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EVIDENCE: THE NEW STATUTORY PROVISIONS AS TO DOCUMENTARY EVIDENCE.

THE Evidence Amendment Act, 1945, now on the statute-book, will come into force on January 1, 1946. It touches the law of evidence at several important points. Part I, dealing with documentary evidence, is a replica of ss. 1 to 4 and 6 of the Evidence Act, 1938 (Eng.) (*31 Halsbury's Complete Statutes of England*, 145), and, by the foresight of the Law Revision Committee, we receive it in the identical language of its English counterpart, a convenience already noticeable in considering decisions of the English Courts on the sections comprising this Part of our new statute. Part II, which is concerned with affidavits and documents of servicemen overseas, replaces the now familiar Evidence Emergency Regulations, 1941, and its two amendments, all of which are now repealed by s. 10 of the Act. Part III deals with the proof of official documents, evidence of their having been made or issued, and evidence of official Acts, &c. Part IV will be generally welcomed, as it abrogates the rule in *Russell* v. *Russell*, [1924] A.C. 687, and permits either spouse to give evidence proving non-access at the time of conception of a child born to a wife during the subsistence of the marriage.

Our purpose here is to confine our attention to Part I, which relates to documentary evidence, which provides a considerable departure from the narrowness of scope to which we have been accustomed in the common-law rules of evidence with their limited statutory modifications. This Part of the new statute merits close study by all practitioners, especially those whose work lies principally in the Courts.

The Evidence Act, 1938 (Eng.), which is reproduced as Part I of the new statute, is known in Great Britain as "Lord Maugham's Act." It was welcomed by all branches of the profession on its appearance. Although it did not reach the statute-book until May, 1938, it had received the very careful consideration of a Committee of Judges appointed in 1931 to recommend statutory amendments relating to the admissibility of documentary evidence. The Committee consisted of Lord Justice Greer, Mr. Justice Avory, Mr. Justice Langton, Mr. Justice Roche, and Mr. Justice Maugham. It fell to the lot of the Committee's junior member to introduce the Bill in his then capacity as Lord Chancellor.

In *Robinson* v. *Stern*, [1939] 2 All E.R. 683, 686, Lord Justice Scott observed that the statute was a difficult one to construe for certain purposes, as any Act of the *kind* necessarily is when applied to actual circumstances.

Up to the passing of the new statute, or to be more precise, until December 31 of the present year, the law of evidence has prevented, with a few exceptions, the admission of documents of record of any kind, principally because the statements made therein were not made on oath, to which the greatest importance has always been attached, and their truth and validity could not be tested by cross-examination. It has often happened, however, that a Court has been confronted with completely irreconcilable evidence of witnesses, and, although documents existed which would throw valuable light on the matter, it had been impossible to produce them. The most important of the few exceptions to which we have referred has been, apart from admissions, so-called declarations against interest, and declarations made in the course of business or professional duty; in both these cases, the person who made the statement must be proved to be dead.

Part I of the new statute, like its English counterpart, in making fundamental changes in the law relating to the admissibility of documentary evidence, deals principally with "statements." Generally, the statement referred to must be made in a "document," which is defined as including "books, maps, plans, drawings, and photographs" (s. 2). A statement is not, for the purposes of Part I, deemed to have been made by a person unless the document or the material part thereof was written, made, or produced by him with his own hand or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible (s. 3 (4)).

The main provisions of Part I are contained in s. 3, which reproduces s. 1 of the English statute. They may conveniently be summarized as follows:—

(i) The section has no application whatever except to civil proceedings, and to written statements (s. 3 (1)). (For criminal cases and for oral statements, the law remains unaffected.)

(ii) In order to be admissible, the contents of a statement must be matters personally known to the maker of it (s. 3 (1) (*a*)); *or*, if they are matters of which the maker had no personal knowledge, the statement must form part of a continuous record which it was his duty to record from information supplied to him by persons to whom they were personally known (s. 3 (1) (*b*).)

(iii) If the foregoing conditions are both satisfied, then, if the maker of either kind of statement referred to in (ii) is called as a witness, where direct oral evidence of a fact would be admissible, the statement made by a person tending to establish that fact may, as a matter of right, on production of the original document, be tendered in evidence (s. 3 (1)). (Thus, whereas formerly the witness could use the document only to refresh his memory, it can now be put in as part of his testimony.)

(iv) Only if the conditions set out in (i) and (ii) are satisfied, then if the maker of either kind of statement is dead, cannot be found by reasonable exertions, is beyond the seas, or is certified by a doctor as unfit by reason of his bodily or mental condition to come to Court, the statement may be admitted as of right (s. 3 (1), proviso).

(v) If it would be unduly expensive or be the cause of undue delay to call the maker of either kind of statement referred to in (ii), the Court may, in the exercise of its discretion, having regard to all the circumstances of the case, give leave to admit his statement in evidence without the need of calling him as a witness, although he is available and is not called as a witness (s. 3 (2) (*a*)).

(vi) If, in lieu of the original document, there is produced a copy, the Court may give leave to admit a copy of the original document or of the material part thereof, if it is certified as correct in such a manner as the Court may approve (s. 3 (2) (*b*)).

Thus, under the statute, the proper mode of tendering in evidence a statement that is rendered admissible by s. 3 is to produce the original document. If the original document be not produced, the leave of the Court must be obtained to tender a copy in evidence, and the Court must approve the manner in which the copy was made or obtained.

The statute makes ample provision for preventing the abuse of the foregoing provisions and for countering the fabrication of evidence. No objection may be taken to statements otherwise rendered admissible on the ground that they were not made contemporaneously with the events described (which provides a contrast to the common law as to declarations in the course of duty), though, of course, diminished weight will be given to such statements: see s. 4. But there is the safeguard, contained in s. 3 (3), that statements will be excluded altogether if they were made *post litem motam*—that is, after the dispute had arisen. Thus a statement is inadmissible if " made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

Again, a statutory differentiation is made between the rules of evidence applicable to civil proceedings before a Judge alone and to those before a Judge sitting with a jury. The Court may exercise its discretion in the course of proceedings before a jury, and reject a statement, otherwise admissible under the statute, if for any reason it appears to be inexpedient in the interests of justice that the statement should be admitted (s. 3 (5)).

Evidence of a witness cannot be corroborated by the production of a statement by its maker, as such self-corroboration would not comply with any rule of law or practice requiring evidence to be corroborated (s. 4).

Section 5 of the new statute makes another cut into the ancient rule that, where a document is attested, the attesting witness must be called to prove the document. Wills and other testamentary documents remain subject to the attesting-witness rule in proofs in solemn form. Any other documents required by law to be attested may now be proved " in the manner in which it might be proved if no attesting witness were alive." Those documents now form a special class, but remain subject to the rules formerly applicable to documents requiring attestation the witnesses to which were proved to be unavailable by death. The existing rules remain unaffected if the witness is dead; but, subject to the new provision in s. 5, there must, it would seem, in all other cases, still be proof of the executing party's identity and of the witness's identity, or proof of the party's or witness's writing, unless it is shown to be impossible by diligent search to produce proof of the attesting witness's writing. Only if these " second best " requirements are shown to be impossible of fulfilment can these documents (always excluding wills and testamentary documents) be admitted in evidence under the new statute. (The foregoing may not be very clear; and, as the topic requires some elaboration and the citation of case-law, we may return to a more detailed consideration of it on some future occasion.)

A consequential amendment of s. 120 of the Property Law Act, 1908, is made by s. 6, which relates to the proof of the contents of documents proved or purporting to be not less than twenty years' old. In any proceedings, civil or criminal, the truth of the contents of such a document is presumed, by admission of the document as *prima facie* evidence of the whole of its contents. In other words, the presumption formerly applicable to documents which have been in existence for twenty (and, for some purposes, for thirty years) is now applicable to all documents of every kind proved or purporting to be not less than twenty years old.

The new statute has placed no limitation on any existing common-law principles relating to admissibility of evidence. The new provisions are an addition to them, and not substitutional. They do not prejudice the admissibility of any evidence, which, apart from the new statute, would be admissible; and, in cases of pedigree, they do not render admissible what is now inadmissible: s. 2 (2). Thus, for example, oral declarations by deceased persons will be admissible as hitherto, but only in so far as the rules affecting them now allow. On the other hand, such documents as letters of an agent to his principal, which are now admissible against him, but not for him, will be admissible subject to compliance with the requirements of s. 3.

From our summary of Part I of the new statute, it will appear that, in the main, the new exceptions to the hearsay rule are not so revolutionary as at first sight may have appeared. The types of evidence which they render admissible are admitted every day

in the Courts in civil proceedings, by agreement between the parties or their counsel. Now such agreement is not necessary: formerly it was voluntary, now it is governed by the statute itself. This common practice was in a sense contrary to the current principles, but the law tolerated it. Now, the law itself is brought into conformity with existing practice that has been found to be sound and salutary in the proper and expeditious presentation of evidence in civil proceedings.

Shortly after the passing of the English statute, Mr. Justice Humphreys said that it was an admirable move in the right direction. It would save expense, and the safeguards it contained would preclude the fabrication of documentary evidence. He considered that one of the most important provisions was that which gave power to the presiding Judge to admit or reject evidence. This power, he added, originated from a judgment in the House of Lords, in which the great principle was laid down that a Judge was never required to admit as evidence something of which he considered the evidential value very small, and its capacity for prejudicing the jury very large. He considered this an excellent power, and he himself had often exercised it. A Judge could put out of his mind a certain piece of evidence by virtue of his legal training; but a jury could not. The wide discretionary powers reposed by the new statute in a Judge in estimating the value of a piece of evidence were fully justified.

