory order asked of him. He found that the questions asked in the summons were essentially abstract, if not academic, and if decided by him must be so decided without knowledge of the facts and circumstances relating to any specific case of the kind, which it appeared to His Honour to constitute a formidable objection to making a declaratory judgment on the summons before him. Further, if he were, as asked, to make a general declaratory exposition of the law, the result would be that the actual parties to the proceedings would be bound by it, while the persons really interested in the matter would not, but would remain free to act (and to litigate) on an opposite interpretation of the Education Act, 1914, and its amendments, and the regulations thereunder, which were the subject-matter of the summons.

The English provision corresponding to s. 10 of our Declaratory Judgments Act, 1908, for obtaining declaratory judgments or orders is contained in R.S.C. Ord. 25, r. 5*; and the numerous cases decided on the interpretation and application of that order are collected in *1940 Yearly Practice*, 408, and *1942 Supplement*, p. 18. It is well established that the power to make declarations under this rule is a discretionary power: see, for example, Lord Wright, M.R., in *Odham's Press, Ltd.* v. *London and Provincial Sporting News Agency (1929) Ltd.*, [1936] 1 All E.R. 217, 221.

In the *Dairy Proprietary Association* case, their Honours pointed out that that was not an action for a declaratory judgment, but an application under s. 3 of the statute by originating summons for a declaratory order determining a question or questions as to the construction of a statute; but, they added, even where a declaratory judgment has been sought in an action, and not by originating summons, the discretion to exercise the jurisdiction has been exercised with great caution. For instance, Viscount Finlay in *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade*, [1921] 2 A.C. 438, 445, quoted the opinions expressed in a number of cases as follows:

> It should be exercised sparingly: *In re Staples*, [1916] 1 Ch. 322. With great care and jealousy: *Austen* v. *Collins*, (1886) 54 L.T. 903, 905. With extreme caution: *Faber* v. *Gosworth Urban Council*, (1903) 88 L.T. 549, 550. Stirling, J., took the same view in the subject in *Grand Junction Waterworks Co.* v. *Hampton Urban District Council*, [1898] 2 Ch. 331, 345; and Lord Sterndale in *Markland* v. *Attorney-General*, [1920] 1 Ch. 348, 357, said that there has been too great a tendency of late years to ask for declarations.

This dictum was quoted to Mr. Justice Johnston in his judgment in the recent case, *New Zealand Theatres, Ltd.* v. *J. C. Williamson Picture Corporation, Ltd.* (*supra*), where he had to consider a summons to set aside a writ of summons and to strike out the statement of claim in an action, on the ground that a declaratory judgment was sought by the plaintiff, and that the issue between the parties was one upon which the Court should exercise its discretionary jurisdiction by refusal to give a declaratory judgment. In effect, it was contended for the defendant in that action that the plaintiff had asked for specific performance of an agreement said to arise by implication from a clause in that agreement, and that it had no right to pursue that object in an action asking for a declaratory judgment. In support, the defendant referred to the cases in which it has been held that declaratory judgments should be sparingly used, and to which we have already referred; and contended that it would be putting the parties to useless expense if the Court would in the end decline to make a declaration.

The learned Judge said that a summons to dismiss an action asking for a declaratory judgment seemed to stand on a different footing from the summons for directions as to service which was before the Court in the *Dairy Proprietary Association* case (*supra*); and, moreover, it had not been suggested to him that if a declaration were made the action, it would not in substance be determined and litigation ended. His Honour then said, summarizing the result of the authorities on the point:

> In the first place, a party has a right to bring an action asking for a declaratory judgment without claiming other relief. Plaintiff has brought such an action. A party seeking to dismiss such an action, if he is to succeed on a motion prior to hearing, must show clearly that the declaration sought would be futile in that it would not end the litigation between the parties, that it is anticipatory, or that it would necessarily involve a general interpretation of wide significance, affecting rights and interests outside the interests of the parties to a particular dispute.

On the application before His Honour, the defendant had failed to satisfy him on any of those grounds. He found himself in the same position as MacGregor, J., in *Gilmour* v. *Gavegan*, [1931] G.L.R. 378—a summons to strike out the pleadings in an ordinary action—in finding that it was impossible to say with certitude that the plaintiff had no cause of action or that the action was frivolous and vexatious, and that the declaration asked for should not be made. He, therefore, dismissed the summons to set aside the writ and strike out the statement of claim seeking a declaratory judgment.

* No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Wellington. 1943. May 17; June 10. *Johnston*, J.

NEW ZEALAND THEATRES, LIMITED v. J. C. WILLIAMSON PICTURE CORPORATION, LIMITED.

Declaratory Judgment—Summons to dismiss pending Action asking for Declaratory Judgment—Further Relief not claimed—Grounds upon which such an Action may be dismissed—Declaratory Judgments Act, 1908, ss. 2, 10.

A party, to succeed on an application, before hearing, for the dismissal of an action asking for a declaratory judgment without claiming other relief, must show clearly that the declaration sought would be futile in that it would not end the litigation between the parties, that it is anticipatory, or that it would necessarily involve a general interpretation of wide significance affecting rights and interests outside the interests of the parties to a particular dispute.

Dairy Proprietary Association (Inc.) v. *New Zealand Dairy-produce Control Board*, [1926] N.Z.L.R. 535, G.L.R. 394, distinguished.

Gilmour v. *Gavegan*, [1931] G.L.R. 378, referred to.

Counsel: *Sim*, K.C., and *Sladden*, for the plaintiff; *Spratt*, for the defendant.

Solicitors: *O. and R. Beere and Co.*, Wellington, for the plaintiff; *Sladden and Stuart*, Wellington, for the defendants.

SUPREME COURT. Palmerston North. 1943. May 10; June 3. *Johnston*, J.

McARTHUR AND BARBER v. MANAWATU KNITTING-MILLS, LIMITED, AND ANOTHER.

Company Law—Articles—Proxy—Articles governing Appointment—"Under the hand of the appointor"—Place indicated in Proxy Form for Signature at Foot—Name of Appointor written by him in the Blank for insertion thereof at Beginning of Text—Whether Compliance with Articles—Companies Act, 1933, Second Schedule, Table A, Arts. 59, 61.

Where the articles of a company provide that the instrument appointing a proxy shall be "in writing under the hand of the appointor" and shall be in a prescribed form beginning "I, , of ," and ending "As witness my hand ," or "Signed ," a signature is required apart from the insertion of the name of the appointor in the blank in the text; such insertion, even if written by the appointor himself, cannot be regarded as a sufficient substitute for a signature; and an instrument without further signature thereon than such insertion in the text is invalid.

Hubert v. *Treherne*, (1842) 3 Man. & G. 743, 133 E.R. 1338, applied.

Cohen v. *Roche*, [1927] 1 K.B. 169; *Holmes* v. *Mackrell*, (1858) 3 C.B. (N.S.) 789, 140 E.R. 953; *Knight* v. *Crockford*, (1794) 1 Esp. 190, 170 E.R. 324; and *Schneider* v. *Norris*, (1814) 1 M.S. 286, 105 E.R. 388, distinguished.

Hucklesby v. *Hook*, (1900) 82 L.T. 117; *Harben* v. *Phillips*, (1883) 2 Ch.D. 14; *New Pinnacle Group Silver Mining Co.* v. *Griffiths*, (1897) 18 N.S.W. S.R. (Eq.) 159; and *In re Prince Blucher, Ex parte Debtor*, [1931] 2 Ch. 70, referred to.

Counsel: *H. R. Cooper*, for the plaintiffs; *J. F. Stewart*, for the defendants.

Solicitors: *Cooper, Rapley, and Rutherfurd*, Palmerston North, for the plaintiffs; *Hogg and Stewart*, Wellington, for the defendants.

