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PROFITS ON SHARES IN DECEASED PERSONS' ESTATES: WHETHER CAPITAL OR INCOME.

IN the recent case of *Re Sechiari, Argenti* v. *Sechiari*, [1950] 1 All E.R. 417, the testatrix, who died in February, 1924, having made her will in 1907, in effect settled her estate in shares upon each of her children for life, with remainder to each child's issue, a normal enough type of provision. One of the assets which was comprised in her residuary estate was a sum of £4,000 ordinary stock of Thomas Tilling, Ltd., which had extensive holdings of shares in passenger road-transport and road-haulage undertakings. After the coming into force of the Transport Act, 1947 (Eng.), it sold all these interests to the British Transport Commission for the sum of £24,800,000, which was satisfied by the allotment to it of British Transport Stock, 1968/73, at a price of 101 per cent. There was no particular point in the company's retaining the whole of this large holding; and, as it had realized its assets at a handsome margin over book values, it distributed £20,600,000 of it as a special " capital profits dividend " on its ordinary stock. Under this distribution, every ordinary stock-holder on the company's register on February 21, 1949, received £5 British Transport Stock for every £1 ordinary stock of the company held by him.

Consequently, the trustees of Mrs. Sechiari's will were presented with a capital sum of £20,000 British Transport Stock. It was a capital sum, so far as the provisions of the income-tax law are concerned: there could be no doubt that this sum was free of both income-tax and sur-tax. At this point, relying upon the converse of Lord Macnaghten's famous dictum that " Income-tax is a tax upon income," the ordinary man in the street—and, indeed, even the instructed lawyer—would probably not hesitate to say that the sum must, therefore, be capital for all purposes, and would not pass to the tenants for life as income, but that it must form part of the capital of the trust fund. But it was not for nothing that Lord Macnaghten had a considerable reputation as a judicial humorist; and, like many other obvious notions, this simple view cannot long survive a nodding acquaintance with equity law. In short, not to put too fine a point upon it, Mr. Justice Romer found he was completely precluded by the authorities from giving effect to this *prima facie* view, and that the £20,000 British Transport Stock, notwithstanding that it was tax-free, belonged to the tenant for life as income, and not to the remaindermen as capital.

How does this anomaly, or apparent anomaly, arise? In this way: no company incorporated under the provisions of the Companies Acts can, unless it is in liquidation, return to its members any sums except either (*a*) by way of reduction of capital, and then only with the sanction of the Court, or (*b*) by way of division of its profits. These profits may arise in various ways: they may be purely income profits: they may be purely " capital " profits—that is to say, they may have arisen because a capital asset has been sold at more than its book value; or they may be mixed. But, by whatever name they are called when they are distributed, whether " dividend," " bonus," " capital bonus," " capital bonus distribution," " capital dividend "—the list is inexhaustible—such distribution still represents a dividend of the profits of the company, and represents that only.

If this is so, it follows that any payments made by way of reduction of the company's capital, with the sanction of the Court, must belong to the persons entitled to the capital of the trust estate, but that all payments made without the sanction of the Court must belong to the tenant for life. So put, the matter is a simple logical exercise. The principle which is decisive of the question is to be found in *Hill* v. *Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720, where the judgment of the Board, delivered by Lord Russell of Killowen, enunciated the following five principles, at pp. 730, 731, 732:

(1) A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A. absolutely or as trustee for A. for life only.

(2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called " dividend " or " bonus," or any other name, it still must remain a payment on division of profits.

(3) Moneys so paid to a shareholder will (if he be a trustee) *prima facie* belong to the person beneficially entitled to the income of the trust estate. If such moneys or any part thereof are to be treated as part of the corpus of the trust estate there must be some provision in the trust deed which brings about that result. No statement by the company or

its officers that moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect upon the rights of the beneficiaries under a trust instrument which comprises shares in the company.

(4) Other considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits, so deals with it that no part of it leaves the possession of the company, but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders, who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend.

