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NEGLIGENCE: CONTRIBUTORY NEGLIGENCE ACT, 1947.

II.—Canadian Experience.

It may be of interest to our readers to have some information regarding the Canadian Provincial statutes corresponding with the recently-enacted Contributory Negligence Act, 1947.

With the exception of Quebec, which applies the doctrine of common fault under the French Civil Code, and Manitoba and Saskatchewan, all the Canadian Provinces have in operation statutes providing for the apportionment of damages in negligence cases where both parties have been found at fault.

While the general effect of these statutes corresponds broadly, with that of our own recent statute, care must, of course, be taken in applying judgments interpreting them, as, in many instances, their language differs from that used in the New Zealand Act. The cases, taken at random from the Canadian reports, are, therefore, used as illustrations only of the manner in which the particular wording of those statutes is interpreted and applied.

As an example, the following are the provisions of the Negligence Act, 1930, of Ontario:

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. This Act may be cited as the Negligence Act, 1930.

2. In this Act "action" shall include counterclaim, "plaintiff" shall include a defendant who counterclaims, and "defendant" shall include a plaintiff against whom a counterclaim is brought.

3. In any action founded upon the fault or negligence of two or more persons the Court shall determine the degree in which each of such persons is at fault or negligent, and where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

4. In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the Court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

5. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

6. Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as may be deemed just.

7. In any action tried with a jury, the degree of fault or negligence of the respective parties shall be a question of fact for the jury.

8. Where the damages are occasioned by the fault or negligence of more than one party, the Court shall have power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just.

9. The Contributory Negligence Act, being Chapter 103 of the Revised Statutes of 1927, is repealed.

The Negligence Act, 1930, was amended by the Negligence Amendment Act, 1935, as follows:

2. (1) Section 3 of the Negligence Act, 1930, as amended by section 2 of the Negligence Act, 1931, is amended by striking out the words "where two or more persons are found liable" in the third and fourth lines and inserting in lieu thereof the words "except as provided by subsection 2, where two or more persons are found at fault or negligent" so that the said section shall now read as follows:

3. (1) Where damages have been caused or contributed to by the fault or neglect of two or more persons the Court shall determine the degree in which each of such persons is at fault or negligent, and except as provided by subsection 2 where two or more persons are found at fault or negligent, they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

(2) The said section 3 is further amended by adding thereto the following subsections:

(2) In any action brought for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from a motor-vehicle other than a vehicle operated in the business of carrying passengers for compensation, and the owner or driver of the motor-vehicle which the injured person was being carried in, or upon or entering, or getting on to, or alighting from is one of the persons found to be at fault or negligent, no damages, contribution or indemnity shall be recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver and the portion of the loss or damage so caused by the fault or negligence of such owner or driver shall be determined although such owner or driver is not a party to the action.

(3) In any action founded upon fault or negligenc and brought for loss or damage resulting from bodily injury to, or the death of any married person where one of the persons found to be at fault or negligent is the spouse of such married person, no damage, contribution, or indemnity shall be recoverable for the portion of loss or damage caused by the fault or negligence of such spouse, and the portion of the loss or damage so caused by the fault or negligence of such spouse shall be determined although such spouse is not a party to the action.

The following is an explanation by Mr. T. N. Phelan, K.C., of the Ontario Bar, of the amendments :

Section 3 (1) effects an amendment in the form of s. 3. The original Act (s. 3 in part) provides: "Where two or more persons are found liable . . . each shall be liable to make contribution and indemnify each other."

It is believed that the words quoted made the remedy conditional upon two or more being "found liable to the plaintiff." Therefore, if the plaintiff elected to sue only one of two wrong-doers, the one sued would be thereby prevented from making claim against the other who could not be found liable because the plaintiff asserted no claim against him. The amendment is intended to make clear that the rights and remedies under the Act are not dependent upon the plaintiff's election.

Section 3 (2). An amendment to our Traffic Act, 1935, provided that no gratuitous passenger in a motor-vehicle could sue the owner or driver of such vehicle for damages. The Negligence Act was thereupon amended to meet the case of a passenger injured by the combined negligence of the driver or owner of the car occupied and of some other wrong-doer.

Section 3 (3) provided for a similar situation which arose under the common-law immunity which exists between spouses where one is injured by the negligence of the other.

This statute, as amended, was explained by Laidlaw, J. A., in the Ontario Court of Appeal in *Cohen* v. *S. McCord and Co., Ltd.*, [1944] O.R. 568, 576, where he said :

The law of proximate cause relative to contributory negligence at common law was defined and settled in *Radley* v. *London and North Western Railway Company*, (1876) 1 App. Cas. 754. It was thereafter clear that in a case where the negligence of each party was a proximate cause of the injury, neither one of them could recover against the other. There was no common-law liability upon either party. The Contributory Negligence Act, 1924 [Ont.] (14 Geo. V, c. 32), altered the rights of the parties in such cases. It enabled the plaintiff to recover judgment against a defendant whose negligence was a proximate cause of the loss or injury, notwithstanding some degree of negligence on his own part as an immediate and proximate cause thereof. The statute at the same time took away the defence, in such a case, that the plaintiff's negligence was a proximate cause of the loss or damage. Lamont, J., in *Littley* v. *Brooks and Canadian National Railway Co.*, [1932] S.C.R. 462, 487, [1932] 2 D.L.R. 386, says: "In enacting the Contributory Act the Legislature gave a right of action to a plaintiff guilty of contributory negligence." The statute has no application unless the faults of both parties to an action are proximate causes of the loss: *McLaughlin* v. *Long*, [1927] S.C.R. 303, 311, [1927] 2 D.L.R. 186, per Anglin, C.J.C.: see also *Farber* v. *Toronto Transportation Commission*, 56 O.L.R. 537, 540, [1925] 2 D.L.R. 729. Thus there can be no apportionment of damages as provided by the Act, unless the negligence of each party to an action was a *causa efficiens* of the loss. A determination that negligence of the defendant and of the plaintiff was each a proximate cause of the loss or injury is a condition precedent to the apportionment of liability and damages.

No provision was made in the statute for joinder, as parties to the action, of persons who might be wholly or partly responsible for the damages claimed. There was no right or obligation as between two or more persons found to be at fault or negligent. This condition of the law was changed in 1930. The Contributory Negligence Act (*supra*) was repealed and replaced by the Negligence Act, 1930 (20 Geo. V, c. 27). By s. 3 of that statute,

> where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, . . . each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

It was also provided, by s. 6 :

> Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as may be deemed just.

The liability imposed by this statute on two or more persons found liable in an action founded upon their fault or negligence is new. It did not exist at common law. It is declared that such persons shall be "jointly and severally" liable. Likewise the obligation as between themselves, that "each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent," is created by the Act and did not exist at common law: see *Esten* v. *Rosen*, 63 O.L.R. 210, [1929] 1 D.L.R. 275.

This consideration, the learned Judge proceeded, becomes of paramount importance. It is of equal importance to observe that the liability and remedy over thus created by statute is limited in application to the event "where two or more persons are found liable . . . in any action founded upon the fault or negligence of two or more persons." A finding of liability, in an action as specified, is a requisite and a condition precedent to the statutory rights and obligations.

The same statute that creates the liability provides means by which the Court may add, as a party defendant to the action, any person who "is or may be" wholly or partly responsible for the damages claimed. On this point, his Lordship said :

I think it is made clear that the statute was intended to provide the machinery to enable the Court in one action to determine the liability of all persons whose negligence might be a proximate cause of the loss or injury sustained, and to give in that action the remedy of contribution and indemnity as between two or more persons found liable. The Negligence Act, 1930, does not alter the principles properly applicable to the law of contributory negligence. It is still an essential that "the fault or negligence" of each person found liable in an action to which the Act applies shall be a *causa proxima*. It is almost impossible to conceive of a determination in one action of the proximate and decisive causes of an injury done, and a subsequent enquiry, in another action, as to other proximate causes. Such a course would, I think, result in confusion, contradiction, and complexities far beyond imagination and defeat the purpose of the legislation . . . My view is that it was intended by the legislation that all issues between all persons who may be wholly or partly responsible for the damages claimed ought to be the subject of one action only. No other remedy or procedure was available at common law to enforce the obligation to make contribution and indemnity as provided by the statute, and no procedure is provided therein apart from the action in which two or more persons are found liable.

An interesting decision, which supports the propositions submitted in the first part of this article, was given in *Pfeister* v. *Toronto Transportation Co.*, [1946] 3 D.L.R. 71, to the effect that the Negligence Act (Ontario) has no application where the defendant is solely responsible for the accident. Before it can apply, the defendant must be guilty of negligence. In that case, it was submitted that the rule in *Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274, 288, that the invitee must take reasonable care for his own safety, has been modified by the Contributory Negligence Act. Hogg, J. A., in referring to this submission, said :

The learned trial Judge was of the opinion that the effect of the rule in *Indermaur* v. *Dames* has been modified by the Negligence Act, R.S.O. 1937, c. 115, and that a plaintiff, seeking damages for an injury, is not barred from recovery in some measure because such plaintiff has not used reasonable care. He cited the judgment in *Greisman* v. *Gillingham*, [1934] 3 D.L.R. 472, S.C.R. 375, in support of this view.

With respect for the opinion of the trial Judge, I do not think the facts of the present case are such that the provisions of the Negligence Act are relevant. The Act entitles a plaintiff to recover damages although he was guilty of contributory negligence, but to the extent he was to blame, he is obliged to suffer the loss himself. The damages are to be apportioned in proportion to the degree of negligence found against the parties respectively. No negligence in law has been found against the appellant, and therefore there is no question of damages being apportioned, between the parties: see *Stark* v. *Batchelor*, [1928] 4 D.L.R. 815, 63 O.L.R. 135.