The statute which now forms Part I of the Evidence Amendment Act, 1945, which will come into force on January 1 next, has been the subject of a number of judicial pronouncements in England. It may be of interest, therefore, to summarize them with the view to showing the new provisions in action, and the bounds placed upon their use by the higher Courts. In considering these judgments, we shall transpose the section numbers so that, wherever a section is mentioned, it will refer directly to the section in our new statute.

Section 3 (1) (2).—In a workers' compensation case in the Court of Appeal, *Baggs* v. *London Graving Dock Co., Ltd.*, [1943] 1 All E.R. 426, in order to show the continuance of the incapacity caused to the worker by his accident at his work, letters were read from the worker's commanding officer who had had opportunities of observing him in the course of his subsequent military duties. The writer of the letters was not only the officer commanding a unit, but he was stationed somewhere in Perthshire. Objection was taken that these letters should not have been admitted by the County Court Judge. Scott and du Parcq, L.JJ., concurred with Goddard, L.J., as he then was, that the letters had been properly admitted under subss. (1) and (2) of (our) s. 3, on the ground that, if they had not been admitted but the witness had been called, undue expense or delay would have been caused. In the circumstances, the learned Lord Justice added, it would be quite unreasonable to expect the worker to be able to bring an officer down from Perthshire, with the expense of a return journey, and so forth.

Section 3 (1) (4).—In *Bullock* v. *Borrett*, [1939] 1 All E.R. 505, an action for damages for injuries caused by alleged negligence, it was disclosed that an independant witness to the accident had since died, and astatement was made the day after the accident by the deceased to a Police Officer who took it down in writing, whereupon it was signed by the deceased. Finlay, L.J., admitted it under (our) s. 3 (1). Then it was sought to admit the notes made by the Justices' clerk but not signed, of the evidence given by the deceased upon oath at the hearing of the summons at the Police Court some months after the accident. His Lordship held, on the proper construction of (our) s. 3 (1) (*b*) and (4), which he said had caused the difficulty, this note of evidence given in a Magisterial inquiry was admissible. As to what weight, if any, might be attached to either document, the learned Lord Justice said that that was a thing on which he proposed to say nothing at that stage of the proceedings; but, of course, different considerations must be given to admissability of evidence and the weight to be given to such evidence when admitted.

Section 3 (3).—In *Robinson* v. *Stern*, (*supra*), the defendant, while driving her motor-car injured a child and she at once went to a police-station, where she made and signed a statement on the usual Police form, after she had been given the usual caution. In the action for damages for personal injuries, this statement was admitted in corroboration of the defendant's evidence. The Court of Appeal (Scott, Clauson, and Goddard, L.JJ.) held, assuming the statement was a document within the meaning of s. 3 (1), it was inadmissible by reason of (our) s. 3 (3), because, at the time when it was made, proceedings were anticipated involving a dispute as to the facts referred to therein. Scott, L.J., at p. 685, said, after setting out subs. 3:

> It is obvious that the defendant was a person interested, and, on the assumption I have already made, all the provisions of that subsection are satisfied unless it can be said that, not only were proceedings not pending (which must be conceded), but also proceedings were not anticipated, involving a dispute as to the facts stated in the statement. To my mind, it is impossible for the defendant to say that proceedings were not anticipated, and I hold quite definitely that at that time, immediately after running into the small boy, when she went to the police station, it was quite obvious that, although proceedings had not been started, they must, within the meaning of the subsection, have been anticipated. I cannot help thinking that necessarily the word "anticipated" should be construed as including "likely," but, even assuming that the word "anticipated" should be given the interpretation of "anticipated by the person making the statement" in my view, it is quite impossible to contend that this defendant did not anticipate proceedings, having regard to the facts of the case and to the further internal evidence of the statement itself, with its initial questions and statements, which I have already read, about a statement being taken down in writing and being a statement which may be given in evidence at a later stage. No doubt that statement is primarily addressed to criminal proceedings, but it is essential to take into account the fact that the defendant herself signed the statement, and, therefore, it is, to my mind, wholly impossible to say that she did not anticipate proceedings within the meaning of the section.

Goddard, L.J., had something to say about statements made to the Police by the driver of a vehicle involved in a running-down accident:

> It should be remembered that, before the Evidence Act, 1938, and, indeed, at common law, there were cases in which written statements made in the past by persons could be admitted as evidence, principally, no doubt, in cases relating to pedigree and cases relating to title. In those cases, however, it was always held that the statement could not be admitted if, at the time it was made . . . there was what was always called in the old cases a *lis mota*. The reason for that is nowhere better stated than it is by Lord Eldon in *Whitelocke* v. *Baker*, (1807) 13 Ves. 510. He puts it in this way, at p. 514: " . . . all [this class of statements] are admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth." A

reference on this point may also be made to a decision of the House of Lords in *Butler* v. *Mountgarret*, (1859) 7 H.L. Cas. 633, where Lord Cranworth cites that passage from *Whitelocke* v. *Baker*, which I have just read. How can it be said, when a young lady goes to a police station and has the caution administered to her, which is the caution in the form now approved by what is called in the Court of Criminal Appeal the Judges' Rules, that her mind must stand in "an even position?" I am not talking about this case, for I have no doubt, and I am willing to assume, that this lady gave absolutely unbiassed and fair information. In the majority of cases, however, when a person has that caution administered to him, what would be his natural tendency? It would be to do that which it is the very object of the caution that he shall do—namely, not incriminate himself. It is the whole object of the caution to warn the person: "You need say nothing, but, if you do say anything, mind you do not incriminate yourself." It seems to me that that is very far from saying, in those circumstances, that a person's mind "stands in an even position, without any temptation to exceed or fall short of the truth." When one is considering the admissibility of evidence which is made admissible by statute . . . one has to see that one is not giving some wider interpretation to the Act than the language bears. I think, however, that, when one is considering these words "when proceedings were pending or anticipated"—and *Butler* v. *Mountgarret*, to which I have referred, shows that "anticipated" does not mean an immediate proceeding, or a threatened proceeding, or anything of that sort—the judgment which I have read of Lord Eldon is most helpful in considering what meaning one should put upon them.

Later in his judgment, the learned Lord Justice spoke of the tendency, which he disapproved, since the coming into force of the Evidence Act, 1938, to tender in evidence statements made to the Police after an accident; and he said he had always discouraged counsel from putting them in, without his having had to rule formally whether or not they were admissible. He concluded:

They do not seem to me to be a class of document which the Act is really contemplating. I never can see that they really assist in coming to a conclusion as to the true facts of an ordinary running-down action. If this decision puts an end to that growing practice, I think that it will be a very good thing.

In a later case, to which we shall next refer, the Court of Appeal made it clear that *Robinson* v. *Stern* is not authority for the proposition that a statement made to a Police officer inquiring into the circumstances of a road accident is never admissible. The Court may read the statement, and may draw from it reasonable inference that the person making the statement could not anticipate that proceedings were likely to be taken in respect of the accident.

The same question was before the Court of Appeal (Lord Greene, M.R., Goddard, and du Parcq, L.JJ.) in another running-down case: *Hollington* v. *F. Hewthorn and Co., Ltd.*, [1943] 2 All E.R. 35, where it was sought to admit a signed statement made by the plaintiff's deceased driver to a Police constable soon after the accident. Hilbery, J., in the Court below, in rejecting it without looking at it, said he was precluded from admitting it by the judgment in *Robinson* v. *Stern* (*supra*).

In delivering the judgment of the Court of Appeal holding against the admissibility of the statement, Goddard, L.J., at p. 44, said that the question turned on (our) s. 3 (3),

which renders inadmissible a statement by a person interested at a time when proceedings were pending, or anticipated, involving a dispute as to any fact which the statement might tend to establish. *Robinson* v. *Stern* [*supra*] did not decide that a statement made to a constable, who is inquiring into the facts of a road accident, can never be admitted. It depends on whether the person making it is interested, as no doubt ordinarily the driver of a car involved in the accident would be; and also on whether proceedings are pending or anticipated. To enable the Court to decide on the admissibility of the statement, the Court is permitted by s. 1 (5) [our s. 3 (5)] to look at it, and then draw any reasonable inference from its form and contents, which is what this Court did in the case cited; and from which they drew the inference, that the defendant in that case must have anticipated proceedings. We have looked at the statement that was tendered in evidence in this case: and counsel have agreed that the warning required by the Road Traffic Act, 1930, s. 21, was given to the deceased before he made it. In the circumstances of this case, we do not draw any inference from that fact; it was not the same sort of warning, nor were the circumstances under which it was given the same as in *Robinson* v. *Stern*. Here we find from the statement that the defendant at first practically admitted that the accident was his fault; but some time afterwards came and said it was the fault of the deceased. In these circumstances we think that the deceased must have anticipated the likelihood at least of civil proceedings and, consequently, the statement was not admissible.

