New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

VOL. XXIII. TUESDAY, OCTOBER 7, 1947. No. 18

CRIMINAL LAW: PROOF OF INTENT.

A RECENT judgment of the Court of Criminal Appeal in England, *R.* v. *Steane*, (1947) 111 J.P. 339, is of particular importance to those engaged, for the Crown or for the accused, in criminal prosecutions where a particular intent is an ingredient of the offence charged, or a necessary constituent of that offence. The Court, in quashing the conviction, held that such intent must be proved by the Crown just as it must prove any other fact necessary to constitute the offence; and the burden of proving that intent remains throughout with the prosecution.

The appellant was convicted on an indictment which charged him under Reg. 2A of the Defence (General) Regulations, 1939, with doing acts likely to assist the enemy "with intent to assist the enemy." He was convicted, and was sentenced to three years' penal servitude. He obtained leave to appeal on the ground of misdirection. The judgment of the Court of Criminal Appeal (Lord Goddard, L.C.J., and Atkinson and Cassels, JJ.) was delivered by Lord Goddard.

The facts, as stated in their Lordships' judgment, were as follows:

The count on which the appellant was convicted charged him with entering the service of the German Broadcasting System on a date in January, 1940; and it was common ground, and admitted by the appellant, that he did so enter that service and on several occasions broadcast certain matters through that system. The evidence called by the prosecution was that of one witness, who did not carry the matter very far beyond proving that the appellant did in fact broadcast, but also said that he had seen a telegram in the appellant's possession signed "Emmie Goering" which stated that he could expect to be released and be home very shortly. The principal evidence against him was a statement taken from him by an officer of the British Intelligence Service in October, 1945, which purported to give an account of his activities in the German Broadcasting Service. It is to be observed, their Lordships commented, that this statement concludes in this way:

> I have read this statement over and to the best of my knowledge and belief it is all true, and must request it to be used in conjunction with my written report, dated July 5, 1945, to the American C.I.C., in Augsburg.

This previous statement or report was, however, not produced. This was, no doubt, inevitable, but none the less unfortunate, especially as the appellant in his evidence before the jury maintained that many matters were contained in that report which he, accordingly, did not re-state in the statement which he made to the intelligence officer.

It seems, and this again was common ground, that before the war the appellant was employed in Germany as a film actor and was so engaged when the war broke out. His wife and two sons were then living in Germany. The appellant was at once arrested and taken to Berlin, and his wife and two sons remained in Oberammergau. The only other evidence in the case was that of the appellant himself. It was to the effect that he was at once arrested and questioned, and that the interview ended with the order: "Say Heil Hitler, you dirty swine." He refused, and was thereupon knocked down, losing several teeth, and was then interned. This was on September 11, 1939. Just before Christmas, he was sent for by Goebbels, who asked him to broadcast. He refused. He was thereupon warned that he was in an enemy country and that they had methods of making people do things. A week later an official named von Bockman saw him, and dropped hints as to German methods of persuasion. A professor named Kossuth also warned him that these people could be dangerous with those who gave trouble. In consequence of these matters, he submitted to a voice test, trying to perform as badly as he could. The next day he was ordered to read news three times a day, and did so until April. In April, he refused to do any more broadcasting. Two "G-men" called upon him. They said: "If you don't obey, your wife and children will be put in a concentration camp." In May, three "G-men" saw him and he was badly beaten up, one ear being partly torn off. He agreed to work for his old employers helping to produce films. There was no evidence that the films he helped to produce were or could be of any assistance to the Germans, or at all harmful to Britain. He swore that he was in continual fear for his wife and children. When the Americans overran the part of Germany in which he was, he reported to them, giving on August 5, 1945, a statement of his history during the war. In October, 1945, an English official, Captain Shorter,

saw him, and to him the appellant made another statement.

The appellant also asserted again and again—and said that he had done so in the written report of July 5, which, as we have already said, was not produced—that he never had the slightest idea or intention of assisting the enemy, and what he did was done to save his wife and children, and that what he did could not have assisted the enemy except in a very technical sense. Unlike the evidence which has been adduced in many other similar cases, there was no record of the actual broadcasts made by the appellant. This again was, no doubt, inevitable, but unfortunate, as the actual tone of the broadcast might have thrown some light on the motives and intentions of the appellant, but, in the opinion of the Court, there was undoubtedly evidence from which a jury could infer that the acts done by the appellant were acts likely to assist the enemy.

Their Lordships then proceeded to consider what they termed " the far more difficult question " arising in connection with the direction of the jury with regard to whether the acts were done " with the intention " of assisting the enemy. Their judgment continued :

> The case as opened, and, indeed, as put by the learned Judge, appears to this Court to be this :—A man is taken to intend the natural consequences of his acts. If, therefore, he does an act which is likely to assist the enemy, it must be assumed that he did it with the intention of assisting the enemy.
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> Now, the first thing which the Court would observe is that, where the essence of an offence or a necessary constituent of an offence is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence. The wording of the regulation itself shows that it is not enough merely to charge a prisoner with doing an act likely to assist the enemy. He must do it with the particular intent specified in the regulation. While, no doubt, the effect of a man's act and his intention in doing the act are in law different things, it is none the less true that in many offences a specific intention is a necessary ingredient, and the jury have to be satisfied that a particular act was done with that specific intent, although the natural consequences of the act might, if nothing else was proved, be said to show the intent for which it was done.

Taking a simple illustration, a man is charged with wounding with intent to do grievous bodily harm. It is proved that he did severely wound the prosecutor. Nevertheless, their Lordships said, unless the Crown can prove that the intent was to do the prosecutor grievous bodily harm, he cannot be convicted of that felony. It is always open to the jury to negative by their verdict the intent, and to convict only of the misdemeanour of unlawful wounding. Or, again, a prisoner may be charged with shooting with intent to murder. Here, again, the prosecution may fail to satisfy the jury of the intent, although the natural consequence of firing, perhaps at close range, would be to kill. The jury can find in such a case an intent to do grievous bodily harm, or they might find that, if the person shot at was a Police Constable, the prisoner was not guilty on the count charging intent to murder but was guilty of intent to avoid arrest. The judgment went on to say :

> The important thing to notice in this respect is that, where an intent is charged in the indictment, the burden of proving that intent remains throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which would be a certain result, and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.

Their Lordships added that in many offences it is unnecessary to allege any particular intent. The commonest case is in larceny, where the prisoner is simply charged with stealing. If the evidence shows that the prisoner picked a person's pocket, there is no necessity to prove that he intended to steal, although he may give some evidence in defence which would lead the jury to believe that he was not acting with a felonious intent. But, they repeated, where a particular intent must be laid and charged, that intent has to be proved. They continued :

> An illustration given by the learned Judge in the course of his rather brief summing-up related to what are commonly called the " black-out regulations." He pointed out to the jury that, if a person accidentally omitted to put up his black-out curtains or left some gap in them, although he was doing an act likely to assist the enemy, as it was accidental, he would not be committing the offence with intent to assist the enemy. Matters which involve accidental acts are, perhaps, not altogether a happy illustration. A nearer case would be if a person deliberately took down his black-out curtains or shutters, with the result that light appeared on the outside of his house, perhaps during an air raid. It might well be that, if no evidence or explanation were given, and if all that was proved was that during that raid the prisoner exposed lights by a deliberate act, a jury could infer that he intended to signal or assist the enemy, but, if the evidence in the case showed, for instance, that he or someone was overcome by heat and that he tore down the black-out to ventilate the room, the jury would certainly have to consider whether his act was done with intent to assist the enemy or with some other intent, so that, while he would be guilty of an offence against the black-out regulations, he would not be guilty of an offence of attempting to assist the enemy.

The Court considered that some confusion appeared to have arisen at the trial with regard to the question of intent, by so much being said on the question of duress. But, they said, before any question of duress arises, a jury must be satisfied that the prisoner had the intention which is laid in the indictment. Duress, they pointed out, is a matter of defence, and the onus of proving it is on the accused who raises it. But, where an intent is charged, it is for the prosecution to prove it, so the onus is the other way.

Another matter of importance in the case, but which did not seem to have been brought directly to the attention of the jury, was that different considerations may apply where the accused at the time when he did the acts was in subjection to an enemy power, and where he was not.

In discussing the summing-up of the learned trial Judge, Henn Collins, J., their Lordships drew attention to the fact that it did not contain anything like full enough direction as to the prisoner's defence. Their opinion on this important topic is of general interest, and may be useful to remember where an accused person is charged with committing an offence with some particular intent. They said :

> " The defence must be fully put to the jury, and we think they ought to have been reminded of various matters upon which the accused relied as negativing the intent. The jury may well have been left under the impression that, as they were told that a man must be taken to intend the natural consequences of his acts, the matters as to which he had given evidence were of no account."

SUMMARY OF RECENT JUDGMENTS.

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

JUDICIAL COMMITTEE. 1947. May 6, 12; June 26. LORD DU PARCQ, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON.

Contract — Formation — Mortgage — Evidence — Agreement by Mortgagee and Mortgagor for Reduction of Interest for Specified Term—Alleged tacit Continuance of Agreement by Parties—Evidence of Negotiations prior to Agreement and of the Actions of the Parties subsequent thereto—Whether Admissible in Order to Determine the Meaning and Effect of the Contract—Whether Questions of Fact only or Mixed Questions of Fact and Law involved.

By mortgage, dated July 2, 1927, S. mortgaged certain licensed premises to the appellant to secure the repayment of the principal sum of £20,000 with interest at 9 per cent. per annum, reducible to 7 per cent. on punctual payment. After May 10, 1932, however, 5.6 per cent. was the maximum rate of interest legally exigible under the provisions of the National Expenditure Adjustment Act, 1932. By a second mortgage, dated May 21, 1928, S. mortgaged the premises to the respondents to secure repayment of the principal sum of £4,000 with interest. In August, 1931, the respondents, after the mortgagor had defaulted under their mortgage, entered into possession, and they remained in possession and carried on the hotel business until the sale of the property by the Registrar under the provisions of the Land Transfer Act, 1915. This was done on the respondent's application after the commencement of the present action; and they purchased the property at the sale at a price which was insufficient to meet the aggregate amounts admittedly due under the first and second mortgages.