Referring to a section in the Contributory Negligence Act, 1925, New Brunswick, which is the same as s. 2 of the Contributory Negligence Act, 1926, Nova Scotia, Sir Francis Anglin, C.J., in *McLaughlin* v. *Long*, [1927] 2 D.L.R. 186, 191, in delivering the judgment of the majority of the Supreme Court of Canada, said :

> In our opinion, within the meaning of s. 2 of the Contributory Negligence Act, 1925 (N.B.), damage or loss is " caused " by the fault of two or more persons only when the fault of each of such persons is a proximate or efficient cause of such damage or loss.

In an action for damages by the administratrix of her late husband, on behalf of herself as wife and of the child of her late husband, who died as the result of injuries sustained through being struck by the defendant's motor-truck, *Wiksech* v. *General News Co.*, [1947] 1 D.L.R. 402, Chevrier, J., referred to an interpretation of the Ontario statute by the Supreme Court of Canada, quoting Rinfret, J. (as the Chief Justice of Canada then was), where he said :

> Under the Ontario Contributory Negligence Act, the limitation as to damages is only consequential. The true purport of the Act is a limitation as to responsibility.

This " limitation as to responsibility " is found (Chevrier, J., added) in s. 2 (1) and in the concluding words of s. 3 (1) of the statute. He said that the jury's finding of negligence on the part of the deceased husband was in effect a finding of " fault or negligence " on the part of the plaintiff as representing her deceased husband's estate. Judgment was for the plaintiff on the finding of the jury : the sum of $4,582 in favour of the widow, and the sum of $1,500 in favour of the child, both subject to a deduction of 40 per cent.

An example of the reasoning leading to the apportionment of damages in relation to degrees of fault is shown in the dissenting judgment of Richards, J., in the Appeal Division of the Supreme Court of New Brunswick, in *Daigle* v. *Albert*, [1943] 2 D.L.R. 764, 777. An accident occurred to the plaintiff who was using a tractor with a trailer attached to haul a load of straw along a highway. The defendant, the present appellant, was driving her car, when, as the respondent came from behind his stationary trailer to speak to a motorist whose car was parked across the highway, she struck the respondent, and as a result he suffered injuries. The learned Judge concluded his judgment as follows :

> I have no doubt that if the respondent had looked to the left before stepping beyond the load of straw, or if the appellant had sounded a warning before attempting to pass, the accident would not have occurred. It seems to me to be a clear case of the common danger. They each had the opportunity to avoid the accident and each failed to observe due care and attention. The degree of negligence should, I think, under the Contributory Negligence Act, R.S.N.B., 1927, c. 143, be apportioned equally. Accepting the assessment of damages as found by the trial Judge at the sum of $4,906.35, the respondent should have judgment for $2,453.17 with costs to be taxed on the same basis.

It was held by the British Columbia Court of Appeal in *Protopappas* v. *Knap and Burrard Industries, Ltd., and British Columbia Electric Railway*, [1946] 2 D.L.R. 330, that it is only in exceptional cases that the Court of Appeal will interfere with apportionment of fault by the jury under the Contributory Negligence Act, 1926 (B.C.), such apportionment being a finding of fact. Robertson, J.A. (with whom Sydney Smith, J.A., concurred), founded this proposition on *British Fame* (*Owners*) v. *MacGregor* (*Owners*), [1943] 1 All E.R. 33, where the learned trial Judge has apportioned the blame for reasons which he stated. The Court of Appeal altered the apportionment. The House of Lords restored the trial Judge's judgment. Viscount Simon, L.C., at p. 34, said :

> It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate Court, while accepting the findings of fact of the Court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial Judge.

Lord Atkin and Lord Thankerton agreed with the Lord Chancellor. In his speech, Lord Wright, at p. 35, said :

> I do repeat that it would require a very strong case to justify such a review of or interference with this matter of apportionment where the same view is taken of the law and the facts.

Lord Porter agreed with Viscount Simon and Lord Wright.

Robertson, J.A. (as the present Chief Justice then was), in the case referred to, said :

> In that case [the " Fame " case] the House of Lords was dealing with an apportionment by a Judge. The matter is much more difficult when the apportionment is made by a jury, and, with great respect, I agree, if I may say so, that the Court of Appeal when accepting the finding of fact of a jury as to fixing of blame, should not, except in exceptional cases, alter the allocation made by the jury, although, as Viscount Simon says, " I do not, of course, say there may not be such cases."

An example of such a case is *Coates* v. *Toronto St. Catherine's Transport, Ltd.*, [1941] 4 D.L.R. 483, where the Court of Appeal of Ontario reversed the apportionment of damages from the trial Judge's finding that the appellants were 70 per cent. responsible and the respondent 30 per cent. In this case, the reversal of the apportionments of damages was consequential on the success of the appeal on the actual facts as to which of the parties was substantially at fault, owing to the trial Judge's not having taken into account a breach on the part of the respondent of his statutory duty under the local Highway Act.

The Contributory Negligence Act, 1936, in British Columbia, was applied by the Court of Appeal to an action for trespass in the following circumstances : The plaintiff brought an action against a doctor and a dentist for the unauthorized extraction of some of her teeth while she was under an anaesthetic for the purpose of being operated on by the doctor. She was given judgment for damages against them both. In third-party proceedings, the dentist obtained a judgment for indemnity against the doctor for the same amount, less $200, the trial Judge finding that one of the teeth was extracted without instructions from the doctor. On appeal, it was held that the dentist was entitled to contribution under the Contributory Negligence Act, 1936 (B.C.), as the word " fault " as used therein does not mean only negligence. Trespass to the person is " fault " within the Act, whether it was the result of negligence or wilfulness. Since the degrees of fault of the doctor and the dentist could not be distinguished on the evidence, the dentist's right to contribution by the doctor was on the basis of equal liability : *Yule* v. *Parmley*, [1945] 1 W.W.R. 405.

Again, in circumstances other than those relating to running-down actions, the damages were apportioned in a Quebec case, *Marcil* v. *Laroche*, (1941) 79 Que.S.C. 308. The facts were that a customer in a restaurant suffered severe injury from swallowing a bone contained in a vegetable soup served to him by the proprietor. It was held that the proprietor was negligent, but that the customer was also negligent in not dis-

covering the presence of the bone after introducing it into his mouth. It was held that the customer should bear one-third of the damages.

In communications with the Nelson Automobile Association, Mr. T. N. Phelan, K.C., of Toronto, in 1935, and again in 1937, gave some useful information as to the working of the Negligence Act in Ontario. Mr. Phelan is counsel to the Ontario Motor League. In 1935, he wrote:

> The opinion is that the Act is both in principle and practice a distinct improvement upon the common-law rule. Neither the public, the Bar, nor the insurance companies have expressed dissatisfaction with the principle of the Act, and no desire to revert to the common-law rule has been suggested.
>
> Discussing briefly the advantages or otherwise of the Act, this memorandum will first deal with rule (*a*) as applied to claims between the claimant and the wrong-doer.
>
> The advantage to a plaintiff from the Act is that under it he can recover, though negligent himself, if it can be shown that the defendant was also negligent, whereas before the Act the plaintiff wholly failed if there was joint or concurrent negligence. What is to be considered negligence in any particular circumstances must generally be largely a matter of individual judgment, *i.e.*, the judgment of the Court or jury. That judgment is often influenced, especially in juries, by motives of sympathy for an injured plaintiff. Under the common-law rule, a jury was inclined to overlook the negligence of a plaintiff whose conditions or injuries appealed to the jury's sympathy, and to find the defendant's negligence the cause of the plaintiff's damage. The result was that the entire burden was unjustly imposed upon the defendant. The Act removes that motive. Conversely, there is a disadvantage under the Act to a defendant, in that under the common law he was entitled to have the action dismissed if there was joint or concurrent negligence, whereas under the Act the plaintiff may still recover.

Asked, at the end of the year 1937, if the Negligence Act had continued to function satisfactorily, his answer was: "Unqualified, Yes." He went on to say:

> The answer is given by one who sees the application of the Act quite as frequently from the defendant's side as from the plaintiff's; as you know we represent a great many of the insurance companies which carry automobile risks in this Province.
>
> Mr. Hill, the General Manager of the Dominion of Canada General Insurance Company (one of the largest insurers of automobile risks in Canada), has just stated to me that in his belief the Contributory Negligence Act in this Province has not increased the cost of claims to the insurance companies and on the contrary has decreased it. I have Mr. Hill's permission to quote his views.
>
> In order that you may judge of the value of the experience of this Province in actions of this type, the following information is submitted: Ontario has a population of about three and one-half million people—more than one-third of the entire population of Canada. There are registered in Ontario in excess of five hundred thousand motor-vehicles.*

Mr. Phelan went on to say that, in his opinion, there is no increase in loss which is reflected in insurance premiums. While a defendant now has to pay a proportion of damages where formerly this defendant would have been entirely free, the aggregate of these damages seems to be more than compensated by the immunity which defendants now enjoy from having the entire loss placed upon them by juries sympathetic to the plaintiff. The practice which applies to these actions applies to all actions generally. There should be no reason why persons seeking redress should suffer any delay. He added:

> The degree of fault upon which the apportionment of damages depends calls for the exercise of judgment. No difficulty has been experienced in this Province in arriving at an apportionment of fault that permits substantial justice between the parties.

Viewing the Act as a whole, Mr. Phelan considered that it had worked out fairly to both plaintiff and defendant, because an opportunity is afforded to the Court, where there was joint or concurrent negligence, to do substantial justice between the parties; and the principle that enables the Court to apportion the damages in proportion to the fault seems to him to be beyond criticism. He added that Courts and juries had found no difficulty in applying the statute, either in determining the proportion or the amount of damages. Just as the question of negligence is largely a matter of individual judgment, so also is the degree in which the negligence of each contributed to the result.

*The official figures in 1937 were 648,290 motor-vehicles.

