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NEGLIGENCE: CONTRIBUTORY NEGLIGENCE ACT, 1947.

NOW that the Contributory Negligence Act, 1947, is on the statute-book, it may be of general interest to know its scope and effect, and also the effect of corresponding statutes and their application in the Courts of other jurisdictions.

In this place, in (1945) 21 NEW ZEALAND LAW JOURNAL, 169, we dealt fully with the Contributory Negligence Bill, then before the British Parliament, which, as the Law Reform (Contributory Negligence) Act, 1945 (*38 Halsbury's Complete Statutes of England*, 356), has since become law. Our new Act, except for necessary substitution of local references, is a copy of that enactment, and follows identically the wording of its principal operative sections. And, in the article referred to, we set out the background of the new statute, and the expressions of judicial and other opinion in Great Britain warmly advocating its enactments. It is, therefore, unnecessary to repeat here the various reasons given in its support.

Briefly, the new statute abolishes the common-law rule which regarded contributory negligence as a complete defence. The new statutory rule corresponds with the Admiralty Rules, already in force in New Zealand as s. 2 of the Shipping and Seamen Amendment Act, 1912, and applies, in general, to all claims for damages to which the Admiralty Rules apply; but it is limited to cases where the acts or omissions giving rise to the claims occurred after August 14, 1947, the date of the passing of the new Act.

At the outset, it must be emphasized that only in the foregoing respect does the new statute alter the common law. This can best be illustrated by taking the three classifications into one of which every common-law action for negligence must eventually fall, whenever there is a defence of contributory negligence.

The ultimate question, as Professor Winfield puts it, in every case is "*Who caused the accident?*"

In *The Bernina*, (1887) 12 P.D. 58, Lindley, L.J., gave the three possible answers:

(*a*) *If it were the defendant, the plaintiff can recover in spite of his own negligence: e.g., Davies* v. *Mann*, (1842) 10 M. & W. 546; 152 E.R. 588; *Radley* v. *London and North Western Railway Co.*, (1876) 1 App. Cas. 754; and *British Columbia Electric Railway Co., Ltd.* v. *Loach*, [1916] 1 A.C. 719.

(*b*) *If it were the plaintiff, he cannot recover in spite of the defendant's negligence: e.g., Butterfield* v. *Forrester*, (1809) 11 East 60; 103 E.R. 926.

Neither of the above answers to the question, and the consequent classification of those cases, is in the least degree affected by the new statute.

(*c*) *If it were both the plaintiff and the defendant: e.g., Admiralty Commissioners* v. *S.S. Volute*, [1922] 1 A.C. 129, 144, 145, and *Swadling* v. *Cooper*, [1931] A.C. 1, 10.

(i) At common law, the plaintiff could not recover anything;

(ii) Under the Contributory Negligence Act, 1947, the plaintiff may recover damages, but reduced to such extent as the Court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage.

The third situation is the only one affected by the new statute. It does not always follow that, because one of the parties had the last opportunity of avoiding the accident, he is solely to blame: *The Eurymedon*, [1938] P. 41; [1938] 1 All E.R. 122; and, since the very term "contributory" connotes some contribution by the other party or parties, it is only when the damage was caused by the negligence of the plaintiff and that of the defendant both contributing to its result, though possibly in different degrees of fault, that the new statute operates.

In brief, the new statute brings the common law into line with the Admiralty Rules, which, in the first two instances given above, were (and are) the same as the common law was (and still is), but which differed from the common law in the third instance: but, with the passing of the new statute, the common law has been modified so as to bring it into conformity with the Admiralty Rules.

Before the passing of the Contributory Negligence Act, 1947, the common-law position was that the plaintiff could not recover by reason of his disqualifying contributory negligence, and the defendant would succeed in the result, but without receiving any compensation for the plaintiff's proved negligence which

contributed to the accident. The new statute, applied to the same case, authorizes the apportionment of the loss according to the degrees of the respective parties' negligence: *Anglo-Newfoundland Development Co., Ltd.* v. *Pacific Steam Navigation Co.*, [1924] A.C. 406.

Before considering in detail the new statute itself, it must be emphasized that it does not in any way affect the law relating to negligence generally; the cases in which the defence of contributory negligence can be raised; the meaning of negligence as used in that phrase; and the onus of proof. In substance, it makes applicable to cases at common law, where both parties share the blame of the accident, the Admiralty practice of apportioning the blame as justly as possible between the parties and assessing the damages accordingly.

We now turn to the Contributory Negligence Act, 1945. The new rule that it creates in common-law actions is as follows:

Where any person suffers damage (including loss of life and personal injury) as a result partly of his own fault (which is interpreted to mean negligence, breach of statutory duty, or other act or omission which gives rise to liability in tort, and which would, except for the provisions of the statute, give rise to the defence of contributory negligence), and partly of the fault, as so defined, of any other person or persons, a claim in respect of that damage may not be defeated by reason of the fault of the person suffering the damage. The damages recoverable in respect of any such claim must be reduced to such extent as the Court or arbitrator before whom the claim falls to be determined thinks just and equitable having regard to the claimant's share in the responsibility for the damage: s. 3 (1).

The foregoing is the fundamental modification of the common law effected by the new legislation. No longer will it be the case of all or nothing, from the plaintiff's or the defendant's point of view, if either has been an effective cause of the accident. The plaintiff will be able to recover something so long as he was not *solely* to blame for the accident. The plaintiff may recover some contribution if he was partly to blame (in that he "contributed" his own negligence to the sum total of negligence of both parties). The defendant will not have to pay the whole of the damage suffered by the plaintiff, if the plaintiff was partly at fault, but his contributory negligence was not solely the effective cause of the accident. The defendant will not have to pay the whole of the damages sustained by the plaintiff, however negligent the plaintiff may have been, just because the jury may find that the defendant had the last opportunity of avoiding an accident which the combined negligence of both parties really brought about.

Where damages are thus recoverable, subject to such reduction, the Court must find and record the total damages which would have been recoverable if the plaintiff had not been at fault: s. 3 (2). Where any such case is tried with a jury, the jury must determine the total damages which would have been recoverable if the plaintiff had not been at fault, and also the extent to which those damages are to be reduced: s. 3 (6).*

The remaining provisions of the Act are largely consequential on the fundamental rule stated in s. 3 (1), as above.

The foregoing provisions do not apply to defeat any defence arising under a contract such as "leave and license," or the defence of *volenti non fit injuria*, or where express or implied consent is otherwise given: s. 3 (1) (*a*); and, where any contract or statutory provision for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant under the new statute must not exceed the maximum limit so applicable: s. 3 (1) (*b*). The latter exception would apply to a railway or service-car or airplane ticket issued subject to the condition that liability for any damages to the passenger by reason of the negligence of the operating authority should be limited to a stated sum. It would, of course, be absurd if the plaintiff partly in fault were to be in a better position than one who was wholly blameless.

Where two or more persons are liable, or would, if they had been sued, be liable, by virtue of the statutory rule contained in s. 17 of the Law Reform Act, 1936, relating to proceedings against, and contribution between, joint and several tort-feasors, that section applies in any case where such two or more persons are liable by virtue of s. 3 (1), or would have been so liable if they had all been sued, in respect of the damage suffered by any person. That is to say, if a tort-feasor has had to pay damages to a plaintiff guilty of contributory negligence as provided by s. 3 (1), he can recover contribution from other tort-feasors responsible for the same damages, whether as joint tort-feasors or otherwise.

If, in any case where the above statutory provisions apply, one of the persons at fault avoids liability to any other such person or his personal representatives by pleading any enactment limiting the time within which proceedings may be taken, he is not entitled to recover any damages or contributions from that other person or representative by virtue of the new statutory rule: s. 3 (5).

A case of the kind contemplated might occur when a local authority which owns and manages a tramway system is involved in a collision between one of its trams and a privately-owned vehicle, or where any other local authority, such as a harbour board, is sued for damages caused in part by one of its employees to a person working cargo on its wharves. If, after the expiration of twelve months, no action had been taken against the local authority, and it then brought an action itself, though it would be able to answer any counterclaim with the plea of the limitation contained in its particular statute, it will not, if it be found that its servants were guilty of negligence, be entitled to receive a proportion of the damages under the new Act. Its position would still be as it was at common law.

A similar case might arise under the Law Reform Act, 1936, where the proceedings are brought on behalf of the estate of a deceased person who had been killed in an accident for which he was in part to blame, but no action had been brought against his estate within the time limited by s. 3 (3) (*b*) of that Act, or the accident took place more than twelve months before his death and proceedings had not been instituted against him in his lifetime.

Where a claim is made on behalf of a deceased person who died as the result partly of his own fault and partly

* By the inclusion of this provision, the Legislature has avoided the awkward position which has arisen under s. 17 (2) of the Law Reform Act, 1936, when the case is tried by a jury: see *Stevens* v. *Collinson*, [1938] N.Z.L.R. 64.

of the fault of any other person or persons, and accordingly if an action were brought for the benefit of his estate at common law under Part I of the Law Reform Act, 1936 (survival of causes of action after death), the damages recoverable by his personal representatives would be reduced under s. 3 (1) of the new statute, any damages recoverable in an action brought under the Deaths by Accidents Compensation Act, 1908, for the benefit of the dependants of the deceased must be reduced to a proportionate extent: s. 3 (4).

Thus, if it be proved by the defendant in an action brought against him under the Deaths by Accidents Compensation Act, 1908, that the deceased was, say, equally to blame for the accident which caused his death, the defendant will not escape liability entirely, but will have to pay damages to the dependants, but they will only be half of the damages which he would have had to pay if the accident had been due solely to his negligence.

The new statute does not apply to:

(*a*) any claim to which s. 2 of the Shipping and Seamen Amendment Act, 1912, enacting the Admiralty Rules, applies; or

(*b*) any case where the acts or omissions giving rise to the claim occurred before August 14, 1947: s. 5; or

(*c*) any proceedings under s. 147 of the Coal-mines Act, 1925, or s. 295 of the Mining Act, 1926, which create rights to compensation for death or injury in mines: s. 6.