Case Annotation: Hubert v. *Treherne*, E. and E. Digest, Vol. 12, p. 155, para. 1092; *Cohen* v. *Roche*, *ibid.*, Vol. 39, p. 393, para. 293; *Holmes* v. *Mackrell*, *ibid.*, Vol. 32, p. 371, para. 549; *Knight* v. *Crockford*, *ibid.*, Vol. 12, p. 154, para. 1071; *Schneider* v. *Norris*, *ibid.*, Vol. 12, p. 155, para. 1087; *Hucklesby* v. *Hook*, *ibid.*, Vol. 12, p. 155, para. 1089; *Harben* v. *Phillips*, *ibid.*, Vol. 9, pp. 442, 443, para. 2870.

COMPENSATION COURT. Greymouth. 1943. April 16; May 28. *O'Regan*, J.

FAIRMAN v. GREY VALLEY COLLIERIES, LIMITED.

Workers' Compensation — Assessment — Jurisdiction — Permanent Non-Schedule Injury—Resumption of Work with Employer at more than Pre-accident Wages—Employer Company in Liquidation—Desirability of Lump-sum Payment—Suspensory Award for Nominal Weekly Payment unnecessary and undesirable—Jurisdiction to suspend or Revive Weekly Payments—Protection in Event of Recurrence of Incapacity—Workers' Compensation Act, 1922, ss. 3, 5, 28, 29.

A workman employed by a coal-mining company as a winchman suffered a serious and permanent non-Schedule injury to a leg, which narrowed his opportunity for work. After recovering from temporary total incapacity as a result, he resumed employment with the company as a storeman at less than his pre-accident wage. He then commenced an action claiming compensation for permanent partial incapacity, but the action was adjourned *sine die* by consent. In the meantime, the mine was acquired by the Government and the company accordingly went into liquidation, and the action was brought on again for consideration, at which it was proved that the worker was in receipt of a wage exceeding his pre-accident wage.

Held, That the Court has jurisdiction to estimate the extent of the worker's incapacity despite the fact that he was at the time earning more than his pre-accident wages; and that, in the special circumstances of this case, the proper course was to award a lump-sum payment in respect of such incapacity.

Maloney v. *Munt, Cottrell, and Co., Ltd.*, [1923] G.L.R. 469, applied.

Brown v. *Thornycroft and Co., Ltd.*, (1912) 5 B.W.C.C. 386, distinguished.

Ball v. *William Hunt and Sons, Ltd.*, [1912] A.C. 496; 5 B.W.C.C. 459; *Jackson* v. *Hunslet Engineering Co. (No. 2)*, [1916] 2 K.B. 8; 9 B.W.C.C. 269; *Cole* v. *United Dairies (London), Ltd.*, [1940] 2 All E.R. 318; 33 B.W.C.C. 332; *Hodge* v. *Altor Co-operative Dairy Factory Co., Ltd.*, (1914) 17 G.L.R. 139; 13 N.Z.W.C.C. 47; *Speck* v. *Young*, [1920] G.L.R. 533; *Cooke* v. *J. M. Haywood and Co., Ltd.*, [1921] G.L.R. 631; *White* v. *Borrie*, [1923] N.Z.L.R. 797; G.L.R. 133; *Rankin* v. *New Zealand Shipping Co., Ltd.*, [1938] N.Z.W.C.C. 69; *Smith* v. *Wellington City Corporation*, [1941] N.Z.L.R. 995; G.L.R. 544; *Chapman* v. *The King*, [1943] N.Z.L.R. 103; and *Hall* v. *Abels Ltd.*, [1937] N.Z.L.R. 888; G.L.R. 507, referred to.

Semble, An exercise of the Court's jurisdiction under s. 29 of the Workers' Compensation Act, 1922, to suspend or revive payments of compensation fully preserves an injured worker's right to further compensation in case of a recurrence of incapacity. The practice of making a suspensory award for a nominal weekly payment, ostensibly for the purpose of preserving the rights of an injured worker (in view of the provision in s. 5 (7) that weekly payments shall in no case extend over a larger aggregate period than six years, and of the necessity under s. 28 of the injured worker taking proceedings within six months) is neither necessary nor desirable, and should be abandoned.

Phillips v. *Wellington City Corporation*, [1941] N.Z.L.R. 134, G.L.R. 5, followed.

Nicholls v. *Westport Coal Co., Ltd.*, [1941] N.Z.L.R. 11, [1940] G.L.R. 606, applied.

King v. *Port of London Authority*, [1920] A.C. 1, 12 B.W.C.C., 260, and *Smith* v. *Kauri Timber Co., Ltd.*, [1918] N.Z.L.R. 536, G.L.R. 334, referred to.

Counsel: *W. D. Taylor*, for the plaintiff; *Hannan*, for the defendant.

Solicitors: *Joyce and Taylor*, Greymouth, for the plaintiff; *Hannan and Seddon*, Greymouth, for the defendant.

COMPENSATION COURT.
Greymouth.
1943.
May 5, 13; June 2.
O'Regan, J.

CASSIDY
v.
BRUNNER COLLIERIES, LIMITED.

Workers' Compensation—Liability for Compensation—Assessment—"Odd lot" Doctrine—Unscheduled Injury—Worker permanently Disabled but competent to undertake light Work—Applicability of Doctrine—Workers' Compensation Act, 1922, s. 3.

A trucker, who had been crushed between two trucks, was so severely injured that there was permanent disablement. On the evidence, the Court held that the injured man should be competent to undertake light work, even though he should be precluded from engaging in heavy work.

Held, That the plaintiff was entitled to compensation for permanent partial incapacity, but such incapacity could not be assessed on the basis of the "odd lot" doctrine.

Gaffney v. *Chorley Colliery Co., Ltd.*, (1922) 92 L.J.K.B. 1, 15 B.W.C.C. 158, applied.

Orr v. *Mainland*, [1940] N.Z.L.R. 686, G.L.R. 408, and *W. B. Young, Ltd.* v. *Landers*, [1941] G.L.R. 386, distinguished.

Cardiff Corporation v. *Hall*, [1911] 1 K.B. 1009, 4 B.W.C.C. 159, and *Fretwell Heating Co., Ltd.* v. *Price*, (1939) 32 B.W.C.C. 75, referred to.

Observations on the "odd lot" doctrine, and its application even more sparingly in New Zealand than in England.

Counsel: *W. D. Taylor*, for the plaintiff; *J. W. Hannan*, for the defendant.

Solicitors: *Joyce and Taylor*, Greymouth, for the plaintiff; *Hannan and Seddon*, Greymouth, for the defendant.

COMPENSATION COURT.
Westport and Christchurch.
1943.
May 10, 13; June 16.
O'Regan, J.

FILER v.
WESTPORT COAL COMPANY, LIMITED.

Workers' Compensation—Assessment—Average Weekly Earnings—Mining Contractor or Piece-worker—"Ordinary rate of pay"—Method of Computation—Workers' Compensation Amendment Act, 1936, s. 7 (1) (3) (5).

The effect of s. 7 of the Workers' Compensation Amendment Act, 1936, is to extend the method of computation formerly limited to waterside workers to all workers. Hence, overtime can be included only when it is necessary to invoke s. 7 (5).

Plaintiff during the twelve months immediately preceding the accident by which he was injured had made the average weekly earnings of £8 5s. 9d. At the time of the accident he was one of a party of mining contractors or piece-workers. The accident occurred after he had worked about two hours on the first shift of the fortnightly pay period observed by the defendant company. The rate earned per shift by each member of the party worked out at £11 4s. 7d. for each man for a five-day week.

Held, That the plaintiff's earnings should be computed pursuant to s. 7 (3) of the statute, and not pursuant to s. 7 (5) thereof.

Robertson v. *Martha Gold-mining Co. (Waihi), Ltd.*, [1937] N.Z.L.R. 1089, G.L.R. 618, applied.