Section 3 (3).—In *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co., Ltd.*, [1941] 1 All E.R. 311, an action for breach of express or implied terms of a contract and for passing off, the plaintiffs desired to put in evidence a proof of evidence taken from a man who had been employed by them in their fuel economiser business as a tester, and who was dead at the time of the action. The proof was taken at a time when the action was pending. It was contended that the proof was inadmissible as the tester was "interested in" the proceedings within the meaning of (our) s. 3 (3). Morton, J., said that, in his view, "a person interested" within the meaning of the section must, in the context, mean a person interested in the result of the proceedings "pending or anticipated." It seemed to him that a useful test, though perhaps not the only test, was whether it was better for the deceased tester when he made the statement that the plaintiff company should succeed in the action or whether it was a matter of indifference to him. On the facts, he held that he was a "person interested" within the meaning of the section; then he went on, at p. 314, to say:

In the case of a limited company, it would seem clear that every shareholder is a person interested in the success of proceedings brought by the company, and, I should think, every director. Whether every servant of the company in every set of circumstances is necessarily a "person interested" is not a matter on which I have formed any concluded judgment. It may be that there are circumstances in which it might be said that a servant of the company was not a person interested. As to that I express no opinion. However, I think that the general intention of the section is that, if a statement is put in as evidence, to which, of course, no cross-examination can be directed, it should be either a statement made at a time when proceedings are not pending or anticipated involving a dispute as to any fact which the statement might tend to establish, or a statement made by what I may perhaps conveniently describe as an independent person.

His Lordship said he had arrived at the conclusion that the statement was inadmissible without throwing the faintest imputation on the honesty or the accuracy of the deceased workman.

Section 3 (5).—Before the passing of the Evidence Amendment Act, 1945, a medical certificate not verified by affidavit was not in strictness admissible at all, though it was usually received without objection. Section 3 (5) now provides that the Court may in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical man. In an appeal from the refusal of a County Court Judge to grant the defendant an adjournment, *Dick* v. *Piller*, [1943] 1 All E.R. 627, the Court of Appeal, by a majority (Scott, L.J., and Croom-Johnson, J., du Parcq, L.J.,

dissenting), held there was a miscarriage of justice. A doctor's certificate stating that the defendant who was suffering from bronchitis, was "unable to leave home probably for two weeks," and another stating his "inability to follow his occupation," were produced to the Court, and the defendant's counsel told the Judge that the doctor would, if necessary, attend the Court; or he would, if required, swear an affidavit during the day. Scott, L.J., in the course of his judgment, said that both the plaintiff's solicitors and the Judge ought, in all the circumstances, to have accepted the medical certificate without an affidavit, since (our) s. 3 (5) was, in his view, an ample justification for the defendant's solicitors not going to the expense of an affidavit.

Section 3 (5).—In *Infields* v. *Rosen*, [1939] 1 All E.R. 121, it was necessary to prove, in a case where there was an acute controversy of fact, whether or not an article was manufactured by a firm consisting of two partners. One partner was in England and was available to be called as witness. The other partner was in Germany, but was available for cross-examination so far as that is permissable under letters of request. A statutory declaration was made by the partner in Germany for the purpose of being given in evidence at the trial of the action in a proceeding that is within the purview of s. 3. This was tendered in evidence. The learned trial Judge, Simonds, J., referred to what is our s. 3 (5), and said that, although he had no doubt that this was the class of document to which the section is intended primarily to apply, the Court must be exceedingly careful in allowing such a document to be used as evidence. In the case before him, His Lordship drew attention to the fact that the witness in Germany was available for examination and cross-examination so far as was permissible in the circumstances; and that there was another partner in the firm resident in England. He exercised his discretion against admitting the declaration, primarily because he did not think it right in the interests of justice that, where there are two partners in a firm, each of them competent to speak to the question as to whether or not a particular article was manufactured by that firm, he should have tendered to him the evidence of one who was in Germany —of whose circumstances the Court knew nothing, and who could not be cross-examined—and not the evidence of that partner who was in Court and could speak to the facts, and be examined and cross-examined upon them, and upon whose demeanour he could form an opinion.

The abrogation of the rule in *Russell* v. *Russell* by s. 15 of the new statute has been so long and so consistently advocated in these pages that we feel it unnecessary to repeat the reasons for it, or the effects that will follow it.

On another occasion, we hope to summarize the remaining provisions of the Evidence Amendment Act, 1945. These do not present the difficulties or make the changes that are evident from a perusal of Part I.

SUMMARY OF RECENT JUDGMENTS.

TE AROHA NEWS PRINTING AND PUBLISHING COMPANY LIMITED v. MURRAY.

FULL COURT. Wellington. 1945. September 25, 26; October 19. MYERS, C. J.; JOHNSTON, J.; FAIR, J.; NORTHCROFT, J.; CORNISH, J.

Printers and Newspapers Registration—Imprint—Leaflet relating to Vendible Articles with addition of Account of Tests to which same subjected—Whether within Exceptions not requiring Imprint—Printers and Newspapers Registration Act, 1908, ss. 4, 8, 19.

Sections 4 and 8 of the Printers and Newspapers Registration Act, 1908, must be read together; and, so read, s. 8 excepts from the operation of the statute what may be described as business documents—that is to say, documents used for ordinary business purposes, such as bill-heads, invoices and other commercial forms of a similar nature, catalogues, and the like, containing, in the words of the section, "the name or the name and address or business or profession" of the person publishing the printed matter "and of the articles in which he deals."

McGuiness and Langdon v. *E. W. Mills and Co.*, (1908) 27 N.Z.L.R. 541, referred to.

If there is a doubt whether or not a printed document or leaflet referring to articles dealt in, but, in addition describing tests made in connection therewith, come within the category of business documents to be excepted by s. 8 of the statute, then, as s. 8 is intended as a provision in favour of the trade and commerce of the country, the doubt should be resolved in favour of the person accused of infringing the statute.

Bank of India v. *Wilson*, (1877) 3 Ex. D. 108, and *W. and A. McArthur, Ltd.* v. *State of Queensland*, (1920) 28 C.L.R. 530, followed.

So held by the Full Court, *Myers*, C.J., and *Fair* and *Northcroft*, JJ. (*Johnston* and *Cornish*, JJ., dissenting) allowing an appeal from the conviction of the appellant by a Stipendiary Magistrate.

Observations on the proper interpretation of s. 19 of the Printers and Newspapers Registration Act, 1908.

Counsel: *Cleary*, for the appellant; *Solicitor-General* (*H. E. Evans*), for the respondent.

Solicitors: *Nicholls and Barrett*, Te Aroha, for the appellant; *Crown Solicitor*, Hamilton, for the respondent.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION, LIMITED v. E. T. TAYLOR AND COMPANY, LIMITED.

COURT OF APPEAL. Wellington. 1945. September 14, 17. MYERS, C.J.; JOHNSTON, J.; FAIR, J.; NORTHCROFT, J.; CORNISH, J.

Practice—Appeals to the Privy Council—Delay in prosecuting Appeal—Appeal as of Right—Respondent not prejudiced by Delay—War-conditions considered—Certificate of Non-prosecution refused—Costs awarded against Appellant—Privy Council Appeals Rules, 1910, R. 21.

Where an appellant, whose appeal was a matter of right, had delayed forwarding the record to England, though he had taken initial steps to enforce that right, and the respondent had not been prejudiced by the delay, the Court of Appeal, on giving consideration to the overriding circumstances and conditions created by the war and obtaining for the whole period during which the appeal should have been prosecuted, should refuse an application under R. 21 of the Privy Council Rules, 1910, for a certificate of non-prosecution.

So held by the Court of Appeal (*Johnston, Fair, Northcroft*, and *Cornish*, JJ., *Myers*, C.J., dissenting) in the circumstances of the particular application, and awarding costs against the appellant.

Counsel: *Pope*, in support of motion; *Blundell*, to oppose.

Solicitors: *Perry, Perry, and Pope*, Wellington, for the appellant; *Bell, Gully, Buxton, and Blundell*, Wellington, for the respondent.

COMPANY LAW REFORM.

The New Proposals in England.

By E. C. Adams, LL.M.

In the Preface to Supplement No. 3 (1944) of *Morison's Company Law*, I said :

> " It may be of interest to readers of *Morison* to learn that last year a strong Committee was set up in England under the Chairmanship of Mr. Justice Cohen, with the following terms of reference : ' To consider and report what major amendments are desirable in the Companies Act, 1929, and in particular to review the requirements prescribed in regard to the formation and affairs of companies and the safeguards afforded for investors and for the public interest.' "

The report of the Committee has now been printed and published, and will doubtless prove of interest to practising solicitors and accountants in New Zealand.

The Committee, after stating its opinion that the great majority of limited companies are honestly and conscientiously managed, that they have been beneficial to the trade and industry of the country and essential to the prosperity of the nation as a whole, enumerates the following general lines of policy for the future in order to prevent abuses :—

(1) The fullest practicable disclosure of information concerning the activities of companies will lessen opportunities for abuse and accord with a wakening social consciousness.

(2) Accordingly as much information as is reasonably required should be made available both to the shareholders and the creditors of the company concerned and the general public.

(3) Shareholders should be enabled to exercise a more effective control than hitherto over the management of their companies.

(4) Observance of the requirements of the Companies Act should be vigorously enforced.

(5) Where companies are improperly or dishonestly conducted, their affairs should be investigated and the offenders prosecuted.

The Committee further advises that, if its recommendations are embodied in an amending statute, it should be followed immediately by a consolidating Act, because constant reference has to be made to the Companies Acts by business men. The same necessity for consolidation would also arise in New Zealand, if we amend our 1933 Act along similar lines.

Throughout this article the reference to the section numbers are for convenience sake, to the New Zealand Act, and not to the Imperial Act of 1929, on which our Act is mainly based.

Doctrine of Ultra vires: Suggested Partial Abolition.

After pointing out that the doctrine of *ultra vires* with reference to limited companies is in actual fact an illusory protection for the shareholders and sometimes a pitfall for third parties dealing with the company, the Committee most courageously makes the suggestion that the doctrine be abolished as regards dealings with third parties.