The rule enacted by s. 3 (1) of the new statute modifies Article 21 of the Convention set out in the First Schedule to the Carriage by Air Act, 1940—which empowers a Court to exonerate wholly or partly a carrier who proves that the damage was caused by or contributed to by the negligence of the person injured—by making that article subject, in its effect, to the provisions of s. 3 of the new statute: s. 3 (7).

Section 4 of the statute creates a special rule with regard to actions by a worker at common law independently of the Workers' Compensation Act, 1922, in relation to the assessment and award of compensation under that statute, and the amount recoverable thereunder.

Without going exhaustively into the meaning of these provisions and their application, the provisions of s. 4 (1) appear to have been inserted, as in the corresponding English statute, in favour of a worker, who, besides being entitled to compensation under the Workers' Compensation Act, 1922, has a remedy by action at common law in respect of an injury or disease giving rise to a claim for compensation under that statute, and, having brought such an action, recovers only small damages owing to his having been found guilty of contributory negligence. The section will enable him to elect whether he will accept the reduced damages, or accept the compensation; and, in the latter case, the action will stand dismissed. The opening words of the section, "within the time limited for the taking of proceedings under the Workers' Compensation Act, 1922," would lead to the construction that, if the action at common law were commenced after the time limited by that statute, the section would not apply, and the worker would have to be content with the reduced award of damages he may recover in the common-law action.

The position of the Crown in respect of the Contributory Negligence Act, 1947, appears to be clear. It is a confusion of ideas to ask if it binds the Crown; because, in any action or petition of right in which the new statute could be applied, the Crown is a party. A claim or demand may be made against the Crown in respect of any action for damages for negligence which would lie if the defendant was a subject of His Majesty: Crown Suits Amendment Act, 1910, s. 3. In an action by the Crown, the position under the new statute is obvious. In any petition of right, the Court must give such judgment, order, or decree as it would give and pronounce in any action between subject and subject: Crown Suits Act, 1908, s. 30.

Although the corresponding statute, the Law Reform (Contributory Negligence) Act, 1945, has been in force in Great Britain since June 15, 1945, so far as can be ascertained there has been only one reported judgment in its regard. *William A. Jay and Sons* v. *J. S. Veevers, Ltd.*, [1946] 1 All E.R. 646, heard at the Manchester Winter Assizes in March, 1946, before Mr. Justice Lynskey, was an action and counterclaim for damages for negligence arising out of a collision between two motor-lorries. It was found that the drivers of both vehicles were negligent, and that the negligence of each contributed to the accident and was contemporaneous; but that the driver of the plaintiff's lorry had the greater share of blame, in that he had created the emergency. Under the section of the statute corresponding with s. 3 (1) of our Contributory Negligence Act, 1947, both parties were entitled to succeed on their claim for damages notwithstanding proved contributory negligence and negligence respectively. His Lordship, hearing the action without a jury, having so held, proceeded to apportion the damages. At p. 648, he said:

> First, under the Act, I have to assess what sum I would have awarded if each had succeeded in their claim without contributory negligence being proved. In this case I am saved that trouble. In the case of the claim, the amount of damages is agreed at £297 10s., for the plaintiff, and in the case of the counterclaim the sum, also by agreement, is £434 15s. 4d. Those are the sums for which I would have given judgment if there had been no contributory negligence on the part of the plaintiff and the defendant. I have now to consider what proportion I have to give. I have already indicated that I think the plaintiff's driver ought to have the greatest share of blame. He was coming out of a side road, he ought to have exercised care and ought not to have come out into the main road. On the other hand, if the defendant's driver had been keeping a proper look-out he might have taken steps in time to avoid the accident. I can only go upon such knowledge as I may have as to what is done in the Admiralty Division in these cases, and I assess the blame as follows, that the plaintiffs' driver was two-thirds to blame and the defendants' driver was one-third to blame. That means that, so far as damages are concerned, the plaintiff will only be entitled to recover one-third of the sum of £297 10s. against the defendants, and the defendants will be entitled to recover two-thirds of £434 15s. 4d. from the plaintiffs. There will be judgment for the plaintiffs for £99 3s. 4d. against the defendants, and for the defendants against the plaintiffs for £289 16s. 9d.

Coming to the question of costs, His Lordship was reminded of the decision of the Court of Appeal in *Cinema Press, Ltd.* v. *Pictures and Pleasures, Ltd.*, [1944] 1 All E.R. 440, where the Court expressed a strong view that it was undesirable to have double taxation, that it was almost an impossible task to separate items on such a taxation, and that, as far as possible, the Court, in exercising its discretion in awarding costs where there was success by both parties, should not have a double taxation, but should order what the Court thought was a probable result in money on the set-off costs, in the form of giving one party an

order for taxation on a proportioned basis. His Lordship, in reply to counsel, at p. 650, said :

> If I only gave costs on the counterclaim there would be the same difficulty in counterclaim taxation as there would be on the double taxation, so, subject to anything you and Mr. Pritchard may say, my mind was rather working on the view of giving you a quarter of the costs. In this case, there will be judgment for the amounts indicated, with no costs for the plaintiff, but the defendants shall have one quarter of the costs of the claim and counterclaim and the taxation costs.

Finally, we point out that the new statute applies to all cases of negligence where the damage is attributable to both the parties in equal or varying degrees, and, in practice, it is by no means confined in its application to damage arising out of accidents caused by or through the use of fast-moving vehicles.

In a later article, we propose to show how similar legislation has been in force for some time in Canada and how it has been applied in the Courts of that Dominion, together with some general comments on its effect on litigation.

SUMMARY OF RECENT JUDGMENTS.

FIELD v. HEALEY.

SUPREME COURT. Wellington. 1947. April 23, 28. SMITH, J.; CHRISTIE, J.

Practice—Interrogatories—Objection on Ground of Incrimination—Admission on Oath sought from Opposite Party that on Specified Date he acted as Agent in Paying out on Bets made by him as Agent—Such Date more than Six Months before Application for Interrogatories—Offence of carrying on Business of Bookmaker on such Date—Party sought to be Interrogated in no Danger from Summary Proceedings—Whether, if such Party still carrying on Business as Bookmaker, Such Admission usable to prove System—Carrying on Business of Bookmaker Indictable Offence not within Six Months' Limitation—Whether Answer to proposed Interrogatory tending to Incrimination—Gaming Act, 1908, s. 77—Gaming Amendment Act, 1920, ss. 2, 5—Justices of the Peace Act, 1927, s. 50.

A defendant, in an action brought against him to recover £700 alleged to have been paid to D. on a specified date at the request and for and on behalf of the defendant, alleged in his statement of defence that the money was paid by the plaintiff in discharge of bets which were made by the plaintiff as an agent while betting as an agent, and sought by interrogatories to the plaintiff to prove that allegation by plaintiff's admission on oath thereof.

Held, 1. That, on the evidence, the plaintiff, who made bets as the agent to another to the extent of £700, could be considered as betting in a substantial way, and probably in a way of business.

2. That, although six months had elapsed since the bets were alleged to have been made, and, therefore, an information for the offence of carrying on the business of a bookmaker could not be laid within six months from the time when the matter of such information arose, as required by s. 50 of the Justices of the Peace Act, 1927, yet, if the plaintiff was still carrying on business as a bookmaker and was prosecuted for such offence after such an admission had been made, that admission could be used against him in that prosecution as evidence of system—*viz.*, as the final link in a chain of proof to show that the plaintiff's bets were not casual bets protected by s. 5 of the Gaming Amendment Act, 1920, but were bets made in the course of a business of making bets.

3. That the Court could, therefore, conclude from the material before it that the answers to the interrogatories proposed, and to which objection was taken, might tend to incriminate the party sought to be interrogated.

O'Neill v. *New Zealand National Creditmen's Association (Wellington), Ltd.*, [1933] N.Z.L.R. 144.

Counsel: *C. A. L. Treadwell*, for the defendant, in support of motion to review; *Arndt*, for the plaintiff, to oppose.

Solicitors: *Treadwell, Gordon, Treadwell, and Haggitt*, Wanganui, for the defendant; *Watt, Currie, and Jack*, Wanganui, for the plaintiff.

BURDETT v. JONES.

COMPENSATION COURT. Auckland. 1946. October 8. 1947. May 7. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Intravertebral Disc Injured in Early Life—Later Injury to Back while Loading Timber in Course of Employment—Another Collapse while pushing Motor-car not in Course of Employment—Subsequent Paralysis—Aggravation by Timber-loading of Existing Condition—Incapacity resultant from such Accident—Workers' Compensation Act, 1922, s. 3.

The plaintiff, a truck-driver, strained the muscles of his back when he was seventeen years old, while shoeing horses. He had had a weak spot in his back ever since, with recurring attacks of sciatica. By that accident he probably had sustained minor injury to an intravertebral disc. On May 4, 1945, when the plaintiff was about thirty-nine years of age, while in the course of his employment, he was assisting with a mate to load timber on to a truck, and, on his mate's slipping, the timber pushed him backwards, and he felt terrific pain in the small of his back and slightly down the right leg. He was, however, able to carry on his work until May 23, when he tried to carry a 200 lb. bag of bran on his back and collapsed. Next day, he sent word to his employer that he was not able to come to work. On receiving a reply that the latter was shorthanded and requested him to try, he was pushing a motor-car out from the wall when he collapsed, but this occurrence was admittedly not in the course of his employment. On admission to hospital, he was paralysed in both legs and could not walk or stand. An operation was performed, and it was found that he had ruptured an intravertebral disc.

The medical evidence was in general agreement that the timber-loading incident severely aggravated the plaintiff's condition, putting him on the " trigger point " of a breakdown, or in such a condition that even a slight injury or a slight extra strain could have produced the final breakdown which produced paralysis.