SUMMARY OF RECENT JUDGMENTS.

SERVICE BUILDINGS, LIMITED v. TODD MOTORS, LIMITED.

COURT OF APPEAL. Wellington. 1947. March 4, 5, 6, 7; June 9. SIR HUMPHREY O'LEARY, C.J.; SMITH, J.; FAIR, J.; CALLAN, J.; CORNISH, J.

War Emergency Legislation—Economic Stabilization—Lease—Appeal from Order made by Supreme Court fixing Fair Rent—Retrospective Effect of Regulation authorizing Appeal—Construction of Regulations generally—Court's wide Discretion to Determine Fair Rent—Relevant Matters to be taken into Consideration—Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335, 1946/208), Regs. 2, 15, 16, 22A, 23.

On January 6, 1944, Mr. Justice *Kennedy* made an order, reported [1945] N.Z.L.R. 18, 20, fixing the fair rent of buildings let by the appellant to the respondent at £624 per year from January 14, 1943. An appeal to the Court of Appeal from that order, on the ground that it was made without jurisdiction, was dismissed, as no excess of jurisdiction had been shown in the making of the order: reported [1945] N.Z.L.R. 18.

By Reg. 22A of the Economic Stabilization Emergency Regulations, 1942 (which was added by Amendment No. 10 (Serial No. 1946/208) and came into force on December 6, 1946), a right of appeal was given where the Supreme Court had, whether before or after the commencement of that regulation, made an order under Part III of the regulations fixing the fair rent of any property, and the fair rent so fixed or the basic rent of the property exceeded an annual rent of £525. The time for appealing under Reg. 22A from any order made before the date of its commencement ran from December 6.

The appellant, under the authority of Reg. 22A, now appealed from the order of *Kennedy*, J., made on January 6, 1944, reported as above.

Two preliminary objections to the appeal were taken by respondent: (*a*) that Reg. 22A granting the right to appeal purported to operate retrospectively to such an extent, and was so unreasonable, as to be beyond the regulation-making power of the Governor-General in Council; and (*b*) that the appellant, having sued upon the order of the Supreme Court,* was estopped from appealing against that order.

Held, per totam curiam, That the learned Judge had properly exercised the discretion given to him by Reg. 16 (1) of the Economic Stabilization Emergency Regulations, 1942, having regard to the policy of promoting the economic stability of New Zealand; and had taken into account the relevant matters required thereby.

Per *O'Leary*, C.J., *Fair* and *Callan*, JJ., That Reg. 16 (1) of the Economic Stabilization Emergency Regulations, 1942, should be construed according to its plain and natural meaning; and the terms of the regulation and the wide discretion given

* In May, 1945, the present appellant brought an action in the Supreme Court for rent alleged to be due in pursuance of the foregoing order, and judgment was given in its favour: [1946] N.Z.L.R. 227

to the Court entitle the Court to have regard to the broadest considerations of general policy, and, in each case, to select the method as a basis of assessing the fair rent most calculated in the opinion of the Court to result in arriving at the fair and equitable rent in the light of the relevant circumstances.

Quaere, per *O'Leary*, C.J., and *Callan*, J., *dubitante*, Whether it is necessary for a tenant, in applying for the fixing of a fair rent under the regulations, to show that his interests in connection with the lease were adversely affected by the war.

Per *Fair*, J., That the foregoing application of Reg. 16 (1) is subject to the limitation that, as the regulations were intended to deal only with war conditions calling for emergency provisions, there must be some evidence or ground from which it may be inferred that a reconsideration of the rent was required as a result of conditions created by the war; but the evidence was clear that the respondent company's interests in connection with their lease were adversely affected by war conditions.

Service Buildings, Ltd. v. *Todd Motors, Ltd.*, [1945] N.Z.L.R. 18, 44, applied.

Per *Smith*, J. 1. That the fixing of the fair rent must depend upon the circumstances of each case, but attention should be paid to any agreement of the parties before September 1, 1942.

2. That the Court should have regard, *inter alia*, to the conditions of the particular lease with which it is dealing, and, among other factors, to the duration of that lease, *i.e.*, to the period for which the landlord is kept out of possession, and, therefore, out of the opportunity of himself turning the land to profitable use.

Service Buildings, Ltd. v. *Todd Motors, Ltd.*, [1945] N.Z.L.R. 18, *Sievwright* v. *Wellington College and Girls' High School Governors*, [1944] N.Z.L.R. 523, and *Otago Harbour Board* v. *Mackintosh, Cayley, Phoenix, Ltd.*, [1944] N.Z.L.R. 14, considered.

Appeal from the judgment and order of *Kennedy*, J., reported [1945] N.Z.L.R. 18, 20, dismissed.

Counsel: *Brash*, for the appellant; *F. B. Adams* and *Armitage*, for the respondent.

Solicitors: *Brash and Thompson*, Dunedin, for the appellant; *Downie Stewart, Payne, and Forrester*, Dunedin, for the respondent.

MERCURY BAY CO-OPERATIVE DAIRY COMPANY, LIMITED v. LILLEY AND OTHERS.

COURT OF APPEAL. Wellington. 1947. March 12; April 3. SIR HUMPHREY O'LEARY, C.J.; SMITH, J.; FAIR, J.; CORNISH, J.

Company Law—Memorandum—Co-operative Dairy Company—Construction of Memorandum—Proposal to pay out of Company's Profits to Provincial Farmers' Union Annual Sum per Head of All Suppliers in Specified Month—Whether prohibited by Memorandum.

On an appeal from the judgment of *Callan*, J., [1946] N.Z.L.R. 766, in which it was held that the appellant company was prohibited by its memorandum of association from making any contribution from the company's funds to the New Zealand Farmers' Union (Auckland Province) Incorporated,

Held by the Court of Appeal (*Cornish*, J., dissenting), That the proposal embodied in the resolution passed at the extraordinary meeting of the appellant company held on September 9, 1944, was prohibited by the company's memorandum of association, not being empowered by cl. 3 (*g*) thereof ("to enter into any arrangement for union of interests with any person engaged in any business or transaction capable of being conducted so as directly or indirectly to benefit this company") or cl. 3 (*i*) thereof (as being "necessary, incidental, or conducive to the attainment of [the company's] objects").

Judgment of *Callan*, J., [1946] N.Z.L.R. 766, affirmed.

Counsel: *Sexton*, for the appellant; *Hubble*, for the respondents.

Solicitors: *Sexton, Manning, and Fortune*, Auckland, for the appellant; *V. N. Hubble*, Auckland, for the respondents.

THE KING v. RATU HUIHUI.

COURT OF APPEAL. Wellington. 1947. March 27, April 3. SMITH, J.; FAIR, J.; CALLAN, J.; CORNISH, J.

Criminal Law—Evidence—Admissibility—Carnal Knowledge—Evidence of Sister of Girl concerned that Accused about the Date of Alleged Crime tried to get into her Bed—Defence of Innocent Association by Accused in loco parentis *to both Sisters—Whether such Evidence admissible to rebut that Defence.*

On the trial of a man accused of unlawful carnal knowledge on a specified date, and on subsequent dates, of the elder of two sisters, both under sixteen years of age, who slept in the same room in different beds, and to both of whom he was *in loco parentis*, the evidence of the younger sister that, about the date specified, the accused tried to get into her bed, is admissible as tending to rebut a defence of innocent association between the accused and the elder sister.

Makin v. *Attorney-General for New South Wales*, [1894] A.C. 57, *R.* v. *Sims*, [1946] K.B. 531; [1946] 1 All E.R. 697, and *R.* v. *Whitta*, [1921] N.Z.L.R. 519, applied.

R. v. *Rodley*, [1913] 3 K.B. 468, distinguished.

Counsel: *J. C. White*, for the appellant; *Taylor*, for the Crown.

Solicitors: *Burnard and Bull*, Gisborne, for the appellant; *Crown Law Office*, Wellington, for the Crown.

In re A PROPOSED SALE, BROWN TO ADDISON BROTHERS.

LAND SALES COURT. Gisborne. 1947. February 14, 25. ARCHER, J.

Vendor and Purchaser—Land Sales—Withdrawal of Application for Consent—Contract of Sale of Land—Right to cancel if Consent not obtained within Three Months—Application not heard within that Period—Vendor asking Leave to withdraw—Application opposed by Purchaser—Committee ordering withdrawal—Whether such Order within Committee's Jurisdiction—Proper Procedure in such Circumstances—Servicemen's Settlement and Land Sales Act, 1943, ss. 44, 45, 48 (2), 51.

An application for the consent of a Land Sales Committee to a sale of land may be withdrawn only with the consent of the Committee or of the Court, and such consent should be granted only with the consent of all parties to the transaction, and of the Crown if the Crown is interested under s. 51 of the Servicemen's Settlement and Land Sales Act, 1943.

A Land Sales Committee has no jurisdiction to allow an application for its consent to be withdrawn by the vendor on the ground that, pursuant to a clause in the contract for sale, he has cancelled the contract. It should consent, if otherwise it could have consented, so as to leave the rights of the parties unimpaired in the event of civil proceedings being initiated by either party.

In re A Proposed Sale, Hendry to Weir, [1945] N.Z.L.R. 744, applied.

Counsel: *Lees*, for the purchasers, the appellants; *Hodgson*, for the vendor; *Kent*, for the Crown.

Solicitors: *Cooney and Jamieson*, Tauranga, for the purchaser; *Potts and Hodgson*, Opotiki, for the vendor; *Lands Department Solicitor*, Wellington, for the Crown.

WALES AND MACKINLAY, LIMITED v. FORREST.

SUPREME COURT. Auckland. 1946. September 12. 1947. March 12. CORNISH, J.