Livingstone v. *Westport-Stockton Coal Co., Ltd.*, (1912) 14 G.L.R. 515, and *Pidwell* v. *Wanganui Sash and Door Factory and Timber Co., Ltd.*, [1917] G.L.R. 346, referred to.

Counsel: *W. D. Taylor*, for the plaintiff; *A. N. Haggitt*, for the defendant.

Solicitors: *Joyce and Taylor*, Greymouth, for the plaintiff; *Ramsay and Haggitt*, Dunedin, for the defendant.

SUPREME COURT.
Wellington.
1943.
May 21; June 16.
Johnston, J.

In re **THE WHAKAMARU TIMBER COMPANY, LIMITED (IN LIQUIDATION).**

Company Law—Winding-up—Articles of Association—Provision for Distribution where Assets after Payment of Debts more than sufficient to Repay the Whole of the Paid-up Capital, but not where such Assets not so sufficient—Method of Distribution—Equalization of Capital.

The capital of a company was £75,000, divided into 75,000 shares of £1 each; on 30,021 shares allotted by the directors, 11s. 6d. had been paid. A further 25,000 shares were allotted as fully paid in part satisfaction of the purchase price payable in respect of certain property acquired by the company. The company was in liquidation. After payment of debts, apart from liability to share capital, there was approximately £24,000 to distribute to shareholders. The relevant articles of association were as follows:—

"22. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the money due upon the shares held by him beyond the sums actually called for; and upon the money so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon shares in respect of which such advance has been made, the directors may, if they think fit, pay interest at such rate not exceeding seven pounds per centum per annum as the member paying such sum in advance and the directors agree upon; but no shareholder shall be entitled as of right to any interest on any money so paid in advance, and the directors may decline to pay any interest.

"127. Subject as aforesaid the profits of the company shall be divisible among the members in proportion to the capital paid up, or credited as paid up, on the shares held by them respectively, but where capital is paid up in advance of calls upon the footing that the same shall carry interest, such capital shall not whilst bearing interest confer a right to participate in profits.

"165. If upon the winding-up of the company the assets remaining after payment of the debts and liabilities of the company and the costs and expenses of winding-up (hereinafter called the 'surplus assets') shall be more than sufficient to repay the whole of the paid-up capital the same shall be distributed among the holders of ordinary shares issued as fully-paid shares and of contributing ordinary shares in proportion to the capital paid or deemed to have been paid or which ought to have been paid at the commencement of the winding-up on the shares held by them respectively other than amounts paid in advance of calls. But this article is to be without prejudice to the rights of the holders of shares (if any) issued upon special conditions."

On a motion by the liquidator of the company for an order determining how and in what proportions the assets of the company available for that purpose should be distributed amongst the holders of the fully-paid shares and the holders of the partly-paid shares, and as to whether calls should be made for adjusting the rights of the shareholders,

Held, That, before making the distribution, the liquidator must first equalize the capital, by paying the fully-paid shareholders out of the sum available for distribution the equivalent of 8s. 6d. per share, and they should share equally in the balance with the partly-paid shareholders.

Re Hodge's Distillery Co., Ex parte Maude, (1870) L.R. 6 Ch. 51; *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.*, (1889) 14 App. Cas. 525; and *In re Driffield Gas Light Co.*, [1898] 1 Ch. 451, applied.

Counsel: *Cousins*, for the liquidator; *Pringle*, for E. E. Johnston, representative of the fully-paid shareholders; *Spratt*, for H. B. Williams, representative of the partly-paid shareholders.

Solicitors: *Findlay, Hoggard, Cousins, and Wright*, Wellington, for the liquidator; *Morison, Spratt, Morison, and Taylor*, Wellington, for the partly-paid shareholders; *Pringle and Gilkison*, Wellington, for the fully-paid shareholders.

CHILDREN'S COURTS.

Powers and Limitations of Justices.

Before tracing the history of the legislation relating to the trial, &c., of juvenile offenders, it is advisable to set out the criminal responsibility of children. Section 41 of the Crimes Act, 1908, enacts that no person is to be convicted of any offence committed by him when under the age of seven years (in England, the age is eight—s. 50 of the Children and Young Persons Act, 1933); and s. 42 declares that no person is to be convicted of any offence while such person was of the age of seven years and under fourteen years, unless the jury by whom he is tried, or the Court or Justices before whom he is charged and who have jurisdiction to deal with the charge summarily, are of opinion that he knew the act or omission constituting the crime was wrong.

Before the passing of the Child Welfare Act in 1925, the procedure for dealing with juveniles was contained in the Justices of the Peace Act, 1908. Part III of that Act set out the steps that were to be taken when a juvenile—*i.e.*, a person under, or apparently under, the age of sixteen years—was charged with an offence. It is to be noted that Part V of that Act (relating to the summary trial of indictable offences) was to be construed subject to such Part—*i.e.*, Part III. There was also s. 229, which made provision for dealing with "young persons" defined as those of the age of twelve years and under sixteen charged with certain indictable offences. And s. 230 contained provisions for dealing with children (defined as persons under twelve years of age) charged with indictable offences (other than homicide); and it is interesting to note that subs. (5) of the section was not to render liable to punishment any child not above the age of seven who was not of sufficient capacity to commit a crime. The right of trial by jury in summary cases was not to apply unless the parent or guardian was present; but this will be referred to later. All those provisions have been re-enacted in the Justices of the Peace Act, 1927; but the provisions in Part V relating to young persons and children are to be read subject to the Child Welfare Act, 1925. Section 34 of this latter Act, while stating that the provisions of the Act are to override the inconsistent provisions of any other Act relating to offences committed by children or to the trial and punishment of children, nevertheless declares that the sections of the Justices of the Peace Act to which reference has been made may apply "if the Court expressly determines that those provisions shall be applicable."

Under the Juvenile Offenders Act, 1906 (now incorporated in Part III of the Justices of the Peace Act, 1927), it was held that an indictable offence—in that case, forgery—was not covered by such provisions. In *Police* v. *Blank*, (1926) 21 M.C.R. 81, it was held that a Children's Court had no jurisdiction to deal finally with an indictable offence (forging and uttering and theft) referred to it by Justices of the Peace.

It may, it seems, be safely assumed that it was in consequence of that decision that the Act was amended in the following year. By the enactment effecting the amendment—the Child Welfare Amendment Act, 1927—it was set out, in s. 19, that "doubts had been expressed as to the true intent and purpose of this provision"—*i.e.*, s. 29 of the original Act; and therefore to remove all doubt and "to define the extended powers conferred on the Children's Court by s. 31 of the said Act" it was specifically declared, *inter alia*, with regard to indictable offences not triable summarily that "the matter may be finally dealt with by the Children's Court acting under the powers conferred on it by s. 31 of the principal Act." But subs. (2) (*c*) of s. 19 enables the Court, should it decide not to exercise with respect to any child the authority conferred by s. 31, to "deal with the child in all respects as if the powers conferred by the said section had not been so conferred." Section 31 is very sweeping; it says that it shall not be necessary for the Court to hear and determine any charge, but, whether or not it determines the charge, it may, after taking into account certain specified factors, commit the child to the care of the Superintendent or make any other order that it could make on a complaint under s. 13 of the principal Act. It is clear, therefore, that in cases of indictable offences not triable summarily the Court must deal with the offender under Part IV, of the Justices of the Peace Act (relating to indictable offences) if it does not propose to exercise the special powers conferred by s. 31. This view derives support from subs. (2) (*d*) of s. 19 (the words "the decision of a Children's Court . . . to commit for trial or sentence . . . "). While on the subject of indictable offences, it should be pointed out that it is to be noted that under s. 22 no proceedings relating to a charge of murder or manslaughter against a child is to be taken in a Children's Court; and that under s. 25 of the Amendment Act, 1927, the Supreme Court may refer a case back to a Children's Court; and there is s. 32 (as amended) conferring jurisdiction in cases of young persons over seventeen and not more than eighteen years of age.