Held, That the timber-loading incident was a substantial factor in the plaintiff's breakdown, and that his incapacity which resulted from that incident was due to accident arising out of his employment.

Counsel: *F. H. Haigh*, for the plaintiff; *J. Hore*, for the defendant.

Solicitors: *F. H. Haigh*, Auckland, for the plaintiff; *Buddle, Richmond, and Buddle*, Auckland, for the defendant.

GOLDSTINE v. THE KING.

SUPREME COURT. Auckland. 1946. June 26, July 22. CALLAN, J.

COURT OF APPEAL. Wellington. 1946. October 10, 11, 13, 14. 1947. March 31. SIR HUMPHREY O'LEARY, C.J.; BLAIR, J.; KENNEDY, J.; FINLAY, J.

Negligence—Contributory Negligence—Engine-driver, after signing off, crossing Railway-yards for Own Purposes—While standing in Dangerous Position knocked down and Killed by Rake of Trucks in Shunting Train—Effective Cause of Accident—Negligence of Railway Department found—Onus of Proof of Contributory Negligence—Nature of such Required Proof.

Practice—Trial—Verdict—Jury's finding Defendant Negligent—No Negligence found on Deceased's Part—Motion for Judgment for Defendant—Necessity for Convincing Proof that No Reasonable Explanation of Deceased's Conduct consistent with Due Care on his Part—Absence of Evidence disclosing such Convincing Proof—Jury's Verdict to stand.

Once initial negligence on a defendant's part is established, the onus of proof lies on the defendant to establish that the plaintiff (or the deceased, when his personal representative is the plaintiff) was guilty of contributory negligence, and that that contributory negligence was the proximate cause of the accident. Such a defendant cannot succeed in setting aside the jury's verdict that there was negligence on his part and no negligence on the part of the deceased whose representative is the plaintiff in the action, unless he shows convincingly that there was no reasonable explanation of the conduct of the deceased, as disclosed by the evidence, consistent with due care on the deceased's part.

Williams v. *Commissioner for Road Transport and Tramways (New South Wales)*, (1933) 50 C.L.R. 258, followed.

Appeal from the judgment of *Callan*, J., setting aside the verdict of the jury in favour of the suppliant and entering judgment for the respondent, allowed, and the verdict of the jury restored, with direction that judgment be entered for the suppliant in accordance with that verdict.

Counsel: In the Supreme Court: *V. R. S. Meredith* and *Rosen*, for the respondent, in support of the motion for judgment; *Goldstine*, to oppose. In the Court of Appeal: *Blundell*, for the appellant; *V. R. S. Meredith* and *N. I. Smith*, for the respondent.

Solicitors: *Bell, Gully, MacKenzie, Buxton, and Blundell*, Wellington, for the appellant; *Crown Solicitor*, Auckland, for the respondent.

HESKETH v. WELLINGTON HARBOUR BOARD AND NEW ZEALAND SHIPPING COMPANY, LIMITED.

SUPREME COURT. Wellington. 1946. August 20. 1947. March 26; May 1. SIR HUMPHREY O'LEARY, C.J.

Master and Servant—Negligence—Transference of Employment—New Trial—Crane-driver—Injury to Third Person caused by Negligence of Crane-driver—Whether Regular Employer or Hirer liable—Failure to leave to Jury, when asked to do so, Question as to Whose Control Crane-driver was under at Time of Accident—Question of Fact—Misdirection occasioning Substantial Wrong or Miscarriage of Justice—New Trial granted—Restriction of New Trial to Question of Control—Code of Civil Procedure, R. 279.

Where, in an action against two defendants for damages for death or injury caused by the negligence of a servant, whose negligence has been found to be the cause of the accident, the question arises whose servant he was—*i.e.*, under the control of which of the defendants he was at the time of such negligence—the failure to put such question of fact involved to the jury as an issue, when asked to do so, is a misdirection that has occasioned a substantial wrong or miscarriage of justice in the trial of the action; and therefore, a new trial should be granted.

Horne v. *The King*, *Ante*, p. 204, followed.,

Where the only matter affected by the misdirection is the question of such control as a matter between the two defendants only, the new trial should be restricted to an issue as to the control of the servant, the answer to which will determine which defendant is liable.

Counsel: *Arndt*, for the plaintiff; *Stevenson*, for the first defendant; *Shorland*, for the second defendant.

Solicitors: *Ongley, O'Donovan, and Arndt*, Wellington, for the plaintiff; *Izard, Weston, and Stevenson*, Wellington, for the first defendant; *Chapman, Tripp, Watson, and Co.*, for the second defendant.

BAIGENT v. WELLINGTON HARBOUR BOARD AND GOLDEN BAY SHIPPING COMPANY, LIMITED.

SUPREME COURT. Wellington. 1947. March 26; May 1. SIR HUMPHREY O'LEARY, C.J.

Master and Servant—Negligence—Transference of Employment—Crane-driver—Issues—Whether Servant of Harbour Board or of Shipping Company at Time of Accident—Question of Fact—Form of Issue.

In an action for damages arising from an accident, allegations of negligence were made against a Harbour Board crane-driver alleged to be the servant of the Board, or, alternatively, of a shipping company. One of the issues put to the jury was as follows:

"If the crane-driver was negligent, was he, at the time of "the negligent acts or omissions, under the control of the "Harbour Board?"

There was no complaint as to the direction to the jury, but objection was taken to the form of the issue as set out.

Held, That the issue was sufficient, and was properly submitted to the jury.

Horne v. *The King*, *Ante*, p. 204, applied.

Tollan v. *Wellington Harbour Board and Port Line, Ltd.*, [1946] N.Z.L.R. 782, distinguished.

Counsel: *Arndt*, for the plaintiff; *J. F. B. Stevenson*, for the first defendant; *Virtue*, for the second defendant.

Solicitors: *Ongley, O'Donovan, and Arndt*, Wellington, for the plaintiff; *Izard, Weston, Ward, and Stevenson*, Wellington, for the first defendant; *Young, Courtney, Bennett, and Virtue*, Wellington, for the second defendant.

COZENS v. GRIFFITHS.

SUPREME COURT. Palmerston North. 1947. March 13. CHRISTIE, J.

Destitute Persons — Affiliation — Evidence — Corroboration — Mother's Evidence of Intercourse before Normal Date of Conception—Corroboration by Evidence of Intercourse subsequent to that Date—Denial by Defendant of such Subsequent Intercourse—Such Denial proved to be false—Whether sufficient Corroboration "in some material particular"—Destitute Persons Act, 1910, s. 10 (2).

Where in affiliation proceedings under the Destitute Persons Act, 1910, the evidence relied on as corroboration of the evidence of the mother is based on acts and conduct subsequent to the date of conception tending to confirm the mother's evidence, the defendant's denial of an act of intercourse subsequent to the date of conception (which act the Court has found to be proved and confirmed on appeal, there being nothing to suggest that intercourse took place then for the first time) is sufficient corroboration of the mother's evidence as to acts of intercourse before the date of conception "in some material particular," as required by s. 10 (2) of the Destitute Persons Act, 1910.

Florence v. *Smith*, [1913] S.C. (Ct. of Sess.) 978, applied.

The case is reported on this point only.

Counsel: *Ongley*, for the appellant; *Scott*, for the respondent.

Solicitors: *A. M. and J. A. Ongley*, Palmerston North, for the appellant; *Scott and Bergin*, Wellington, for the respondent.

PAHIATUA CO-OPERATIVE DAIRY CO., LTD. v. BOSWELL.

SUPREME COURT. Palmerston North. 1947. February 28; March 19. JOHNSTON, J.

War Legislation — Primary Industries Regulations — Dairy Supply Control Order—Milk and Cream as Separate Products—Supplier not bound to send Milk to Particular Factory—Direction by Controller—Whether ultra vires *the Order—Primary Industries Emergency Regulations, 1939, Amendment No. 2 (Serial No. 1940/120), Reg. 6 (2)—Dairy Supply Control Order, 1945 (Serial No. 1945/83), cl. 4 (1) (2).*

A dairy farmer, Parker, residing at Pahiatua, for eleven years supplied a milk round in the town. He separated the surplus and sent the cream to the Pahiatua factory, until the issue of a zoning order by the Executive Commission of Agriculture on September 9, 1937. This directed him to supply his cream to the Konini factory, which can take only milk and not cream, instead of the Pahiatua factory. He duly complied with the order until the commencement of the 1945–46 season. On October 24, 1944, he wrote to the Director of the Dairy Division to the effect that he proposed to discontinue his town supply after April 30, 1945, and asked permission to send his milk thereafter to the Pahiatua factory for cheese-making, on the grounds that his separator was too small to cope with his entire output, that he had no facilities for rearing pigs, and that he was building up a pedigree Ayrshire herd, the milk of which was more particularly suited for cheese than butter. The application was refused, as were two subsequent applications.

From the commencement of the 1945–46 season, Parker supplied what cream he produced to the Konini factory and the milk he produced to the Pahiatua factory, and so notified the Director of the Dairy Division. On October 8, 1945, the Director issued to defendant a direction to him under the Primary Industries Emergency Regulations, 1939, and the Dairy Supply Control Order, 1945, to supply to the Konini Co-operative Dairy Co., Ltd.:

" all milk produced on and disposed of from the dairy situated
" at Main North Road, Pahaitua, of which you are the
" occupier, other than milk disposed of for liquid consumption
" to the creamery of Konini Co-operative Dairy Co., Ltd.,
" situated at Konini, in the form of cream."

Nevertheless, he continued to send his milk, as milk, to the Pahiatua factory for making cheese.