(5) The result of such a dealing is obviously wholly different from the result of paying away the profits to the shareholders. In the latter case the amount of cash distributed disappears on both sides of the company's balance sheet. It is lost to the company. The fund of undistributed profits which has been divided ceases to figure among the company's liabilities; the cash necessary to provide the dividend is raised and paid away, the company's assets being reduced by that amount. In the former case the assets of the company remain undiminished, but on the liabilities' side of the balance sheet (although the total remains unchanged) the item representing undivided profits disappears, its place being taken by a corresponding increase of liability in respect of issued share capital. In other words, moneys which had been capable of division by the company as profits among its shareholders have ceased for all time to be so divisible, and can never be paid to the shareholders except upon a reduction of capital or in a winding-up. The fully-paid shares representing them and received by the trustees are therefore received by them as corpus and not as income.

In *Sechiari's* case, Romer, J., said that, for the purposes of that case, the second of those principles was the most important. He cited it and the third principle, and said, at p. 419, that those observations, coupled with the rest of the judgment of the Judicial Committee in *Hill's* case, completely covered the position in *Sechiari's* case, so far as His Lordship was concerned. He added that, although the decision in *Hill's* case was not strictly binding on the English Courts—as it undoubtedly is on a New Zealand Court—it formulated, in an extremely clear way, as one would expect from its author, the principles applied both before and since by the High Court of Justice in England, which were binding on His Lordship. He accordingly made a declaration that the sum of British Transport stock should be treated as income of the testatrix's residuary trust fund; but that declaration—which was limited to being a declaration on the construction of the will and in the events which had happened—would leave the way open to such steps as had been suggested as possible by counsel for the remaindermen. The declaration of the Court would, accordingly, be qualified by a proper provision somewhat resembling the one which was inserted by the Privy Council in *Hill's* case—that is to say, the order was to be without prejudice to any question whether, in the circumstances, in the administration of the trust, the Court has, or would exercise, any jurisdiction to apportion the dividend on equitable principles between income and capital.

Historically speaking, the principles enunciated in the Privy Council judgment as set out above—in their express form, as distinct from an implied form—do not appear to be very old, and, indeed, have not been established without the dissent of some eminent Judges.

For the earliest modern formulation of the principles enunciated in *Hill's* case, we need go back no further than *In re Bates, Mountain* v. *Bates*, [1928] Ch. 682 (approved by the Judicial Committee in *Hill's* case), where Mr. Justice Eve dealt with a case where the shareholders in the company had received a cash bonus with a covering letter stating: "It must be clearly understood that this is neither a dividend nor a bonus, but is a capital distribution and therefore not liable to income-tax or super-tax." Nevertheless, His Lordship pointed out that, clearly, this was just what it was not. He said, at pp. 687, 688:

it was a fund which the company could treat as available for dividend and could distribute as profits, or having regard to its power to increase capital could apply to that purpose by, for example, increasing the capital, declaring a bonus and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared.

His Lordship added, at p. 688:

Unless and until the fund was in fact capitalized it retained its characteristics of a distributable profit . . . the only method by which a company . . . can capitalize such a fund is to increase its capital by an amount equivalent to the sum sought to be capitalized.

The qualification there introduced by Mr. Justice Eve concerning the power of the company to increase its capital must necessarily be made in order to avoid a conflict with a line of cases (often called "the Bank cases")where companies without any power to increase, or any means of increasing, their capital have in fact treated undistributed profits as capital, and then later distributed them on the footing that they were still capital. *Irving* v. *Houstoun*, (1803) 4 Paton, Sc. App. 521, the leading case of this nature (and each of this group of cases deals with a well-recognized anomaly) as Lord Herschell said in *Bouch* v. *Sproule*, (1887) 12 App. Cas. 385, 397, is still to be regarded as good law, but an authority governing only a case similar on its facts.

After *Hill's* case came *Re Ward's Will Trusts, Ringland* v. *Ward*, [1936] 2 All E.R. 773. Now, in this case there was an absence of power in the company to increase its capital. It was perfectly true that it could have taken the necessary power under the provisions of the Companies Acts, but it had not in fact taken it. There was also an article which on its face empowered the company to distribute sums by way of capital distribution. Mr. Justice Clauson seized eagerly upon these two factors to do substantial justice, and held that sums which the company said were distributed by way of capital were in fact so distributed.