The respondents paid interest to the appellants at 4 per cent. per annum from July 1, 1932, to June 30, 1937, but the appellants conceded, without making any admission, that for the year July 1, 1932, to June 30, 1933, they would make no claim against the price of the property in the respondent's hands. They claimed, however, for the period July 1, 1933, to June 30, 1937, they were entitled to payment out of the price of the difference between the sum received by them from the respondents as interest and the sum representing interest at the rate of 5.6 per cent. per annum.

The Court of Appeal unanimously affirmed that part of a judgment of the learned Chief Justice in the Supreme Court which held that the appellants had accepted interest for the period July 1, 1933, to June 30, 1937, at the rate of 4 per cent. per annum in satisfaction of the interest due to them under their mortgage, and that the respondents were entitled to recover from the appellants the amount paid by them in excess of the amount payable at that rate. From that part of the judgment of the Court of Appeal, the appellants appealed to the Judicial Committee of the Privy Council.

The questions for decision were whether the appellants accepted the payments of interest at 4 per cent. under a binding agreement between the parties; and, if so, whether the agreement affected the appellants' right on a realization of the mortgaged property to claim payment of the interest at the mortgage rate, as reduced by the National Expenditure Adjustment Act, 1932, so far as not already paid.

Held, 1. That, in order to ascertain what the alleged agreement between the parties was, it was necessary to consider not merely what took place at a meeting between the representatives of the parties on December 7, 1932, as embodied in a letter written on December 19, 1932, by the respondents' solicitors to the appellants' manager, but also the correspondence between the parties which took place before the said meeting, to which correspondence due weight was not given by the Courts below.

A. and J. Inglis v. *John Buttery and Co.*, (1878) 3 App. Cas. 552; 5 R. (H.L.) 87, distinguished.

2. That the evidence of the subsequent actions of the parties upon which the Courts below had relied for the construction of the contract was inadmissible in order to determine the meaning and effect thereof.

3. That what was said at a meeting of representatives of parties to a contract was a pure question of fact; but whether what was said was said with contractual intent, whether there was consideration, and what was the effect of the agreement if there was one, were all at least in part questions of law.

Judgment of the Court of Appeal (October 28, 1941: not reported) reversed.

Counsel: *Gerald Upjohn*, K.C., and *M. Gravener Hewins*, for the appellants; *C. C. Henderson*, K.C., and *M. Smith*, for the respondents.

Solicitors: *Linklater and Paines*, London, agents for *Bell, Gully, McKenzie, and Co.*, Wellington, for the appellants; *Wray, Smith, and Co.*, London, agents for *Perry, Perry, and Pope*, Wellington, for the respondents.

COATES v. THOMAS AND ANOTHER.

SUPREME COURT. Christchurch. 1947. June 6, 9; July 7. FLEMING, J.

Family Protection—Widow's Application—Husband in New Zealand—Wife in England—Provisional Order made in England in 1939 for Maintenance of Wife not confirmed by New Zealand Magistrate on Ground of Wife's Adultery in 1918—Husband's Will, made in 1918, leaving whole Estate to his Sister—On Husband's Death in 1944, his Widow and Son applying for Provision out of Estate—Wife's Adultery in 1918 res judicata—*Whether such Adultery Disentitled her to Provision out of Estate—Family Protection Act, 1908, s. 33 (2).*

Notwithstanding that, on application by a widow for provision out of the estate of her late husband, her adultery in 1918 established in maintenance proceedings was held to be *res judicata*, and it was proved that, between that time and the husband's death in 1944, he had not contributed towards her maintenance or that of the surviving child of the marriage whom she had brought up, provision for her out of the estate was ordered, on the ground that a wise and just husband and father making a will just before his death would have taken into account what she had done for his son, what he had saved thereby, the state of her health, and the provision that he should have made for his son.

Bosch v. *Perpetual Trustee Co., Ltd.*, [1938] A.C. 463; [1938] 2 All E.R. 14, and the New Zealand cases there cited, and *Paxton* v. *Nicholson*, [1918] G.L.R. 393, referred to.

Counsel: *Brown*, for the plaintiff; *Thomas* and *Hay*, for the defendants; *Alpers*, for the applicant.

Solicitors: *Raymond, Stringer, Hamilton, and Donnelly*, Christchurch, for the plaintiff; *C. S. Thomas and Thompson*, Christchurch, for the defendants; *P. H. T. Alpers*, Christchurch, for the applicant.

PUBLIC TRUSTEE v. FERGUSON AND OTHERS.

SUPREME COURT. Christchurch. 1947. April 21; May 7. FLEMING, J.

Settlement—Deed of Settlement by Father—Trust to apply Income of Settled Fund during Settlor's Lifetime for Maintenance and Benefit of his Children at Discretion of Trustees—Trustees after Settlor's Death to Divide Capital as well as Income equally amongst such Children as should Survive Settlor and attain Twenty-one—Adoption by Other Persons of One of such Children after Date of Settlement—Assignment to Settlor by Daughter of her Interest in Trust Capital and Income—Direction in Writing by Settlor to Trustees to pay to Child so Adopted One-third of the Income during Settlor's Lifetime—Effect of such Adoption, Assignment, and Direction upon Respective Child's Right to Share Trust Fund and Income—Effect of Settlor's Direction on Discretion of the Trustees—Infants Act, 1908, s. 21 (2).

By deed dated September 18, 1919 the settlor appointed trustees and paid to them £1,000 upon trust to receive the income of that sum and of the investments representing it, and to apply the same during the lifetime of the settlor for the maintenance, benefit, advantage, and education of the children of the settlor by his late wife in such manner as the trustees should from time to time think fit, and either by payment to the guardian or guardians of those children or otherwise as the trustees from time to time thought proper; and after the death of the settlor, upon trust as to as well the capital as the

income of the trust fund and of its investments to divide the same equally amongst such of the children of the settlor by his late wife as should survive him and attain the age of twenty-one years and if more than one in equal shares. The Public Trustee administered this trust.

The settlor was married on April 7, 1915, and his wife died on December 30, 1918. There were three children only of the marriage, R.M.E., S.H.F., and W.G.F. (who died on March 4, 1944). The youngest child attained the age of twenty-one on June 19, 1939. On January 31, 1925, S.H.F. became by adoption the child of H.G.J. and M.A.J., and now bore the name of S.H.J.

On September 24, 1940, R.M.E. assigned to the settlor all her share and interest in the capital and income of the trust fund. On November 26, 1940, W.G.F. assigned to the settlor all his like share and interest.

On April 8, 1941, the settlor, by a writing signed by him, hereinafter called "the said authority," authorized and directed the trustee to pay one-third of the income from the trust fund to S.H.J., declaring such authority irrevocable during the lifetime of the said S.H.J.

On an originating summons for an order determining questions arising upon the interpretation of the deed of settlement,

Held, 1. That the subsequent adoption of S.H.F. (now J.) did not in any way affect his rights under the deed of settlement, as the rights conferred by it came into effect before his adoqtion.

In re Carter, Carter v. *Carter*, [1932] N.Z.L.R. 1077, referred to.

2. That, therefore, J. continued to be one of the class of children for whose maintenance, benefit, advantage, and education the income of the trust fund constituted by the deed of settlement was directed to be applied; and he was entitled (contingently upon his surviving the settlor) to participate in the distribution of the capital of the said trust fund.

3. That R.M.E. was still one of the class of children for whose maintenance, benefit, advantage, and education the income of the said trust fund was directed to be applied: and she was entitled (contingently upon her surviving the settlor) to participate in the distribution of the capital of the trust fund; but, by virtue of her assignment, the share of the capital and of interest accruing thereon after the settlor's death to time of payment must be paid to the legal personal representative of the settlor as assignee, or to any other person acquiring, by assignment or operation of law, through the settlor.

4. That the trustee of the settlement was not entitled to pay or apply for the benefit of W.G.F. any part of the income of the trust fund except such moneys or property (if any) as might be paid or delivered, or appropriated for payment or delivery, by the trustee to R.M.E., and not including indirect benefits to her of a nature not assignable.

In re Coleman, Henry v. *Strong*, (1888) 39 Ch.D. 443, applied.

In re Bullock, Good v. *Lickorish*, (1891) 64 L.T. 736, referred to.

4. That the said authority had no effect (except as an estoppel) and, being neither a deed nor a contract for valuable consideration, it could be revoked at any time.

Counsel: *K. M. Gresson*, for the plaintiff; *E. T. Layburn*, for the first defendant; *J. B. Williams*, for the second defendant; *A. L. Haslam*, for the third defendant.

Solicitors: *Public Trust Office Solicitor*, Christchurch, for the plaintiff; *E. T. Layburn*, Christchurch, for the first defendant; *Williams and Williams*, Christchurch, for the second defendant; *A. L. Haslam*, Christchurch, for the third defendant.

VERCOE v. LAMBTON ESTATES, LIMITED.

SUPREME COURT. Wellington. 1947. August 26, 27. BLAIR, J.

Landlord and Tenant—Assignment—Consent to Assignment not to be Arbitrarily withheld—Such Consent Unreasonably withheld—Lessee's Right to apply to Court for Declaration of his Right to Assign—Law Reform Act, 1936, s. 19.

Where a lease contains a term that "the lessee shall not assign the lease without the lessor's written consent, such consent, however, not to be arbitrarily withheld," and the lessee considers that such consent has been unreasonably withheld by the lessor, he is entitled to apply to the Court for a declaration of his right to assign; and, if his application succeeds, he will be entitled to the costs of obtaining it.

Counsel: *Shorland*, for the plaintiff; *A. J. Mazengarb*, for the defendant.

Solicitors: *Mellish and Morgan*, Wellington, for the plaintiff; *Mazengarb, Hay, and MacAlister*, Wellington, for the defendant.

DAVIES v. GLOVER.

SUPREME COURT. Invercargill. 1947. May 26, 27. KENNEDY, J.