> Existing provisions in memoranda as regards the powers of the companies and any like provisions introduced into memoranda in future should operate solely as a contract between a company and its shareholders as to the powers exercisable by the directors.

There is no doubt that this proposal, although it will appear almost revolutionary, if not sacrilegious, to those trained in the law, would be of great benefit to the community : it would remove " a cause of unnecessary prolixity and vexation," and lessen litigation : *e.g.*, *Tauranga Borough* v. *Tauranga Electric-power Board*, [1944] N.Z.L.R. 155.

As the law stands at present, with the exception hereinafter mentioned, if a company enters into a contract not authorized by its memorandum of association, the contract is void *ab initio*, neither party can sue on it, and the only remedy which the other party has who may have suffered loss is on the basis of a tracing-judgment, in accordance with the equitable principles as applied in the leading case of *Sinclair* v. *Brougham*, [1914] A.C. 398.

In one respect, however, the New Zealand law already approximates to the recommendation of the English Committee, and that is with regard to dealings by corporations, such as limited liability companies, with land subject to the Land Transfer Act. The New Zealand Court of Appeal has held that a District Land Registrar cannot question the powers of such a corporation to deal with land of which it is the registered proprietor : *In re Kaihu Valley Railway Co.*, (1890) 8 N.Z.L.R. 522. The Registrar is not concerned with the domestic proceedings of the company, but must act on the maxim, *Omnia praesumuntur rite et solemniter esse acta donec prodetur in contrarium.* And once the instrument is registered the person claiming thereunder obtains an indefeasible title : *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, and *Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542.

Prospectus.

So far as applicable to New Zealand conditions the principal recommendations of the Committee appear to be :

(1) *Disclosure of Previous Transactions in Property of Company.*—For example, in the words of the Committee—

> Promoters sometimes enter into a contract with a vendor for the purchase of property which they resell to the company at a higher price. If the first and second contracts are both completed prior to the issue of the prospectus, the purchase price under neither contract needs to be disclosed. If the second contract is completed after the issue of the prospectus, then the purchase price under this contract only needs to be disclosed ; but in either case investors are left in ignorance of the margin between the price at which the property was originally acquired by the promoter and that at which the company bought it.

(2) *Disclosure of Material Contracts.*—The Committee considers that cl. 13 of Part I of the Third Schedule to the Companies Act is inadequate, as it does not compel the disclosure of any information as to the nature or terms of the contracts. The Committee thinks that the general nature of each contract should be stated.

Private Companies.

The term does not mean the same in both Acts, but it is interesting to note that the Committee recommends that private companies with certain

defined exceptions should be compelled to file written copies of balance-sheets, as

> the existing exemption deprives traders of information in deciding whether to grant credit to a private company, and trade-unions of information which they need to enable them to assess the justice of the wage rates offered by employers.

It is also pointed out that public companies, by trading through subsidiary private companies which they have acquired or may form for the purpose, may give to shareholders and the public less information than is available in the case of public companies carrying on their businesses without subsidiaries.

Rights of Minorities in Private Companies.

The Committee summarizes some of the disadvantages of the minority holders, *e.g.*,—

(1) Liability to pay death duty on a greater value than the shares are able to be sold for, owing to the directors' refusing of permission to register transfers. (This is an undoubted injustice).

(2) Excessive remuneration of directors.

The Committee recommends that in addition to the compulsory winding-up (which, however, is not always an adequate remedy) the Court should have power to impose upon the parties to a dispute whatever settlement the Court thinks just and equitable. This appears an excellent suggestion and one conducive to fair play in the commercial world.

Auditors of Private Companies.

Both under the Imperial and New Zealand Acts a person who is a partner of or in the employ of a director or officer of the company, although barred from being an auditor of a public company, is under no similar disqualification as regards a private company: s. 140 (1) (*b*) and the Seventh Schedule to the Companies Act, 1933. The Committee as a means to the securing of an independent audit says: " We think that this privilege at present accorded to private companies should be withdrawn."

Trustees for Debenture-holders.

The report contains a valuable and concise summary as to the duties and liabilities of trustees for debenture-holders.

It also points out the difficulties which ensue, as in *In re Dorman, Long and Co., Ltd., Re South Durham Steel and Iron Co., Ltd.*, [1934] Ch. 635, when the interests of the debenture-holders conflict with their duties as trustees. For example, a

> company may owe money to its bankers (who are also trustees for the debenture-holders) who in their capacity as creditors have an interest in discouraging the debenture-holders from realizing for their own benefit securities which would otherwise be available for creditors ranking after the debenture-holders.

But owing to the extreme difficulty of any remedial legislation the Committee makes no recommendation hereunder for legislation, but adds :

> We, therefore, refrain from recommending legislation on this subject but we trust that banks, insurance companies, and others who act as trustees for debenture-holders, will take care not to undertake this work in cases where there is risk of a conflict arising between the interests of the debenture-holders and those of the trustees appointed to act for them and, in cases where the possibility of conflict already exists, will take steps to secure the appointment of a successor who is independent.

Liability of Trustees for Debenture-holders.

The Committee refers to the practice whereby deeds appointing trustees for debenture-holders contain clauses which absolve the trustee from liability for anything but his own wilful neglect or default: the legal effect of such clauses is that a trustee is exonerated unless he has done wrong knowing that the act he is doing is wrong: *In re City Equitable Fire Insurance Co., Ltd.*, [1925] Ch. 407. The Committee thinks that this is not fair to the beneficiaries and makes the following recommendations :—

> Any provision for exempting any trustee of a trust deed securing debentures of a company from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default breach of duty or breach of trust of which he may be guilty in relation to his duties under the trust deed, shall be void :
>
> Provided that—
>
> (i) Nothing in this section shall render void—
>
> (*a*) Any express indemnity against any act of commission or omission for which he has become responsible given to a trustee by a resolution of the debenture-holders, passed by a three-fourths majority at a meeting duly convened for that purpose and held under the provisions of the trust instrument or pursuant to any Act of Parliament,
>
> (*b*) Any provision in any trust instrument authorizing a trustee to rely upon opinions or evidence or act upon advice upon which he might not otherwise be entitled to rely ;
>
> (ii) In determining whether a trustee has been guilty of negligence, default, breach of duty, or breach of trust, regard shall be had to any powers or authorities or discretions conferred on such trustee by the trust instrument notwithstanding that the effect of having such regard may be to exempt the trustee from a liability which he would otherwise have been under ;
>
> (iii) Nothing in this section shall prohibit the inclusion of a provision protecting a trustee from liability for any error of judgment made in good faith, unless it shall be proved that such trustee was negligent in ascertaining the pertinent facts ;
>
> (iv) In relation to a trust deed containing any provision for exemption or indemnification which is in force at the date of commencement of the new Act this section shall not have effect as regards any trustee of that trust deed appointed before that date.

Receivers.

The Committee points out that a receiver deals with the assets for all practical purposes as a liquidator until he has satisfied the claims of the debenture-holders: his management affects not only the interests of the debenture-holders or chargee, but also those of the unsecured creditors and the shareholders: the interests of these last two have insufficient protection under the present law: s. 290 of the Companies Act, 1933. Accordingly, it has drafted a very elaborate provision dealing with the following matters :—

(*a*) The receiver should file in the office of the Registrar of Companies a summary of the affairs of the company on his appointment and thereafter of receipts and payments in the course of the receivership at yearly intervals and also a statement showing the position at the conclusion of the receivership; copies of these returns must be forwarded to the trustee for the debenture-holders, the company, or its liquidator.

(*b*) A receiver, whether appointed by the Court or out of Court, should have the right to apply to the Court to determine any question arising in the course of his administration.

(*c*) A receiver, notwithstanding any provision to the contrary in any instrument, should be made

personally liable on any contract (unless the contract otherwise provides) entered into by him as receiver, provided, however, that the receiver shall be entitled to indemnity out of the assets comprised in the charge and such indemnity shall be entitled to priority over all debts other than preferential debts.

(*d*) In no circumstances should undischarged bankrupts be allowed to act as receivers.

REGISTRATION OF CHARGES.

From a lawyer's point of view the following passage is one of the most interesting in the report :—

Registration of charges given by trustee over property of a company.—It has been suggested to us that the provisions regarding the registration of charges can be evaded in cases where a trustee holds property for a company and gives a charge over that property, as such charge, not being given by the company, does not require registration. We do not think that there is any real ground for the view thus expressed, but it might be advisable to remove by a suitable declaratory amendment to the Act all possible room for doubt.

This reminds one that the New Zealand Legislature on one occasion in order to resolve a similar doubt had to amend the Native land laws, because one District Land Registrar held that an alienation of Native land by a European trustee did not require confirmation, as in his opinion it was not an alienation by a Native : see s. 46 of the Native Land Amendment Act, 1936, amending s. 264 of the Native Land Act, 1931.

SHAREHOLDERS' CONTROL.

The Committee points out that in the last hundred years there has been a great redistribution of wealth, and whereas in the early days of joint-stock companies investors were usually people of wealth, to-day many small investors have holdings in companies and there is a likelihood of a further diminution in the size of the average share-holding. Small shareholders seldom take a close interest in the company, and " the growth of investment companies and of unit trusts has tended to divorce the investor still further from the management of his investments." Although the directors usually use their powers to the advantage of the shareholders, there have been exceptional cases in which directors have abused their position. It should be made difficult for directors to secure the hurried passage of controversial measures. To enable ordinary shareholders to introduce resolutions on their own account the Committee thinks that

One hundred members holding on the average not less than £100 of the paid-up capital per member or a member or members holding not less than 5 per cent. of the shares carrying voting rights should be entitled, subject to giving notice not less than thirty-five days before the annual general meeting, to require the company to send out with the notice convening the annual general meeting a notice of any resolution which the members propose to introduce at the meeting together with the statement in support of it, the statement not to exceed one thousand words.