Parker was convicted of a breach of cl. 4 of the Dairy Supply Control Order, 1945—namely, that he had failed to supply all milk or cream disposed of from his dairy to a creamery the owner or manager of which was not prohibited by an order of the Executive Commission of Agriculture from receiving milk or cream produced in such dairy. The appellant company was also charged with aiding and abetting the commission of the said offence by Parker, and was convicted and fined. On the hearing of the appeal from that conviction, by agreement, the informations were each amended by striking out the words " or cream."

On the company's appeal from such conviction and fine,

Held, quashing the conviction, 1. That, in construing cl. 4 (1) of the Dairy Supply Control Order, 1945, the division between milk and cream as separate products must be maintained, and, so far as the disposition of milk is concerned, the dairy must be one from which milk was supplied during the season to a creamery for the manufacture of butter; and the same distinction must be made in cl. 4 (2), which concerns the particular factories that can receive cream and milk sent for the manufacture of butter, and is not designed to deprive cheese-factories of their supplies.

2. That Parker was not bound to send any milk for the manufacture of butter to the Konini factory; and in receiving Parker's milk the appellant company, operating a cheese-factory, was not a party to an offence under cl. 4 (1) and (2) of the said control order.

3. That the direction of October 8, 1945, by going beyond the scope of the order itself, provided Parker and the appellant with " lawful excuse " within the meaning of that term as used in Reg. 6 (2) of Amendment No. 2 (Serial No. 1940/120) of the Primary Industries Emergency Regulations, 1939.

Counsel: *W. H. Cunningham*, for the appellant company; *H. R. Cooper*, for the respondent.

Solicitors: *Luke, Cunningham, and Clere*, Wellington, for the appellant company; *H. R. Cooper*, Palmerston North, for the respondent.

McCORMICK v. NEW ZEALAND SHIPPING CO., LTD.

SUPREME COURT. Auckland. 1947. June 27, 30. FAIR, J.

Practice—Discovery—Trial—Damages—Action by Worker against Employer at Common Law for Damages for Personal Injury—Discovery of Payments received by Plaintiff by way of Workers' Compensation—Whether Statement to Jury of Worker's Right to Payment of Workers' Compensation improper—Workers' Compensation Act, 1922, s. 49.

In a common-law trial of an action for damages for personal injury brought by a worker against his employer, there is nothing in s. 49 of the Workers' Compensation Act, 1922, or in the New Zealand practice, to exclude any statement of the worker's rights or payments under the Workers' Compensation Act, 1922.

Therefore, in such an action such documents as are relevant in relation to the payment of compensation are discoverable, and should be included in the affidavit for discovery.

Price v. *Glynea and Castle Coal and Brick Co.*, (1915) 85 L.J.K.B. 1278, *Rowe* v. *Edwards*, (1934) 51 C.L.R. 351, *Fitzpatrick* v. *Cooper*, (1935) 54 C.L.R. 200, and *Wallace* v. *Gough, Gough, and Hamer, Ltd.*, [1940] N.Z.L.R. 814, distinguished.

Semble, Where the payment of workers' compensation is relevant, it is not improper to advise the jury in a common-law action of the sum received by the plaintiff by way of workers' compensation, as, with a proper direction, there is no possibility of prejudice to the plaintiff.

Counsel: *Hamer*, in support; *Trimmer*, to oppose.

Solicitors: *Trimmer and Teape*, Auckland, for the plaintiff; *Russell, McVeagh and Co.*, Auckland, for the defendant.

WELCOME TO MR. JUSTICE NORTHCROFT.

A Pleasant Gathering of the Bar.

On July 21, a very happy and successful gathering, at which almost every practitioner in Christchurch attended, was held to welcome Mr. Justice Northcroft. His Honour was on leave from his duties in Japan as a member of the International Military Tribunal for the Far East. Mr. Justice Kennedy and Mr. Justice Fleming were present, as were the local Stipendiary Magistrates.

Mr. W. R. Lascelles, President of the Canterbury District Law Society, expressed the pleasure of members at seeing the resident Judge back in Christchurch again. The profession, he said, fully appreciated the importance of the pioneering work being done by the International Military Tribunal for the Far East. He referred to the happy association that members had had with a distinguished Judge and friend.

The scope of the inquiry being conducted by the Tribunal was so great that it was anticipated that the sitting would last at least another six months, said Mr. Justice Northcroft. His Honour said that it was a privilege for him to be associated with members of the Tribunal, men who were drawn from various peoples which sought to work harmoniously to the best ends of international justice.

After outlining the constitution of the Court and the procedure followed, Mr. Justice Northcroft said he was impressed with the natural beauty of Japan and felt that tributes usually paid to its loveliness were understatements. He referred to the industry, habits, and customs of the people, the old feudalism, and recent changes in the structure of society.

PROMISES TO MAKE TESTAMENTARY PROVISION

Law Reform Act, 1944, s. 3.

By I. D. CAMPBELL.

The Law Reform Act, 1944, s. 3, provides a remedy in certain cases where the deceased has not fulfilled a promise to remunerate by testamentary provision. It may sometimes enable justice to be done when common law and equity give no relief. The section was discussed editorially in this Journal in 1945 (21 NEW ZEALAND LAW JOURNAL 2), and has been the subject of reported decisions in *Bennett* v. *Kirk*, [1946] N.Z.L.R. 580, and *McAllister* v. *Public Trustee*, [1947] N.Z.L.R. 354. This article, after discussing the relief available at common law and in equity, considers the nature and scope of the new statutory remedy.

I. NON-STATUTORY REMEDIES.

A person may contract to make a will containing certain dispositions, or not to revoke an existing will, or not to make a will. In substance the promise is the same in each case: it is a promise that certain persons shall acquire certain interests by way of succession, whether by will or on intestacy. From the point of view of the promisee, almost any other method of rewarding him is to be preferred, but this hazardous procedure is still frequently adopted by persons who feel no need for legal advice at the time. Notwithstanding the contract, the power to make or revoke a will remains undiminished, the validity of the will or revocation being in no way affected by the existence of the contract. The promisee is not protected by anything in the nature of *ultra vires*. He must be content with the usual remedies for breach of contract, so far as they are applicable. He may have a claim for damages for actual or anticipatory breach, and, under certain conditions, there may be a remedy in the nature of specific performance.

It would appear a simple matter to determine whether there has been a breach of a contract to leave property by will or not to revoke a disposition already made. The simplicity is deceptive, and it is the promisee who is certain to be deceived. The promisor who has undertaken not to revoke his will commits no breach of contract if he causes a revocation of the will by marrying. A covenant not to revoke does not imply a covenant not to marry or remarry, where revocation follows as a matter of law: *In re Marsland, Lloyds Bank, Ltd.* v. *Marsland*, [1939] Ch. 820; [1939] 3 All E.R. 148.

If breach of contract can be established and damages are sought, what is the measure of damages? The amount to be awarded will be determined, no doubt, by the value of what would have been received if the promise had been fulfilled. Does it follow that damages are to be reduced where insufficiency of assets would have caused an abatement of legacies? It might be thought, for instance, that, if the estate were insolvent, damages would necessarily be purely nominal. A superficial reading of *In re Dillon, Dillon* v. *Public Trustee*, [1941] A.C. 294; [1941] N.Z.L.R. 557, may lend colour to this view, but it is incorrect. The measure of damages is the benefit that would have accrued from performance; but what is performance? If there is a promise of a specific or general legacy, the mere inclusion of an appropriate clause in the testator's will is not performance. He must also leave assets sufficient after payment of debts to answer the gift. If he leaves insufficient assets, resulting in an abatement of legacies, then the contractual obligation to leave the legacy has been performed only *pro tanto*. If the estate is insolvent, there has been no performance at all: *Eyre* v. *Monro*, (1857) 3 K. & J. 305; 69 E.R. 1124; and *Graham* v. *Wickham*, (1863) 1 De G.J. & S. 474; 46 E.R. 188. On the other hand, if the promisor has left a valid will including the promised provision, and has left assets sufficient to satisfy that provision, he has performed his contract. The promisee is then no longer a creditor, but a beneficiary. He will have no claim for damages, even though the provision made for him in the will may be rateably reduced or completely taken away as the result of orders made under the Family Protection Act: *Dillon* v. *Public Trustee* (*supra*). Unless a contrary intention is indicated, a contract to leave property by will imports a promise that property will be left which could be applied pursuant to the terms of the will, but does not import a promise that the testator will make such provision for other persons as will ensure that no order will be made under the Family Protection Act to the detriment of the promisee. (By parity of reasoning with *Dillon's* case, damages for breach of a covenant to leave property by will should be reduced by a sum equal to the duties which would have been payable by the recipient.)

The decisions above referred to may appear to lead to a remarkable anomaly. If the testator performed his contract, the promisee, as beneficiary, may get nothing, because of orders under the Family Protection Act. If the testator died insolvent (in which event no orders could be made under the Family Protection Act), the promisee would apparently be better off, since he could rank with creditors in the estate for the full amount promised him. The fallacy is in this last assertion. The amount he could claim would not necessarily be the full amount promised, but would depend on the answers to both of these questions: (i) If the gift had been duly made by will, and the estate had been able to meet all bequests in full, what would have been the value of the gift? (ii) *On the same assumptions*, what claims might have been made under the Family Protection Act? Had the testator in *Dillon* v. *Public Trustee* died insolvent or without inserting the promised provision in his will, the damages recoverable for breach of contract would have been reducible by the amount estimated to be necessary to satisfy just such an order as was actually made in that case.