Justices—Practice—Evidence—Magistrate reserving Decision on Objection that Case not Proved—Evidence given for Defendant that, if regarded, might complete Proof of Offence—Whether Magistrate can Disregard such Evidence.

In the case of an information determinable summarily, the rule that prevails in the trial of indictable offences applies—*viz.*, that, if the prisoner calls evidence and the missing elements of proof are supplied from his testimony, the Court is warranted in considering his evidence and in considering the case proved, notwithstanding the fact that at the close of the case for the prosecution there was no case to answer.

The position is analogous to the case of a civil action where a nonsuit has been moved and the trial goes on, and, in the case for the defendant, evidence is adduced which cures the defect in the plaintiff's evidence.

R. v. *Peddle*, (1907) 26 N.Z.L.R. 972, applied.

R. v. *Abraham George*, (1908) 25 T.L.R. 66, *R.* v. *Pearson*, (1908) 1 Cr.App.R. 77, *R.* v. *Fraser*, (1911) 7 Cr.App.R. 99, and *R.* v. *Power*, [1919] 1 K.B. 572, referred to.

R. v. *Joiner*, (1910) 4 Cr.App.R. 64, considered.

Counsel: *Mills*, for the appellant; *French*, for the respondent.

Solicitors: *Macalister Bros.*, Invercargill, for the appellant; *Prain and French*, Invercargill, for the respondent.

O'CONNOR v. DAVIES.

SUPREME COURT. Invercargill. 1947. May 23, 26. KENNEDY, J.

Food and Drugs—Sale—Power to Demand, Select, and take Samples—Onus of Proof of Sale—Constructive Sale of Sample for Analysis purposes to be treated as real Sale of Sample—"Did sell"—Sale of Food and Drugs Act, 1908, ss. 5 (1) (3), 7, 22 (2).

The effect of s. 22 (2) of the Sale of Food and Drugs Act, 1908, is that, once there is proof of the obtaining of a sample in manner provided by s. 5 of that statute, the provisions of s. 7 having been complied with, a sale of the sample is deemed to have occurred; and the onus is thrown upon the defendant of proving that the milk from which such sample was taken was not offered, exposed, or intended for sale for human consumption or use.

West v. *Lawry*, [1946] V.L.R. 304, applied.

Wieland v. *Butler Hogan*, (1904) 73 L.J.K.B. 513, referred to.

Counsel: *Smyth*, for the appellant; *Mills*, for the respondent.

Solicitors: *Russell, Meredith, and Smyth*, Invercargill, for the appellant; *Macalister Bros.*, Invercargill, for the respondent.

In re CHRISTIE (DECEASED), MARKHAM v. PUBLIC TRUSTEE.

SUPREME COURT. Wellington. 1947. March 20; August 15. CHRISTIE, J.

Will—Construction—Restraint on Anticipation—Married Granddaughtes of Testator entitled by one Clause in Will, on Attaining Twenty-reven, to One Half of Capital representing her Deceased Father's Share of Trust Estate—Subsequent Clause imposing Restraint on Anticipation on Property to which Daughter or Granddaughter of Testator became Entitled—Whether such Clause derogated from Rights conferred by Previous Clause.

A will contained, the following clauses for the disposition of the residue of a testator's estate:

"I declare that my trustees shall hold my trust estate subject to all payments disbursements and annuities hereinbefore provided and subject to the contingencies hereinafter mentioned and to the payment of the annuities and trusts for accumulation (if any) hereinafter provided for IN TRUST as if divided into as many equal shares as there shall be children me surviving regard being had to the provisions of cl. 14 hereof as to any child predeceasing me and leaving issue me surviving AND upon further trust (subject to the provisions of cl. 17 hereof) to pay the income of one such share or of so much thereof as shall not have been applied

or disposed of under the trusts and powers hereinafter vested in my trustees to each of my children so surviving during the life of such child and from and after the death of any such child to hold one (1) such share of my trust estate or so much thereof as shall not have been applied or disposed of as aforesaid in trust for such of the children of such child as shall survive their parent so dying and attain the age of twenty one years and if more than one in equal shares absolutely PROVIDED that if any grandchild of mine shall attain the age of twenty-one years before the expiration of twenty-one (21) years computed from the death of my child the parent of such grandchild then the vesting of the share of each such grandchild in my trust estate shall be postponed to the expiration of such term of twenty-one (21) years or until the attainment by such grandchild of the age of twenty-seven (27) years which shall first happen AND in the meantime the share of each such grandchild shall be held by my trustees UPON TRUST to pay the income thereof to him or her until the period of vesting arrives AND in the event of the death of any such grandchild before his or her share shall become vested as aforesaid my trustees shall hold the share of such grandchild in trust for the child or children of such grandchild living at his or her death if more than one in equal shares and if there be no such child or children then the share of such grandchild in my trust estate shall fall back into the share from which it immediately arose and be divisible accordingly."

By cl. 19 of the will, each of the children of the testator was entitled, in addition to the income derived from their respective shares, to demand payment of a capital sum therefrom, not exceeding £500 in any year.

Clause 17, by directions given to the trustees, in effect imposed restrictions on anticipation of income or of capital; these restrictions were applicable to all the beneficiaries under the will (whether male or female, and without regard to their marital status).

Clause 18 was as follows:

"I expressly declare that any property to which any daughter or granddaughter of mine shall become entitled under this my will shall be held by her for her sole and separate use free from the control or interference and not subject to the debts contracts or engagements of any husband to whom she shall be married and that she shall not have power to anticipate the same."

On originating summons for the determination of the question whether a married granddaughter of the testator was entitled to require the trustee of his will to pay or transfer to her the capital of her share, or whether, in the alternative, the restraint on anticipation imposed by cl. 18 of the will operates, during coverture, so as to limit her rights to the receipt only of the income from time to time derived from her share,

Held, That, on the principle that questions involving the interpretation of wills are to be answered in accordance with the intention of the testator as that intention is expressed in or declared by the words that he has used, the restraint on anticipation set out in cl. 18 of the will did not apply to the share of capital given by cl. 12 of the will to the married granddaughter; and, further, that she was entitled to call upon the trustee of the will to pay or transfer to her the capital of her share.

Counsel: *Sim*, K.C., and *Brown*, for the plaintiff; *Tripe*, for the defendant.

Solicitors: *Public Trust Office Solicitor*, Wellington, for the plaintiff; *Duncan, Cotterill, and Co.*, Christchurch, for the defendant.

PAGE v. AUCKLAND TRANSPORT BOARD.

COMPENSATION COURT. Auckland. 1947. May 8; August 8. ONGLEY, J.

Workers' Compensation—Assessment—Lump-sum Compensation—Non-Schedule Permanent and Partially-incapacitating Injury—Suitable Employment provided by Employer at Lower Rate than earned before Accident—Basis of Assessment—Workers' Compensation Act, 1922, s. 5 (6)—Workers' Compensation Amendment Act, 1936, s. 6—Workers' Compensation Amendment Act, 1943, s. 3 (1).

Where a worker suffers an injury that is permanent and partially incapacitates him, but is not a Schedule injury, and his employer provides him with suitable employment at a lower wage rate than he was earning before the accident, he is not entitled to a lump sum calculated either on a Schedule injury basis, or, alternatively, to a lump sum calculated on the basis that he is a light-work man able to earn less than the wage the employer is paying him for the employment provided.

The Court cannot depart from the basis provided by s. 5 (6) of the Workers' Compensation Act, 1922, (as amended by s. 6 of the Workers' Compensation Amendment Act, 1936, and further amended by s. 3 (1) of the Workers' Compensation Amendment Act, 1943), for weekly payments while suitable work is provided for the worker by the employer, unless both parties ask for it or some unusual special circumstances justify it. Any lump-sum payment, in circumstances which in the present case were held not to be special or unusual, must be on the basis provided by that subsection.

Counsel: *F. H. Haigh*, for the plaintiff; *A. K. North*, K.C., for the defendant.

Solicitors: *F. H. Haigh*, Auckland, for the plaintiff; *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the defendant.

GEAR AND ANOTHER v. THE KING.

COMPENSATION COURT. Wellington. 1946. September 9, 12, 30. 1947. August 6. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Cerebral Aneurysm—Second Rupture while at Work—Blow on Head by Piece of Wooden Wedge—Haemorrhage not occurring until about Twenty-three Hours after Blow—Haemorrhage not precipitated by Blow—Workers' Compensation Act, 1922, s. 3.

A rupture of a congenital cerebral aneurysm occurs in the course of normal activity, and trauma is not a usual cause of such rupture. Of those who survive an initial haemorrhage, about 50 per cent. have a second rupture, which is fatal in a very high proportion of the cases, and usually occurs within one month of the first haemorrhage. Trauma, in order to cause a rupture, must be severe, and haemorrhage should ensue immediately after the blow.

Therefore, where a worker who had suffered a rupture of cerebral aneurysm on July 22, which healed quickly, enabling him to go on working and playing football, was struck on the forehead by a piece of a wooden wedge on the following August 27, haemorrhage did not occur for about twenty-three hours later.

Held, adopting the report of the medical referee to whom the matter was submitted for report under s. 58 (2) of the Workers' Compensation Act, 1922, That the blow from the wedge, in the circumstances as disclosed, must be regarded as a minor trauma, insufficient to cause any movement of the brain, and therefore could not have torn the adhesions to the brain or ruptured the aneurysm itself, and that the haemorrhage from the aneurysm was not precipitated by the blow on the head on August 27.

Counsel: *W. D. Taylor*, for the suppliants; *Kitchingham*, for the Crown.

Solicitors: *Joyce and Taylor* (Greymouth), for the suppliants; *F. A. Kitchingham* (Greymouth), for the Crown.

O'NEILL v. THE KING.

COMPENSATION COURT. Westport. 1946. September 10, 12, 30. 1947. July 2. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the course of the Employment—Coronary Thrombosis—Coronary Occlusion—Worker with Diseased Coronary Arteries—Collapse while at Work—Onus of Proof on Worker of Strenuous or Unusual Effort—Workers' Compensation Act, 1922, s. 3.