The overriding nature of the jurisdiction conferred by the Child Welfare Acts is well illustrated in the case of *R.* v. *Rix*, [1931] N.Z.L.R. 984. The facts in that case were that the accused was charged with breaking and entering and theft, and the presiding Justices, assuming that the accused was an adult, as he stated he was eighteen years of age, on his plea of guilty, committed him to the Supreme Court for sentence. He was sentenced to a term of Borstal detention. On subsequent proceedings it was held that the plea of guilty, the committal for sentence, and the sentence itself must be quashed; as the Children's Court has exclusive jurisdiction over children, and that a child cannot be deprived of his right to be tried by a Children's Court "constituted as it is with special safeguards and exceptional immunities appropriate only to juvenile offenders": *ibid.*, 990. It is, of course, clear in such a case, as contended by counsel, that the child might have been dealt with by committing him to the care of the Superintendent of Child Welfare: *ibid.*, 985. It was pointed out, too, that the Justices could not have fixed the age under the powers conferred by s. 40 of the Child Welfare Act as they "were admittedly not sitting under that Act at all": *ibid.*, 988.

So far as indictable cases are concerned, the Children's Court has jurisdiction in all such, except murder or manslaughter, provided that it proposes to act under the special powers conferred by s. 31. If, on the other hand, it does not intend to so act, it must proceed in

the ordinary way under Part IV of the Justices of the Peace Act, and commit the accused for trial or sentence, should in the former case a *prima facie* be established.

So far as indictable cases not triable summarily are concerned, the position is clear. But what of such offences that are triable summarily? Section 24 of the Amendment Act, 1927, gives power to the Governor-General to make regulations for the practice and procedure in Children's Courts; and, in default of such rules or in so far as they do not extend, the Court may determine its own procedure, and, in doing so, it is not necessary that it conform to any rules that would be applicable in the proceedings if taken elsewhere. The rules are to relate to practice and procedure only, and it seems that an indication is given of what is intended by this phrase in the concluding sentence of subs. (2) of s. 24. Under that provision it is not necessary to record a conviction: and any penalty may be imposed or order made as if a conviction had been actually recorded.

While on this subject we have to consider the position when a child is charged with an offence punishable in the case of an adult by imprisonment for more than three months. The section to which reference is now being made is s. 124 of the Justices of the Peace Act, under subs. (3) of which the parent or guardian of a child charged with an offence within the section is entitled to make an election of trial by jury should there not be anything in the Child Welfare Acts excluding such provision. The question therefore is, Does s. 24 of the amending Act of 1927 impliedly repeal or supersede s. 124 of the Justices of the Peace Act? It seems clear that such a right cannot be rightly regarded as merely a "rule" of procedure. As has been stated, a clue is given as to the meaning of the term "rule" by the provision that there is no necessity to record a conviction—this being obviously for the benefit of the child. That, however, is quite a different matter from depriving a child of a statutory right of trial by jury should his parent or guardian so desire. But s. 24 does not stand alone: there is s. 34 of the original Act, which provides that in so far as the provisions of Part IV of the Child Welfare Act are inconsistent with the provisions of other Acts relating to offences committed by children or to the *trial* or punishment of children, the provisions of Part IV are to prevail. Clearly this enactment overrides all such provisions as s. 124 of the Justices of the Peace Act; as an election of trial by jury would oust the jurisdiction of the Children's Court. This view is supported by subs. (2) of s. 34: but for that saving provision all the provisions of the Justices of the Peace Act would have been superseded (apart that is from indictable offences not triable summarily in respect of which the Court did not propose to exercise the powers conferred by s. 31). But the subsection just quoted makes no reference whatever to s. 124, and there is no saving clause in respect of it; nor is there any reference in s. 124 to such section being construed subject to the Child Welfare Act, as there is in the case of Part III of the Justices of the Peace Act. Reading s. 24 of the Amendment Act, 1927, in conjunction with s. 34 of the original Act, the joint effect is that the Court is to determine its own procedure, unless the Court expressly proceeds under Part III of the Justices of the Peace Act, or s. 241 or s. 242 of such Act. This view makes for a consistent enactment: it would be a strange position indeed if a Children's Court could deal with an indictable offence not triable summarily, but could not deal with an indictable offence triable summarily should not an election to deal with the case be forthcoming (s. 241 and s. 242, of course, apart): see also s. 29 of the Child Welfare Act.

Summing up the position as regards the jurisdiction of the Children's Court to try cases against children, it may be said that such Court has universal jurisdiction over all such cases and finally to deal with them with the following exceptions: those indictable cases not triable summarily when the Court does not propose to exercise the powers conferred by s. 31—in which case the Children's Court can only take the preliminary investigation under Part IV of the Justices of the Peace Act; secondly, when an election is made under s. 241 or s. 242 of the latter Act for trial by jury; or, thirdly, in cases of murder or manslaughter. As to right of trial by jury under s. 124 of the Justices of the Peace Act, such provision must, in the case of children, be superseded or impliedly repealed by the provisions of the Child Welfare Acts.

Other powers of the Court include the ability to discharge an information if, after considering the report of a Child Welfare Officer, the Magistrate deems the charge to be trivial: s. 17 of the Amendment Act, 1927.

It is to be observed, too, that no Court fees are payable in respect of proceedings in Children's Courts: s. 29 (2).

What punishments can a Children's Court impose? Section 34 of the principal Act provides, *inter alia*, that as to punishments the provisions of that Act are to prevail. Before dealing further with the question of punishment, it is necessary to point out that the Act is mainly concerned with the welfare of children; in the words of Lord Russell of Killowen in *R.* v. *Jennings*, [1896] 1 Q.B. 66: "The scheme of the . . . Act shows that it is not a code of criminal procedure, and is not punitive in its character; it is on the contrary, benevolent in its aims and operations, and is intended to protect those children who come within its protection." That defines admirably the intention of the Legislature—it is not so much punitive as benevolent in its conception. We find that under the Act or by virtue of the provisions of the Justices of the Peace Act incorporated by special provision in that Act a child offender may be (*a*) committed to the care of the Superintendent of Child Welfare; or (*b*) placed under the supervision of a Child Welfare Officer; or the Court may (*c*) impose any penalty or (*d*) make any order—*e.g.*, restitution—with or without a conviction; under Part III of the Justices of the Peace Act it may (*e*) admonish and discharge the offender or (*f*) may order him or his parents to pay costs and damages incurred by or through the offence. Then under s. 241 of the Justices of the Peace Act a "young person" may be (*g*) imprisoned or (*h*) fined; and similarly in the cases to which s. 242 of the same Act applies. It has been said by the last Lord Chief Justice of England that the Judge or Magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility. There are, of course, many cases in which it has to be done—per Sir Michael Myers, C.J., in *In re Mitchell*, [1938] N.Z.L.R. 671, 673, in reducing a sentence of reformative detention to one of probation in the case of an offender aged nineteen years.