The principle applied in *Eyre* v. *Monro* and *Graham* v. *Wickham* (*supra*) governs the promise of a specific gift or a general or demonstrative legacy. But with residuary gifts, or gifts of all or part of an estate, the position is entirely different. Where the contract is that the promisor will leave a share of his estate at death or make any other provision in the nature of a residuary gift, this *prima facie* implies no promise that

the estate will be of any minimum value, or that it will show a distributable surplus at all. The contract is completely performed when a will is left with the necessary clauses in it, regardless of the value of the estate, regardless even of insolvency. The promisee has not bargained for a definite or fixed provision, but has chosen to take the risk. It is as though he had elected to invest in shares rather than debentures. If it should turn out that the promised share of residue which has been left him is valueless, he will have no remedy, for there has been full performance of the undertaking of the promisor; and, if there has been a breach but the estate is insolvent, only nominal damages can be recovered: *Jervis* v. *Wolferstan*, (1874) L.R. 18 Eq. 18. If the estate does have an available surplus, it would, of course, be subject to claims under the Family Protection Act in priority to the claim of the promisee as legatee, and, if the promise has been broken, any orders made under the Act must be taken into account in the assessment of damages.

This interpretation of *Jervis* v. *Wolferstan* and the earlier cases is inconsistent with *In re Syme, Union Trustee Co. of Australia, Ltd.* v. *Syme*, [1933] V.L.R. 282. It is respectfully submitted that the principle laid down in that case should not be followed, for the reasons given in an article by the present writer in *20 Australian Law Journal*, 466 (April, 1947).

Damages may be recovered in the lifetime of the promisor if the promise is in its nature susceptible of anticipatory breach. If a contract is made to leave a specific piece of land to another, and the owner sells the land to a third person, this anticipatory breach gives rise to an immediate claim for damages: *Synge* v. *Synge*, [1894] 1 Q.B. 466. It may be noted, however, that this remedy is appropriate only where the promise was in form to leave property by will. If the promise took the form of an undertaking not to revoke an existing will, or not to make a will, it would involve a commitment by the promisor as to present conduct. To make or revoke a will in breach of a contractual undertaking not to do so is not an anticipatory breach but an ordinary breach of contract.

If the contract is to leave an estate or interest in ascertained or ascertainable property, there may be a further remedy in equity. By means of a constructive trust, the promisee can protect the equitable estate or interest which vests in him by reason of the contract, and this equitable interest is valid as against all who claim under the promisor otherwise than as holders of the legal estate for value without notice. *Synge* v. *Synge* (*supra*) is one of the many cases which are authority for that proposition. Some doubt, it is true, may be felt to exist, in view of dicta in *Young* v. *Anderson*, [1940] N.Z.L.R. 239, but on this point the decision does not appear to be in accord with higher authority: see 17 NEW ZEALAND LAW JOURNAL 77.

When any of these remedies is sought, an enforceable contract must be established. The question most likely to arise is in regard to s. 4 of the Statute of Frauds. If the promisor happens to own land at the date of the contract, and the promise is to leave a share in the estate of the promisor at death, must the contract be evidenced in writing? Does the statute become applicable if the promisor, though owning no land at the date of the promise, acquires land before his death? An answer to these questions was given in *Birmingham* v. *Renfrew*, (1936) 57 C.L.R. 666. In that case, Latham, C.J., said: "A contract which does not in its terms concern an interest in land ought to be held to be within the Statute of Frauds, because a particular set of circumstances may bring about the result that the performance of the contract may involve some disposition of an interest in land. In the present case the husband's promise did not contain any reference to land. . . . It was a promise to leave by will to specified persons the property, whatever it might be, of which he should die possessed. . . . The applicability of the statute could not, it seems to me, properly be determined by considering what in fact was the character of the property which he then had or might thereafter acquire or might have when he died." On the other hand, the promisor may have undertaken to leave by will specific property which he owned at the date of his promise or expected to acquire before his death. Should this property include interests in land, the promise will have to be evidenced in writing. Thus in *Horton* v. *Jones*, (1935) 53 C.L.R. 475, the testator, after promising to leave his fortune, explained that by his fortune he meant his interest in the estate of his deceased father and an insurance policy. The interest under his father's will happened to be an interest in land, and written evidence of the contract was, therefore, essential.

In *Young* v. *Anderson* (*supra*), the testatrix had promised to leave the whole of her property among her children. This falls exactly within *Birmingham* v. *Renfrew*, but the Court made no reference to that decision and held that *Horton* v. *Jones* was a direct authority for requiring written evidence of the promise by the testatrix. This takes no account of the difference between a promise to leave specific property and a promise to leave whatever may be owned at the date of death. In *Birmingham* v. *Renfrew*, the decision in *Horton* v. *Jones* was expressly distinguished, on the ground that in that case the promise which was sued upon was a promise to leave a specified interest. *Young* v. *Anderson* cannot be supported on this point unless the promise of the testatrix is construed as including, in the special circumstances of the case, an implied promise that the property she acquired under her husband's will would form part of her estate at death.

If the contract does in terms refer to the disposition of an interest in land, so that the Statute of Frauds is applicable, the promisee cannot avail himself of the doctrine of part performance if the promise was made in consideration of services to be rendered. Work or services would not be exclusively referable to such a contract as alleged: *Maddison* v. *Alderson*, (1883) 8 App. Cas. 467.

A contract to leave property by will may be invalid or unenforceable on other grounds, as where the terms are too vague and uncertain, or there is a lack of contractual capacity. Again, the arrangement may be a mere understanding, not intended to create legal relations. In some of these situations, but by no means all of them, the Law Reform Act, 1944, s. 3, confers a remedy on the person who, relying on the promise that property will be left to him, has rendered services to, or done work for, the promisor.

In the succeeding part of this article, the remedy provided by s. 3 of the Law Reform Act, 1944, will be considered, and the cases which have interpreted its scope and effect will be discussed.

(*To be Concluded.*)

REFRESHER COURSE 8.

THE LAW OF CONTRACT.

Developments since 1939.

By PROFESSOR J. WILLIAMS.

(*Continued from p. 210.*)

ESSENTIAL ERROR.

To be clearly distinguished from mistake preventing the formation of agreement—*error in consensu*—is mistake as to the existence of fact at the root of the contract. The law will supplement the express intention of the parties by reading into any contract relating to a specific and ascertained subject-matter an implied condition that that subject-matter is, at the time when the contract is made, in existence and of the same essential kind as described in the contract: *Salmond and Williams on Contract*, 219. The leading case is *Bell* v. *Lever Bros., Ltd.*, [1932] A.C. 161, in which it was held that a voidable contract is not something different in kind from a non-voidable contract. This principle was recently applied in *Adams* v. *Adams*, [1941] 1 K.B. 536. In that case husband and wife entered into a separation agreement under which the husband was to pay £1 per week to the wife. Afterwards the marriage was annulled on the ground of the wife's incapacity, and the husband claimed to be relieved from the separation agreement. It was held by the Court of Appeal, however, that in the case of incapacity, the marriage is voidable and not void and that therefore the separation agreement could not be avoided on the ground of fundamental mistake. See also *Fowke* v. *Fowke*, [1938] Ch. 774. *Cf.* the position where the marriage is *void* as being bigamous or within the prohibited degrees: *Law* v. *Harragin*, (1917) 33 T.L.R. 381.

FRAUD AND MISREPRESENTATION.

A compendious statement of what amounts to fraud at common law is to be found in the speech of Viscount Maugham in *Bradford Third Equitable Benefit Building Society* v. *Borders*, [1941] 2 All E.R. 205, 511: "First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit. . . . Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true. . . . Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him. . . . If, however, fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made. . . . Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing." Lord Wright, at p. 220, said: "I do not question that, if a person knowingly and deliberately profits by another's fraud, he may be properly held to have participated in the fraud and to be liable for the damage. This may happen where a continuing false representation has been made by a person, on the basis of which the transaction is concluded. I am prepared to assume here that, not only may that person be guilty of fraud . . . but so also may any person who, though not a party to the fraudulent original representation, afterwards learns of it and deliberately and knowingly uses the delusion created by the fraud in the injured party's mind in order to profit by the fraud."

Spence v. *Crawford*, [1939] 3 All E.R. 271, a Scottish appeal in the House of Lords, is of interest in regard to the question of *restitutio in integrum* when an executed contract is rescinded for fraudulent misrepresentation. The respondent purchased from the appellant his holding of 2,925 shares in a private company for £2,250, being £1,350 value of the shares and £900 amount of a loan which had been made by the appellant to the company. Under the contract, the respondent undertook to relieve the appellant of his obligations in respect of the company's overdraft and to have securities, which the appellant pledged to support the overdraft, redeemed within two years. The appellant was to resign his directorship and to cease to have any further interest in the profits or losses of the company or in any dividends which might be declared. Both parties carried out the contract. The appellant sought to have the contract set aside on the ground that he had been induced to enter into it by the respondent's fraud, and he also claimed *restitutio in integrum*. The respondent denied fraud and contended that *restitutio* was no longer possible, inasmuch as the appellant, by the redemption of his securities and his release from his personal liability in respect of the overdraft, had obtained a contractual benefit which he could not restore. Furthermore, at the time of the impugned transaction, the appellant and the respondent owned in equal proportions all the shares in the company. The respondent had since transferred some of his shares to B, so that were he now to restore the appellant's shares appellant and B would have a controlling interest. The House of Lords held that fraud was made out, and, therefore, that the respondent was not entitled in bar of restitution to found on dealings with the subject purchased, which he had been enabled by his fraud to carry out; and, further, that the appellant was therefore entitled to rescission accompanied by *restitutio in integrum*, as the substantial identity of the subject-matter of the contract remained.

In *Whinray* v. *Public Trustee*, [1943] N.Z.L.R. 239, Callan, J., considered at some length two questions: (i) when a representation may amount to a warranty for breach of which damages may be had, and (ii) the position where the elements required to constitute fraud are distributed between two or more agents of a principal whom it is sought to charge with fraud although he himself is personally innocent.

See also *Jack* v. *Peters*, [1941] N.Z.L.R. 153, where damages were recovered for certain fraudulent representations on the sale of an hotel, including a representation that the hotel did not carry on an after-hours trade.

Infants.

In general a contract entered into by an infant does not bind him; and, even if he ratifies it after attaining his majority, his ratification is deprived of most of its common-law efficacy by the Infants Act, 1908.