Assuming the adoption of the theory of the school of thought (but without deciding in its favour) that strenuous or unusual effort can cause coronary occlusion, where it has been proved that the worker's coronary arteries have become diseased and degenerated at the time of, and for some time before, his collapse, even although the heart attack took place while he was at work, the onus of proof lies on the worker to prove that there was, at or immediately before the time of his collapse, some strenuous or unusual effort on his part which contributed in a material degree to the onset of the thrombosis, or which was a more probable cause of such onset than the disease.

Tansey v. *Renown Collieries, Ltd.*, [1946] N.Z.L.R. 738, applied.

Rowbottom v. *Shaw, Savill, and Albion Co., Ltd.*, [1946] N.Z.L.R. 86, referred to.

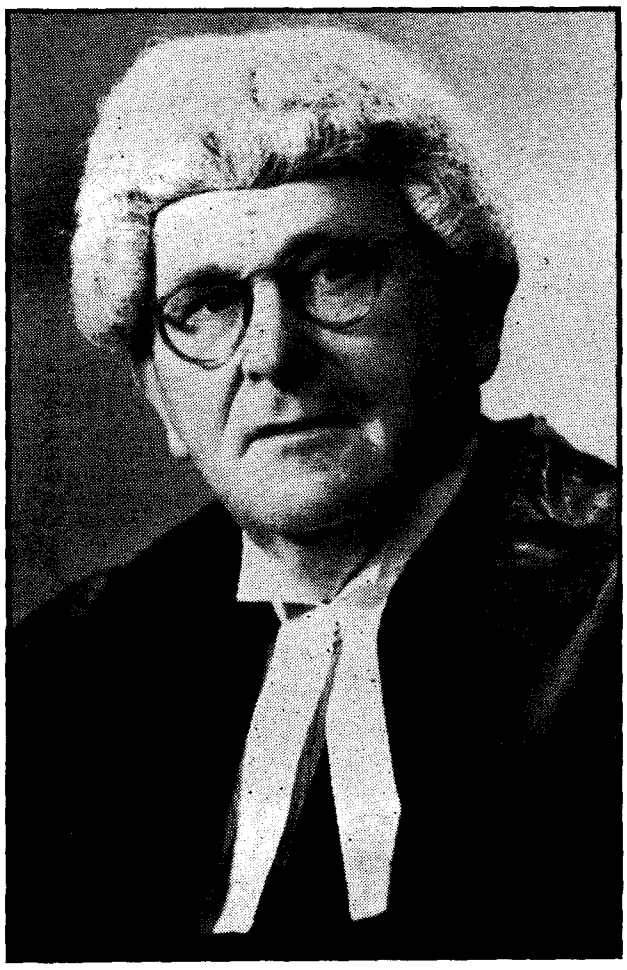
Counsel: *W. D. Taylor*, for the suppliant; *Kitchingham*, for the Crown.

Solicitors: *Joyce and Taylor*, Greymouth, for the suppliant; *F. A. Kitchingham*, Greymouth, for the Crown.

MR. JUSTICE GRESSON.

The latest Appointment to the Bench.

Ninety years have elapsed since Mr. Justice Henry Barnes Gresson was appointed the first Judge in the Province of Canterbury. On October 2, 1947, his grandson, Mr. Kenneth Macfarlane Gresson, took the oaths of office as a member of the Supreme Court. The new Judge, whose father, Mr. John Beattie Gresson, was in practice in Christchurch until his death in 1891, was born in the latter year. After attending Wanganui Collegiate School from 1903–1911, and rising to be Head Prefect under that distinguished Headmaster, the late Mr. Walter Empson, Mr. Gresson entered Canterbury University College, where he graduated with the degree of Bachelor of Laws.



Spencer Digby, Photo.

Mr. Justice Gresson.

He went overseas in the first World War with the Main Body as a Captain in the Canterbury Infantry Battalion. He was severely wounded on Gallipoli, and invalided home with the rank of Major. Until the end of the War he was military representative on the Canterbury Military Service Board.

He entered practice in Christchurch in 1918, being first in partnership with Mr. C. E. Salter and later a member of the firm of Messrs. Papprill, Salter, and Gresson. Over the past fifteen years he has been practising on his own account, specializing on the Chancery side, particularly in Trust, Administration, and Company work. During that period he has figured prominently as counsel in many equity suits in the Supreme Court and in the Court of Appeal. A notable example is *In re Amelia Bullock–Webster (Deceased)*, [1936] N.Z.L.R. 814, where his exhaustive memorandum on the history of charitable trusts in the Dominion was accepted *in toto* by the Court, and virtually embodied in the judgment.

In the year 1936, after having for a long period been a lecturer in law at Canterbury University College, he was appointed Dean of the Faculty of Law, and held this office continuously until his elevation to the Bench. With characteristic thoroughness, he dispatched the growing volume of administrative detail which devolved upon him as head of the Faculty. Despite the insistent calls of a busy practice, he was the ever-watchful guardian of his assistant lecturers and of his students, and his appointment to the Bench will be hailed with acclamation by those of them who have learnt in practice the value of the practical thoroughness and attention to detail given to their preparation for examinations by their former lecturer.

The new Judge served for many years on the council of the Canterbury District Law Society, attaining the office of President in the year 1937. He was at one time an examiner in law for the University of New Zealand, and was a member of the Council of Legal Education. During the recent War, he was Aliens Authority for Christchurch District.

Three centuries ago, Sir Matthew Hale, C.J., remarked: "The amending and alteration of the lawes is a choice and tender business." In the delicate enterprise for which the Law Revision Committee was set up by the Attorney-General in 1936, Mr. Gresson was a foundation member, and served until his appointment to the Bench. It can have been given to few practitioners to share actively in so many diverse contributions to our statute law. While having due regard for legal precedent, Mr. Gresson has never been partial to outworn pedantry. Hence Law Reform was a cause which he espoused with all his tireless energy. Few were as well equipped to innovate without disruption. None will welcome his new appointment more than his colleagues on the Law Revision Committee. As their years of service have mounted up, so has increased their appreciation of his worth as a lawyer and his excellent sense of judgment.

Outside his profession, Mr. Gresson's chief activities have been in connection with the affairs of the Christchurch Diocese of the Church of England. In that field he has served in almost every administrative capacity, becoming Chancellor in the year 1943. He

has also been a member of the General Synod for New Zealand.

In 1918, Mr. Gresson married Athole, daughter of Mr. T. H. Bruce, Christchurch. They have two children, a married daughter living in Wellington, and a son who, after service in the Pacific as a Sub-Lieutenant in the Royal New Zealand Navy, is now at the Royal Naval College, Greenwich, England.

In the more mobile atmosphere of the capital, Mr. Gresson may at times think wistfully of the peaceful beauty of Christchurch in September, and of tennis parties on his court at Fendalton. His professional brethren in Canterbury will long remember him as one who, with solid preparation and in cogent argument, ever strove mightily in the cause of his clients, and who never flinched in fearless assertion of the independence of the Bar. He will, with his accustomed industry and energy, bring to the service of New Zealand in his new capacity fully-developed qualities of legal knowledge, sound judgment, independence of thought, and human understanding.

LAND SALES ACT.

Can Vendors or Purchasers Withdraw from Contracts?

By WARRINGTON TAYLOR.

I.

The recent decision of Mr. A. A. McLachlan, S.M., in *Ralston* v. *Heremia*, (1947) 5 M.C.D. 47, following that of Mr. A. M. Goulding, S.M., in *Brunskill* v. *Tringham*, (1945) 4 M.C.D. 140, leaves parties to agreements for sale of land in an extremely precarious and unsatisfactory position. The point actually to be decided in each case was that, as no Land Sales consent or no unconditional consent had in fact been obtained, the contract was unenforceable and the vendor had therefore no legal right under the contract to resist the purchaser's claim for refund of deposit.

However, each of the judgments went much further and laid down a general principle to the effect that a contract for sale of land is entirely conditional, and that, until the consent of the Land Sales Committee is filed in the Court, *either party may withdraw from the transaction.*

This conclusion in both cases was based primarily on s. 45 of the Servicemen's Settlement and Land Sales Act, 1943, which provides that "the transaction shall not have any effect unless the Court consents to it," and on similar provisions in s. 46. These sections certainly make it clear that, *until the consent of the Court is granted*, neither party can sue on or enforce the contract, nor can the vendor set up the contract as a defence. But does the Act really go so far as to provide that the contract is "entirely conditional," and that either party may withdraw even without making application for consent or without waiting for the decision of the Land Sales Court if an application is already made? In other words, have vendors or purchasers no redress if the other party decides to withdraw or back out before the Court's consent is granted?

With all respect to the learned Magistrates, it seems to me that the parties have a redress if proper steps are taken.

The purpose of Part III of the Act is to control prices. This is done by requiring transactions to be submitted to the Land Sales Court (or Committees) for consent. To ensure that transactions are so submitted and that the document in question cannot be acted on until consent has been obtained, the transactions are declared to be unlawful or of no effect unless consent is so obtained: see ss. 45 and 46. The obtaining of consent is therefore made a statutory condition precedent to every such transaction.

But the purpose and effect of the above are only to ensure the obtaining of consent, and are surely not intended to alter and undermine the whole binding effect of contracts for the sale of land in the Dominion, for such is really the result of the decisions in *Brunskill's* and *Ralston's* cases, which make the contract not only "entirely conditional" on the Court's consent, but also "entirely conditional" on the whim of vendor or purchaser, either of whom may for any extraneous reason change his mind and withdraw from the contract without taking the proper steps to see whether consent would be granted, even although the agreement may be one which the Committee would properly have consented to, and one which, therefore, in due course would become a binding agreement on the granting of consent. There is no express provision in the Act giving either party a right to withdraw; and I cannot see anything in the Act to indicate that such was the intention of the Legislature.