Regarding the variation of shareholders' rights, the Committee thinks that the period of ten days mentioned in s. 73 of the Companies Act, 1933, should be extended to twenty-one days.

(To be concluded.)

ADOPTION OF CHILDREN.

Procedure in the Magistrates' Court.

(Continued from p. 290.)

CONSENTS CONTESTED : DIFFERENCE IN PRINCIPLES APPLICABLE TO ADOPTION AND GUARDIANSHIP CASES.

A few reported cases relating to the consents of parents and guardians to the adoption of infant children were mentioned in the previous article. There is a tendency to confuse the issues in contested adoption applications under Part III of the Infants Act, 1908, with those arising in proceedings to settle disputes as to custody, guardianship, and protection of infants, under Parts I and IV of that Act and the Guardianship of Infants Act, 1926.

It should be noted that the effect of adoption by strangers to the child as laid down by s. 21 (1) and (2) of the Infants Act, 1908, is to sever the existing ties of the infant with its natural parents. The section, as amended reads—

21. (1) Such order of adoption shall confer the name of the adopting parent on the adopted child, with such proper or Christian name as the Judge [Magistrate], on the application of the adopting parent, may fix ; and the adopted child shall for all purposes, civil and criminal, and as regards all legal and equitable liabilities, rights, benefits, privileges, and consequences of the natural relation of parent and child, be deemed in law to be the child born in lawful wedlock of the adopting parent :

Provided . . . [*Paras.* (*a*), (*b*), *and* (*c*) *deal with property*].

(2) Where such order of adoption has been made, the adopting parent shall for all purposes, civil, criminal, or otherwise, be deemed in law to be the parent of such adopted child, and be subject to all liabilities affecting such child as if such child had been born to such adopting parent in lawful wedlock ; and such order of adoption shall thereby terminate all the rights and legal responsibilities and incidents existing between the child and his natural parents, except the right of the child to take property as heir or next-of-kin of his natural parents directly or by right of representation.

While in both adoption and guardianship proceedings the Magistrate and the Court will treat the welfare of the infant as a matter of primary importance, there is this distinction : in adoption proceedings the rights and wishes of natural parents may outweigh considerations as to the welfare of the child. This was explained by Luxford, S.M., in *In re P. V. H.* (*an Infant*), (1945) 4 M.C.D. 260, 263 :

The underlying principle of the law relating to adoption is that the special jurisdiction conferred on this Court should not be exercised without the consent of the parents unless the Court is satisfied that both parents have permanently abandoned the child or have by their conduct made themselves permanently unfit to discharge their duties as parents. The welfare of the child is, of course, an important consideration in the sense that the promotion of the child's welfare is the chief duty devolving upon all parents. But the welfare

of the child is not a matter for consideration in adoption proceedings in the sense that the natural parent may lose his child against his will merely because the proposed adopting parent is likely better to promote the child's welfare.

The principle upon which questions relating to custody, upbringing, &c., of infants are to be decided is laid down by s. 2 of the Guardianship of Infants Act, 1926, which reads—

> Where in any proceeding before the Supreme Court or any other Court of competent jurisdiction the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, *shall regard the welfare of the infant as the first and paramount consideration*, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration, or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

It is necessary, therefore, to distinguish between the authorities to be relied upon in adoption proceedings, and those dealing with custody and guardianship. Some of the cases settle issues and contain valuable dicta relating to both matters. The following selection of the more recent cases, by no means exhaustive, may be useful. Where English cases are reported, a comparison of the statutes should be made.

In *In re P. V. H. (an Infant)* (*supra*), Luxford, S.M., had to consider an application by a widow for the adoption of the legitimate child of parents whose consents had not been obtained, and only the father appeared to oppose the order. The mother was apparently a worthless woman who had exhibited little, if any, interest in the child. The father, realizing that the child was not receiving proper attention, arranged, in 1940, for a licensed foster-parent to take the child into her custody, where he had been until April, 1945, and she was the applicant for adoption. The father has served terms of imprisonment; three months from July, 1940; in November, 1940, further imprisonment for theft; twelve months for car conversion in August, 1943; and, at the time of the hearing, he was serving a sentence of two and a quarter years for breaking, entering, and escaping. During the whole period the father had paid only £4 7s. 6d., but the grandparents and the father's army pay had supplied a further £38 towards the child's support, and, in the five years, he had visited his son on three occasions only. The learned Magistrate said that there were circumstances which were quite inconsistent with an intention by the father permanently to abandon the child. There could not be much doubt that the father's conduct during the five years was such that a finding as a fact that he was unfit to have custody and control of his son would be justified. Similarly, the learned Magistrate said he would be bound to hold that if the application before him had been for a custody order under s. 32 of the Destitute Persons Act, 1910, the order should be made in spite of the father's opposition. He proceeded:

> An adoption order, however, is more far reaching in its effects than a guardianship or custody order; it extinguishes the rights of the natural parents, and consequently the principles to be applied in respect of the granting of a guardianship or a custody order do not wholly cover an application to dispense with a natural parent's consent to an order for adoption. Unfortunately this question has not been the subject of judicial decision, but the dictum of Sir Charles Skerrett, C.J., in *In re Mills*, [1928] N.Z.L.R. 158, 163, 165, provides a useful formula which may well be adopted in the present case. The learned Chief Justice said: "The *prima facie* presumption is that it is for the benefit of the child that it should be in the custody of its natural parent, and this presumption has to be displaced" (*ibid.*, 163). "Parentage calls for sacred obligations on the part of the parent. It creates equally sacred rights, which ought not to be annulled unless for grave reason and with the greatest caution" (*ibid.*, 163, 165).
>
> In spite of the father's bad record during the past five years, I was impressed with the fact that he does not appear to be an inherently bad man, but rather one who in consequence of the unfortunate marriage he contracted at an early age slipped into a course of conduct which has qualified him for inclusion in the criminal class. He stated with apparent truth that he was taking divorce proceedings against his wife, and intends completely to rehabilitate himself on his release from prison. His parents appeared before me and expressed their willingness to undertake the care and custody of P.V.H. and to assist their son in his endeavour to win his way back to respectability. Whether this will eventuate or not is impossible to say at the present time. If it does and a Court of competent jurisdiction came to the conclusion that the father had permanently reformed, it might well grant him the custody of his son.
>
> In these circumstances, I think it would be wrong to grant the present application at the present time. To do so would not only affect custody but would permanently affect the child's status and deprive the father of all the legal rights in respect of the child. In my opinion, an order of adoption should not be made against the wishes of the father unless the Court is satisfied that he is not likely properly to perform his duties as such within a reasonable time. The provisions of s. 2 of the Guardianship of Infants Act, 1926, which declare that, in deciding the right of the custody of a child, the Court shall regard the welfare of the infant as the first and paramount consideration, do not apply to an application to dispense with the consent of a parent to the making of an adoption order. If those provisions did apply, it would be competent for any person to deprive a parent of his child if such person succeeded in proving that the "welfare" of the child would be promoted by making him the adopting parent.

In *In re S. (an Infant)*, (1939) 1 M.C.D. 188, 190, Stilwell, S.M., said that to deprive a father of his child without his consent is a grave matter, and before dispensing with his consent the grounds for doing so should be clearly established. The onus of doing so rests with the applicants for adoption. He pointed out that s. 15 of the Infants Act, 1908, contemplates the co-existence of three elements to establish desertion within the meaning of the definition of "deserted child" in that section—namely, the child must be (i) deserted, and has ceased to be (ii) cared for, and (iii) maintained by the parent. He held, on the facts of the case, that a child cannot be regarded as a "deserted child" where he has been placed by his father in an orphanage, and (though in five years the father had paid no maintenance for and took no interest in him) the authorities of the orphanage in their contract with the father had assumed a relationship *in loco parentis* respecting the child that was terminable in the manner provided in that contract, and subject to the obligation on the father to pay when he could. In coming to this conclusion, His Worship applied *In re Newton (Infants)*, [1896] 1 Ch. 740, *In re O'Hara (Infants)*, [1900] 2 I.R. 232, and *Mitchell, Petitioner*, (1905) 42 Sc.L.R. 429.

An order for the adoption of an illegitimate child was sought in *In re A. (an Infant)*, (1945) 4 M.C.D. 234; where Lawry, S.M., said that, if any consent were necessary, it would be the consent of the mother only.

During a period of eleven years the mother had not seen the child, inquired as to his welfare, contributed towards his maintenance, or otherwise concerned herself with him. She had, in May, 1934, entered into a deed of covenant whereby she had covenanted with the putative father and his mother that they should have the sole custody, care, and control of the child. The father's mother applied for adoption. The child's natural mother had married, and it was desired to avoid asking her for a formal consent. The learned Magistrate distinguished *In re S. (an Infant)* (*supra*), and held, on the facts, that the child had been deserted by its mother, and her consent to the application for adoption was dispensed with under s. 18 (1) (*e*) (*f*).

Here, however, it is well to note that the following cases were determined under the custody and guardianship provisions of the statute, and are distinguishable from those relating solely to adoption: *In re Butler (an Infant)*, [1931] N.Z.L.R. 121, *Penwarden* v. *Gray*, [1931] N.Z.L.R. 780, and *In re L. (an Infant)*, (1938) 1 M.C.D. 47.