To the general rule that an infant's contract does not bind him there are exceptions. One relates to the case where an infant has acquired property to which the performance of continuous or recurring contractual obligations is incident, in which case the infant is bound by those obligations unless and until he repudiates them by disclaiming the property. Such a disclaimer must be made before or within a reasonable time of attaining majority.

Another exception relates to contracts for necessaries. It would seem to be the law that a contract entered into by an infant (of sufficient understanding to contract) for necessaries, if, taken as a whole, it is beneficial to him, binds him as though he were an adult: *Salmond and Williams on Contract*, 305ff. The question has been raised whether in such a case the contract need be one for necessaries, if only it is such as the Court can pronounce beneficial to the infant. Support for the view that the contract need only be beneficial is to be found in the judgment of Lord Hanworth, M.R., in *Doyle* v. *White City Stadium, Ltd.*, [1935] 1 K.B. 110, 126. In *Mercantile Union Guarantee Corpn., Ltd.* v. *Ball*, [1937] 2 K.B. 498, however, the Court of Appeal, although basing its decision on the ground that the contract in that case was not beneficial to the infant, further intimated the view (*obiter*) that there are only certain classes of beneficial contracts by which an infant may be absolutely bound *ab initio*.

An infant is in general liable for his torts, and the general rule appears to be that he is none the less liable because the tort happens also to be a breach of contract. On this point, however, some writers distinguish between torts which are independent of the contract except that there would have been no opportunity of committing them but for the contract (in which case the infant is liable in tort—*Walley* v. *Holt*, (1876) 35 L.T. 631) and torts which are merely wrongful ways of performing the contract (in which case the infant, if liable at all, is liable only in contract—*Jennings* v. *Rundall*, (1799) 8 T.R. 335; 101 E.R. 1419). Sir John Salmond, however, thought the distinction merely verbal and *Jennings* v. *Rundall* wrongly decided: *Salmond and Williams on Contract*, 319, 320. This difference of opinion was scarcely noticed in the case of *Ballett* v. *Mingay*, [1943] K.B. 281, where it was held that an infant who receives a chattel under a contract of bailment and refuses to return it after the bailment expires is liable for the tort of conversion.

Corporations.

On the doctrine of *ultra vires* in relation to statutory corporations and the consequences of a partly performed *ultra vires* contract, the arguments and judgments in *Tauranga Borough* v. *Tauranga Electric-power Board*, [1944] N.Z.L.R. 155, well repay study. In this case, electricity had been supplied by one corporation to another pursuant to a contract which was *ultra vires* both corporations. On the question of *ultra vires*, the decision was an application of the principle that "whether a corporation created by a statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or can be implied from the language used. The question is simply one of construction of language, and not of presumption": Lord Haldane, L.C., in *Dundee Harbour Trustees* v. *D. and J. Nicol*, [1915] A.C. 550, 556. As to the adjustment of the rights of the parties in respect of the electricity which had actually been supplied by the Borough and re-sold by the Board, *Sinclair* v. *Brougham*, [1914] A.C. 398, was applied. The Borough was not entitled to recover on a quasi-contractual basis, but was given relief in the form of a tracing order, on the basis of the sums received by the Board on re-sale of the electricity being the property of the Borough at law or in equity, which sums (less proper deductions) the Board was under a duty to account for to the borough. The questions of *ultra vires* and the adjustment of the rights of the parties where an *ultra vires* contract has been partly performed are considered in *Salmond and Williams on Contracts*, 329–335.

See further, as to the question of *ultra vires*, *Attorney-General, Ex rel. United Theatres, Ltd.* v. *Levin Borough*, [1945] N.Z.L.R. 279.

Illegality.

Where an illegal contract has been wholly or partly performed, the performing party is not entitled to set up the illegality and claim the return or restitution of what he has done: *in pari delicto potior est conditio defendentis*. To this general principle there are a number of real or apparent exceptions. One such exception sometimes occurs where the relation of principal and agent exists between the parties. It is clear, however, that, if property is acquired by one person by the actual doing of an illegal act as the agent of another, the principal cannot recover the property from the agent. So, if A employs B to commit a robbery, A cannot sue B for the proceeds. But, if B, who is A's agent, receives on A's account money paid by C pursuant to an illegal contract between A and C, the position is otherwise, and A can recover the money from B, although he could not have claimed it from C.

In *Harry Parker, Ltd.* v. *Mason*, [1940] 2 K.B. 590, A employed B to place a bet of £6,000 each way on his horse. B. was to place £6,000 with street bookmakers and £6,000 with bookmakers all over the country so as to affect the starting-price as little as possible. It was found as a fact that the parties conspired for B to make a sham bet on another horse on the course to deceive the public. The horse lost, and A paid B £12,000. A then discovered that B had not applied the money as instructed but had retained it in the belief that the horse would lose. A therefore claimed to recover the amount as money had and received to his use. The Court of Appeal held (1) the bargain between the parties was illegal by reason of (*a*) the bets to be placed with street bookmakers and (*b*) the sham bet which was contemplated. Therefore the claim failed; and the fact that the relation of principal and agent existed did not help the plaintiff because that relationship was itself the result of an illegal contract.

(*To be continued.*)

LAND SALES COURT.

Summary of Judgments.

No. 106.—M. to D.

Urban Land—Special Value to Purchaser—Industrial Purposes—Comparison with Sales of Like Nature—Potential Value—Advantages personal to Purchaser.

Appeal by the Crown against an order of the Christchurch Urban Land Sales Committee granting consent to the sale by David Torrence Moffat to the Dominion Compressed Yeast Co., Ltd., of an area of 6 acres 21 perches in Blenheim Road, Riccarton, for £2,875, being at the rate of approximately £475 per acre.

The Court (per *Archer*, J.) said: "In justification of the sale price, Mr. E. B. E. *Taylor*, for the vendor, compared the property in question with three areas in Blenheim Road sold in 1946. The areas in question have considerable similarity to the land now under consideration, their only advantage being that they are somewhat nearer to the centre of Christchurch and to the fully built-up areas of Riccarton. Two of these properties were bought by Patons and Baldwins, Ltd., at prices of £700 and £725 per acre respectively, and the other property was bought on behalf of Certified Concrete, Ltd., for £600 per acre. In each of these cases, the Committee granted consent at the sale price in the terms: 'Granted in view of special value to the purchaser.' The Crown filed an appeal in each case, but subsequently arranged, with the consent of the respective parties, to have all the cases referred back to the Committee. The Committee thereupon amended its orders to: 'Granted, the basic value of the land not being fixed,' and the Crown withdrew its appeals.

"Mr. *Taylor* contended, and his argument appears to be unassailable, that it must be assumed that the Crown was prepared to acknowledge, in the circumstances, the propriety of the prices paid, and that the Crown must also be assumed to have approved of the Committee's action in granting its consent without fixing a basic value. Mr. *Taylor* then argued that any special circumstances operating in favour of the purchasers in the three sales referred to were equally applicable to the purchaser in the present sale, and that, whether the sales in question be justified on the ground of the intrinsic value of the land or on the ground of the special circumstances of the purchasers, the sale of the present land to the Dominion Compressed Yeast Co., Ltd., at £475 per acre could readily be justified on similar grounds.

"Notwithstanding that the final order granting consent to each of the three sales mentioned is in form an order of this Court, we cannot agree that an order which was in fact made by the Committee in a matter which has never been judicially considered by the Court has any binding force on us as a precedent. Nor is the Court bound by a decision of the Crown as to whether it should appeal, or as to whether appeals which have been lodged should be withdrawn. The prior decisions of a Land Sales Committee are no doubt *prima facie* evidence of value which the Court should hesitate to disregard. When, however, the decisions of a Committee in earlier cases are called in question at the hearing of a subsequent appeal, it is competent for the Court to consider the whole matter upon its merits.

"The Crown now contends that in the cases cited the Committee was wrong, in the first place, in recognizing a special value to the purchasers, and, subsequently, in granting consent without fixing a basic value. Mr. *Taylor* commented strongly upon the fact that the Crown failed to raise its present objections on the hearing of the earlier cases and failed to pursue the matter to appeal in this Court. It is significant, however, that these very questions were before the Court in other appeals at approximately the same time that the cases in question were before the Christchurch Committee, and judgments of the Court which, had they been available at the time, might well have affected the Committee's decision and the decision of the Crown as to its appeals, have in the meantime been given.

"In *No. 97, L. to N.Z.S.C., Ltd.*, the Court held that s. 50 (4) of the Land Sales Act was not intended to give Land Sales Committees a discretion in exceptional cases to grant consent at a price above the basic value, and that it is the duty of a Land Sales Committee to determine the basic value in every case where the Committee has reason to believe that the purchase price or other consideration was or might be above the basic value. We think that the three cases cited by Mr. *Taylor* fall within this category, and that accordingly a basic value should have been fixed.

"The matter of special value was considered in *No. 101, In re A Sale, S. to A. Bros., Ltd.*, where it was held: 'It may also be desirable to point out that the added value attributable to a potentiality pertaining to land is not to be measured by an assessment of so-called "special value" to the purchaser nor by what a particular purchaser may be willing to pay for the land, save to the extent that such considerations add actual value to the land in the sense that they increase the amount . . . which the land might reasonably be expected to realise. The Court can have regard only to "matters affecting the land" and the personal desires, needs, and circumstances of a purchaser, unless they may fairly be deemed to affect the land, must be disregarded.'

"If, therefore, the Committee intended to allow a purchase price above the real value of the land by reason of special value to the purchaser, its decision conflicts with the ruling of the Court above set out. It therefore follows that the three sales cited cannot be relied upon to justify an allowance for special value on account of the personal needs and requirements of the purchaser; nor do we think they can properly be deemed to set a standard for values in Blenheim Road.