I think the effect of the statutory condition precedent is the same as a private condition precedent inserted in a contract of sale requiring consent by some third party as a condition of its validity, such as, for example, a sale of leasehold "subject to consent of the Dunedin City Corporation as landlord." The effect of such a contract is clearly stated in *Williams on Vendor and Purchaser*, 3rd Ed. 981:

> In cases like these, the vendor does not warrant the fulfilment of the condition but he is bound so far as the performance rests with himself honestly to use his best endeavours to procure fulfilment and will be liable to substantial damages for a breach of this duty.

The authority cited by *Williams* is *Day* v. *Singleton*, [1899] 2 Ch. 320.

Further light is thrown on the position by considering the provisions of the Native Land legislation, regarding consent to alienations. Section 270 (1) of the Native Land Act, 1931, provides that:

> No alienation of Native land by a Native shall have any force or effect until and unless it has been confirmed by the Native Land Court.

Similar provisions were contained in earlier Native Land Acts. It will be seen that this wording is almost identical with s. 45 of the Servicemen's Settlement and Land Sales Act, 1943.

In *Wilson* v. *Herries*, (1913) 33 N.Z.L.R. 417, it was held that, until such confirmation by the Native Land Court had been granted, the document had no force or effect, and could not be the basis of any action for damages, but, notwithstanding this, the Court of Appeal further held (at p. 423) that " every such instrument creates an inchoate right, which becomes perfect upon confirmation thereof." The Court pointed out that the Native Land Act gave either party the right to apply for confirmation, and that the purchaser in particular was entitled to have confirmation granted if he could satisfy the Board that the requirements of the Act had been complied with. (Similarly under the Land Sales Act, either party may apply, and the applicant is *entitled* to consent on satisfying the Committee that the Act is complied with : see decision of Land Sales Court, *No. 54.—H. to X.*) The judgment in *Wilson* v. *Herries* continues, at p. 423 : " Until confirmed such instruments have no force or effect as alienations, but this in no way interferes with the rights under s. 220 of those who claim under such instruments." (Section 220 contained the provisions under which the purchaser had the right to have confirmation granted.)

In the same judgment, at p. 427, the Court makes a statement to the effect that the purchaser was entitled to proceed with her application to the Maori Land Board for confirmation of her transfer, and that, if she could satisfy the Board that she was entitled to a confirmation order, it would be the duty of the Board to grant such order notwithstanding other dealings by the Native owner with the land in question. The Court added that, if the plaintiff could obtain the order confirming her transfer, the difficulties of action would be removed from her way, but, unless and until she could obtain such order, no action was maintainable by her.

Under s. 90 of the Land Act, 1924, Crown leases cannot be assigned without the consent of the Board or the Minister. In *Munro* v. *Pedersen*, [1921] N.Z.L.R. 115, Salmond, J., considered the obligations of the parties regarding the obtaining of such consent. He held that, if a contract was made " subject to the Board's consent," then the vendor's *duty* is to do his best to obtain that consent, and he refers to *Lehmann* v. *McArthur*, (1868) L.R. 3 Ch. 496, as authority.

I can find no case either under the Native Land Acts or the Land Acts indicating that the vendor could refrain from applying for consent or withdraw his application, and thereby—at his option and with impunity—render the contract finally null and unenforceable.

It seems to me that the above reasoning applies irresistibly to the Land Sales Act also, and that it enables a full and liberal interpretation to be given to the restrictions in ss. 45 and 46 and yet at the same time restores to contracts of sale their original and proper binding force, subject only to the granting of consent in due course but not subject to the whim of a changeable vendor or purchaser.

The above conclusion is confirmed by the fact that there are two methods under the Land Sales Act in which a sale may be approved. Under s. 44, combined with s. 48 (1), the parties may obtain consent in advance to a " proposed " transaction. In this case, of course, there is no binding contract at all between the parties unless both remain willing to carry the proposal into force by signing later a binding contract.

The second method is under s. 45 combined with s. 48 (2), where the parties sign at once a final and, I consider, binding contract, but make it " subject to the consent of the Court."

Under the first method, only the proposed vendor may apply, but, under the second method, either vendor or purchaser may apply for consent. If, as decided by the two Magistrates, a contract signed " subject to consent " has no more binding force than a proposed sale, why should the Act give these two different methods, and, under the second method entitle either party to apply for consent ? I think the provisions clearly indicate that, although the agreement has no force and could not be sued on or acted on until consented to, it confers an inchoate right on both parties and involves an implied obligation on both to have it properly submitted for consent and given an opportunity of becoming a binding agreement.

It is usual for the vendor to apply for consent. The purchaser normally relies on this being done and refrains from lodging an application. The statutory month may then elapse, and, if the vendor could withdraw, the purchaser's rights are gone, as it is then too late for him to apply in his own name. Under the Family Protection Act, 1908, and certain other statutes, an application when lodged enures for the benefit of all parties and cannot be withdrawn at the will of one, and I think the same should apply to an application under the Land Sales Act.

This is actually the procedure adopted by the Land Sales Committee in Dunedin. (I am not aware of the procedure in other centres.) Once an application is lodged, the Committee will not allow it to be withdrawn without the consent of both parties. Further, if either party (say, for example, the vendor) refuses or neglects to file the appropriate application or statement or declaration, the Committee will accept an application by the other party (in this case, the purchaser) under s. 48 (2) and will by subpoena and other steps compel the vendor either to file his statement or to attend at the hearing and supply the necessary information orally on oath. This means that the Committee can therefore hear, and, if necessary, grant consent to an application lodged by either party despite the unwillingness of the other party to proceed.

Similarly, the Land Sales Court will not allow an appeal to be withdrawn without 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 : *In re A Proposed Sale, Darragh to Kirkby*, [1947] N.Z.L.R. 683 ; *ante*, p. 268.

If the Dunedin procedure is applicable in other centres, it means that either party to a sale can put himself in a position to enforce the contract in the civil Courts by first obtaining the consent under the Act, if the price and other conditions are in order, despite the other party's unwillingness or refusal. Similarly, a vendor if sued by the purchaser, as in *Ralston* v. *Heremia*, for

return of the deposit before a Land Sales application was lodged (or completed) could immediately lodge his application and ask the Magistrates' Court for an adjournment of the summons on the grounds that a preliminary matter was under adjudication before another tribunal. Then, if he obtained the Land Sales consent, he would have an enforceable contract and could legally resist the purchaser's summons.

At the moment, the decisions in *Brunskill's* and *Ralston's* cases leave vendors and purchasers in a very unsatisfactory position; and it seems to me highly desirable that there should be an amendment of the Act to make it clear that, subject only to the granting of the Land Sales consent, contracts of sale still are binding obligations from which neither party may withdraw without proper justification.

Since the above article was written, I have seen the decision of the Land Sales Court in *In re A Proposed Sale, Brown to Addison Brothers*, [1947] N.Z.L.R. 688. This decision goes a long way towards removing the difficulty, and I shall refer to it further in a later article.

REFRESHER COURSE 8.

THE LAW OF CONTRACT.

Developments since 1939.

By PROFESSOR J. WILLIAMS.

(*Concluded from p. 254.*)

BREACH.

Generally.—The law as to the consequences which may flow from breach of contract is set out very fully in the judgment of Jordan, C.J., in *Tramways Advertising Pty., Ltd.* v. *Luna Park (N.S.W.), Ltd.*, (1938) 38 N.S.W. S.R. (1938) 632, 641 *et seq.*; reversed on other grounds, (1938) 61 C.L.R. 286.

In *Southland Investments, Ltd.* v. *Public Trustee*, [1943] N.Z.L.R. 580, may be found valuable discussions of such matters as essential breach, specific performance, compensation, repudiation, and return of deposit, in relation to a contract for the sale of land. The Court of Appeal decided the case by applying the principle that a purchaser of land may rescind for essential breach if the property to which the vendor is able and willing to make title is not substantially in accordance with the contractual description of it. The case was one of deficiency in area, and the Court held that the purchaser had rightfully rescinded on this principle, and was entitled to the return of his deposit. An interesting point was taken by Smith, J., at p. 629. The learned Judge suggested that there might be cases in which a vendor might fall so far short of being able to perform his contract as to fail in a suit for specific performance even on the terms of allowing compensation, and yet the deficiency might not be such as to entitle the purchaser to rescind at common law. In that event, the purchaser would not be entitled to the return of his deposit unless there was a provision in the contract entitling him to it in these circumstances: *Cf. Salmond and Williams on Contract*, 604n.

DAMAGES.

In *Sandford* v. *Dairy Supplies, Ltd.*, [1941] N.Z.L.R. 141, there was an agreement for the conditional sale of a chattel, the property not to pass until all instalments of the purchase-price had been paid. The contract contained a clause under which, on default by the buyer, the total amount outstanding should become immediately due and payable, and might be sued for by the seller. The buyer refused to accept delivery of the chattel and repudiated the contract. The seller sued for the price. Fair, J., held (i) that the property in the chattel had not passed to the buyer, and therefore (ii) that the seller was not entitled to recover the price, but only damages under s. 51 of the Sale of Goods Act, 1908. One might venture the criticism of this decision that it looks uncommonly like a party being allowed to take advantage of his own wrong.

Under the rule in *Bain* v. *Fothergill*, (1873) L.R. 7 H.L. 158, a purchaser of land, who lawfully rescinds the contract because of a defect in the vendor's title which the vendor has done his best, though unsuccessfully, to remove, is (unless the contract expressly provides otherwise) not entitled to damages for the loss of his bargain, but merely to the return of his deposit and instalments of purchase-money (if any), together with damages limited to interest thereon and his expenses of investigating the title. The question has been raised from time to time whether this rule applies in New Zealand. Sir Michael Myers, C.J., in *Staples* v. *Lomas*, [1944] N.Z.L.R. 150, held that, as a Judge of first instance, he should follow a decision of Cooper, J., in *Fleming* v. *Munro*, (1908) 27 N.Z.L.R. 796, that the rule did apply here. The Chief Justice decided that, where a party had agreed to sell land with vacant possession, but found himself unable to give vacant possession because a tenant took advantage of the Fair Rents Act, 1936, this constituted a defect of title, and, as the vendor had done his best to remove the defect, his liability was limited by the *Bain* v. *Fothergill* principle.