Carriers—Common Carrier—Goods arriving at Destination at End of Transit—Goods to be called for there by Consignee—Arrival at Destination late in Evening—Goods Kept in Motor-truck at Carrier's Premises—Goods destroyed by Fire during that Night—Whether Reasonable Time had Elapsed for Change of Obligation from that of Carrier to that of Warehouseman.

Where goods have arrived at the end of their transit by a common carrier from whom the consignee is to claim and fetch them, the latter (in the absence of any special agreement) has a reasonable time in which to do so, during which the obligation of the carrier *qua* common carrier continues; but

after the expiration of that time the latter's obligation is confined to taking proper care of the goods as a warehouseman, and he ceases to be liable in case of accident.

The defendant received goods from the plaintiff at A. for delivery to the plaintiff's agent at P. Not having been able to find such agent, the defendant informed the plaintiff that he proposed to bring the goods back to A. in order that the plaintiff might resume possession of them; and plaintiff did not forbid him to do so. The goods arrived back at the defendant's premises in A. at 8.30 p.m. one evening, and were destroyed there by fire early the next morning.

In an action by the plaintiff company against the defendant for the value of the goods,

Held, 1. That, on the evidence, a new contract for the carriage of the goods on the return journey had been entered into, and on such journey the defendant retained his obligation as a common carrier.

2. That, in the absence of any agreement, as a reasonable time had not elapsed for the plaintiff to call at the defendant's depot and collect them, the defendant had not become a warehouseman, but remained liable as a common carrier to the plaintiff for the value of the goods.

In re Webb, (1818) 8 Taunt. 443; 129 E.R. 455, distinguished.

Counsel: *North*, for the plaintiff; *Milne*, for the defendant.

Solicitors: *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the plaintiff; *Milne and Meek*, Auckland, for the defendant.

In re A PROPOSED SALE, MANOY TO NEWMAN BROTHERS, LIMITED.

LAND SALES COURT. Nelson. 1947. March 26; April 1. ARCHER, J.

Vendor and Purchaser—Land Sales—Leasehold Interest—Valuation—Principles governing Valuation of Freehold Interests—Applicability to Valuation of Leaseholds—Special Consideration for Ascertainment of Fair Value—Servicemen's Settlement and Land Sales Act, 1943, ss. 50, 54—Valuation of Lsnd Act, 1925, s. 54.

The term "land," where used in ss. 50 and 54 of the Servicemen's Settlement and Land Sales Act, 1943, includes leasehold interests.

The same principles that govern the valuation, for the purposes of the Servicemen's Settlement and Land Sales Act, 1943, of freehold interests in land, must, *mutatis mutandis*, be applied to the valuation of leasehold interests; but an apportionment of the respective interests of a lessor and lessee in accordance with s. 54 of the Valuation of Land Act, 1925, is not necessarily conclusive for the purposes of the Servicemen's Settlement and Land Sales Act, 1943.

Valuer-General v. *Public Trustee*, [1942] N.Z.L.R. 6, applied.

In valuing a leasehold interest, as in valuing a freehold, the duty of a Land Sales Committee is to ascertain a fair value of the interest sold, having regard to the amount which the vendor of the interest might reasonably have expected to obtain for it if it was offered for sale on December 15, 1942, on reasonable terms.

Duthie v. *Valuer-General*, (1901) 20 N.Z.L.R. 585, *Colonial Sugar Refining Co., Ltd.* v. *Valuer-General*, [1927] N.Z.L.R. 617, and *Compton* v. *Hawthorne and Crump*, (1903) 22 N.Z.L.R. 709, referred to.

While it is impossible to lay down any simple method of valuation of leasehold interests for adoption by Land Sales Committees, a Land Sales Committee should have regard to the following considerations:—

The sum of the values of all the separate interests in a piece of land cannot be greater than the capital value of the land, and the capital value should be capable of division into the lessor's and lessee's interests respectively. Once the value of the freehold has been determined, the value of the leasehold interest assessed in accordance with s. 54 of the Valuation of Land Act, 1925, and by the use of *Inwood's Tables*, may be accepted as *prima facie* evidence of value, but it is not conclusive of the fair value of such interest which it is the duty of a Land Sales Committee to ascertain.

In the case of leaseholds, as of freeholds, a hypothetical "willing purchaser" must be deemed to be a prudent and informed purchaser, and the amount which he might be expected to pay for the leasehold interest must be assessed accordingly.

In re A Proposed Sale, Mountney to Young, [1947] N.Z.L.R. 436, applied.

In its inquiry as to a fair value, a Land Sales Committee is entitled to give reasonable weight to an apportionment of the capital value in accordance with s. 54 of the Valuation of Land Act, 1925, since the relative values of leasehold interests arrived at under s. 54, though not conclusive, are evidence *pro tanto* as to the value, and, therefore, as to what a prudent purchaser might reasonably be expected to pay, or as *prima facie* evidence of its fair value so as to throw upon the party relying thereon the onus of proof that some other sum is the true measure of the fair value of the interest sold.

In re A Lease, Wellington City Corporation to Wilson, [1936] N.Z.L.R. s. 110, mentioned.

The Committee is bound to have regard to any evidence, including the evidence of comparable sales, which may assist it in determining the fair value of a leasehold interest, but it is for the Committee to say what weight may properly be given to any sale claimed to be comparable, bearing in mind that the fair value of the lessor's interest added to the fair value of the lessee's interest must not exceed the capital value of the freehold at the date of assessment.

Counsel: *Fitchett*, for the vendor; *Thorp*, for the purchaser; *Ott*, for the Crown.

Solicitors: *Rout, Milner, and Fitchett*, Nelson, for the vendor; *C. W. Thorp*, Motueka, for the purchaser; *Lands Department Solicitor*, Wellington, for the Crown.

In re A PROPOSED SALE, PUBLIC TRUSTEE TO MITCHELL AND OTHERS.

LAND SALES COURT. Greymouth. 1947. May 7, 29. ARCHER, J.

Vendor and Purchaser—Land Sales—Renewable Lease—Valuation—Land in Borough—Proper Basis on which Valuation made—Principles applicable—Servicemen's Settlement and Land Sales Court, 1943, ss. 43 (c), *54, 55.*

The principles of the valuation of leasehold interests set out in *In re A Proposed Sale, Manoy to Newman Brothers, Ltd., supra*, are of general application and they should be applied with such modifications as may be necessary to meet special circumstances.

In valuing the interest of a lessee, the extent and consequently the value of his interest must be governed by the terms of the lease, and, in particular, by the rent payable, the period which the lease has to run, and the terms, if any, on which it can be renewed; and it is reasonable to give some weight to the Government valuation when assessing the value of the lease.

Where the rent is less than the full rental value of the land, the lessee has a goodwill in the balance of his lease, which can be assessed in accordance with recognized methods of valuation.

In considering the value of a right of renewal, consideration must be given to the conditions set out in the lease itself, the rentals at which similar leases have been renewed in the past and are likely to be renewed in the future, and, in particular, the rentals at which renewals are being granted at the time of the valuation that is being made.

As the ultimate object of a Land Sales Committee is to assess a fair value between the parties to the sale of a leasehold interest so that the vendor shall receive the fair value of his lease as on December 15, 1943, the Committee is entitled to have regard to the market value of a lease; but market value must be assessed by reference only to sales between willing but reasonable vendors, on the one hand, and willing but prudent and informed purchasers, on the other. Comparative sales of leasehold properties are reliable only when the terms of the leases concerned have been examined and compared, and regard is had to all the circumstances of the sale; evidence of comparable sales is not necessarily the best evidence of value, and sales at prices which are manifestly excessive must be disregarded.

In re A Proposed Sale, Mountney to Young, [1947] N.Z.L.R. 436, referred to.

Special circumstances, practices, or customs alleged to exist in the borough in which the leasehold properties are situated may be taken into account, but only in so far as they are consistent with the provisions of the Servicemen's Settlement and Land Sales Act, 1943.

Counsel: *S. T. Barnett* and *Kay*, for the Crown; *Hannan* and *Kitchingham*, for the respondents.

Solicitors: *Lands Department Solicitor*, Wellington, for the Crown; *Hannan and Seddon*, and *Guinness and Kitchingham*, Greymouth, for the respondents.

PROMISES TO MAKE TESTAMENTARY PROVISION

Law Reform Act, 1944, s. 3.

By I. D. CAMPBELL.

(Concluded from p. 202.)

II. THE REMEDY UNDER THE LAW REFORM ACT, 1944, s. 3.

There had been a number of cases in which the absence of written evidence or the uncertainty of the nature of the provision which the testator was to have made defeated the claims of those who had laboured for him. In some cases the injustice and the breach of faith were clear, but no legal remedy was available. To give relief in certain of these cases, the novel provisions of s. 3 were made law. *Bennett* v. *Kirk*, [1946] N.Z.L.R. 580, the first reported decision on the section, expresses substantially this view of the purpose of the enactment.

Considering the reasons for the enactment, one expects to find, as one does find, that the section is applicable even though the claimant cannot prove an enforceable contract and would be unable to bring successful proceedings apart from the Act. But does the section apply only to promises which would be unenforceable except for the Act? The terms of s. 3 (1) do not suggest any restriction of this kind. The section applies where there is proof of an express or implied promise by the deceased to reward the claimant by making some testamentary provision for him. There is nothing in these words or elsewhere in the section to require proof of a fully enforceable contract, nor is there anything that would exclude from its scope a promise which forms part of a valid and enforceable contract. The remedy afforded by the section would appear to be no more advantageous than the remedies already provided at common law and in equity. But the terms of the section seem to envisage the possibility of a claim being made irrespective of whether action could be taken for breach of contract. This is the conclusion reached by Mr. Justice Smith in *McAllister* v. *Public Trustee*, [1947] N.Z.L.R. 334. It is there held that the section may be applied to both enforceable and unenforceable promises.