Cases which were confined to the cancellation of adoption orders are *In re H. (an Infant)*, [1944] N.Z.L.R. 367, and *In re H. (an Infant) (No. 2)*, (1944) 3 M.C.D. 368.

CONSENT OF CHILD, IF OVER THE AGE OF TWELVE YEARS.

Section 18 (1) (*d*) makes it mandatory for the Magistrate, before making order of adoption, to be satisfied that the child, if over the age of twelve years, consents to the adoption. The Magistrate is now given discretionary power to dispense with such consent by s. 15 of the Statutes Amendment Act, 1942, which reads—

> Notwithstanding anything to the contrary in section eighteen of the principal Act, if the Judge [Magistrate] making an order of adoption of any child over the age of twelve years is satisfied that it would not be desirable to require the consent of the child to the adoption, he may, if he thinks fit, dispense with the consent of the child.

As distinct from consents of parents and guardians which must be in writing, the Act does not mention written consent by the child. It is open to question whether all Magistrates would prefer the consent of the child in writing or, on the other hand, would consider it more satisfactory to test the child's appreciation of the situation and its wishes by questions put to it personally upon the hearing or during an attendance. Here again, the applicants' solicitor should ascertain the requirements of the appropriate Magistrate beforehand, either by memorandum or interview.

The rules do not prescribe a form of consent to be given by a child over the age of twelve years. If such consent is required in writing by the Magistrate, then the following form, in some instances, has been held to be satisfactory.

FORM OF CONSENT OF CHILD OVER TWELVE YEARS.

(*Heading as in application.*)

I, ...[*Child*], do hereby acknowledge that I have been independently advised by .... [*Solicitor*] that if an adoption order is made under which I shall be adopted by .... [*Applicants*] I shall be a near relative of the said.................. [*Applicants*] and liable to contribute to their support if they become destitute.

I do hereby further acknowledge that I have been advised by Mr. .... [*Solicitor*] that my adoption by .... [*Applicants*] will have the effect of making them my parents as if I had been born to them and that they will take the place of .... my natural parent(s) whom I understand will no longer have any control over me. Mr. .... has also explained to me that I will owe obedience and affection to my new father and mother and not to .... my natural parent(s) who will not be responsible for my welfare unless I myself become destitute and from whom I will be parted and will not see again unless the said .... [*Applicants*] wish me to do so.

I consent to being adopted by .... [*Applicants*].

Dated at, &c.

....

Witness: ....

....

....

CERTIFICATE.

I, ..., being a solicitor not engaged in the above proceedings, do hereby certify that, having read the affidavits of .... filed herein and the reports of the Police and Child Welfare Departments and the relative provisions of the Infants Act, 1908 (s. 21 (1) (*a*), (*b*), (*c*) and (2)), the Destitute Persons Act, 1910 (s. 12 and 26) and the Family Protection Act, 1908, s. 33, as amended.

I have explained the effect thereof to .... the abovenamed child and (s)he appeared fully to understand the same and expressed the wish to be adopted by the said .... [*Applicants*].

Date:

....

While Part III of the Infants Act apparently treats a child over twelve years of age as having reached the age of discretion, it will be appreciated that the form of consent suggested above could be varied in several ways, depending on the age and intelligence of the child, especially as it advances towards its twenty-first birthday. Needless to say, the wording and method of obtaining such written consent must be a matter for the Magistrate dealing with the application.

As to age of infants and children, an authority frequently quoted in adoption, child welfare, custody, destitute persons, and guardianship proceedings is *R.* v. *Scoffin*, [1930] 1 K.B. 741, where Lord Hewart, L.C.J., in delivering the judgment of the Court of Criminal Appeal, quashing a Borstal sentence, says: "The appellant was born on February 17, 1909; he therefore completed twenty-one years on February 16, 1930"; and he goes on to say that he was one day more than twenty-one years of age and two days more than twenty-one years on February 18 and 19, 1930, respectively. Based on that and other authorities, a child who has reached his twelfth birthday is treated as "over the age of twelve years" mentioned in s. 18 (1) (*d*); and must not have attained his twenty-first birthday to be capable of adoption under Part III of the Infants Act, 1908, where by s. 15, as amended by s. 34 (1) of the Statutes Amendment Act, 1939, "child" means a person under the age of twenty-one years.

The respective ages mentioned are deemed to be those at the date of hearing upon which the Magistrate pronounces his grant of adoption. In view of the decision in *Tipene* v. *Tutua Teone*, [1937] N.Z.L.R. 1098, in which it was decided that an adoption order is not effected unless the order in the prescribed form is actually signed, it is vitally important to have the adoption order drawn up and signed immediately after the making thereof.

The applicant's solicitor would do well to ensure that the form of order (in triplicate) is on the file before the hearing. In some Courts, the practice is to require the order to be filed with the application and other papers.

(*To be concluded.*)

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 55.—S. Ltd. to B.

Urban Land—Section in Subdivision—Recent Sale Prices of Sections in Immediate Vicinity—Preferable Indication of Value—Discrimination between Sections sold.

Appeal concerning the value of Lot 71 of a subdivision at Haughton Bay, Wellington. The area was 26.7 perches.

The Court said: "The lot has a number of advantages in that it is in a sheltered position, has a view, although a somewhat limited one, of the entrance to the harbour, and reasonably good access for the delivery of building-materials on the site. As against these advantages, it has a number of disadvantages. It is a steep section with a considerable area of waste land on or towards its southern boundary, whilst the approach by Cave Road is steep and rough.

"Mr. G., a witness for the appellant, relied to some limited extent in fixing his value of the lot, on the recent sale of Lot 74 for £200. Consent to that sale was, however, given without a hearing, so it is not as reliable a basis as it otherwise might have been for the purpose of fixing the value as at December, 1942, of other lots in the locality. The price paid for this lot seems out of line with other sales. The reference to the price paid for the land on the sale of Lot 73 depends on the accuracy of the assumption as to what the purchaser paid for the house and other improvements. Such instances are not without value, but they clearly must be viewed with discrimination.

"Lot 102, the sale of which was approved at £175, was also referred to as an indication of value. Lot 102 is a good section which lies particularly well and has no hollow, as was suggested. The price realized for it seems, however, to afford some indication of the value of sections in the immediate locality. The sale of Lot 54 at £125 in 1939 is also an indication of value but Lot 54 is a larger section. These sale prices afford a more reliable basis than an alternative method suggested—namely, taking an average of sales spread over a considerable number of lots and over a good many years, and then arriving at a conclusion by working out the average prices paid on an area basis.

"Taking every factor into account, £90 seems too low a value to attach to Lot 71. Its real value would seem to be £110. The basic value of this lot is therefore fixed at that sum. Consent to the sale of Lot 71 at £110 is given; and the appeal is dismissed."

[*The foregoing judgment is to be sustituted for No. 55, ante* p. 276.]

No. 56.—M. to J.

Urban Land—No Recent Sales of Comparable Sections—Inferences as to Value drawn from Single Dissimilar Area—Distinguishing Features considered.

Appeal from the determination of an Urban Land Sales Committee, limited to the unimproved value of the land involved.

The Court said: "The two witnesses for the appellant testify to a value of £700 and £750 respectively, whilst the Crown witness maintains that the value is £600. There having been no sales of completely comparable lands for many years, the valuers were compelled to draw inferences from the sale price of a single, somewhat dissimilar, area.

"Mr. H., for the appellant, relied in his assessment of the value at £700 upon his own opinion. He established support for his view, however, by concluding that the appellant's land exceeded by £150 to £200 the value of a section in Jubilee Avenue sold at the end of 1943 for £550. Mr. S., another witness called by the appellant, also though the appellant's land worth £200 more than the Jubilee Avenue section. He saw in the site under consideration many merits not attaching to the Jubilee Avenue property, including access to what he called a good beach. An inspection, however, revealed that what was once good beach has now almost ceased to be a beach at all. It would appear, in consequence, that level access and proximity to transport are the only features distinguishing the appellant's land from the Jubilee Avenue section.

"The latter, on the other hand, whilst within reasonable walking distance of transport, enjoys a better view and more privacy. Despite its comparative disadvantages, it would it is thought, command a wider field of buyers than the appellant's land. The latter would appeal more to people to whom the advantage of having a bus stop at hand mattered most.

"Taking a broad view of all the factors involved, the Court has formed the conclusion that any difference in value was adequately expressed by the Committee's assessment of £600. The appeal is therefore dismissed."

No. 57.—B. to C.

Rural Land—Uneconomic Unit—Unlikely Value as Subdivision into Farmlets—Potentiality Value based on Price possibly payable by Adjoining Owner—Computation of such Value—Comparable Areas.

Appeal from the determination of a Rural Land Sales Committee.

The Court said: "By common consent, the land which is the subject of this appeal is not an economic unit. Its value must therefore be determined by ascertaining its value as at December 15, 1942.

"Mr. S. who was called by the appellant, assessed the value at £2,750. To reach this result he valued the 25 acres of level land at £90 per acre, and 11 acres defined as undulating, at £50 per acre. To the remaining area of 1 acre 26·4 perches he attched no value. The result, so calculated, does not quite accord with the valuation of £2,750, but the method indicates with accuracy Mr. S.'s estimate of the relative values of the various constituent areas, and is fairly descriptive of the basis of Mr. S.'s estimate of value.

"In fixing the foregoing values, Mr. S. took into account two factors which are frequently and properly relied upon to increase intrinsic value. In the first place, he said that the land could be subdivided into three farmlets as it has almost one chain of frontage for every acre of land. In the next place, he said that his value of £2,750 represented the price which an adjoining owner would pay. He agreed that a buyer who had no adjacent property would not pay so much.