Hardwick v. *Lincoln*, [1946] N.Z.L.R. 309, is a decision as to the measure of damages for breach of a building contract where the owner has entered into occupation of the defective building before making his claim on the builder.

Rescission where Injured Party has had Part Performance.—It is occasionally said that the mere fact that a party has received some part performance from the defaulting party excludes the remedy of rescission for breach. *Hunt* v. *Silk*, (1804) 5 East 449; 102 E.R. 1142, is sometimes cited for this proposition, but it would seem that this case is really based on waiver of the right to rescind by the acceptance of further performance by the injured party at a time when he knew

of the breach. *Hunt* v. *Silk* is discussed and this view of it supported by Lord Wright in *Spence* v. *Crawford*, [1939] 3 All E.R. 271, 290.

Rescission and Damages.—There is no real doubt that a person may both rescind a contract for breach and (unless the contract otherwise provides) recover damages: *Harold Wood Brick Co., Ltd.* v. *Ferris*, [1935] 1 K.B. 613, 615; [1935] 2 K.B. 198. It appears, however, that it was (and apparently still is) the practice in the Chancery Division in England not to put into one order a clause rescinding a contract and another order providing for the assessment of damages in respect of the breach which was the ground of rescission, and this practice has sometimes led to wrong conclusions being drawn as to the substantive law. The practice in question was applied quite recently by Romer, J., in *Barber* v. *Wolfe*, [1945] 1 All E.R. 399.

Defaulting Purchaser Recovering back Money Paid, where Other Party Rescinds for Breach.—This was allowed by Stable, J., in *Dies* v. *British and International Mining and Finance Corporation, Ltd.*, [1939] 1 K.B. 724. A similar decision had been given some years before by the High Court in *McDonald* v. *Dennys Lascelles, Ltd.*, (1933) 48 C.L.R. 457.

Specific Performance.—Specific performance is not generally granted of a contract to build, repair, or maintain works or buildings. To this general rule there is an exception where the works are precisely defined, the plaintiff has a substantial interest in the performance of the contract of such a nature as cannot be adequately met by an award of damages, and the land on which the works are to be erected is in the possession of the defendant, or the defendant otherwise than in virtue of possession of the land has it in his power to erect the works.

The exception is illustrated by *Carpenters Estates, Ltd.* v. *Davies*, [1940] Ch. 160. There a vendor who sold certain land to purchasers for building development retained other land adjoining it, and covenanted to make certain roads and lay certain mains, sewers, and drains on the land retained. The purchasers sought specific performance of this covenant, which was granted by Farwell, J., on the principle above stated. As to this case, see F. Officer, *Specific Performance of Building Covenants*, in *14 Australian Law Journal*, 388.

Specific performance with compensation.—*Smith* v. *Young*, [1941] N.Z.L.R. 147, was a purchaser's suit for specific performance with compensation for a substantial deficiency of area. The contract provided that part of the price should be paid in cash, part was to be raised by the purchaser on first mortgage, and the balance was to be secured by way of second mortgage to the vendor. It was held that the abatement in the price should be spread proportionately over these three items.

Void or Voidable.

In general, a contract which is expressed to become void on the failure of a condition to be fulfilled by one party is to be regarded as becoming not void *ipso facto* on the failure of the condition, but merely voidable at the election of the other party. The defaulting party is not himself allowed to take advantage of his own default: *New Zealand Shipping Co., Ltd.* v. *Société des Ateliers &c.*, [1919] A.C. 1. This principle was recently applied by the Queensland Full Court in *Smith* v. *Wirth* (*No. 2*), [1945] Q.St.R. 59.

Effect of Discharge for Anticipatory Breach on Arbitration Clause.

In *Heyman* v. *Darwins, Ltd.*, [1942] A.C. 356, the House of Lords considered the vexed question of the availability of an arbitration clause in a contract which had been discharged for anticipatory breach by one party accepting the repudiation of the other. The effect of the decision may be given in a sentence or two from the speech of Viscount Simon, L.C.: "... I do not see how this claim, however expressed, ... can be regarded otherwise than as involving a dispute 'in respect of the agreement' and in respect of something arising out of it. The fallacy of the other view arises from supposing that, if the respondents have so acted as to refuse further performance of the agreement, this amounts to saying that they deny that the agreement ever existed. If the respondents were denying that the agreement had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains; but that is not the position they take up. They admit the contract, and deny that they have repudiated it. Whether they have, or have not, is one of the disputes arising out of the agreement" (*ibid.*, 362). See also *Larratt* v. *Bankers and Traders Insurance Co., Ltd.*, (1941) 41 N.S.W. S.R. 215, 229.

Very great doubt was thrown in the House of Lords on the decision of the Privy Council in *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.*, [1926] A.C. 497, that the discharge of a contract by frustration rendered an arbitration clause no longer available, so that the question of frustration or no frustration could not be arbitrated under such a clause, no matter how ample its terms.

LAND AND INCOME TAX PRACTICE.

Certificates of Taxes Outstanding as at Date of Death.—Where returns were made on an earnings basis by a deceased taxpayer, the trustee should make the returns to date of death on an earnings basis. This applies in general to business profits, including farming profits. Although farmers are, for convenience, permitted to return dairy bonus payments and wool retention moneys in the year they are received, such dairy bonus payments and wool retention moneys payable in respect of produce supplied by the deceased taxpayer in his lifetime must, in accordance with normal practice, be included in the return to date of death, although they may be received by the trustee after the death of the farmer. The tax payable in respect of such dairy bonus payments and wool retention moneys will be included in the certificate as to tax outstanding at the date of death. A trustee should not return dairy bonus payments or wool retention moneys as accrued income derived by him after the death of the farmer.

When returns are made on a receipts basis by a deceased taxpayer, the trustees should make the returns to date of death on a receipt basis. Any income accrued to date of death and received by the trustees after the date of death will be assessed to the trustee, and will not be included in the certificate of tax owing by the deceased taxpayer at the date of death.

Royalties paid to Authors.—Royalties paid to authors are payments made for the right to publish, and are not fees for services rendered. Such payments constitute income other than salary or wages, and are, therefore, not subject to deduction of Social Security charge at the source.

LAND SALES COURT

SUMMARY OF JUDGMENTS.

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

No. 107.—A. TO Y.

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

(*Concluded from p. 226.*)

" The contention that it was necessary for the Committee to adjudicate upon the respective claims of C. and R., and competent for it to prefer one to the other, or to disallow the claims of both, was based by Mr. *Wills* for the appellant Y., upon that portion of s. 11 (*b*) which refers to 'facilitating or ensuring the successful settlement of a discharged serviceman on any adjoining or neighbouring farm land.' Mr. *Wills* contended that the Committee must be in a position to allocate the land to a particular discharged serviceman already established on adjoining or neighbouring land. It was admitted that C. and R. were partially settled discharged servicemen and that either of them would benefit by the addition of A.'s land to his own. Mr. *Wills* claimed, however, that for certain reasons it would be inequitable for C. to be given the land in preference to Y. He also contended that R.'s present property was too far distant from A.'s land to be described as adjoining or neighbouring land.

" The duty of the Crown, if it desires to acquire land under s. 11, is to satisfy the Committee that the land proposed to be taken will facilitate or ensure the successful settlement of some discharged serviceman settled or proposing to settle on adjoining or neighbouring farm land. We do not think it is necessary for the Crown to nominate a particular serviceman, or that it is necessary for a serviceman to be already settled on the adjoining or neighbouring land which is in contemplation. The sole matter on which the Committee must be satisfied is that the settlement of a serviceman will in due course be facilitated or ensured by the amalgamation of the land under consideration with other adjoining or neighbouring land owned or to be acquired by a discharged serviceman, or which the Crown has acquired or intends to acquire for rehabilitation purposes.

" In the present case, the Crown indicated its desire to acquire A.'s land for the purpose of allocating it to one or other of two discharged servicemen settled on what it claimed to be neighbouring land. Evidence that A.'s land could with advantage be added to the respective holdings either of C. or of R. was tendered by the Property Supervisor of the State Advances Corporation acting on behalf of the Crown in connection with the settlement of servicemen. There was, therefore, evidence on which the Committee was entitled to find that the land might be utilized for facilitating or ensuring the settlement of a serviceman in accordance with s. 11 (*b*). Once the suitability of the land for the settlement of a discharged serviceman has been established, the Act gives the Crown an absolute right to take the land in preference to a civilian purchaser. Evidence of hardship to the purchaser was, therefore, irrelevant.

" Evidence of the respective circumstances of the two suggested servicemen was also irrelevant, except in so far as it might have a bearing upon the question whether A.'s land was in fact suitable to be amalgamated with the lands held by them respectively.

" In these circumstances the only objections which could properly be made to the proposed acquisition of the land by the Crown were objections relating to the suitability of the land to be utilized for one or other of the purposes proposed by the Crown. Of the objections raised by Mr. *Wills*, for the purchaser, only two appear to fall within that category. The first, as already mentioned, was that R.'s land was too far distant from A.'s land to be classed as neighbouring land. ' Neighbouring ' is a relative term, which, in our view, should not be given an unduly restricted meaning in cases where two pieces of land, though situated some miles distant from each other, can conveniently and economically be farmed together. We agree with the Committee that R.'s land may properly be classed, for the purpose of this application, as neighbouring land. As no other objection was raised affecting R. or his land, the Crown must be held to have established its right to acquire the property under s. 11 above quoted.

" It therefore becomes unnecessary to enquire further into the suitability of the land for amalgamation with C.'s land. We have used the word ' unnecessary ' advisedly because we are satisfied that, through a series of misunderstandings, the Crown's original proposal to add the land to C.'s land was not adequately presented to the Committee, and that, in fairness to C., it should be said that upon a fuller investigation the Committee might have reached a different conclusion as to the relative claims of R. and C. to be settled on A.'s land. It is unnecessary, however, for us to refer this aspect of the matter back to the Committee for further inquiry, as neither the Committee nor the Court has jurisdiction to bind the Crown as to the ultimate disposition of the land. For the same reason, no good purpose will be served by further considering the second objection raised by Mr. *Wills*, which, while relevant if the Crown had based its case solely on the proposal to take the land for C., cannot avail now that the Crown's right to acquire the land has been otherwise established.