The section provides a remedy "to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased)." There is a tinge of obscurity about this part of the section. The statute is dealing with a promise to reward by testamentary provision. Such a promise cannot be fulfilled by the testator by gifts *inter vivos*, but the Act brings into operation a principle akin to the equitable doctrine of satisfaction. Provision made for the claimant in the lifetime of the promisor is to be taken into account. The section then contains the words: "(whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased)." To what does this refer? Can circumstances be conceived in which one who has promised to make some testamentary provision could be compelled to remunerate the promisee in a different way? In appropriate cases, a claim might be brought for damages for anticipatory breach, but only by a very strained used of language could this be termed a claim for remuneration. It is not at all clear what claims, if any, are let in by the addition of the words in parentheses. Perhaps the purpose of these words is merely to emphasize that provision *inter vivos* is to be taken into account notwithstanding the absence of any right on the part of the promisor to substitute this mode of performance, or on the part of the promisee to demand it. The statutory remedy is to be available only to the extent that the promisor has neither carried out the terms of the promise nor made alternative provision which, under the statute, is to be taken *pro tanto* as a discharge of the obligation.

There is nothing in the section to indicate what is to be regarded as "making testamentary provision." It seems to be arguable that the words should bear the same meaning as was attributed to them in *Eyre* v. *Monro*, *Graham* v. *Wickham*, and *Jervis* v. *Wolferstan* (*supra*)—*i.e.*, that "making provision" means leaving assets as well as leaving a will, unless the gift is of a residuary nature.

If we have a case in which a promise has been made, as contemplated, by the section, and nothing has been done directly or indirectly to discharge the obligation, what substantive provision does the section make? It says that the claim shall be enforceable *in the same manner and to the same extent as if the promise were a promise for payment by the deceased in his lifetime of the amount specified*, or, if no amount be specified, then of a reasonable amount, having regard to the matters mentioned in the section. Except as modified by later subsections, s. 3 (1) converts the claim into a claim for a sum of money payable by the deceased in his lifetime but as yet unpaid. To the extent that such a promise of payment would have been enforceable, the claimant is able to recover. A bare promise of payment is, of course, not enforceable at all: it is *nudum pactum*. The promisee must establish that the promise was made for consideration or was expressed by deed.* The natural construction of the section is that the promise to make testamentary provision is to be treated as though it were a promise to make a money payment *inter vivos*, all other conditions remaining unchanged. Thus, if the actual promise were given for valuable consideration, the statutory remedy might be available, since a promise to make a money payment, *for the same valuable consideration*, would be enforceable. On the other hand, if the original promise were given for past consideration, no remedy would be available under the section, since a promise to pay *inter vivos* would, in the same circumstances, be unenforceable.

If this view were correct, a claim could successfully be brought under the section if the original promise were unenforceable solely by reason of the Statute of Frauds. Although the real promise was to leave an

* The exception recognized and applied in *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, [1947] 1 K.B. 131, has no application in the present context.

interest in land, proceedings under the section would be founded on a (notional) promise to pay money, and in an action on such a claim the defence of the Statute of Frauds would not be open. Vagueness or uncertainty in regard to the *promised reward* might also be overcome if there were enough certainty about it to enable the Court to assess a reasonable monetary equivalent. The section expressly applies where no amount was specified, and some promises otherwise void for uncertainty might enable the Court to fix a reasonable amount to be awarded to a claimant. On the other hand, vagueness and uncertainty in regard to the *promised work or services* would, on this view, be fatal. If the promisor had promised to pay a specific sum in his lifetime in return for services to be rendered, this would not constitute a legally enforceable promise if the services were so vaguely described that no Court could say whether or not the contract had been fully performed. In *Horton* v. *Jones* (*supra*), there was a promise to look after a man and make a home for him for the rest of his life, and to " give up everything " for him. The majority of the Judges in the High Court of Australia held that the terms of the arrangement were too uncertain to constitute a contract. Under s. 3 of the Law Reform Act, the claim is to be enforceable to the same extent as a promise to pay. A promise to pay, in return for an uncertain consideration, would not be enforceable at all. No relief, therefore, would be available under the statute, and, if another case like *Horton* v. *Jones* were to arise, no claim could successfully be brought under s. 3.

This, however, is not the view that has been adopted by the Supreme Court. In *McAllister* v. *Public Trustee* (*supra*), Smith, J., held that the section applies to promises made in respect of a past consideration. No reason was given for this part of the decision, and, as the learned Judge decided that the applicant had failed to prove any promise, the opinion on the scope of the section may be *obiter*. If so, it is respectfully submitted that, on re-examining the matter, it may be found that the terms of the section hardly warrant this construction. It involves reading the section as though it were altered by the addition of some very vital words : " shall be enforceable . . . as if the promise of the deceased were a promise *by deed or for valuable consideration* for payment. . . ." The word " promise " has already been used in an earlier part of this section, and it would be necessary to give the word two different meanings in the same sentence. To read the section as though it referred to a promise *to pay for the said services* would seem reasonable, but of course this would not enable action to be taken where the promise was given for past consideration. To arrive at that result, one would have to read into the section the further stipulation that the promise to pay should be deemed to have been made before the rendering of the said services. There is nothing in the section to suggest that it ought to be subjected to this process. A further objection is that this construction throws the remedy open to anyone who can prove a promise. It is not easy to suppose that the Legislature is here giving a legally enforceable claim to one who is purely a volunteer. The section certainly assists those who have rendered service in reliance on unenforceable promises, but their position is very different from that of persons who have rendered service voluntarily and have subsequently been promised some reward. Equity did not assist a volunteer, and there seems to be no good reason why the Legislature should do so in this case. It is suggested that the true scope of the section is indicated in the marginal note : " Estate of deceased person liable to remunerate persons for work done under promise of testamentary provision." For these reasons it is respectfully submitted that the section should be construed as altering the content of the promise but nothing else, the substituted promise being regarded as being given in the same circumstances, and for the same consideration, as the original promise.

In *Bennett* v. *Kirk*, it was laid down that the Court has to be satisfied on satisfactory evidence that the promise was made, was relied on by the plaintiff, and resulted in benefit to the deceased or detriment to the plaintiff, but that the Court ought not to ask for a standard of proof that is impossible to satisfy. *McAllister* v. *Public Trustee* decided that it was essential to prove a promise in the full legal sense, an accepted offer as distinct from a mere statement of intention. Statements by the deceased of his intention to make some provision for the claimant may be useful evidence in corroboration, but by themselves cannot be the foundation for an action. An actual offer, duly accepted, must be proved.

The action under the statute is an action in contract, and is not comparable with proceedings for an order under the Family Protection Act. In *Bennett* v. *Kirk*, Fair, J., held that the applicant, who had been promised the estate of the deceased, had rendered services that entitled her to the provision that he contemplated, and that she was entitled to substantially the whole of his property *in specie*. In *McAllister* v. *Public Trustee*, however, Smith, J., stresses that the action under the section is founded on a promise to pay a sum of money. If judgment is given in favour of the claimant, then by s. 3 (4) the amount awarded is to be treated as a legacy, but the section does not give the promisee any claim to the property which he was actually promised. The proceedings are for a money judgment, not for an order conferring rights in respect of any specific property. Every promise enforced under the section is treated as though it had been a promise of a general legacy.

The section applies to " an express *or implied* promise of the deceased." This implied promise has no reference to quasi-contract. When the law implies a quasi-contractual promise, it is always a promise to pay, never (as in s. 3) a promise to reward by testamentary provision. The implied promise in the Act must be a promise implied from conduct, an actual and not a fictitious agreement. An implied promise to remunerate by testamentary provision may be an abstract possibility, but a practical instance can hardly be conceived.

Although a claim under the statute is to be enforced in the same manner as a claim on a promise to pay in the testator's lifetime, most of the consequences which have followed from this provision have been altered by other clauses in the Act. Breach of such a promise could have occurred at, and not before, the testator's death, and the normal period of limitation of actions would have been that appropriate to simple contracts. But by s. 3 (2) a time limit of twelve months is imposed, and time runs, not from the date of breach (*i.e.*, death), but from the date on which the personal representative took out representation. By s. 3 (3), all actions are to be brought in the Supreme Court and tried before a Judge without a jury. By s. 3 (4), the amount awarded is to be treated for all purposes as a legacy.

Where no amount has been agreed on, the claim is treated as though based on a promise to pay " such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services rendered or the work performed, the value of the services or work, the amount of the estate, and the nature and amounts of the claims of other persons against the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise." In view of these qualifications, a claim where no amount was agreed upon runs a two-fold risk of reduction: by the Court in making an award, and again by way of abatement. Since the amount awarded is for all purposes to be deemed to be a legacy (s. 3 (4)), it is automatically subject to reduction either by general abatement for insufficiency of assets or by reason of an order under the Family Protection Act. But the section rather unfortunately requires the Court to take into consideration the claims of beneficiaries and creditors and possible claimants under the Family Protection Act when determining the amount of the " legacy " to be awarded. The claimant under s. 3 is exposed to the risk that reductions will be made twice over. Subsection 4 was not in the clause when the Bill was originally introduced into Parliament, and, when it was added, some consequential amendment should have been made in subs. 1, as the two subsections appear to embody inconsistent principles.

Where an amount has been specified in the promise, this is the amount which may be claimed and awarded under s. 3. The special matters to be taken into consideration where no amount was specified in the promise do not appear to be relevant when a definite sum was promised. If this is the construction to be placed on the section, the anomalous nature of the final portion of subs. 1 is accentuated. A person who had been promised £1,000 would recover judgment for that amount and rank with other legatees for that sum; but a person who had rendered exactly similar services but had not been promised a specific sum might be awarded £400 by the Court out of regard for the claims of others. No rational basis can be found for this distinction.