There may, of course, be cases where the child should be imprisoned, but clearly they must be few and far between. But the question is: Has

Children's Court such power? It is thought that it has, but only when by virtue of s. 34 (2) of the Child Welfare Act, s. 241 or s. 242 of the Justices of the Peace Act is expressly invoked, and there is no election for trial by jury; but not otherwise. What, too, in the case of non-payment of a fine. In this case, also, there is such power, but there is ample protection afforded by the Summary Penalties Act, 1939. As regards imprisonment for an offence, it is true that we have not such a forthright provision against imprisonment, as is afforded by s. 52 of the Children and Young Persons Act, 1933, in England; but it would seem that the joint effect of s. 34 (1) of the Child Welfare Act and s. 24 of the Amendment Act, 1927, amounts to the same (except so far as imprisonment in default of a fine is concerned and as otherwise), and even although the only punishment prescribed for a particular breach is imprisonment, a fine may be imposed by virtue of s. 193 of the Justices of the Peace Act. It is true that s. 193 uses the term "penalty" in association with imprisonment; but it would seem that s. 24 of the Child Welfare Act employs the term in its usual connotation of financial penalty. The "order" mentioned in the section means an order for payment of costs or damages: see s. 129 of the Justices of the Peace Act. On this view it does not appear that a Children's Court, even when presided over by a Magistrate, has the power to make an order for Borstal detention, or for the matter of that, reformative detention, in the case of a child offender. It has been held in *R.* v. *Bryant*, [1931] N.Z.L.R. 554, that order for detention in a Borstal institution is a punishment; and the cases of *Griffin* v. *Police*, [1933] N.Z.L.R. 225, and *In re Mitchell* (*supra*), can be regarded as authority for the view that reformative detention is not only concerned with the reform of the individual but is punitive in its nature as well. As regards the former method of detention, it should be pointed out that there is power to transfer a child from an institution controlled by the Education Department to a Borstal institution (s. 13 of the Prevention of Crime (Borstal Institutions Establishment) Act, 1924); but so far as a child is concerned, it does not appear that the jurisdiction can be exercised by a Children's Court in the first instance. The jurisdiction of a Children's Court in regard to punishment must be found within the Act itself or in any provisions of other Acts incorporated in the Child Welfare Act. It seems that Borstal detention is a punishment inconsistent with the provisions of the Child Welfare Act and cannot therefore be imposed. Even if there is only a doubt on the point, the benefit of the doubt must be given to the child: *31 Halsbury Laws of England*, 2nd Ed. 537, para. 704.

EASEMENT UNDER SECTION 41 OF THE PUBLIC WORKS ACT, 1928.

By E. C. Adams, LL.M.

Explanatory Note.

The following precedent is suitable as a grant of easement under s. 41 of the Public Works Act, 1928, which reads as follows:—

> 41. (1) His Majesty or the local authority, as the case may be, but, in the case of a local authority, subject to the provisions of subsection two hereof, may from time to time grant to any person any easement in, upon, through, over, or under any land taken or acquired for a public work, subject to such conditions and payment of rent as His Majesty or the local authority thinks fit, and subject to revocation without compensation at any time when the service of the public requires it, and subject also to immediate revocation in case of the breach of any conditions under which such easement was granted.
>
> (2) The power given by the last preceding subsection shall not be exercised by a local authority without the consent of the Minister; and no instrument executed by or on behalf of a local authority granting or purporting to grant such an easement shall have any effect whatever unless and until the consent of the Minister has been endorsed thereon.

For the purposes of the Stamp Duties Act, 1923, this instrument is a "license" and the consideration therefor, although not rent in the strict legal sense, is in the nature of rent. The duty on the following precedent would therefore be 3s. 6d.

Precedent.

THIS DEED made this day of BETWEEN THE CHAIRMAN COUNCILLORS AND INHABITANTS OF THE COUNTY OF (hereinafter called "the grantor") of the one part and Limited a company duly incorporated under the Companies Act 1933 and having its registered office at in the Dominion of New Zealand (hereinafter called "the grantee") of the other part WITNESSETH that in consideration of the rent hereinafter reserved and subject to the terms conditions and covenants hereinafter contained or implied on the part of the grantee to be paid observed and performed THE GRANTOR HEREBY GRANTS to the grantee for the term of one year from the first day of and so on from year to year until determined under any of the provisions herein contained the right of laying a line of galvanized-iron pipes inches in diameter under and across the Main Highway at its junction with the Road as the same is shown on sketch plan drawn hereon such pipes to be laid in manner and position to be approved by the engineer to the grantor and to be for the purpose of conducting skim milk to the piggeries of the grantee AND the grantee hereby covenants with the grantor as follows:—

1. That the grantee will pay to the grantor the annual rental of one pound (£1) such rent to be paid yearly in advance on the first day of in each and every year during the currency of this grant.
2. That the grantee will at its own cost and to the satisfaction of the engineer to the grantor lay and maintain the said pipes under and across the said Main Highway at its junction with the said Road provided that if the said engineer shall so decide the whole or part of the work shall be done by or under the supervision of the said engineer and the grantee shall pay the cost of same to the grantor on demand.
3. Subject to the provisions of clause 2 hereof the grantee shall on first obtaining the consent of the said engineer have permission to enter on to the said Main Highway at all reasonable hours during the term of this right for the purpose of effecting all necessary repairs or alterations to the said pipes or for the purpose of maintaining same.
4. That the grantee shall be liable to the grantor for the cost of repairing any damage which may be caused to the said Main Highway from any breakage or leakage in the said pipes.
5. That the grantee will not hold the grantor liable for any accident or damage which may occur to the said pipes.
6. That in the event of any alteration or addition to the said Main Highway necessitating the removal or alteration in the position of the said pipes or anything connected therewith the cost of such removal or alteration as the case may be shall be borne by the grantee.
7. That the grantee will indemnify and keep indemnified the grantor during the continuance of the grant hereby created against all claims demands suits or proceedings which may

arise in connection with the laying or maintenance of the said pipe-line or from any cause whatsoever in connection therewith.

AND IT IS HEREBY AGREED AND DECLARED—

8. That the within grant shall not be transferable without the consent in writing of the grantor first had and obtained.

9. That the grantor or the grantee may at any time determine this grant by either giving to the other three calendar months' notice in writing and on the expiration of such notice the right hereby created shall absolutely cease and determine.

10. That the grantee will on the determination of the within grant remove the said pipes and anything connected therewith from the said Main Highway in the same good order and condition as it was before this right was created.

11. That on breach of any of the within conditions or in default of payment of rent this grant may be cancelled.

12. That the grantee shall not be entitled to any compensation at the termination of this grant.

13. That in the construction of these presents when any notice is to be given it shall be sufficient in cases where the notice is to be given by the grantor that such notice be signed by any person acting under the express or implied authority of the grantor and sent by letter or telegram addressed to the grantee at its then or last known place of abode or business.

14. That all expenses incurred by the grantor in connection with this grant and incidental thereto or in connection with any inspection of the said pipe-line or otherwise howsoever shall be paid by the grantee.

15. That this grant is conditional upon the consent being obtained to same by the Honourable the Minister of Public Works in accordance with section 41 of the Public Works Act 1928.

IN WITNESS WHEREOF these presents have been executed the day and year first before written.

THE COMMON SEAL of the Corporation of the Chairman Councillors and Inhabitants of the County of acting by the County Council was hereto affixed in pursuance of a resolution in that behalf duly passed by the said Council in the presence of— [L. S.]

A.B.
County Chairman.
C.D.
County Clerk.

THE COMMON SEAL of LIMITED was hereunto affixed in the presence of— [L. S.]

E.F.
Director.
G.H.
Secretary.

CONSENT.

THE MINISTER OF PUBLIC WORKS for the DOMINION OF NEW ZEALAND DOTH HEREBY CONSENT pursuant to section 41 of the Public Works Act 1928 to the foregoing grant of easement.

Dated this day of 19 .

SIGNED by I.J. Minister of Public Works in the presence of— I.J.

K.L.
Private Secretary
Wellington.

ANNUAL MEETINGS.*

Wellington District Law Society.

The annual meeting of the Wellington District Law Society was held on Wednesday, February 24, 1943, at 8 p.m., in the small Court-room, Supreme Court Buildings, Wellington, some thirty-seven members being present.

The retiring President, Mr. A. B. Buxton, occupied the Chair until the election of his successor, Mr. T. P. Cleary.

Report and Balance-sheet.—The President, in formally moving the adoption of the report and balance-sheet, expressed his thanks to the Council, the Secretary, and the staff for the help and support he had received from them during the last year.

He then referred to the various matters set out in the annual report and stated that there had been fewer complaints than usual against practitioners during the year and most were without foundation arising mainly from misunderstandings. In two cases, however, disciplinary action had been taken, resulting in one practitioner's name being removed from the rolls and in the other a period of one year's suspension.