" To sum up, we are satisfied that the Crown is entitled, should it so desire, to acquire this property under s. 11 (*b*) of the Act of 1945 to facilitate the settlement of a discharged serviceman, but that the ultimate allocation of the property to a particular discharged serviceman is the right and the responsibility of the Crown alone.

" It follows that, if the Crown decides to take the land, both C. and R. are entitled to apply for the land through the appropriate channels without being prejudiced by these proceedings or by any preference expressed by the Committee. On the other hand, it is competent for the purchaser to make representations to the Minister in favour of his being allowed to retain the land.

" For the foregoing reasons, the Committee's order is discharged and the following order is made in substitution therefor :

> " The basic value is fixed at £950 and the land is found to be suitable, in terms of s. 11 of the Amending Act of 1945 for the purpose of facilitating the settlement of a discharged serviceman on neighbouring farm land."

No. 108.—B. TO R.

Lease—Residence, Bake-house, and Shops—Basic Rent or Fair Rent—Relevant Matters in Assessing Value of Rent—Proposed Rent in Excess of Basic Rent—No Qualification as to Fixing of Fair Rent—Court's Condition that Fair Rent be fixed before Consent Granted—General Direction accordingly—Servicemen's Settlement and Land Sales Act, 1943, ss. 10 (2), 14, 26, 43 (1), 55.

Application relating to a lease for thirteen years of a residence, bake-house, and shop at Putaruru, at a rental of £329 per annum. The Hamilton Land Sales Committee granted consent to a lease subject to the rent being reduced to £202 10s. per annum. From this order the lessor appealed.

The Court (per *Archer*, J.) said: "The application discloses that the premises have been let since 1934 at an annual rental of £208. It is clear that the premises are subject to the Fair Rents Act, 1936, or to the Economic Stabilization Emergency Regulations, 1942 (or to both the Act and the regulations), but as to which, or whether as to both, it is not necessary, for our present purposes, to inquire. Sufficient be it to say that the basic rent of the premises under the Act or the regulations, and whichever may apply, is £208 per annum, and that no greater rental can be lawfully recovered by the lessor without an application to the appropriate authority for approval of an increase therein. No such application has been made, and the appellant contests the submission, advanced at the hearing by the Crown, that the obtaining of such approval should be deemed to be a prerequisite to the grant of its consent by this Court.

"That the basic rent and the fair rent (if any) of land subject to a proposed lease are relevant matters for the consideration of the Court is made clear by s. 55 of the Servicemen's Settlement and Land Sales Act, 1943, which reads as follows:

> "For the purposes of this Act the basic rent of any land shall be deemed to be such rent as is determined by the Land Sales Committee, having regard to the basic value of the land, the value of the lessee's interest (if any) in the improvements on the land, and all other relevant considerations, including the basic rent or the fair rent (if any) of the land under the Fair Rents Act, 1936, or the Economic Stabilization Emergency Regulations, 1942.

"The section appears to assume, as indeed appears to be the case, that every piece of land subject to a lease requiring the consent of the Land Sales Court, has a 'basic rent' under the Fair Rents Act, 1936, or the Economic Stabilization Emergency Regulations, 1942 (which we shall hereinafter refer to shortly as 'the Act and/or regulations'), and may have a 'fair rent.' A perusal of the Act and regulations (which upon this point are drawn in identical terms) shows that the basic rent of land subject to a lease may always be ascertained if the full facts are disclosed, but a 'fair rent' is assessed by the appropriate authority only upon application of one of the parties. It is only by means of an application for the determination of a fair rent that the requisite consent can be obtained to an increase in the rent of any property above the basic rent.

"While the main purport of the Act and of the regulations appears to be to render irrecoverable any amount in excess of the duly authorized rent, it would seem from Reg. 26 that to stipulate for a rent in excess of the authorized rent is itself an offence. The relevant portions of Reg. 26 read as follows:

> "Every person commits an offence against these regulations who . . . (*b*) Stipulates for or demands or accepts for himself or for any other person on account of the rent of any property any sum that is irrecoverable by virtue of this part of these regulations.
>
> (*c*) Stipulates for or demands or accepts for himself or for anot other person on account of the rent of any dwellinghouse any sum that is irrecoverable by virtue of the Fair Rents Act, 1936.

"The agreement for lease which we are now asked to approve provides unequivocally for the payment of an annual rental of £329. No provision is made for the amount of the rent to be subject to the consent of the appropriate authority under the Act or regulations, or for the acceptance by the lessor of a lesser sum in the event of such consent not being obtainable. We cannot construe the agreement otherwise than as evidence that the lessor has stipulated for and demanded, and that he intends to accept from the lessee, a rental which is substantially in excess of the basic rent under the Act and regulations, and which, to the extent of such excess, is irrecoverable. Such an agreement appears to contravene Reg. 26 above-quoted, and is certainly unenforceable, if not invalid, unless and until the proposed rent has been authorized by the appropriate authority under the Act and/or regulations, as the case may require.

"The basis of an application for the consent of this Court is the proof, in the appropriate manner, of a contract or agreement coming within the scope of s. 43 (1) of the Servicemen's Settlement and Land Sales Act, 1943. While it is no part of the Court's jurisdiction to enquire into questions of validity and enforceability of contracts as between the parties, we conceive that the Court is amply entitled to refuse its consent to a contract which upon its face is unenforceable or void, whether by reason of some inherent and patent defect in law or of the lack of some necessary authorization or consent required by statute or regulation.

"In the present case, the agreement is unenforceable as to the full amount of the rent unless and until a proper authorization for the increase of the basic rent has been obtained. The Crown submits that the uncertainty now existing as to the amount (if any) by which the present rent may lawfully be increased during the currency of the Act and regulations should be cleared up before this Court is asked to deal with the application. It is true, of course, that the Act and regulations are of temporary duration, and it may well be that the lease now proposed will survive their expiry. On the other hand, the decision of the appropriate authority under the Act or regulations is paramount as to the maximum rental which may be charged so long as they subsist. While, therefore, this Court might lawfully restrict the rent under the agreement to a figure below the 'fair rent' assessed by the proper authority, it could not effectively allow a higher rent save for any residue in the term of the lease subsequent to the expiry of the Act and regulations.

"Section 55 indicates that the Legislature deemed the 'fair rent' to be a matter to which the Court, though not necessarily to be bound thereby, should have regard. In the present case, an application for determination of the fair rent is necessary before the agreement can lawfully be carried out. No hardship is involved if the lessor is required to make this application before proceeding in this Court. Such, indeed, is the usual procedure, and in the present case time would have been saved had the lessor sought the consent of the proper authority without waiting for the hearing of this appeal. Had this been done, the 'fair rent' could have been considered in accordance with s. 55, and would have been of assistance to the Court. Where, as in this case, it is necessary for the lessor to seek the consent of the proper authority under the Act or regulations, as well as of the Land Sales Court, we think that the appropriate order is for the 'fair rent' to be fixed first, so that the Court, when dealing with the application under the Land Sales Act, may be aware of the maximum rental which may lawfully be recovered by the lessor during the subsistence of the order fixing the fair rent. We do not think an appellant is entitled to deprive the Court of this valuable information by reversing the order in which he seeks his necessary consents.

"We agree, therefore, with the Crown that, in such a case as that now before us, the 'fair rent' should be fixed before the consent of the Court is granted. We are of opinion that the Court has jurisdiction to require this to be done upon the ground that, until the fair rent has been fixed and the agreement, if necessary, amended to conform to the fair rent so fixed, the agreement is unenforceable and not entitled to the consent of the Court, and upon the further ground that a direction that other necessary consents should be obtained before the consent of the Land Sales Court is granted is a matter of procedure, which, in accordance with s. 10 (2) of the Servicemen's Settlement and Land Sales Act, 1943, may be determined by the Court as it thinks proper.

"The hearing of the appeal is therefore adjourned *sine die* to enable the appellant to take the necessary steps to have the 'fair rent' of the property fixed. Should he fail to take such steps within a reasonable time, the case may be set down again by the Crown, in which case the appellant will be required to show cause why the appeal should not be dismissed.

"In order that there may be uniformity in procedure, Land Sales Committees are directed, pursuant to s. 14 of the Servicemen's Settlement and Land Sales Act, 1943, that, in any case where, upon the face of the proceedings, it appears that the rental proposed in a contract or lease requires, in order to render it legally recoverable, the consent or approval of the appropriate Court or authority under the Fair Rents Act, 1936, or under the Economic Stabilization Emergency Regulations, 1942, as the case may be, the applicant should be required, unless the Committee is satisfied that, in the special circumstances of the case, such a course would result in undue hardship to the parties, or to any of them, to seek and obtain such consent or approval before the making of a final order granting consent, whether unconditionally or subject to conditions, to the application."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Peripatetic Wig.—There is one feature of the appointment of K. M. Gresson of the Canterbury Bar to the Supreme Court Bench that would have been relished by the late Mr. Justice Alpers, whose friendship the new Judge enjoyed for many years. On his appointment, Gresson, J., expressed a desire to wear the wig of his distinguished grandfather, Henry Barnes Gresson, a graduate of Trinity College, Dublin, who became a Judge in 1857, and held office until 1875, at one time exercising jurisdiction over the whole South Island. With a spirit of willing assistance (for which Christchurch practitioners are deservedly noted), amateur legal archaeologists "unearthed" the wig, in a remarkable state of preservation, reposing with Ravenscroftian dignity in a glass case in the Canterbury Museum.* Modern transport will ensure for the ancient wig a more serene existence then fell to its lot when it accompanied its earlier owner on his first circuit, a journey from Nelson to Dunedin on horseback. The new Judge, by the way, is the first "old boy" (or, is it "old girl") of Rangi-ruru, a well-known girls' school in Christchurch. Life can hold few wonders for him, after that.