A person who would have taken a share in the estate of a deceased person in the event of his dying intestate, and who has worked for the deceased in reliance on his promise not to make a will, can obtain no relief under this section if the deceased has left his property to others. The section applies only if the deceased has promised to make testamentary provision.

Possibly the section applies only to promises to leave personalty. This was considered by Smith, J., in *McAllister* v. *Public Trustee* (*supra*), but did not have to be finally determined. Should it be held that the section does not apply to promises to leave realty, the view expressed earlier in this article, that the section involves a partial repeal of s. 4 of the Statute of Frauds, would become untenable. The learned Judge mentioned three matters which might present difficulties in the way of applying the section to devises of land, and suggested that the wording of s. 3 seemed inappropriate to the case of the promise of a devise. So far as the wording is concerned, the section could, without undue strain, be held to be applicable to a promise to leave realty (though not very aptly expressed for that purpose), and the question needs to be determined mainly on other grounds. It would appear that many of the cases which led to the passing of the enactment were cases in which some interest in land had been promised, but there was nothing in writing to evidence the promise. If it were to do justice in such cases that the section was enacted, nothing but a deficiency of drafting would prevent it being applied to realty. But, the intention of the Legislature being mainly surmise, it may be more useful to consider in turn the three points raised by Smith, J., in his judgment.

The first was this: to apply the section to the promise of a specific devise of land would mean that the authority to convert a devise of land into cash would be conferred only by implication. But the cash can be regarded as almost the equivalent of damages for breach of a promise by the deceased. If there were a breach of a covenant to convey land *inter vivos*, damages would not be withheld on the theory that this would be " converting the conveyance into cash." If the claim is in substance a claim for damages, it would not seem to matter whether or not the promise originally made had reference to land. Secondly, Smith, J., said that the " promise " constructed by the Court under s. 3 would not be that which was made, but something regarded by the Court as its equivalent in money, and the realisation of the money might be difficult. Both of these statements are clearly correct, but do they afford any reason for restricting the section to promises to leave personalty? The deceased had undertaken to leave realty to the promisee, and failed to do so. Have other successors any real ground for complaint if the estate is obliged to pay the monetary equivalent? If the testator had broken a contract to leave realty, or any other contract, it would be no answer to say, when sued for damages, that realisation of funds to satisfy an award of damages is going to prove difficult. If the difficulty of realisation is a substantial objection, will it not follow of necessity that the section cannot be applied to a promise to leave specific personalty? The third point mentioned by Smith, J., was that safeguards provided by the law in respect of actions for specific performance would be side-stepped under a section which allows the Court to have regard to all the circumstances of the case. But the section confers no claim whatever to specific property. All that can be obtained is a judgment for a sum of money which is deemed to be a legacy. The restrictions on the granting of a decree of specific performance are not " side-stepped " when one brings an action for damages at common law. A claim under s. 3 is in this respect exactly comparable to a claim for damages. If successful, it confers no rights in respect of the promised realty (other than those possessed by all successors under the will of the deceased), and therefore cannot be regarded as infringing or evading the rules which safeguard the granting of specific performance. For these reasons, it is submitted, with respect, that the section should be construed as applicable to realty and personalty alike.

The person who has been promised a testamentary reward may predecease the testator. Unless the promise included some provision in favour of the estate of the promisee, his personal representatives would be unable to recover any part of the promised reward. The right to a legacy is very like a life estate: it does not pass to successors at death. Even if the promisor failed to perform his promise, damages would be moninal only, since complete performance by the promisor would bring no benefit to the estate of the promisee. The promisor is not bound to provide for the

contingency of lapse: *In re Brookman's Trust*, (1869) 5 Ch.D. 182. In that case it was said: "If a testator is bound to make a will in a certain form, the law says there is no breach provided he makes a will in due form, and it is not owing to any act of his that the child does not take." This was a case in which some of the beneficiaries for whom the testator had covenanted to make provision had predeceased him. It would seem that the estate of a deceased promisee would likewise have no claim under the Law Reform Act, 1944, since any amount awarded is *for all purposes* to be deemed a legacy, and the principle of lapse would accordingly apply, unless, perhaps, s. 33 of the Wills Act, 1837, could be invoked.

Where a claim is made under the Act, can the personal representative safely allow or compromise the claim without requiring that it be established by judicial proceedings? Does the Act compel the parties to come to Court? Where the estate shows an ample surplus, or the residuary beneficaries, being *sui juris*, consent to the terms of settlement, the executor or administrator may feel sufficiently protected. Section 2 of the Trustee Amendment Act, 1924, and kindred provisions give ample authority to enter into *bona fide* settlements. But the beneficiaries are not the only persons whose interests are supposed to be considered. It is a difficult and, it may be, a risky task to settle such claims out of court, since to act *bona fide* one may have to take into consideration—

need for satisfactory evidence establishing both offer and acceptance;
circumstances in which the promise was made;
circumstances in which the services were rendered or the work performed;
value of the services or work;
extent to which the deceased has made testamentary provision for the claimant;
extent to which the deceased has otherwise remunerated the claimant;
amount of the estate;
nature and amounts of the claims of other persons against the estate, whether as creditors, beneficiaries, next-of-kin, *or otherwise*;
whether the promised provision included any interest in land.

Further than this, the personal representatives will have to decide how to reconcile s. 3 (1) with s. 3 (4). As the amount awarded is deemed a legacy, it cannot in any way affect creditors, yet by s. 3 (1) the claims of creditors must be taken into account. The amount awarded under a settlement, if ranking as a legacy, would be liable to reduction if necessary to give effect to orders under the Family Protection Act, yet possible claims under that Act have to be considered when making a settlement under s. 3. Settlement out of court appears inadvisable until the inconsistency of these provisions is removed by amendment or by judicial construction.†

† *Erratum:* On p. 222, second column, second line, after *ought* insert *not*.

LAW EXAMINATIONS FOR EX-SERVICEMEN.

The University announces that special Accountancy and Law Professional examinations for ex-servicemen will be conducted for the last time in March, 1948. The dates of entry and examination, and the general conditions, will be very similar to those which governed the examinations of March, 1947.

The qualifying period of active service will again be three full years.

Special information and entry forms for students will again be provided, and these will be available on application to the University Office after mid-September.

"DEVIL'S OWN" GOLF TOURNAMENT.

The Thirteenth "Devil's Own" Tournament, for the relaxation and rejuvenation of the Legal Profession, conducted by the Palmerston North Law Society, is to be played on the Manawatu Golf Club's Links at Hokowhitu, on Saturday, September 20, to Monday, September 22, 1947 (Dominion Day). The Management Committee consists of Messrs. L. M. Abraham, J. A. Grant, A. M. Ongley, G. I. McGregor, J. A. Ongley, T. M. N. Rodgers, and G. C. Phillips (Wellington). Mr. G. T. Rapley, Box 612, Palmerston North, is the Hon. Secretary.

The programme is as follows:

SATURDAY, SEPTEMBER 20, 1947:

Morning: 1. "Guarantee Fund" Handicap (18 Hole Stroke Paralytic).

Afternoon: 2. Stabilization Handicap (18 Holes Stroke). The best 16 aggregate nett scores in events Nos. 1 and 2 to qualify and play for the Devil's Own Cup on Handicap. The next 16 to play off for The Ancient Lights' Stakes. The third 16 to play off for The Paupers' Appeal Stakes. The fourth 16 to play off for The Land Sales Stakes.

SEPTEMBER 21, 1947.

Morning: The Certiorari Handicap (18 Hole Bogey), and first round of Devil's Own Cup, Ancient Lights, and Pauper's Appeal.

Afternoon: Public Trust Bogey Handicap (18 Holes) and second round of Devil's Own Cup, Ancient Lights, and Pauper's Appeal.

MONDAY, SEPTEMBER 22, 1947.

Morning: Semi-final Devil's Own Cup and Ancient Lights. 18-Hole Distress Foursome (Medal Handicap). (Choose partners).

Afternoon: Final Devil's Own Cup and Ancient Lights. 18-Hole. Butterworth's Hurdle Four Ball (Bogey Handicap).

Teams' Match: To be played in conjunction with Stabilization Handicap. Post Entries. Nett medal scores. Teams of four to be entered in accordance with nearest Supreme Court registry of individual members.

Entry forms for the "Devil's Own" contest are obtainable from the Hon. Secretary: Mr. G. T. Rapley, Box 612, Palmerston North.

The Conditions of Play are as follows:—

1. Open to any occupant of the Bench (High or Low), or to any qualified K.C., Barrister, or Solicitor of any age, belonging to affiliated clubs.
2. Entry fee 30s. to include green fees from September 19 to September 22 (inclusive).
3. Entries must be made to Hon. Secretary, and must be accompanied by competitors' handicaps and par of their course. Entries to be received not later than WEDNESDAY, September 17, by the Secretary. Post entries may be accepted.
4. Opponents for each event will be drawn, and the Committee reserves the right to adjust handicaps.
5. The Rules of Play shall be those of "The Royal and Ancient Golf Club of St. Andrew's," except as varied by the local rules of the Manawatu Golf Club (Incorporated).
6. The decisions of the Management Committee on any point shall be final. Any protest must be lodged with the Secretary or a member of the Committee by 6 p.m. on the day on which the dispute has arisen, failing which the information will be dismissed with costs.
7. The Committee reserves to itself the right to alter the programme times and date—by orderin' Counsel.
8. Ties will be decided in such manner as the Management Committee may direct.
9. For calls to the Bar—Court Usher, 19th Hole.

REFRESHER COURSE 8.

THE LAW OF CONTRACT.

Developments since 1939.

By PROFESSOR J. WILLIAMS.

(*Continued from p. 224.*)

ILLEGALITY.