This was the state of the law when *Re Doughty, Burridge* v. *Doughty*, [1946] 2 All E.R. 341, came before Mr. Justice Roxburgh, and he, too, seized upon the wording of a special article giving the company power to "pass a resolution . . . that any surplus capital moneys or capital profits . . . shall be divided amongst the members of the company by way of capital distribution" to hold that such distributions were truly capital in nature, and, accordingly, did not enure for the benefit of the tenant for life. But the Court of Appeal were not to be swayed from the straight and logical path, and unanimously they overruled this decision ([1947] 1 All E.R. 207), casting grave doubts upon *Ward's* case in so doing. The final result of all the cases was perhaps there best summarized by Lord Justice Somervell, when, dealing with the case where there are no special provisions in the trust instrument, he said, at p. 212:

where capital profits are distributed by a company during the life of the tenant for life, they fall under the word "income" or similar words in the will in question, although they are not subject to income-tax in the hands of the recipient.

Accordingly, when Mr. Justice Romer decided *Sechiari's* case as he did, he was only following clearly-defined principles.

Perhaps the most unfortunate aspect of these cases is that it is the method by which the company chooses to deal with such surplus moneys as it may have which finally determines their characteristics as between tenant for life and remaindermen, and not the true inherent nature of those surplus moneys themselves. The only thing which the company is concerned to see is whether it is at all possible that any distribution which is made can be made free of income-tax and sur-tax. Their Lordships' Board put this well in *Hill's* case, when they said, at p. 730 :

> A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholders.

Accordingly, inescapably, there are times when the tenant for life reaps an apparently unjustified harvest. But there are also times where the principle works the other way round. If the company chooses to go through the proper steps of capitalizing its profits and distributing them as such by means of bonus shares, then such shares, when received by the trustees, will clearly be capital, and will not belong to the tenant for life, even if the profits in question are in origin purely income in nature. Indeed, whilst the anomaly is glaring when the tenant for life " takes the lot " in respect of capital distributions made during his lifetime, the anomaly is just as glaring the other way, where the company does not distribute anything like the whole of its profits, but retains a larger proportion, which it ultimately capitalizes. Under present conditions, this may not in most cases be practicable, but, under normal conditions, it certainly is, to the very great, if unspectacular, discomfort of the tenant for life, as in *Bouch* v. *Sproule*, (1887) 12 App. Cas. 385. The general principle was stated by Fry, L.J., in that case ((1885) 29 Ch.D. 635, 653) as follows :

> When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital.

This statement was approved by the House of Lords on appeal.

Much consideration was given in *Hill's* case by the High Court of Australia and before their Lordships' Board to the decision of the House of Lords in *Bouch* v. *Sproule* (*supra*). It may be well to consider what was the decision in that case, and what was the basis upon which it rested. It is not, in their Lordships' view, as expressed at p. 732, an authority for the proposition that the company's statement of intention determines, as between tenant for life and remainderman, whether a sum paid away by the company to a shareholder who is a trustee is income or corpus of his trust estate. In *Bouch* v. *Sproule* (*supra*), no moneys, in fact, left the company's possession. It is not, they said, an authority which touches a case in which a company parts with moneys to its shareholders. The essence of the case was that the company, not by its statements, but by its acts, showed that what the shareholders got from the company was not a share of profits divided by the company, but was an interest in moneys which had been converted from divisible profits into moneys capitalized and rendered for ever incapable of being divided as profits. In those circumstances, it was held that shares which were issued to a trustee shareholder, and which represented the moneys so capitalized, were, as between him and the *cestuis que trust*, corpus, and not income, because the company had decided that the profits in question should be permanently added to the company's capital. Their Lordships considered that Lord Watson had stated the point concisely when he said in *Bouch's* case, at p. 401 :

> In a case like the present, where the company has power to determine whether profits reserved, and temporarily devoted to capital purposes, shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company.

In the opinion of their Lordships in *Hill's* case, there is no decision in the Courts of Great Britain which justifies the view that a person beneficially entitled in remainder to shares in a limited company is entitled to any interest in profits lawfully distributed during the lifetime of the tenant for life by a company not in liquidation, and such a view is, in their Lordships' opinion, contrary to principle.

In *In re Stewart*, (1903) 22 N.Z.L.R. 908, *Bouch* v. *Sproule* was distinguished on the facts. There, Sir Robert Stout, C.J., had to decide whether a dividend was to be treated as income or as capital in a deceased estate. A company offered unissued shares, and, in the circular which offered them, it was stated that a dividend proposed to be declared on the shares then held by the shareholders in the company would be applied in payment of the amount due on the allotment of the new issue of shares, but this provision was not embodied in the resolution declaring the dividend, and no resolution was passed by the shareholders approving of the provision. The learned Chief Justice held that the dividend was to be treated as income, and not as capital, though in fact it was to be applied in payment of the money due on allotment.