"Mr. *Taylor* then contended that the price in the present sale could be justified on account of potential value, in accordance with *dicta* of this Court in cases where a potential value had been allowed as part of the basic value of land. As the question of potential value in respect of commercial or industrial sites is one of considerable importance, it is desirable to be clear as to what the Court has said in the past. In *No. 101, In re A Sale, S. to A. Bros., Ltd.*, the Court said: 'It is not, however, the intention of the Act to impede normal progress or commercial development and we think the Court is entitled under s. 54 (2) (*c*) to take into account an increase—or for that matter a decrease—since December, 1942, in the potentiality attaching to any particular piece of land. The extent, however, to which such an increase in potential value may justify an increase in the basic value must be governed by the circumstances of the particular case, having regard always to the general intention of the Act to stabilize land values as at December 15, 1942, and to prevent undue increases in the price of land, but subject to the over-riding consideration that the value so fixed shall be, in all the circumstances, fair to both parties.' In *No. 92, R. to M.*, the position was further defined in the following terms: 'As was indicated . . . in *No. 101, In re A Sale, S. to A. Bros., Ltd.*, we are of opinion that we should have regard to a change since 1942 in the nature or extent of a potentiality which affects the land, and in this category we include such a change of circumstances as is created by the cessation of the war and the adoption by the Government of a policy of decentralization, which may have the effect of increasing the demand for suitable commercial sites in such towns as Rotorua. The particular desires or requirements of the purchaser, insofar as they are personal to the purchaser, and do not affect the land as such, must, in our opinion, be disregarded.

"The Court has therefore recognized that a vendor is entitled to the full value of a potentiality, but subject to the proviso that the potentiality must affect the land and must not arise as the result of inflationary tendencies which it is the intention of the Act to restrain. Accordingly, the Court has been prepared to recognize as a ground for potential value a change in the inherent characteristics of land due to normal commercial development, to alterations in zoning, or to the opening up of railways or similar projects, but the monetary value of a potentiality must be measured according to standards of value established for land of similar characteristics in 1942. Increases in price due, not to a change in the character of the land, but to scarcity or to abnormal prosperity, cannot be permitted. Notwithstanding the careful argument presented by Mr. *Taylor*, we are of opinion that we cannot properly give effect to a wider conception of potentiality than that defined in *No. 101, In re A Sale, S. to A. Bros., Ltd.*, and *No. 92, R. to M.*, and that the present case must, therefore, be determined in accordance with the principles laid down therein.

"Considerable evidence was led to show the particular advantages which the land now in question offers to the purchaser company. To the extent that those advantages are

personal to the company, they must be disregarded, but we are impressed by the fact that the land appears to be obviously well suited to the establishment of heavy industry. It is part of a comparatively limited area in the Christchurch metropolitan district which is zoned and available for heavy industry, and, although situated a little further from the city, it has similar road and railway access to that of a number of other properties which have recently been bought at high prices for heavy industrial purposes. We are satisfied that, while it may be true that this property would not have been readily saleable in 1942, the circumstances have now changed in several material respects. The industrial development of the Christchurch district has been such that the Blenheim Road industrial area is now keenly sought after by substantial concerns to whom railway access is a matter of primary importance. In consequence of this development, the Railway Department, which in 1942 might have hesitated to give siding access, is now offering facilities to those desiring direct access to the railway. Town planning and zoning is a much more important factor than in 1942, and Mr. Moffat's land has the advantage of being zoned for heavy industrial use. Blenheim Road itself was an unimportant street in 1942, but it is now in course of development as a main highway, and will ultimately be one of the main arteries leading to the city from the south. The Government has purchased large areas of neighbouring land for State housing, and there is every probability of an adequate supply of labour for industrial purposes being available in the vicinity in the near future. The Christchurch City Council is taking a particular interest in the industrial development of the district, and the Railway Department has agreed to co-operate by the construction of a loop line from Sockburn to Styx which will assist in its further development. We are therefore satisfied that, in the course of normal development unconnected with those tendencies which it is the intention of the Land Sales Act to restrain, the circumstances of land in Blenheim Road have become entirely different to-day from what they were in 1942. These are matters which may properly be taken into account in fixing a fair value for the purposes of the Land Sales Act.

" On the other hand, we conceive it to be our duty to disregard the fact that the purchaser company, in view of its own particular requirements and of the large amount which it proposes to spend upon the land, may be prepared to pay more than the real value of the land. We must also attempt to assess the value of the land as if the development above described had already taken place in December, 1942.

" There have been a number of sales of industrial land in Blenheim Road which we think offer a useful guide as to the true value of the present property. As long ago as 1929, land at the eastern end of Blenheim Road was bought by an oil company at £600 per acre. It is therefore evident that the suitability of the district for industrial purposes has been recognized for many years. Four acres in the vicinity were purchased by the Sefton Flourmilling Co. in 1940 at £316 per acre, and an area adjoining was taken under the Public Works Act in 1941 at approximately £375 per acre. Next to this land were the properties purchased by Patons and Baldwins, Ltd., and passed by the Committee at £700 and £725 per acre. It is significant that experienced valuers called by the then vendors, and professing to be guided by prices previously approved by the Land Sales Committee for industrial sites, valued this land at £425 per acre. A similar area of two acres was subsequently sold by one Clements to Witte and approved by the Committee at £400 per acre. The valuers who valued Patons and Baldwins' land at £425 per acre gave evidence for the vendor in the present case and said that they considered the present area to be of the same value, notwithstanding its greater distance from the city. We are of the opinion that, in consenting to the sales to Patons and Baldwins, Ltd., the Committee allowed a substantial sum for special value to the purchaser, and that these sales must, therefore, be disregarded, but we think that the valuation of £425 per acre placed on the land by the valuers called for the vendor might reasonably have been adopted as its fair value. We do not agree that the present land is of equal value. It is somewhat further from the city and of inconvenient shape, and these facts must be taken into account.

" We have, therefore, come to the conclusion that the fair value of the land now sold should be calculated at the rate of £375 per acre. The appeal will therefore be allowed and consent will be given to the transaction subject to the purchase price being reduced to £2,300 accordingly."

No. 107.—A. TO Y.

Rural Land—Crown desiring to Acquire Property for Settlement of Serviceman C.—Committee fixing Basic Value suitable for facilitating Settlement of Serviceman R.—Appeal by C. asking for Substitution in Order of his Name for R.'s—Proper Function of Committee—Position of C. and R. if Crown acquires Property—Servicemen's Settlement and Land Sales Amendment Act, 1945, ss. 11, 51.

Appeals lodged by the purchaser, Y., and by a discharged serviceman, C., in respect of an order of the Canterbury Rural Land Sales Committee concerning an area of farm land at Duvauchelle. The property was sold by A. to the appellant, Y. At the hearing, the Crown intimated its desire to acquire the property under s. 11 of the Servicemen's Settlement and Land Sales Amendment Act, 1945, to facilitate the settlement of the appellant C., or, in the alternative, of another discharged serviceman named R. After a hearing and certain investigations, the Committee made an order in the following terms:

" The Committee fixes the basic value at £950 and finds the land to be suitable, in terms of s. 11 of the 1945 Amendment Act, for the purpose of facilitating the settlement of R., farmer of Le Bons Bay, who is the owner of neighbouring farm land."

From this order C. appealed on the ground that R. should not have been named in preference to himself. He asked the Court to substitute his name for that of R., or, in the alternative, to delete from the order all reference to R., so that the Crown, in the event of its acquiring the property, would be unfettered in the matter of its ultimate disposition. The purchaser Y. appealed on the ground that the Committee had insufficient evidence to justify an order in favour either of C. or of R., and claimed on grounds of hardship that he should be allowed to acquire the property himself.

The Court (per *Archer*, J.) said: " The relevant portions of the section under which the Crown desires to take this property read as follows:

" 11. Part II and section fifty-one of the principal Act are hereby extended so as to apply, with the necessary modifications, as if the purpose of the settlement of a discharged serviceman included the following purposes . . .
(*b*) The utilisation of any land not situated within any city, borough, or town district (whether or not it is farm land) for facilitating or ensuring the successful settlement of a discharged serviceman on any adjoining or neighbouring farm land. . . .'

" All parties, including the Committee, appear to have supposed that it was necessary for the Crown to satisfy the Committee that the land in question should be allocated to some particular discharged serviceman already settled on adjoining or neighbouring land, in preference to the purchaser; and that, where, as in this case, two servicemen were nominated in the alternative, it was incumbent on the Committee to enquire into the respective circumstances and claims of the servicemen and of the purchaser and to determine which of the three parties interested in the property should be allowed to have it.

" The proper function of the Committee must be gathered from the terms of s. 51 of the principal Act, as amended by s. 11 of the Amending Act above quoted. Under s. 51, it is clear that the Committee is concerned only with the suitability or adaptability of the land for the settlement of discharged servicemen. The object of the section is to enable the Crown, should it so desire, to acquire any land which is on the market for sale, and which, in the opinion of a Land Sales Committee, is suitable or adaptable for the settlement of servicemen. It is no part of the Committee's function to recommend any particular discharged serviceman for settlement on land acquired by the Crown. If so acquired, the Crown alone has the responsibility of selecting the serviceman or servicemen to whom the land is ultimately allotted.

" Section 11 of the Amending Act extends the operation of s. 51 by making it clear that the Crown may now acquire certain lands not previously within the operation of s. 51, or in respect of which a doubt existed as to the applicability of that section. We do not think, however, that s. 11 was intended to alter to any material extent the respective functions of the Committee and of the Crown in regard to the settlement of discharged servicemen. In particular, it remains the dominant function of the Committee to determine whether the land is suitable for the settlement of a serviceman, and it is still the prerogative of the Crown to allocate any land which it may acquire to a particular serviceman.