Another exception to the general rule against restitution occurs where the plaintiff has a cause of action which is independent of the illegal contract: *Salmond and Williams on Contract*, 346, 347. This principle was applied by the Court of Appeal in *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.*, [1944] 2 All E.R. 579. A obtained certain machine tools from B under a bailment hire-purchase agreement. Contrary to the terms of the agreement, A, before he had paid all the instalments under the agreement, converted the tools by selling them to X. Thereupon B determined the agreement and claimed the return of the tools or damages for their conversion. A's defence was that the hire-purchase agreement was forbidden by the Control of Machine Tools Order, 1940, and therefore illegal. The Court held, however, that, even if this were so, it did not prevent B from recovering, for he could rely on his ownership and was not forced to claim under the hire-purchase agreement. "*Prima facie*, a man is entitled to his own property, and it is not a general principle of our law . . . that where one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action" (p. 582).

An interesting application of the principle that no rights can, in general, accrue from an illegal contract was made by O'Regan, J., in the Compensation Court in *Bidois* v. *Robinson and Knapp*, [1945] N.Z.L.R. 454. It was there held that a claim for workers' compensation could not be founded upon an accident occurring in the course of employment under an illegal contract. Presumably it was this decision which prompted the Legislature to enact s. 5 of the Workers' Compensation Amendment Act, 1945, whereby, if the Court before which proceedings for compensation are brought thinks proper, having regard to all the circumstances of the case, it may award compensation notwithstanding that the contract of employment was illegal.

In *Hutchinson* v. *Davis*, [1940] N.Z.L.R. 490, the Court of Appeal had before it the question of the extent to which the illegality of a contract infected a subsequent related transaction between the same parties. A had promised B that, if she would have sexual intercourse with him, he would marry her if a child were conceived. When A subsequently learned that B was pregnant, A and B agreed to marry each other. The question was whether the later arrangement was a new and separate contract, and therefore valid, or a mere ratification of the earlier promise, and tainted by its illegality. The Court of Appeal held that the evidence was consistent only with the latter view. In the course of the judgments, a number of cases on the ratification of infants' contracts were examined. As to these, see *Salmond and Williams on Contract*, 312, 313.

As to whether a contract to buy an hotel which is entered into by one who intends to carry on after-hours trading is illegal, see *Jack* v. *Peters*, [1941] N.Z.L.R. 153, and *Neal* v. *Ayers*, (1940) 63 C.L.R. 524. As to when the outbreak of war renders illegal subsisting contracts in which an enemy is interested, see the decision of the House of Lords in *Schering, Ltd.* v. *Stockholms, etc.*, [1946] 1 All E.R. 36.

NUGATORY CONTRACTS.

Contracts which offend against public policy are sometimes illegal but generally are nugatory or void rather than illegal. A contract whereby a person purports to subject himself to such restrictions on his personal liberty as are incompatible with his status as a free member of the community is nugatory as being contrary to public policy. An illustration is afforded by *King* v. *Michael Faraday and Partners, Ltd.*, [1939] 2 K.B. 753. In this case, A, who was at the time earning a salary of £3,000 a year, submitted to a judgment for £34,030 16s. 4d., on the condition that execution should be stayed provided that he paid the creditor £1,000 a year, and gave an irrevocable authority to his employer to make payments at this rate out of his salary. Subsequently his salary was reduced to £1,000 a year. Atkinson, J., held that it would be against public policy to enforce an agreement which would deprive the debtor of his sole means of support. The learned Judge purported to follow *Horwood* v. *Millar's Timber and Trading Co., Ltd.*, [1917] 1 K.B. 305.

Another type of nugatory contract is one in undue restraint of trade. A recent decision on this type is *Connors Bros., Ltd.* v. *Connors*, [1940] 4 All E.R. 179, in the Privy Council.

Generally as to the distinction between illegal and nugatory contracts, see *Public Trustee* v. *Dillon*, [1940] N.Z.L.R. 874, 881.

AGENCY.

The law as to the remuneration of commission agents and in particular land agents has lately been considered in a number of cases, the general effect of which is to stress that whether or not an agent is entitled to commission depends on the precise terms of the offer or contract which he has from his principal, and that there is no presumption that the agent is to be entitled to remuneration if he should be unable to do exactly what that offer or contract requires of him, even although his inability in this respect is due to his principal being no longer willing to go on with the business (unless, of course, the principal has bound himself to the agent by contract not to withdraw). Recent cases are the following, *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] A.C. 108 (the leading case), *Sharpley* v. *Ward*, [1944] N.Z.L.R. 661, *Jones* v. *Lowe*, [1945] K.B. 73, *Turnbull* v. *Wightman*, (1945) 45 N.S.W.S.R. 369, *Poole* v. *Clarke and Co.*, [1945] 2 All E.R. 445, and *Grey* v. *Wagstaff*, [1946] N.Z.L.R. 207. In the

last cited case, W. agreed to pay to G. commission if his land were sold to anyone through C.'s agency. G. introduced a satisfactory purchaser, but the Minister of Lands then acquired the property compulsorily at the sale price, under the Servicemen's Settlement and Land Sales Act, 1943. Blair, J., held that G. could not recover either the agreed commission or a *quantum meruit*.

It is a general rule that, where one who is really an agent has contracted in his own name, his principal may intervene and sue and be sued by the third person. To this rule, however, there is an exception where the contract made by the agent is in writing, and describes the agent in such manner that extrinsic evidence to establish the existence of the undisclosed principal would not merely supplement, but would contradict the writing. Thus, where an agent contracted in his own name as the owner of a ship, his principal was not allowed to intervene: *Humble* v. *Hunter*, (1848) 12 Q.B. 310; 116 E.R. 885. It is otherwise, however, where a contract describes the undisclosed agent as a "tenant," for it is consistent with this description that he may have leased the property as an agent merely: *Danziger* v. *Thompson*, [1944] K.B. 654.

See also *Phillips* v. *Butler*, [1945] 2 All E.R. 258, noted under Statute of Frauds (*supra*).

Contracts in Trust for Third Persons.

It is a principle of the common law that a contract upon its making can confer rights and impose obligations upon those persons only who are parties to it. In some sense the common-law rules as to undisclosed principals are an exception to this principle. The chief exception, however, has developed in equity by the application of principles of trustee law. As a result of this development, one who is not a party to a contract may nevertheless be able to take advantage of it, and may even be made liable in respect of it: see *Salmond and Williams on Contract*, Chap. XVII, p. 424.

A recent case in which these matters are discussed is *Re Schebsman, Ex parte Official Receiver, The Trustee* v. *Cargo Superintendents (London), Ltd., and Schebsman*, [1943] Ch. 366 (Uthwatt, J.), affirmed in the Court of Appeal, [1944] Ch. 83. A was employed by a Swiss company and its subsidiary, an English company. On March 31, 1940, his employment ended, and on September 20, 1940, he entered into an agreement with the companies in part as follows: "In consideration of the agreement which has already been made between the parties hereto the English company also agree to pay by way of compensation for loss of the debtor's [A's] employment a sum of £5,500 to be paid to the persons at the dates in the amounts and subject to the conditions more particularly specified in the schedule hereto." One question that arose was whether A was a trustee of the benefits of this provision for the persons mentioned in the schedule. The Court of Appeal held that no trust could be spelled out of the words of the contract. Lord Greene, M.R., said (p. 89): "An examination of the decided cases does, it is true, show that the Courts have on occasions adopted what may be called a liberal view on questions of this character, but in the present case I cannot find in the contract anything to justify the conclusion that a trust was intended. *It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention.* To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third. That dividing line exists, although it may not always be easy to determine where it is to be drawn."

Assignment of Contractual Rights.

In *In re Matahina Rimu Co., Ltd.*, [1914] N.Z.L.R. 490, Fair, J., discussed the question whether consideration was necessary to support an equitable assignment, but expressed no concluded opinion, inasmuch as he was able to hold that consideration was present. An exhaustive examination of certain aspects of this question is contained in the important judgment of Atkinson, J., in *Holt* v. *Heatherfield Trust, Ltd.*, [1942] 2 K.B. 1.

Assignment or Delegation of Performance of Contractual Obligations.

It is not in general possible for a party to assign his contractual obligations in the sense that he drops out completely and the assignee entirely takes his place. The most that the obligor can as a rule do is to delegate the performance of his obligations, himself continuing liable to the obligee in case of any deficiency of performance by the delegate. And even delegation of performance is permissible only if there is nothing in the contract expressly or impliedly prohibiting delegation. Such a prohibition may be implied from, *e.g.*, the personal nature of the services to be rendered, or from other circumstances. The whole matter is most lucidly expounded by Lord Greene, M.R., in *Davies* v. *Collins*, [1945] 1 All E.R. 247. In that case, some clothes had been left with a dyer and cleaner for cleaning and for certain small repairs. It was decided by the Court of Appeal that, in the circumstances of the case, the dyer and cleaner was not entitled to subcontract the work.

(*To be continued.*)

RULES AND REGULATIONS.

Water-power Regulations 1934, Amendment No. 2. (Public Works Act, 1928.) No. 1947/119.

Bobby Calf Marketing Regulations, 1947. (Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934.) No. 1947/120.

Motor-spirits Prices Regulations 1942, Amendment No. 9. (Motor-spirits (Regulation of Prices) Act, 1933.) No. 1947/121.

Motor-spirits Prices Regulations 1942, Amendment No. 10. (Motor-spirits (Regulation of Prices) Act, 1933.) No. 1947/122.

Samoa Customs Order 1939, Amendment No. 4. (Samoa Act, 1921.) No. 1947/123.

Dangerous Drugs Amending Regulations, 1946. (Dangerous Drugs Act, 1927.) No. 1947/124.

Poisons (General) Regulations 1937, Amendment No. 6. (Poisons Act, 1934.) No. 1947/125.

Social Security (Maternity Benefits) Regulations 1939, Amendment No. 2. (Social Security Act, 1938.) No. 1947/126.