In *In re Rolland, Trustees, Executors, and Agency Co., Ltd.* v. *Black*, (1911) 30 N.Z.L.R. 494, 495, Williams, J., said that the dividend declared by the directors of the company after the decease of the testator went to the tenant for life. After stating the principle of *Bouch* v. *Sproule* (*cit. supra*), the learned Judge pointed out that, in the case before him, shares in a company were an investment authorized by the will of the testator ; the company by its articles of association had the power either of distributing the profits as a dividend or of converting them into capital ; and the company validly exercised the power of distributing the profits as a dividend. If the company had gone into liquidation, the case might have been different, and the principle of *In re Armitage, Armitage* v. *Garnett*, [1893] 3 Ch. 337, would apply. He added, at p. 495 :

> The moment the company gets into liquidation the power of declaring dividends is gone. In the present case, however, though the company no doubt has liquidation in prospect, it is not yet in liquidation, and the power of deciding whether undivided profits shall be distributed by way of dividend remains unimpaired.

Although a company may not have any express power to capitalize its profits, yet, if it is clear that what was done was intended to effect indirectly such a capitalization, that intention must prevail. In *Perpetual Trustees and Agency Co.* v. *Glendinning*, [1921] N.Z.L.R. 557, the facts were that a company passed a resolution to increase its capital by the creation of 50,000 new shares of £10 each, of which 15,000 were to be issued and were under the articles of association to be offered to shareholders in proportion to their

holdings. The proposals put before the shareholders by the directors were that the whole amount due on the new shares would be called up, but that a bonus of £2 per share on the existing 75,000 shares would be declared contemporaneously with the call, and the amount of the dividend would be applied in payment of the call. The shares of the company at the time of the passing of the resolutions were valued at a price considerably above par. The company had no power to capitalize profits, and had not at any time created a reserve fund out of profits. It was held by Sim, A.C.J., that the substance of the whole transaction was to convert the undivided profits to the extent of £150,000 into capital on the 15,000 newly created shares. He said that the case, therefore, came within the decision in *Bouch* v. *Sproule* (*supra*), and that, as between the tenant for life and remainderman, the new shares were to be taken as capital of the testator's estate.

It is interesting to recall that in *McGruer* v. *Gresham*, [1927] N.Z.L.R. 704, in deciding the question whether the surplus income of an estate, invested by the trustees in several businesses in which the deceased was a partner, was to be treated as having been capitalized or as income which is to be distributed ultimately between charitable institutions on behalf of the trusts of the will, Sim and Stringer, JJ., applied the principle of *Bouch* v. *Sproule* (*cit. supra*) adopted in connection with the profits of a company in which the testator was a shareholder. They decided that the position was that the trustees had power to determine whether or not any part of the income for any year, after satisfying the annuities and expenses of administration, was to be converted into capital by being invested in the businesses, or was to be distributed as surplus income; and that the determination of the trustees, so long as it was made *bona fide*, was binding on the beneficiaries under the will.

A consideration of *Hill's* case and *Sechiari's* case, and of the relevant authorities generally, shows that it is at least theoretically possible that what the life tenant gains on the income roundabouts he may lose on the capital swings. There is, of course, as always, a remedy at hand. That remedy lies in the terms of the trust in question. There were not, in any of the cases which have been cited, any special provisions to deal with this kind of anomaly. But there is nothing to prevent a testator or settlor from dealing expressly with the matter of capital distributions and providing in so many words that any sums which escape tax, for whatever reason, shall belong to the capital of the trust, and not to the tenant for life.

Even without such provisions, it is the duty of all trustees to keep the balance between tenant for life and remainderman scrupulously adjusted, so far as it is humanly possible to do so. What, then, is their duty if they are holding shares in respect of which any such "capital dividend" is proposed? If they sell before the distribution, they are depriving the tenant for life of what would otherwise be income: if they do not sell, they are in effect depriving the remaindermen of what would otherwise be capital. The figures in the distribution of Thomas Tilling, Ltd., are, of course, startling—£5 distribution on each £1 share—and many will feel uneasily that the burden which was laid upon the trustees in that case of deciding whether or not to take action was one which it was unfair to thrust upon anybody.