During the year a tribute was paid by the Court, the New Zealand Society, and the Wellington Society, to the memory of Mr. P. Levi who had been a past President and was also associated with the activities of the Society for many years.

The President also made reference to the passing of Messrs. H. F. Bollard, I. A. Hart, B. G. Phillips, J. Power, E. S. Smith, and P. W. Jackson.

In connection with the Christmas parcels to members of the Society the President stated that letters were now coming to hand expressing appreciation.

In accordance with the resolution of the previous meeting a levy of 5s. for the Benevolent Fund had been added to the practising fees for 1943.

In addition to the scheme for assisting overseas members returning to civilian life, it was intended to seek the New Zealand Law Society's co-operation to a proposal whereby law students who were prisoners of war in Germany and Italy would be supplied with books to continue their studies and be able to sit for their examinations. For this purpose the assistance of the University of New Zealand and the Law Society in London would be sought.

In seconding the motion Mr. E. P. Hay, Treasurer, pointed out that the loss on the year's working was due not to an increase in expenditure but to a very substantial drop in income owing to the payment of thirty-six less practising fees in 1942 than in 1941 and to the fewer admissions. Mr. Hay drew attention to the amount received from admission fees in 1939, £370 2s. 6d., as against admission fees in 1942, £94 10s.; and to practising fees in 1939, £1,431 3s., as against £1,100 9s. 6d. in 1942.

The motion was then put to the meeting and carried unanimously.

Election of Officers and Council.—President: Mr. T. P. Cleary, the only nominee, was then duly elected and on taking the chair thanked the members for the honour accorded to him and referred appreciatively to the services of the retiring President. Vice-President: Mr. A. M. Cousins, the only nominee, was declared duly elected. Treasurer: Mr. W. P. Shorland, the only nominee, was declared duly elected. Members of Council: (*a*) Elected by Branches: Palmerston North, Mr. J. W. Rutherfurd; Feilding, Mr. J. Graham; Wairarapa, no nomination having been received, Mr. R. McKenzie continues in office. Wellington Members: As only eight nominations had been received for the eight places on the Council no ballot was required and the following were declared elected: Messrs. J. R. E. Bennett, H. R. Biss, A. B. Buxton, E. P. Hay, W. E. Leicester, A. J. Luke, N. H. Mather, and G. C. Phillips.

Delegates to New Zealand Law Society: Messrs. H. F. O'Leary, K.C., G. G. G. Watson, and T. P. Cleary, the only nominees, were declared duly elected.

Mr. G. G. G. Watson expressed the thanks of his co-delegates and himself for their election and gave a résumé of the work carried out by the Council of the New Zealand Law Society during the year.

The Guarantee Fund, Mr. Watson stated, was in the best financial position since its inception, the total amount of claims paid during the past year being comparatively small. He also reported on the past year's work of the Disciplinary Committee.

Out of a grant of £455 made by the Council of Law Reporting to assist in the maintenance of the Libraries of District Law Societies, an allocation of £50 was made to the Palmerston North Branch.

During the year, Wellington delegates who formed the Standing Committee of the New Zealand Law Society had made representations to the Government on various matters, including Protection of Land Transfer Documents, Probate of Soldiers' Wills, War Damage Act, Impounding Act, Jurisdiction of Supreme Court, Women Jurors Bill, Time for Sealing Probate, Death Duty Procedure, Land Brokers, Rehabilitation Act orders, Land Transfer forms, and Death Duties in Deceased Soldiers' Estates. In one or two of these instances the representations had been successful, but many of the matters were still outstanding.

Amendments to the Solicitors Audit Regulations had been enacted; and the principal regulations and amendments were

* Owing to pressure of space, the reports of these meetings have unavoidably been held over.—ED.

being reprinted in consolidated form, and it is hoped that these would be circulated to the profession in the near future.

In order to shorten the course for solicitors the suggested elimination of certain subjects from the course was agreed to by the Council of Legal Education and the Senate on condition that the statutory provision for the five-year rule was repealed. The Act was accordingly amended and a course prescribed for solicitors reduced the number of subjects by five.

The Wellington members had interviewed the Director of National Service with regard to the shortage of man-power in legal offices in the Dominion and had been received with the utmost courtesy and consideration. Publicity had already been given to the conclusions reached.

Mr. Watson referred to the contribution made by the profession to the war effort, the records of the Society showing that 554 law clerks and principals were serving full time with the Forces either in New Zealand or Overseas.

Retiring Member of Council.—Mr. Cleary then referred to the retirement from the Council of Mr. D. G. B. Morison who had given many years of service in the interests of the Society.

On the motion of the President it was decided that a letter should be sent to Mr. James wishing him an early return to his accustomed place; and it was decided to express to Mr. Rollings the best wishes of the Society in his illness.

Election of Auditors.—Messrs. Clarke, Menzies, Griffin, and Co. were appointed auditors for the forthcoming year.

Easter and Christmas Vacations.—It was stated that due to the war, additional duties were now being carried out by members of the staffs of legal offices and urged that generous consideration be given to the question of holidays this year. It was decided that the dates of the Easter and Christmas vacation be fixed by the Council.

Auckland District Law Society.

The annual general meeting of members of the Law Society of the District of Auckland was held at the University College on March 5, 1943.

The President, Mr. J. Stanton, occupied the chair.

The Annual Report showed that the number of practitioners' certificates issued during the year was 419, a decrease of 70 compared with the number of the previous year.

The President referred to the fact that within a few weeks of the commencement of the year, the Society suffered a severe loss in the death, on June 22, of its newly elected President, Mr. Spencer R. Mason, who, he said, had been an inspiration and an ornament to the profession. The President stated also that the Council recorded with deep regret the deaths during the year of the following: Messrs. A. J. M. Tudhope, J. I. Wilson (former member), H. A. Horrocks (former member), A. L. Spence, J. R. Gray, and T. V. Mitchell, the latter two on active service, and Mr. W. E. Devonport, who had been the assistant Librarian to the Society for twenty years. Brigadier J. R. Gray's death cut short a very distinguished military career and a most promising legal one.

The President asked members to stand in silence as a tribute to Mr. Mason and to those others whose deaths had been reported during the year.

One hundred and seventy-four solicitors and clerks were on service abroad and in New Zealand. Congratulations were extended to Sergeant Bramwell (now Second Lieutenant) who had been awarded the Distinguished Conduct Medal during the year.

As the result of contributions of practitioners the Council was able to forward during the year three gift parcels to every member and clerk serving overseas. Numerous letters had been received showing how much these parcels were appreciated by those on service, and the Council hoped that further contributions would be made to enable this activity to be continued. At Christmas time, greeting cables were sent to all practitioners and clerks serving overseas. The position of members of the forces occupied the attention of the Council during the year. Two meetings of members were held and a Committee set up to collect information and present it to Appeal Boards.

Refunds of practising and Benevolent Fund fees have been made during the year to those members on full-time service.

The Society still holds large numbers of wills for safe custody and carries on a large volume of correspondence with Base Records and others in relation to the wills of deceased soldiers. The number of wills and power of attorneys handled by the Society is approximately nine thousand.

The Benevolent Fund now stood at £1,327 18s., and members of the profession had contributed the sum of £1,325 to the 1942 Patriotic Appeal, the whole of which sum had been obtained by voluntary contribution.

Forty-five inquiries had been made for missing wills under the scheme instituted by the Society for this purpose.

Two scholarships were awarded from the Hugh Campbell Scholarship Fund during the year to Messrs. J. J. Northey and J. F. Sheffield, but payment to Mr. Sheffield has been deferred owing to the nature of his military duties.