Permanent Court of Appeal.—What has happened to the projected Court of Appeal, writes an agitated contributor to Scriblex, seemingly under the impression that Scriblex possesses the legislative omniscience of a Cabinet Minister. Scriblex hastens to assure inquirers that he has not mislaid the tribunal, but gathers that the oil necessary for pouring on troublesome waters is still in short supply. He is reminded, however, of a story told by Downie Stewart in his portrait of Sir Joshua Williams. It seems that when Sir John Findlay was Attorney-General he had in mind to set up a permanent Court of Appeal consisting of three Judges. There was considerable discussion on the merits of the proposal and on the Judges to be selected for the Court. When Williams, J., was walking through the annual Art Exhibition in Wellington with some of his brother Judges, they came upon a painting of three donkeys looking over a farm gate, and proceeded to argue upon the merits of the picture. On the opinion of Sir Joshua being asked, he "half closed his eyes and in his gentle, mocking voice said, 'Perhaps it is meant to represent the proposed new Court of Appeal.'"†

Objecting to Costs.—No matter how hard we try, and with what success our efforts are crowned, there will always be with us, like the poor, the client who objects to the amount of the charges against him. In Melbourne recently, such a person labouring under a sense of grievance demonstrated his disapproval to a bill of costs sent him by his solicitor by opening the door of the solicitor's office and throwing six snakes therein. The lady typist, unversed in the art of snake-charming, promptly had hysterics—a fact disturbing to the routine of the office in general and to the quality of her work in particular. Upon the authority of *R.* v. *Manley*, [1933] 1 K.B. 529, the irate client was charged with doing an act tending to the public mischief, and also with assaulting the lady. No charge was preferred against the six snakes or any of them. For reasons that are not reported, and, indeed, may be beyond reporting, the Criminal Court acquitted him of both charges. A more subtle method of expressing resentment was once adopted by a Wellington doctor, now deceased, in respect of a bill of costs received from his solicitors, who, through no fault of theirs, had been unsuccessful in collecting certain of his accounts, and who, perhaps incautiously, had rendered him a detailed bill. This he displayed upon the wall of his waiting-room with arrows directing the attention of his patients to it, presumably as a forerunner to subsequent criticism on his part of the painful topic. In this instance, the B.M.A. took a hand, pointing out to the medico that, like an *affaire* with one's own female patients, the whole business was unethical. Impressed but unconvinced, he took down the document and substituted a water-colour.

Layman's Puzzle.—An enquirer writing in *London Opinion* seeks to ascertain why insanity should remain on the statute books as a ground for divorce when it is probably the only explanation of the marriage.

The Limits of Labour.—"In my opinion," says Denning, J., in *H. E. Green and Sons* v. *Minister of Health*, [1947] 2 All E.R. 469, "the words 'working classes' are quite inappropriate to modern social conditions." He was called upon to interpret the words used in s. 73 of the Public Health Act, 1936, which empowers local authorities "to acquire any land . . . as a site for the erection of houses for the working classes"; and he found nothing in the Act to compel the authority to let or sell them exclusively to members of such so-called classes and that it was within its rights in allocating houses that it had built to anybody requiring accommodation in the present house-shortage irrespective of whether applicants came within the usual classification of members of the working classes. Scriblex is glad that no Judge in the Dominion has been subjected to the necessity of having to define how extensive the term "working classes" really is. Does it give prominence, for example, to a concept of manual work as contrasted with mental toil? If so, do waterside workers, reputedly better paid than Cabinet Ministers, come within it? With a Tory diehardism that is probably part and parcel of his increasing senility, Scriblex would feel inclined to submit that, as the average legal practitioner works considerably more than the statutory forty-hour week, he falls within the plain meaning of "working classes" as "classes that work." But the simplicity of this viewpoint inclines him to think, upon second thoughts, there must be something fundamentally screwy about it.

On Appeals.—"The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others": Mr. Justice Cardozo.

*This is the wig worn by His Honour in the photograph on p. 262.—Ed.

†Mr. Justice Williams and Sir Francis Bell, with the Chief Justice, were to be members of the proposed Court, as was then generally known.—Ed.

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. Lease.—*Construction—Rent based on Average Price paid by Dairy Company—Farm Costs Allowance paid since Execution of Lease—Whether Calculable in Estimating Rental—"Average price."*

QUESTION: A. is the lessee of a dairy-farm under a lease for a term commencing July 1, 1940, and ending June 30, 1948. The rental is on a sliding scale—namely, £230 per annum with a proviso that in each year, if the average price paid by a named co-operative dairy company to its suppliers for butterfat shall exceed 10d. per pound, then the rental of £230 shall be increased by £16 per annum for every 1d. by which such price exceeds 10d. per pound. The lease does not stipulate a maximum rental. As from August 1, 1943, the Government has paid to dairy companies a farm-costs allowance which the companies have passed on to their suppliers in proportion to the butterfat supplied by each. For the season ending June 30, 1947, this particular company has paid to its suppliers in respect of the net amount received for its produce at the rate of 1s. 6.715d. per pound of butterfat and in addition it has paid its suppliers 5.185d. per pound of butterfat by way of farm-costs allowance received from the Government, making a total payment to its suppliers of 1s. 11.9d. per pound of butterfat?

Should A.'s rental for the past year be calculated on the amount which the company paid its suppliers as the price received for its produce—namely, 1s. 6.715d. per pound butterfat—or that amount plus farm-costs allowance 5.185d., making a total of 1s. 11.9d. per pound butterfat?

ANSWER: The determination of this question does not fall under Part III of the Economic Stabilization Emergency Regulations, 1942. The question assumes that the proviso to Reg. 14 (1) applies to the provision for increasing the rental, and this appears to be correct.

The answer turns on the meaning of the term "price" (or "average price") as used in the lease, and the ordinary canons of construction apply. In the absence of any indication in the context that the parties used the term with other than its usual connotation, it seems that "price" has its plain and literal meaning.

At the time the lease was drawn and executed, "cost allowances" were unknown. These allowances have been paid by the Government since 1943, and the dairy company acts merely as an intermediary in passing the benefit of the allowances to the supplier of the butterfat: see *Mills* v. *Wainwright*, (1944) 3 M.C.D. 260, 264. It may be, however, that extrinsic evidence is admissible to show, for example, that, in transactions amongst dairy farmers, the "price" paid by dairy companies for butterfat has consistently been understood to mean the "payout" made by the companies to suppliers. This would presumably include the payment of the price together with the farm-costs allowance made to companies by the Government during the past four years, and passed on by the companies.

O.2.

2. Land Transfer.—*Registered Proprietor missing—Ultimate Purchaser holding under Series of Agreements—Vesting of Legal Title in Ultimate Purchaser—Procedure.*

QUESTION: Our client I. by agreement dated June 25, 1937, agreed to purchase from H. a piece of land of which A. appears as the registered proprietor. The title is under the Land Transfer Act. A number of agreements were handed by H. to I. as constituting an equitable title. There were:

1. An agreement for sale between C. and D. dated May 6, 1919, in which is recited that A. had disposed of the land to B. and B. had subsequently sold to C.

2. An agreement for sale between D. and E. dated August 11, 1924.

3. An agreement for sale between E. and F. dated December 19, 1931. In this agreement it is recited that A.'s whereabouts are unknown.

4. An agreement for sale between F., G., and H. dated July 17, 1935, reciting the previous agreements and also a parole agreement for sale from F. to G.

All these agreements have been properly stamped. The whereabouts of A., and possibly of others of the intermediate parties, are still unknown.

What steps, if any, can I. take to have the land vested in him as registered proprietor?

ANSWER: Assuming that G. has paid all moneys due by him under the agreement dated June 25, 1937, he may apply to the Supreme Court under the Trustee Act, 1908, for a vesting order and appointment of a new trustee on the principle of *In re Park*, (1907) 10 G.L.R. 111. In the circumstances the appointment of a new trustee may be waived by the Court: *In re Rogers*, [1921] N.Z.L.R. 245; see also *Re Chrystal (deceased)*, (1910) 13 G.L.R. 118.

The Court will probably require proof that the purchase money under the various agreements has been duly paid; it is to be hoped that you can produce the various receipts therefor.

You have indeed a veritable string of agreements. About 1929, Adams, J., made a vesting order in the Supreme Court at Hokitika, where there were many intermediate sales (as in the present case) and where the only instrument *signed by the registered proprietor* which could be produced, was an agreement to mortgage in favour of a bank; this case seems very similar to yours, except that you do not appear to have anything in writing from the registered proprietor. After the lapse of such a long time, the Court might accept the recitals in the agreement dated May 6, 1919, that A., the registered proprietor, had disposed of the land to B., and that B. had subsequently sold to C.: see s. 60 (*a*) of the Property Law Act, 1908.

X.2.

RULES AND REGULATIONS.

Building Emergency Regulations, 1939, Amendment No. 6. (Emergency Regulations Act, 1939.) No. 1947/128.

Coinage Proclamation, 1947. (Coinage Act, 1933.) No. 1947/129.

Health (Bread-wrapping) Extension Notice, 1947, No. 2. (Health Act, 1920, and Health (Food) Amending Regulations, 1946.) No. 1947/130.

Diplomatic Privileges (United Nations Educational, Scientific, and Cultural Organization) Order, 1947. (Diplomatic Privileges Extension Act, 1945.) No. 1945/131.

Cook Islands Police Regulations, 1947. (Cook Islands Act, 1915.) No. 1947/132.

Camping-ground Regulations Extension Notice, 1947, No. 2. (Health Act, 1920.) No. 1947/133.

Patents (Canada) Regulations, 1947. (Patents, Designs, and Trade-marks Amendment Act, 1943.) No. 1947/134.

Rabbit-destruction (Hurunui Rabbit District) Regulations, 1947. (Rabbit Nuisance Act, 1928.) No. 1947/135.

Patents Amending Regulations, 1947, No. 2. (Patents, Designs, and Trade-marks Act, 1921-22.) No. 1947/136.

Passenger-service Vehicle (Constructional) Regulations 1936, Amendment No. 1. (Transport Licensing Act, 1931.) No. 1947/137.

Stock-remedies Regulations, 1947. (Stock-remedies Act, 1934). No. 1947/138.