(*To be concluded.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Diary of Harold Lex.—In 1941 the Manitoba Bar Association came to the conclusion that there was a grave need to correct popular misconceptions concerning the lawyer and his functions, and for this purpose to institute an intelligent programme of institutional advertising. It considered that an infrequent lapse on the part of a single lawyer was headlined by the Press, while, on the other hand, day-to-day service rendered to their clients by conscientious practitioners gained no public prominence at all. Under the sponsorship of the Association there has appeared, in consequence, in the Saturday editions of the leading Winnipeg newspapers, an advertisement (six inches by two columns in size) in the form of a page from the diary of "Harold Lex," described as an imaginary law student with some years of experience in a law office. Harold, like the author of *Confessions of an Uncommon Attorney*, has been brought in touch with various sorts of people and interesting happenings, and does not hesitate to deal, at times in a sadly philosophic strain, with the unhappy results that fall to the lot of the layman who enters the legal field without adequate legal assistance. The articles advertised are really little stories or "incidents" culled from the experience of practitioners, and are stated to be based upon actual occurrences and illustrate the desirability of following the printed injunction to "consult your lawyer." Levies which were voluntary in character have been made upon members of the Bar Association to meet the cost of financing the programme of advertising, which is said to give Harold Lex a very favourable status with the public and one redounding to the advantage of the profession generally. Scriblex confesses that he is somewhat intrigued by the whole idea, but, having read a number of the advertisements, has considerable doubts whether Harold will join the ranks of Pepys or Evelyn as an immortal diarist.

The Three R'S.—"Accumulation, selection, rejection—these, I think, are the reading, writing, and arithmetic of advocacy": Viscount Simon in an address to the Canadian Bar Association at Ottawa.

Shelley's Case.—Sir Edward Coke, considered by many as the greatest of all the Lord Chief Justices of England, was counsel for the successful party in this case with which once every law student had to make himself familiar. In Anderson's report of the judgment, there is a comment that Coke put into *his* report (1 Rep. 94) much that was never said in Court. Although the venerable rule laid down by the case no longer plagues the student, it was eulogized by Cairns, L.C., in *Bowen* v. *Lewis*, (1884) 9 App. Cas. 890, more than three hundred years after it was decided. A remarkable explanation of its intricacies was once given by Aspinall, Q.C., in a consultation that he had with Joseph Walton, at that time a rising junior. Mention was made of the rule during the course of the consultation. The leader asked: "What the devil was Shelley's case?" Walton then proceeded to muster up his courage, and was endeavouring, as best he could, to explain what it was all about, when Aspinall interrupted him with, "Oh! it begins to come back to me. It's this, is it not? You leave your property to one person and the other blighter takes it!"

Quickened Justice.—The other day in one of our Courts a witness, commanded to withdraw from hearing by the stentorian tones of the orderly, was not to be found when called upon to give his evidence. No one had told him, he explained, precisely where "outside" was, and he had preferred to work in his nearby office rather than to remain longer in the draughty melancholy in the court passage. The incident recalls a story told by Sir Edward Parry of an usher in East Anglia. He had been sent, while still at the Bar, to act as deputy Judge in this County Court whose Judge had just died; and, on his entering for the first time, the usher called out, "All witnesses out of Court!" On Parry asking him why he had done this, the usher answered, "The late Judge always insisted upon witnesses being sent out of Court." "But," said the deputy Judge, a little puzzled, "there may be a difficulty in getting them back again." The reply was both bland and surprising. "The late Judge never had them back again," said the usher.

Privilege.—From the *Irish Law Times* comes a reference to a matter raised during a trial at the Cork Circuit Criminal Court of a man charged with housebreaking and with receiving. The prosecution learned that the accused had paid eight pounds in notes to his solicitor and called upon him to produce these notes, claiming that this was an essential part of the evidence for the State. The solicitor, who had retired from the case, claimed privilege on behalf of his former client, whereupon counsel for the prosecution asked the Judge to compel production and, on refusal, treat the solicitor as in contempt. The report of the case says: "The suggestion of the State is that this money is part of stolen property, and it ought to be produced for identification, and that its production is an essential portion of the evidence. The State are entitled to get the best evidence, and they can subpoena anyone they like. I hope the case will go farther, and that the matter will be threshed out. I will have to fine you £50. It is a very important matter. You are taking a very courageous stand in this matter, and you are acting in the best interests of the profession." The jury was discharged, but later in the week the Judge, on hearing there was to be an appeal, said that he had come to the conclusion that this was not contempt in the ordinary sense, but a refusal to answer a question; and, if his decision was upheld and the solicitor then complied, the fine would be reduced to one shilling. The case bears a strange contrast with the sentence of seven days' imprisonment recently imposed by a Nelson magistrate upon a witness whose religious beliefs appear to have influenced his action in refusing to sign depositions in a charge that involved the failure to procure medical assistance for a victim of tuberculosis.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Gift Duty.—*Husband and Wife—Action for Partition of Assets—Compromise—Liability to Gift Duty.*

QUESTION: A husband and wife, who had been engaged in business together, had a quarrel and separated. The husband demanded the transfer to himself of some property which was in the sole name of the wife. The wife declined, and thereupon the husband initiated Court proceedings. Eventually, on the advice of counsel acting for each party, and before the case came on for hearing, the wife transferred certain of the assets in dispute to the husband by way of compromise. Will this transfer of assets be liable to gift duty?

ANSWER: As, presumably, the Commissioner of Stamp Duties was not a party to the proceedings, the compromise will not be binding on him: see the judgment of Sir Michael Myers, C.J., in *Commissioner of Stamp Duties* v. *Shrimpton*, [1941] N.Z.L.R. 761, 783, 784.

It is submitted, however, that, if it can be established that the compromise was a genuine one (and the question would suggest that it was), gift duty will not be payable: *Commissioner of Stamp Duties* v. *Pearce*, [1924] G.L.R. 338, *Attorney-General* v. *Kitchin*, [1941] 2 All E.R. 735 (cited in *Adams's Law of Death and Gift Duties in New Zealand, Cumulative Supplement No. 2*, 50), and *Attorney-General* v. *Gretton and Shrimpton*, [1944] 1 All E.R. 624.

XI.

2. Easement.—*Creation in futuro or in praesenti—Legality of same.*

QUESTION: Is there anything against the creation of an easement *in futuro—e.g.*, the right of the owner of the dominant tenement to deposit sawdust on the servient tenement, if at any time he should desire to do so?

ANSWER: The example given is not the case of an easement *in futuro*, but of a grant of an easement *in praesenti*. There is a difference between the grant of an easement and the future enjoyment of same; per Griffiths, C.J., in *Commonwealth* v. *Registrar of Titles for Victoria*, (1918) 24 C.L.R. 348, 383. In the example given, the grantee would acquire "an immediate and presently existing right to exercise and enjoy the easement at any time when he thought fit."

On the other hand, if there is any act or event provided in the nature of a condition *precedent* postponing the taking effect of the grant to the future—*e.g.*, the giving of notice by the grantee to the grantor—then care must be taken to see that the possible period of postponement does not infringe the rule against perpetuities: see *Wellington City Corporation* v. *Public Trustee, McDonald, and District Land Registrar, Wellington*, [1921] N.Z.L.R. 1086, 1098, 1099.

XI.

3. Native Land.—*Land originally Native land—Transfer from Chinese Owner to Maoris—Subsequent Transfer to Pakeha—Whether European or Native Land.*

QUESTION: In 1933, all the Maori owners of a block of Native land transferred their interests to a Chinese subject for a pecuniary consideration; this transfer was duly confirmed by the Native Land Court and registered under the Land Transfer Act. In 1936, the Chinese owner transferred the land to Maoris, also for a pecuniary consideration. These Maori owners now desire to sell the block to a Pakeha. Will this last transaction require confirmation by the Native Land Court or the consent of the Land Sales Court?

ANSWER: On the transfer to the Chinese owner the land became European land as defined in the Native Land Act, 1931, and it remains European land. The general rule is, "Once European land, always European land." The land did not become Native land again when the ownership again became vested in Natives: see *In re Puhi Mahi to Hutchison*, [1919] N.Z.L.R. 82. Therefore, the proposed transaction must be consented to by the Land Sales Court.

XI.

4. Law Practitioners.—*Costs—Solicitor's Lien for Costs—Transfer registered by one Solicitor—Subsequent Mortgage registered by another Solicitor—Custody of Certificate of Title.*

QUESTION: S., a solicitor, presents for registration in the Land Registry Office a memorandum of transfer from A. to B., accompanied by the certificate of title. B. has not paid S. his costs, and accordingly claims a lien on the certificate of title. Without S.'s knowledge, B. mortgages the land to C., and D., another solicitor, presents the mortgage for registration before S. has been able to uplift the certificate of title from the Land Registry. Who will now be entitled to uplift the certificate of title from the Land Registry Office? Has S. lost his lien?

ANSWER: It would appear as if S. has lost his lien: *Rosevear* v. *District Land Registrar, Gisborne*, [1916] N.Z.L.R. 482, 485. C. was entitled to have his mortgage registered, although he did not produce the certificate of title: *In re Wright*, (1894) 12 N.Z.L.R. 585. Section 121 of the Land Transfer Act, 1915, gives the mortgagee the right to the custody of the certificate of title. D. then has the right to uplift the certificate of title from the Land Registry: see Land Transfer Regulation No. 24 (c).

XI.

4. Housing Improvement.—*Sale of one of two Adjoining Sections in a Township, now part of a Borough—Housing Improvement Act*, 1945.

QUESTION: My client owns, in the one Land Transfer title, two adjoining sections in a township, which in 1928 was approved of by the Minister of Lands as a "town" under s. 16 of the Land Act, 1924. At that time, the land was situated in a county, but in the meantime it has been included in a borough. My client desires to sell one of the sections and retain the other. Will the consent of the borough council under the Housing Improvement Act, 1945, and s. 332 of the Municipal Corporations Act, 1933, be necessary?

ANSWER: The consent of the borough council to the proposed sale will not now be necessary: s. 57 of the Statutes Amendment Act, 1946.

XI.