Servicemen's Settlement and Land Sales Regulations 1943, Amendment No. 3. (Servicemen's Settlement and Land Sales Act, 1943.) No. 1947/127.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Out is Out.—Reference to literary allusions in judgments has led to an enquiry as to whether the more outdoor-minded Judge makes an occasional allusion to sporting activities. No doubt numerous phrases pertinent to sport can be found, but one allusion which has always appealed to Scriblex appears in the derating case of *Aberdeen Assessor* v. *Collie*, [1932] S.C. (Court of Sess.) 304, in which Lord Sands of the Scots Bench, in observing that the judgments of the House of Lords were not technically binding in Scotland, as the decisions of the Court of Session in valuation matters were final and not subject to review, went on to say, at pp. 311, 312, that :

> The House of Lords is an infallible interpreter of the law. A batsman, who, as he said, had been struck on the shoulder by a ball, remonstrated against a ruling of l.b.w. ; but the wicket-keeper met his protest by the remark : " It disna' maitter if the ba' hit yer neb ; if the umpire says yer oot yer oot." Accordingly, if the House of Lords says " this is the proper interpretation of the statute," then it is the proper interpretation. The House of Lords has a perfect legal mind. Learned Lords may come or go, but the House of Lords never makes a mistake . . . Occasionally to some of us two decisions of the House of Lords may seem inconsistent. But that is only a seeming. It is our frail vision that is at fault.

These remarks have the merit of being caustic without being undignified, which is more than can be said for oral comments to be heard from time to time, and especially by its disappointed counsel, upon a similar topic.

Custody and Religion.—A useful decision on the difficult question of custody is provided by the Full Court of Victoria in *McKinley* v. *McKinley*, [1947] V.L.R. 149. Here, the contest revolved round the custody of a highly-strung boy of eight who had been constantly in the care of the mother during the three years the parents had separated. Upon an application by the father, O'Bryan, J., transferred the custody to the applicant, upon the ground that, where the welfare of a child is at least equally well met by its being in the custody of either parent, then the one who should have the custody is the parent who has the right to direct in what religion the child should be brought up. The Court considered that it could not regard any one of the recognized forms of religion as inherently preferable to any other. It considered that, when a marriage had broken down, and the custody of a child of the marriage was under consideration, it was not open for the Court to prefer one parent to the other merely because that other was responsible for the breakdown, and without regard to the question whether his or her conduct had any real bearing upon the welfare of the child. It was not any part of the duty of the Court to punish a parent for conduct which might amount to a matrimonial offence, by taking the custody of the child of the marriage from him or her, or to allow custody proceedings in respect of such child to be made use of to force one parent to resume cohabitation with the other against his or her will. The Court (by a majority) thought that to transfer the custody to the father would involve a complete upset in the life of the child ; and the appeal was allowed.

Dinner for One, Please, James.—The comments of Scriblex upon " Oviparous Orders " (*ante*, 185), while they appear neither to have moved the Government profoundly nor to have solved the present egg shortage, have since reminded him of a little-recorded incident in the case of *R.* v. *George Joseph Smith*, better known as the " Brides in the Bath " murder. Having polished off one of the victims by his unique method of holding her head for the requisite time under water, he sallied forth from his lodgings with the ostensible object of buying something for supper. When he returned, he handed his purchases to the landlady and proceeded upstairs, only to announce a few minutes later his " horrible " discovery of the " accident " to his bride by calling from the top of the staircase : " Only cook one egg, please, Mrs. Crossley."

Unmistaken Identity.—Mr. Alan Brock, a versatile writer upon crime (to whom Scriblex is indebted for his reference to G. J. Smith's frugal precaution), has drawn attention to a remark that was quoted at the trial of Neville George Clevely Heath, whose ventures into lady-killing were luridly described in the London Press. The accused had been obtaining credit by representing himself as " Lord Dudley " when he was accosted by a stranger in a saloon bar with the question, " Are you Lord Dudley ? " " Yes, I am, old man," was the reply. " Well, I'm Detective-Inspector Hinkman," the stranger informed him. " In that case, I'm *not* Lord Dudley," said Heath. This disarming frankness, which served, no doubt, temporarily to endear the accused to the police, was also a great attraction to his lady acquaintances, with less happy results.

From My Notebook.—" The wife in this case is a ' guilty ' wife, in the sense that it was due to her fault that the marriage was never consummated. It is not material to enquire into the degree of her fault " : *Dailey* v. *Dailey*, [1947] 1 All E.R. 847, per Willmer, J., at p. 849. . . . " I entirely agree with my Lords' view that there is a difference between forecasting the result of a football match in the sense of prophesying who will win, or forecasting the result of a horse race, in which skill, experience and study play a considerable part, and forecasting how many goals will be scored, not by one, but by a combination of three teams, or by how many yards a horse will win a race " : *Boucher* v. *Rowsell*, [1947] 1 All E.R. 870, per Oliver, J., at p. 872. . . . " Assume further that in all other respects the county was equally grant-worthy (I borrow a word coined, I think, by one of the learned counsel)": *Newport Borough Council* v. *Monmouthshire County Council*, [1947] 1 All E.R. 900, per Lord du Parcq, at p. 913.

PRACTICAL POINTS.

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

1. Probate and Administration.—*Succession on Intestacy—Intestate's Brothers and Sisters Predeceasing him—Five Nephews and Nieces and Grandniece Surviving—Whether Grandniece takes the Deceased Mother's Share—Administration Act, 1944, s. 7 (1) (3).*

QUESTION: An intestate died in 1946 and was not survived by a wife or parent or any issue. His brothers and sisters are all dead. One of his sisters married and had six children, who were, of course, nephews and nieces of the intestate. Five of the nephews and nieces survived the intestate, but one of the nieces predeceased him and left one child who survived the intestate.

Does this grandniece of the intestate take the share which her mother would have taken if she had survived the intestate?

ANSWER: Under s. 6 (1) (*e*) of the Administration Amendment Act, 1944, the whole estate will, in these circumstances, be held on the statutory trusts for the brothers and sisters of the intestate. Applying s. 7 (1) (*a*) and s. 7 (3) to the circumstances of this case, the estate will be held in trust in equal shares for all the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of the brothers and sisters of the intestate, such issue to take by way of substitution *through all degrees* according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate: see (1945) 21 NEW ZEALAND LAW JOURNAL 30, para. 3 (*a*).

It is important to note that issue of deceased brothers and sisters take *per stirpes through all degrees*, and the child of the deceased niece will, therefore, provided it attains twenty-one or marries, be entitled to the share its mother would have taken had she survived the intestate. Possibly the doubt in the inquirer's mind has been caused by the table set out in *10 Halsbury's Laws of England*, 2nd Ed. 587, which on the face of it might suggest that only nephews and nieces of the intestate can take, but class 3 of this table does not go far enough, as remoter issue of deceased brothers and sisters are entitled to come in if their parents are also deceased: see *10 Halsbury's Laws of England*, 2nd Ed. 582 (*h*).

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2. Settled Land.—*Land conveyed to Trustees on Trust* (inter alia) *after Death of Settlor for His Children—Four Adult Children surviving Settlor—Two Children predeceasing him leaving Children—Persons entitled to Share in Distribution.*

QUESTION: In 1881, A.B. by a deed of conveyance conveyed certain land to X.Y. upon trust to pay the rent or income to A.B. for the latter's life and after A.B.'s decease to pay the rent or income to A.B.'s wife during her life or widowhood "and from and after the death of the said A.B. and the decease or second marriage of the said A.B.'s wife shall stand seized of the trust premises in trust for all the children of the said A.B. . . . who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or sooner marry in equal shares and if there be only one such child the whole to go to that child."

A.B. outlived his wife, and on his death left him surviving four adult children. One child predeceased A.B. aged eighteen years; another predeceased A.B. without children or marrying, and another predeceased A.B. leaving one child.

The question is, Who are entitled to the property on the decease of A.B.? Are the children living at A.B.'s death entitled, or are all the children of A.B. attaining twenty-one entitled whether they predeceased A.B. or not?

ANSWER: All the children of A.B. who attained twenty-one or, being females, attained that age or sooner married are entitled to the settled property in equal shares whether or not they survived A.B. The settlement imposes no condition that the children must survive A.B. or A.B.'s wife; and, therefore, each son on his attainment of twenty-one and each daughter on her attainment of that age or sooner marriage thereupon acquired a vested share in the settled property which was liable to be diminished by the attainment of twenty-one years by another son or by the attainment of that age or sooner marriage by another daughter of A.B. Where an interest in property is given to a donee contingently on attaining a specified age, the fact that the gift is also postponed to a life estate *prima facie* does not render it contingent on the donee surviving the tenant for life: *34 Halsbury's Laws of England*, 2nd Ed. 390, *Browne* v. *Moody*, [1936] A.C. 635 (particularly the remarks of Lord Macmillan, at p. 645), *In re Rhodes, Duncan* v. *Ryle*, [1917] N.Z.L.R. 504, and *Greenwood* v. *Greenwood*, [1939] 2 All E.R. 150. There are no words in this settlement to displace the *prima facie* rule; and, provided the two last mentioned children of A.B. who predeceased their father attained twenty-one years, or if females attained that age or sooner married, their estates are entitled to share equally with the four adult children who survived A.B.

S.2

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3. Execution.—*Seizure of Goods by Bailiff—Claim by Third Party—Bailiff's Procedure.*

QUESTION: If a bailiff seizes goods, and they are claimed by a third person, what steps should the bailiff take to protect himself?

ANSWER: He should immediately institute interpleader proceedings. If the claim is not admitted, he should apply for "a summons . . . in his own defence in order to prevent his having to make choice between the validity of the claim of the execution creditor and that of the claimant against the execution debtor": per Fletcher Moulton, L.J., in *In re Rogers*, [1911] 1 K.B. 641, 647.

C.1.