"The idea of subdivision was not pressed, probably because although the land could, of course, be easily subdivided, there is probably no market in the particular locality for small subdivisional areas. The demand for such areas will, doubtless, be first satisfied by the extensive areas suitable for subdivision which lie between the city boundary and the land under appeal. These latter areas will, no doubt, be made available for subdivision when the financial inducement is strong enough. In any case, only the 25 acres of level land is properly susceptible of subdivision. The subdivision of that area would strip the remaining area of almost all value.

"It seems, therefore, that the maximum value of the property lies in the potentiality attaching to the fact that the area as a whole is such that an adjoining owner would and could afford to pay more for it than it is intrinsically worth. What calls for consideration in consequence is what sum an adjoining owner would be likely to pay. Such a question can only be determined in this case by having regard to the prices paid for comparable areas, due allowance being made for all differing factors.

"To begin with, this land is not comparable in value as farming land with the area mentioned in the evidence of 45 acres at Maxwell sold by the R. Estate to Mr. A. for £72 per acre in March, 1943. This latter land was defined as the best land along the Coast. It had been the R. Estate's bullock paddock. In quality it was described as being better than the best of any of the Westmere properties. The land now in question cannot be said to be of the quality of the best Westmere land.

"The price of £72 an acre was paid by an adjoining owner and therefore represents a potentiality value of the same general character as the potentiality value attaching to Mr. B.'s property. Mr. A. resold the 45 acres to Mr. C., in November,

1944, at the same price as he paid for it. It is true that this area, which is some fifteen miles from Wanganui, has not got the same locality value as Mr. B.'s property, which is some ten miles nearer Wanganui.

"Divergent factors must also be taken into account in any reference to the sale during last year of 15 acres to Mr. D. at £70 an acre. It is true that Mr. D. had a first right to buy, and that the existence of this right may have somewhat depressed the price. As the right to buy was to buy at a competitive price, however, the price actually paid cannot have been materially depressed.

"The R. property of 44 acres adjoining the land under appeal was also referred to. It is said that an offer on the basis of £80 an acre was refused for this in 1937. The £80 an acre is arrived at after deducting the value of buildings. To proceed in that way always involves some uncertainty, because the accuracy of the result is wholly dependent upon the adequacy and propriety of the sum attributed to the value of the buildings.

"The foregoing were all sales to which Mr. S. referred and upon which he relied. They suggest somewhat forcibly that, apart from locality value, the sale value of uneconomic units in the district generally is somewhere in the neighbourhood of £70 per acre for good land. £72 per acre was paid on two occasions for the 45 acres at Maxwell, and £70 per acre was paid by Mr. D. If the price paid by the latter was too low to the extent of even £10 an acre, it would not suggest a value of more than £70 an acre in the land under appeal, for the property bought by Mr. D. is of better quality than the land under appeal, and is better situated.

"Mr. S., for the Crown, values the 25 acres of flat land at £62 an acre and the 13 acres of broken land, of which 1½ acres are very broken, at £35 an acre. In support of his assessment of value Mr. S. suggests that even the best of the land under appeal is not equal in value to the land bought by Mr. D., whilst it is far inferior to the land sold by the R. Estate to Mr. A. and by Mr. A. to Mr. C. He further relies upon two additional transactions, the first a sale from E. to F. of a property of 68 acres situated some three miles nearer to Wanganui City. This land was sold in 1938 for £60 an acre. It had some buildings on it.

"Mr. S. then relies on the sale from W. to J. of 32 acres at £3,150. This sale was effected on July 29, 1943. The price represents approximately £100 per acre, but there were substantial buildings on the property. It is better land and has a main highway frontage. If only £1,000 is allowed as the value of the buildings, and that would be a meagre allowance seeing that the house alone contains 1,000 to 1,200 square feet, the price of this better and better situated land would be £70 an acre.

"This analysis of the additional sales to which Mr. S. referred confirms the conclusion suggested by the sales quoted by Mr. S. that £70 an acre would be an ample sum to allow as the value of the level 25 acres of the land under appeal. That is the only area of a comparable contour and of approximately comparable value with the other areas sold. The price paid for small areas of comparable land appears to have included the potential value attributable to the probability that an adjoining owner would pay a high price.

"The value of the remaining 12 acres is a matter of some difficulty. The general tenor of Mr. S.'s evidence in relation to it was condemnatory. Topographically, however, that portion of the property is not so difficult to work, nor so difficult to put into good condition as Mr. S. appears to think. In the hands of the owner of the 25 acres it could, most of it, be somewhat easily and somewhat inexpensively brought into good condition. These are factors which would weigh with an adjoining owner and, whilst one would not expect such an owner to pay an excessive price, he might well pay £45 an acre for this area.

"In the result, the Court is of opinion that the 25 acres should be taken in as of a value of £70 an acre and the 12 acres at a value of £45 an acre. This gives an aggregate value of £2,290. The basic value is declared to be that sum and consent to the sale at that figure is given."

No. 58.—E. to A.

Urban Land—Comparison of Prices of Adjoining and Adjacent Land—Necessity for Careful Assessment of Money Value of Differences—Locality View.

Appeal concerning the value of sections 15 and 16 of a subdivision on the corner of Knighton and Cambridge Roads, Hamilton. The contest was limited exclusively to the value of the land apart from the buildings upon it. Mr. M., who was called by the appellant, valued Lot 15 at £275 and Lot 16 at £250, while Mr. H., for the Crown, valued them respectively at £250 and £240. Both witnesses agreed that Lot 15, being a corner lot, was the more valuable of the two.

The Court said: "As is inevitable, both witnesses relied upon the sale price of adjoining and adjacent Lots as indications of the value of the land in question. This involves somewhat careful comparisons and equally careful assessments of the money value of differences.

"There seems very little, if anything, to distinguish between Lot 17 and Lot 16. The former was sold in 1939 to Mrs. A. for £240. What is clear is that if Lots 18 and 19 are built upon, the any limited view which the house built upon Lot 16 enjoys will be almost completely lost. In addition, Lot 16 will be presented with a view of the backyards of the houses on Lots 18 and 19. The fact is that the house on Lot 16 has been built too far to the rear of the section on which it stands. Apart from the fact that Lot 16 is no better than Lot 17, it enjoys no advantages over Lots 12, 13, and 14.

"The maximum price paid for any of the latter sections was £220. The fact that Lot 16 fronts the main road would seem to be no particular advantage in that locality. In fact it may in some respects be a detriment. Then, too, Lot 16 does not compare as favourably with the lots on the lower side of Knighton Road fronting Lots 12 to 14 of the appellant's subdivision, as Mr. M. seemed to think. The lots on the lower side of the road were sold at a maximum price of £130. If Lot 16 is assessed at a value of £100 more, that would seem to be the maximum sum by which that lot exceeds in value the lots on the lower side of Knighton Road. One great merit in the latter is that the views from them are extensive and permanent.

"Upon the whole, therefore, the evidence is in favour of the correctness of Mr. H.'s assessment of the value of Lot 16.

"Somewhat similar considerations apply to Lot 15 except that it is a corner lot, if any advantage attaches to that circumstance in this locality. Lot 15 is well planted, and the shrubs are attractive, but it is obvious that the owner of Lot 15 for the time being cannot have both shrubs and view. If he retains the shrubs, as is likely, then he must sacrifice the view over the town. The northerly view may be affected when Lots 13 and 14 are built upon.

"In this locality view must be a material factor, and it is no doubt because of the permanent view which they enjoy that £250 each was paid for the two lots fronting Tarbutt Road. Those lots, apart from the fact that they are on a blind road, are better lots in many respects than either Lots 15 or 16 of the appellant's subdivision. Their slightly more distant situation from the town is not a factor of any importance having regard to the minor relation of that distance to the distance from town, whilst their situation upon a blind road might be regarded by many potential purchasers as an advantage.

"If, as the appellant thinks, Lot 15 should not be treated as a separate section but should remain an appendage to Lot 16, then its value must necessarily be less than if it were regarded as an independent section. In any event, Lot 15 is only to a very limited extent better than Lots 13 and 14 which adjoin it.

"In the circumstances, therefore, it would appear that Mr. H. has allowed a fair price for this lot also. The appeal is therefore dismissed."

RULES AND REGULATIONS.

Second New Zealand Expeditionary Force Pay and Allowances Emergency Regulations, 1945. (Emergency Regulations, Act 1939.) No. 1945/166.

Opossum Regulations, 1934, Amendment No. 6. (Animals Protection an Game Act, 1921–22.) No. 1945/167.

Orchard and Garden Diseases Act Extension Order, 1945. (Orchard and Garden Diseases Act, 1928.) No. 1945/168.

Aliens Emergency Regulations, 1940, Amendment No. 3. (Emergency Regulations Act, 1939.) No. 1945/169.

War Assets Realization Board Regulations, 1945. (Public Revenues Act, 1926.) No. 1945/170.

Butter and Cheese Marketing (Ships' Stores) Regulations, 1945. (Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934.) No. 1945/171.