A famous Lord Justice once remarked that he had that day for the first time become acquainted, thanks to the industry of counsel, with a long line of cases whose sole unifying feature appeared to be that in all of them the intention of the testator was decisively defeated. Of course, in one sense, this could not possibly be so: the majority of such cases arise precisely because the testator never thought about the very point in issue, and, therefore, did not deal with it in so many words; and, accordingly, one can only speculate as to what he would have done if his attention had been directed to the crucial point. But, if it is permissible to indulge in such speculations, then all that can be said is that it is not only by misconstruction that his desires can be defeated; they can also be defeated, as in *Sechiari's* case, by immaculate deductions from impeccable premises.

SUMMARY OF RECENT LAW.

ARBITRATION.

Arbitrator's Fees—Award set aside by Supreme Court on ground of Arbitrator's Misconduct—Action for Unpaid Fees not maintainable. By an agreement between one Steele as vendor and Evans (the present plaintiff) as purchaser, it was agreed, *inter alia*, that the vendor should sell and the purchaser should purchase stock, plant, and furniture of an hotel at a price to be ascertained by valuation. By such agreement, Evans appointed the present defendant his valuer at a fee of 5 per cent. on the total valuation. The valuers made their valuation, and agreed upon the total sum of £2,008 10s. 6d. (Evans was aware that, between three and four months before that valuation, the defendant, as the then vendor's valuer, had valued the stock, plant, and furniture in the same hotel at £913 6s. 3d.) Evans filed a motion in the Supreme Court to set aside the award, and, from an order made thereon, there was an appeal to the Court of Appeal, which remitted the motion to set aside the award to the Supreme Court with the direction that judgment of nonsuit be entered in favour of Steele. Later, Steele commenced an action in the Supreme Court to recover from Evans £2,008 10s. 6d., the amount of the valuers' award, and Evans counterclaimed to have the award set aside. An order was made by the Supreme Court setting aside the award on the ground of the misconduct of the valuer, the present defendant; and an appeal from that order was dismissed by the Court of Appeal. In an action by Evans claiming £500 damages incurred by him by reason of the alleged negligence, incompetence, or fraud of the defendant while acting as valuer on his behalf, *Held*, 1. That, as the defendant was not a party in the litigation between Steele and Evans, neither the ground of the decisions nor the evidence upon which the judgments and orders were founded in that litigation was admissible in the present proceedings. (*Green* v. *New River Co.*, (1792) 4 T.R. 590; 100 E.R. 1192, *Ex parte Young, In re Kitchin*, (1881) 17 Ch.D. 668, and *Natal Land and Colonization Co.* v. *Good*, (1868) L.R. 2 P.C. 121, followed.) 2. That, on the evidence before the learned Magistrate, the plaintiff had not proved incompetence or negligence on the part of the defendant so far as the valuation was concerned; and he had not proved that the defendant had acted fraudulently or dishonestly as his valuer. (*R.* v. *Kingston*, (1776) St. Tr. 355, 538, *In re Bank of Hindustan, China, and Japan, Alison's Case*, (1873) L.R. 9 Ch. 1, and *Priestman* v. *Thomas*, (1884) 9 P.D. 210, referred to.) On a counterclaim by the defendant against Evans claiming the amount of his fees as valuer, *Held*, That, since the award had been set aside on the grounds of the defendant's misconduct, there had been a total failure of consideration —the making of a valid and enforceable award—on the defendant's part for the fees agreed to be paid to him by Evans, and the defendant was, therefore, precluded from maintaining an action for any unpaid fees. (*In re Hall and Hinds*, (1841) 2 Man. & G. 847; 133 E.R. 987, *Towers* v. *Barrett*, (1786) 1 T.R.

133; 99 E.R. 1014, and *Pulbrook* v. *Lawes*, (1876) 1 Q.B.D. 284, applied.) (*Steele* v. *Evans (No. 2)*, [1948] N.Z.L.R. 1231; aff. on app., [1949] N.Z..LR. 548, referred to.) *Evans* v. *Annabell*. (Dannevirke. May 17, 1950. Coleman, S.M.)