In accordance with the resolution passed at the last annual general meeting of the Society, representation had now been given to country solicitors on the Council. Provision was made for one member from the Northern Area, and one member from the Southern Area. The President moved the adoption of the annual report and balance-sheet. The motion was seconded by Mr. Milliken and carried. For the position of President, there was only one nomination, that of Mr. J. Stanton, who was accordingly declared elected. In thanking members for his election the President referred to the valuable assistance and co-operation given to him by his colleagues on the Council. He said that of course the main problem during the year had been the war, and referred to the number of practitioners in the forces.

Messrs. A. Milliken and V. N. Hubble were declared elected Vice-President and Treasurer respectively, being the only nominees for these positions.

As a result of the postal ballot the following were declared elected members of the Council: Messrs. Garland, Goodall, Grierson, Henry, J. B. Johnston, A. H. Johnstone, K.C., Leary, and Vialoux.

On the motion of Mr. Rogerson, seconded by Mr. Hubble, the President and Messrs. Milliken, A. H. Johnstone, K.C., and J. B. Johnston were elected to represent the Society on the Council of the New Zealand Law Society.

Mr. N. A. Duthie was elected auditor for the coming year. The President referred to the fact that Mr. Cocker who had been a member of the Council for eleven years, was not this year seeking re-election. He referred to the valuable work done by Mr. Cocker during his period of office.

Mr. Cocker reported on the work done by the Council of Legal Education of which he is a member, and gave some information of the alteration to be made in the course for solicitors.

Mr. A. H. Johnstone, K.C., reported on the present position of the Fidelity Guarantee Fund.

On the motion of the President a vote of thanks was passed to those who had acted as scrutineers in connection with the postal ballot for the election of members of the Council.

A discussion took place regarding assistance to men in the services, and the President gave details of what had been done by the Standing Committee of the New Zealand Law Society. The President referred to the fact that the widow of the late Mr. Spencer R. Mason had mentioned that her husband had expressed a wish that a memorial to those members of the profession who had died during the war should take the form of a Library for Law Students to be housed in the University College, and asked that members should give this suggestion their consideration.

It was recommended to the incoming Council that they approach the Land Transfer Office asking if it is possible to have some one on duty between 12.30 and 1.30 in order that searching only could be done during that period.

Southland Law Society.

At the annual meeting of the Southland District Law Society held on March 4, 1943, in the Supreme Court Library, Invercargill, the following office bearers were elected for the ensuing year: President, Mr. H. E. Russell; Vice-President, Mr. T. V. Mahoney; Hon. Secretary, Mr. J. H. B. Scholefield; and Hon. Treasurer and Librarian, Mr. K. G. Roy. The following were elected members of the Council: Messrs. G. C. Cruickshank, N. L. Watson, J. C. Prain, John Tait, and L. F. Moller. Mr. H. E. Russell was elected as member of the New Zealand Law Society, Mr. M. H. Mitchel as delegate to the Chamber of Commerce, and Mr. A. B. Macalister as Hon. Auditor. Apart from the election of the officers as above, only matters of local interest arose at the meeting.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The Hon. W. Perry.—The appointment of Hon. W. Perry to the War Cabinet should be a source of satisfaction and pride to all lawyers, whatever their political views. Throughout his career the new Minister has been held in the highest regard by his colleagues in the law. In past years he has served the profession as a Councillor and as President of the Wellington District Law Society, and as a member of the Council of the New Zealand Law Society. For some years he has been a member of the Council of Law Reporting. His clear-headedness and common sense, his integrity, his manliness, and his pleasing personality should be great assets to him in his new office. His many friends in the profession will wish him well.

A Judicial Demolition.—It must be seldom that an English Lord Justice of Appeal completely misunderstands the case presented by one of the parties. Yet, as appears from the report in the House of Lords of *Hichens and Co.* v. *Jackson and Sons*, [1943] 1 All E.R. 128, this has been done recently. In the Court of Appeal MacKinnon, L.J., had said that the claim rested upon a certain basis and he proceeded in his judgment to deal with the case on that basis. On appeal to the House of Lords, Lord Atkin was not silent on the matter. He said:

> "This claim he [the Lord Justice] very satisfactorily demolished showing by authority that for the last 80 years it has been held that the vendor on a sale of shares does not guarantee registration. But the appellants maintained in this House that they had never made such a case in the Court of Appeal. This seems to be borne out by the opening words of du Parcq, L.J. . . . "

The Lost Laws.—Scrutton, L.J., was a profound lawyer, but his elocution was not of the clearest. Slesser, L.J., was for some years a member of the Court of Appeal over which Scrutton presided. Slesser did not pretend to great learning, but he had many other qualities which earned him the respect of the Bar. Not least among these was his modesty. He once said: "There's been more law lost in Scrutton's beard than I have ever known."

Abolition of Flogging.—No doubt there are many in the profession who consider that the statutory abolition of flogging in 1941 was due to mistaken sentimentalism. Scriblex is one who strongly holds that view. It must, however, be recognized that this alteration to our law was part of the settled and considered policy of the Government then, and now, in power; and it must further be recognized that there was little real opposition to the change at the time when it was effected in the statute-book. Cases sometimes come before our Courts where the presiding Judge feels that the brutality of the crime is such that flogging should be part of the punishment in the particular case; but there may be room for two views as to whether it is really wise for the Judge to make any public observations upon the subject. No matter how carefully Judges, in expressing such observations, may refrain from criticizing the existing law or the Legislature, there is no doubt that a large section of the public regards such observations as *implying* such a criticism. Further, the judicial observations are often taken up by sections of the Press and used, quite unjustifiably, in a semi-political way. The result is that unthinking people may be encouraged to form the impression that the Judges' observations may be actuated in part by considerations which are outside the proper sphere of the Judges. No impression could be more unfounded; but, nevertheless, no matter how illogical it may be, there may be a risk of it being created in the minds of some people.

No Moaning of the Bar.—In 1934, having reached the age of seventy-two, MacGregor, J., took his seat on the Bench for the last time, the occasion being a farewell by the practitioners of Wellington. The Judge was sailing for England in the next day or two. "And may there be no moaning of the Bar," he said, "when I put out to sea." The aptness of the quotation was regarded by many as another instance of the Judge's prowess as an original humourist. There were a few, however, who recalled that the Judge had been somewhat anticipated, years previously, by Bowen, L.J., when the latter, completely inexperienced in matters maritime, quoted Tennyson's lines as he was about to sit for the first time in the Admiralty Court.

"Issue" and "Parent."—Conveyancers should always be careful when using the word "issue." *Prima facie* the word means descendants and is not limited to children. But, where the "parent" of "issue" is spoken of, the word must generally, though not always, be read as "children." This is the so-called rule in *Sibley* v. *Perry*, (1802) 7 Ves. 522—a rule much discussed in later authorities and in the text-books. The matter came before the High Court of Australia in the recently reported case of *Matthews* v. *Williams*, (1942) 65 C.L.R. 639, where that Court pays a compliment to our late Skerrett, C.J., describing his judgment in *Guardian, Trust, and Executors Co.* v. *Ramage*, [1928] N.Z.L.R. 288, as perhaps the best discussion of the rule in *Sibley* v. *Perry*. If Skerrett, C.J.'s, term of office had not been so prematurely cut short, there can be no doubt that he would have left embodied in the Law Reports many judgments that would have long remained landmarks in the law of this country.

Who Knows his Dr. Johnson?—Scriblex is indebted to W. E. Leicester for the following note:

> "You ask for the second of the two memorable sentences in the well-known utterance of Dr. Samuel Johnson, the first being quoted by MacKinnon, L.J., in a recent divorce appeal. The complete utterance is, I think: 'My dear Sir, never accustom your mind to mingle virtue and vice. The woman's a whore and there's an end on't.' In his '*Sir*' *said Dr. Johnson* (1911), the late Sir Chartres Biron places the utterance under the heading, 'On a lady of temperament'."