War Service Gratuities Emergency Regulations, 1945. (Emergency Regulations Act, 1945.) No. 1945/172.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Age and Experience.—Recent criticism of the compulsory age for retirement from the Judiciary in this Dominion draws attention to the position in the High Court of Australia. Here, there is Sir George Rich, now eighty-two, and he has held the office for the past thirty-two years. Only eight years younger, there is Sir Hayden Starke. His service is a mere twenty-five years. The Chief Justice, Sir John Latham, is sixty-eight. At one time the Commonwealth's Minister to Japan, he has also been Federal Attorney-General, Leader of the Opposition, and Deputy Prime Minister; and he bears the reputation of being a fine classical scholar. Sir Owen Dixon, fifty-nine, served for two years during World War II as Australian Envoy Extraordinary and Minister Plenipotentiary to the United States, while Williams, J., who is fifty-six, won the Military Cross in World War I and served upon the Bench of the Supreme Court of New South Wales. The baby of the High Court Bench, Mr. Justice McTiernan aged fifty-three, was once Rich, J's., associate, and has had the unusual distinction of serving with him as a brother Judge for fourteen years. How many associates, after suffering a "bad quarter hour," must have sighed for an opportunity to dissent from their "Judge" in no uncertain manner! How many, again, can look back upon those years with wistful and affectionate longing. Scriblex remembers an occasion during late afternoon when Reed, J., finding that his bell remained unanswered, went to look for his associate and found him in an adjoining room, crouched on the floor with several associates and busily engaged in playing poker-dice as he entered, the throw exposed three aces. "Ought to win," he observed drily, and left the room without further comment.

Not an Operative Mason.—And speaking of associates, the following critical occurrence was related at the recent dinner of the Law Students' Faculty in Welington, where Johnston, J., was the principal guest of honour. It seems that, although it may not be generally known, it is the practice of the Court messengers to meet the Judges when they arrive at the railway-station of their destination in order to attend to their luggage. A short time ago, there was at Hamilton a new messenger who did not know the Judges by appearance. His task was to meet the Chief Justice. After an early-morning search of the platform at Frankton, he espied two gentlemen approaching him. Bowing low before one of them, he informed His Honour that he was there to meet him and attend to his pleasure generally. Then, in an abrupt manner, he told the other to hurry up and hand over the luggage-checks. Trains, he observed sagely, did not stay there all day. The other gentleman, however, could not oblige. *He* was the Chief Justice. It was W. E. Mason, his well-known associate, who had had the honours thrust upon him.

Advocacy.—"Advocacy is the Art of Persuasion. . . . Advocacy consists of choosing the most effective means of presenting and arguing your case."—Viscount Simon, L.C.

Lawyer-authors.—Scriblex is surprised to hear that, at recent sessions in Palmerston North, one of our Judges, in his summing-up, quoted a passage from a book on negligence written by a well-known advocate and subsequently observed that the quotation "just tipped the scales in favour of the plaintiff." Sweet though the uses of advertisement may be, it is not usual for textbooks by living authors, and in particular by practising barristers, to be quoted to or by occupants of the Bench, although Scriblex must confess to complete ignorance of the origin of so salutary a custom. It is related that once, when Judge Foster was sitting, another Judge sought to encourage Sir Julian Salomons by telling him that the view he was advancing was supported by a passage "in my brother Foster's *District Court Practice*." "It might be good law for all that!" said Salomons, with a rudeness for which he was noted. Again, when opposed by Mr. (afterwards Mr. Justice) A. H. Simpson, he referred to a passage in *Simpson on Infants*, and turning slowly and deliberately to the title page, remarked "I am quoting from the only edition—no other has been called for!"

Jones, J.—The appointment of His Honour Judge Austin Jones, M.C., to the Probate, Divorce, and Admiralty Division is the second occasion in the long history of the High Court of Justice that a County Court Judge has been similarly elevated. Since 1943, Jones, J., has been Judge of the Westminster County Court. The earlier occasion was in 1920 when Sir Edward Acton, at the time County Court Judge of Nottingham, became a Judge of the King's Bench Division. It was Acton who, at the Bar dinner tendered to Sir Edward Parry on his retirement, told how the guest had in one case listened for a long time with malicious patience to counsel that had insisted upon addressing him after the usual intimation of judicial leaning: "I need not trouble you." Counsel, however, was not to be deterred from speaking to his brief. "I am still of opinion," said Judge Parry, when there was a suitable lull in the flow of oratory, "that your client is still entitled to a verdict, but go on if you wish to and I shall try to keep an open mind on the subject."

Judicial Soap and Water.—"I do not know if a Judge is allowed to know of a duchess who made an income by vowing that her complexion derived its perfection from somebody's soap, though it did not. . . . It is difficult to know what Judges are allowed to know, though they are ridiculed if they pretend not to know. A jury is certainly allowed to know something not in the evidence when they are constantly told to use their knowledge 'as men of the world' in interpreting the evidence"—Scrutton, L. J., in *Tolley* v. *J. S. Fry and Sons, Ltd.*, (1929) 46 T.L.R. 108. . . . "The next thing which I think is quite clear is that if the Court is plunged, as we were plunged yesterday, into a sea of statutes, we come up perhaps gasping, but no wiser than we were when we went underneath"—Humphreys, J., in *Algar* v. *Middlesex County Council*, [1945] 2 All E.R. 243.

PRACTICAL POINTS.

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1. Executors and Administrators.—*Life Insurance Policy—Intestacy—Proceeds payable to Widow—Premiums paid by Deceased—Whether Widow entitled beneficially to Proceeds.*

QUESTION : A. dies intestate in April, 1945, leaving a widow, B., and two young children. A. had a life policy, issued in 1940, which stated that A. is the life assured and B. is the grantee, and that the proceeds of the policy are payable to B., the grantee, on the death of A. The policy is expressed to be given in consideration, *inter alia*, of the payment already made by the grantee of the first annual premium and of the payment by the grantee of all future annual premiums. In actual fact, the premiums were paid by A. Is B. beneficially entitled to the proceeds of this policy or do they form part of A.'s estate ?

ANSWER : In all probability B. is benefically entitled to the proceeds of the policy, but, in all questions as to the ownership of policies, the proposal forms and the policies should be perused before an opinion is given : *Cleaver* v. *Mutual Fund Life Association*, [1892] 1 Q.B. 147 ; *Cousins* v. *Sun Life Assurance Society*, [1933] 1 Ch. 126 ; *16 Halsbury's Laws of England*, 2nd Ed. 671, 672, and the cases collected in *27 English and Empire Digest*, 149–152, and Supplement thereto, and s. 16 of the Married Women's Property Act, 1908. As to whether the policy in the case under consideration was for the benefit of B., see *Re Gladitz, Guaranty Executor and Trustee Co., Ltd.* v. *Gladitz*, [1937] 3 All E.R. 173, and the cases cited therein. As to policies taken out for the benefit of third persons, see the articles in this JOURNAL (1934) Vol. 10, p. 264, (1937) Vol. 13, p. 324, and (1942) Vol. 19, p. 126 ; and as to contracts for the benefit of third persons, see *In re Schebsman, Ex parte Official Receiver*, [1943] 2 All E.R. 768.

In the case under consideration, A. paid the premiums, but *In re Leslie, Leslie* v. *French*, (1883) 23 Ch.D. 552, is authority that, in the absence of a special contract, the person who pays the premiums upon a policy of which he is not the owner obtains thereby no interest in the policy. Y2

2. Trusts and Trustees.—*Life-tenant desiring Trustee to purchase Section and build Dwellinghouse for herself and Remaindermen—Order of Court necessary—Appointment of new Trustees—Inadvisability of appointing Life-tenant.*

QUESTIONS : 1. A. by his will appoints B and C., executors and trustees. A. dies and B. and C. prove the will ; and then B. dies, and C. carries on as sole surviving trustee. The estate of the deceased consists of mortgages over freehold lands and certain house properties bringing in rents. A., by his will left a life estate to his daughter with gift over on her death to her children as tenants in common in equal shares. These children at the present time are all minors and the daughter lives in a town other than that in which the said houses are situate. The life-tenant has asked C. to purchase a vacant section in the town in which she is now living, and to erect thereon a suitable dwelling for herself, her husband, and the remaindermen, in which to live. There is available sufficient cash to purchase the vacant section ; but, in order to build, it would be necessary either to mortgage the existing assets or to sell some of them. Under the will the trustee must invest in ordinary trust investments. Power is given to postpone the sale, calling in, &c.

Can C. accede to the life tenant's request, and, if so, what steps must be taken by C. in order to complete the matter

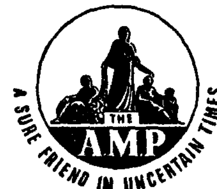
2. Further, C. desires, after carrying out the life-tenant's wishes as stated above, to appoint the life-tenant and another person to act with himself as trustees. Can he do so without making application to the Court

ANSWERS : 1. The Trustee Act, 1908, does not authorize the investment of trust funds in the purchase of land ; and, unless the will itself contains an express provision authorizing such investment, the trustee can purchase the dwelling desired by the life-tenant only under the authority of an order of the Court authorizing such purchase, or under the provisions of the Settled Land Act, 1908. In *In re Fell*, [1940] N.Z.L.R. 552, the Court under s. 81 of the Statutes Amendment Act, 1936, made an order for the sale of land, and apparently did not consider that subs. (4) of that section prevented the making of the order. In *In re Craven's Estate, Lloyd's Bank* v. *Cockburn*, [1937] 3 All E.R. 33, it was held in England that the Court, in exercising the power given by the similar provision in England to s. 81, must exercise the power for the benefit of the whole trust.

If the provisions of the Settled Land Act, 1908, apply in this case, any capital moneys belonging to the trust, and available for investment could be invested in the purchase of land *with the consent of the Court* : s. 50 (*b*).

2. C., the survivor of the trustees, has power under s. 78 of the Trustee Act, 1908, to appoint two new trustees ; but it would be inadvisable for him to appoint the life-tenant a trustee. Y2

LIFE ASSURANCE



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