Statement of Special Case for Court's Opinion on Question of Law—Party's Indefinite Request to Arbitrators to state Special Case—Disagreement of Arbitrators—Umpire making Award without stating Special Case—Technical Misconduct—Award remitted to Umpire to deal with Request—Arbitration Act, 1908, ss. 11, 12 (2), 20—Arbitration Amendment Act, 1938, s. 11. In an arbitration, arising out of a deed of partnership, questions were referred to two arbitrators, who failed to agree. The matter was referred to an umpire. In the submissions sent to the arbitrators (with whom, for convenience, the umpire sat), the plaintiff's solicitor put forward the construction which he contended should be placed on the deed of partnership and the consequences which, as he contended, would flow from that interpretation. He stated, *inter alia*: "I simply base my argument on the real intention of the parties as recognized by statute; and, if there is any doubt in the minds of the arbitrators as to the existence and effect of this overriding intention, I require them to state a case for the opinion of the Court." When the umpire came to deal with the matter, he did not raise with the plaintiff's solicitor the question of stating a special case; but he proceeded to make his award. On a motion under s. 20 of the Arbitration Act, 1908, to set aside or remit the award, *Held*, 1. That, although the plaintiff's solicitor's request for the stating of a special case was somewhat vague and indefinite, it was a request that could not be ignored by the umpire; and the umpire, in proceeding to make his award, was, *prima facie*, guilty of a breach of duty, which was technically misconduct within the meaning of s. 12 (2) of the Arbitration Act, 1908. 2. That the award be remitted to the umpire to enable him to deal with the plaintiff's request for the stating of a special case for the opinion of the Court under s. 11 of the Arbitration Amendment Act, 1938, on the questions of law raised by the plaintiff's solicitor. (*In re An Arbitration between Fischel and Co. and Mann and Cook*, [1919] 2 K.B. 431, and *In re An Arbitration, Broughton and Renown Collieries, Ltd.*, [1941] N.Z.L.R. 227, referred to.) *Semble*, The umpire's proper course of procedure would be: (*a*) He should request the plaintiff for a statement of the precise legal matters which he desires to refer to the Court, to be supplied within a stated and reasonable time. (*b*) On receipt of these, the umpire should consider whether in his judgment a special case should be stated; and, if so, should proceed accordingly. (*c*) If the umpire considers that a special case should not be stated, then he should give to the plaintiff notice of his decision, and state a limited but reasonable time for the plaintiff to apply to the Court for an order. (*d*) If no application to the Court is made by the plaintiff, the umpire will proceed to make his award; if it is in the same terms as the present award, this may be treated as restored; and the motion to set it aside on other grounds will then be dealt with. *In re An Arbitration, Roke* v. *Stevens*. (S.C. May 19, 1950. Stanton, J.)

COMMERCIAL LAW.

Points in Practice. *100 Law Journal*, 271.

COMMON LAW.

Points in Practice. *100 Law Journal*, 284.

CONVEYANCING.

Assents by Officers of Trust Corporations. *209 Law Times*, 182.

Purchase Clause in Partnership Deeds. (F. T. Cross.) *3 Australian Conveyancer and Solicitors Journal*, 58.

Seasonable Times. *100 Law Journal*, 272.

CRIMINAL LAW.

Breach of Probation: Taking into Consideration. *114 Justice of the Peace Journal*, 164.

Treatment of Offenders in Colonies and Protectorates. *114 Justice of the Peace Journal*, 139.

DIVORCE AND MATRIMONIAL CAUSES.

Matrimonial Causes (War Marriages) Order, 1950 (Serial No. 1950/85). This Order appoints June 1, 1950, to be the appointed day for the purposes of the Matrimonial Causes (War Marriages) Act, 1947, which extended the jurisdiction of the Supreme Court in relation to certain marriages celebrated between September 3, 1939, and the appointed day by enabling the wives to petition for divorce in New Zealand notwithstanding that they lost their New Zealand domicil by reason of their marriage to men domiciled outside New Zealand. Proceedings in New Zealand invoking the extended jurisdiction may be commenced at any time not later than five years after June 1, 1950.

EVIDENCE.