Worse than the Curate's Egg.—"The County Court Judge has been in error in a great many of the sentences contained in his judgment on questions of law; indeed, there is hardly a sentence expressing a legal opinion in the judgment with which I do not disagree"—per Scott, L.J., in *Cumming* v. *Danson*, [1942] 2 All E.R. 653, 657.

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. Road.—*Will—Subdivision of Land, pursuant to Two Wills, fronting Road less than One Chain in Width—Whether Title can be conferred on Devisees.*

QUESTION: A., who died in 1925, left "all my real and personal estate whatsoever and wheresoever unto my wife W. for her sole and separate use without impeachment of waste voluntary or permissive so long as she shall live with power for my said wife to dispose by will of my said estate real and personal absolutely among my four younger sons B. C. D. and E. and my daughter F. and any remoter issue of mine and in such shares and proportions and upon such terms and conditions as she may think fit with power to exclude any one or more of such sons or daughter or remoter issue absolutely or partially." W. died in 1941, and exercised this power of appointment by will in favour of B., C., D., and E., appointing Lot 1 to B., Lot 2 to C., Lot 3 to D., and Lot 4 to E. The subdivision fronts a public road less than 1 chain in width. Can title be conferred on B., C., D., and E., without widening the road to 1 chain or having it exempted under s. 128 of the Public Works Act, 1928?

ANSWER: Yes; s. 128 of the Public Works Act does not apply to the subdivision effected by W. On W.'s death the four appointees, B., C., D., and E., acquired an equitable estate in fee-simple in the respective parcels so appointed, and they acquired the right to get in the legal estate from the person or persons in whom it was vested. It is clear from the judgments of Williams and Chapman, JJ., in *Plimmer* v. *District Land Registrar*, (1908) 27 N.Z.L.R. 1134, that the mere getting in of the legal estate from trustees is not a subdivision for the purposes of sale within the meaning of the Public Works Acts.

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2. Stamp Duty.—*Auction Sale—Lots sold separately—One Memorandum signed by each Purchaser—Several Lots purchased by same Purchaser.*

QUESTION: An estate is sold by auction in seven different lots, each lot being bid for separately. A. purchased four of the lots, his bids being, respectively, £20, £5, £10, and £11, making a total of £46. At the conclusion of the sale A. signed one memorandum only, and each consideration was not shown therein, only the total consideration of £46 being mentioned. What is the correct stamp duty payable by A. on the agreement?

ANSWER: The correct stamp duty is £2 4s. and not 11s. The memorandum relates to separate contracts, and therefore s. 61 of the Stamp Duties Act, 1923, applies: *Emmerson* v. *Heelis*, (1809) 2 Taunt. 38, 127 E.R. 989; *Roots* v. *Lord Dormer*, (1832) 4 B. & Ad. 77, 100 E.R. 384; *Attorney-General* v. *Cohen*, (1936) 52 T.L.R. 370, 53 T.L.R. 214. It is submitted that the case of *Baldey* v. *Parker*, (1823) 2 B. & C. 37, 107 E.R. 297, which has been cited to support a contrary opinion, is not in point.

3. Death Duty.—*Mortgages in New Zealand Portion of English Trust—Liability to Death Duty here.*

QUESTION: A., who was domiciled in England, died in 1891, leaving a will, whereof he appointed English trustees. At the date of his death he owned realty in New Zealand valued at £2,000. The material part of his will is as follows: "I desire that all my debts and funeral expenses be paid I give devise and bequeath to my said executors their heirs executors and administrators all my real and personal estate and effects whatsoever and wheresoever whether in England Canada Australia or New Zealand or wheresoever situate upon trust either to continue my investments as at present and to cultivate and carry on my estates and concerns as hitherto done and for such purposes to obtain such assistance advice and advances of money and to pay such commissions as may be necessary or desirable or to let for a term or from year to year all or any portion of my property or to sell or dispose of all or any portion thereof as may be deemed best and to invest the proceeds of such sale in such manner and upon such securities whether real or personal as they may think right and with power from time to time to vary transpose and deal with such securities as they may think right but with full power to continue the mortgages upon any portion of my property as now subsisting and I declare that the whole of my property and the income to be derived from it shall be divided into seven shares whereof I give devise and bequeath to my son B. two . . . ." B. has now died domiciled in England. In the meantime all of A.'s New Zealand estate has been realized and invested in mortgages of real property in New Zealand, all the mortgagors being resident and domiciled in New Zealand. All such mortgages are in the names of the present trustees of A.'s estate, who are all resident in England. The interest-moneys have been collected by a firm of solicitors in the Dominion, and transmitted to the trustees. B., along with the other beneficiaries in A.'s estate, has received the interest. B. has no other property in New Zealand. Is his estate liable to death duty in New Zealand?

ANSWER: Yes. B.'s estate is liable to death duty in New Zealand as to two-sevenths of the value of the New Zealand mortgages. At his death he had a beneficial two-sevenths share in each of the mortgages. After such a lapse of time it must be assumed that *administration* of A.'s estate has long ago been completed. The will itself authorizes investments in New Zealand, and the beneficiaries at any time could have determined the trust. The mortgages themselves are property situated in New Zealand: s. 8 (*h*) of the Death Duties Act, 1921. The nearest analogous case appears to be the House of Lords decision *Skinner* v. *Attorney-General*, (1939) 55 T.L.R. 1025; *cf. Attorney-General* v. *Sudeley*, [1897] A.C. 11, where the second deceased at the date of her death merely had the right to have her husband's estate administered.

RULES AND REGULATIONS.

Hairdressers (Health) Regulations Extension Notice, 1943, No. 2. (Health Act, 1920.) No. 1943/95.

Medical Practitioners Emergency Regulations, 1941, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/96.

Strike and Lockout Emergency Regulations, 1939, Amendment No. 3. (Emergency Regulations Act, 1939.) No. 1943/97.

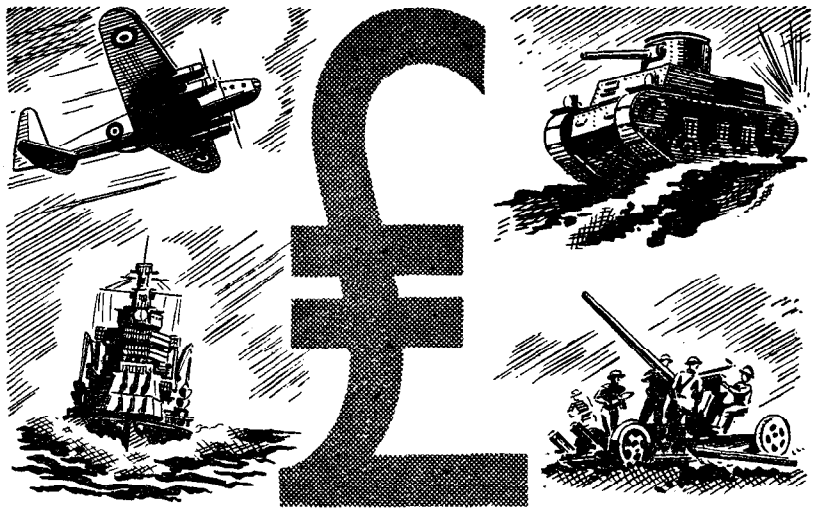
Social Security (Hospital Benefits) Regulations, 1939, Amendment No. 1. (Social Security Act, 1938.) No. 1943/98.

Radio Amendment Regulations, 1943, No. 2. (Post and Telegraph Act, 1928.) No. 1943/99.

Post and Telegraph (Staff) Regulations, 1925, Amendment No. 15. (Post and Telegraph Act, 1928.) No. 1943/100.

Motor-drivers Regulations, 1940, Amendment No. 1. Motor-vehicles Act, 1924.) No. 1943/101.

Occupational Re-establishment Emergency Regulations, 1940, Amendment No. 3. (Emergency Regulations Act, 1939.) No. 1943/102.



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