Relevancy—Cross-examination—Claim by Waterside Worker for Damages for Injuries—Plaintiff cross-examined as to Earnings from Communist Party—Questions as to Past and Future Receipts of Income relevant to Issue of Damages—Duty of Counsel—Practice—Trial—Summing-up—Isolated Expression of Judge's Personal View of Communism—Irrelevancy not amounting to Misdirection. In an action claiming damages for injuries sustained by the plaintiff while carrying out his work as a waterside worker in consequence of negligence alleged against servants of the defendant company, tried before *Cornish*, J., and a jury of twelve, the plaintiff, in cross-examination, was asked if it was not incorrect to describe himself as a waterside worker, and if he were not the National Organizing Secretary of the Communist Party, and he was then asked if he were paid for his work in that capacity. Objection was taken to the question by plaintiff's counsel. The learned trial Judge questioned its relevancy, but was assured by the cross-examining counsel that he would show that this question, and other questions he intended to put, were relevant to the question of damages. The cross-examination proceeded as to receipts by the plaintiff of moneys from the Communist Party. In the course of both his addresses to the jury, defendant's counsel made reference to the fact that the plaintiff was a prominent Communist. The learned trial Judge, in directing the jury, said: "We will not take into consideration the fact that plaintiff is a Communist, and I do not understand Mr. Blundell to suggest that we should consider that alone. What Mr. Blundell was attempting to show in his cross-examination was this (and that is why I allow his questions on the point)—that, if plaintiff had another source of remuneration—*e.g.*, in being a prominent official of the Communist movement—and if that movement paid salaries to such officials, then plaintiff might have been able to earn quite substantial sums in the future, as perhaps in the past. If a man can make money in a vocation such as speaking or singing, and if his vocation ceases as a result of an accident, that is a matter to be taken into account in assessing damages. However, it does not seem as if these top positions in the Communist movement are carrying big salaries just at present in New Zealand. I hope they never will. That is my personal hope. I hope the plaintiff will remain for a long time one of a small minority. Here, a man's claim is fairly adjudicated on by a Judge and jury, whatever his politics may be, but that does not happen everywhere in the world. The plaintiff's political opinions have nothing whatever to do with the issues before the Court, whether he be a Communist, a Liberal, or a Conservative." Before the jury's verdict was sought, the learned Judge requested it to ignore any expressions of personal opinion he may have given in regard to Communism. He then directed the jury to retire and reconsider its verdict in the light of his further directions. The foreman replied that the question of the plaintiff being a Communist had not been mentioned or considered at all by the members of the jury during their deliberations. No other juror protested at this statement. The verdict of the jury was then taken, and it was favourable to the defendant company. The plaintiff moved for a new trial on the grounds set out in the judgment. The learned trial Judge granted a new trial, with costs of the first trial to the plaintiff, on the ground that the trial was marred by "the introduction of irrelevancies calculated to prejudice the case of the plaintiff." On appeal from that determination, *Held*, by the Court of Appeal, 1. That the questions asked the plaintiff in cross-examination were relevant to the issue of damages, both special and general, as they were directed to investigating possible sources of earning for the plaintiff in his employment in the Communist organization; and to ascertaining whether there had been any such income, direct or indirect, during the plaintiff's period of alleged incapacity as a waterside worker; and it was equally relevant to probe the possibility of similar future earnings; and, further, that the questions objected to did not offend against any of the rules governing cross-examination. Statements in *2 Taylor on Evidence*, 12th Ed., p. 910, para. 1428, p. 914, para. 1434, approved. 2. That there was nothing in defendant's counsel's questions in cross-examination (which were proper and strictly relevant) or in his addresses to the jury that would justify the setting aside of the jury's verdict. 3. That the judgment in *Horne* v. *The King*, [1947] N.Z.L.R. 538, may not be taken further than its own facts warrant, and it is not an authority for the proposition that the procedure there proposed is to be followed in every case in which counsel think a question put

by opposing counsel in cross-examination may be prejudicial and irrelevant. (*Haigh* v. *Belcher*, (1836) 7 Car. & P. 389; 173 E.R. 173, referred to.) 4. That there was no misdirection by the learned trial Judge, as his irrelevant comment on Communism could not be exalted into a direction to the jury; the effect of his summing-up was not to be judged upon an isolated passage divorced from the remainder; and, even without the disclaimer from the jury that those statements did not have the effect of preventing a fair trial, the words objected to must be considered with those words which preceded and followed them. (*Lang* v. *New Zealand Insurance Co., Ltd.*, [1927] G.L.R. 196, followed.) 5. That, as there was evidence upon which the jury could find as it did, and their verdict was not unreasonable, it could not be said that the jury had not performed the judicial duty cast upon them. (*Mechanical and General Inventions Co., Ltd., and Lehwess* v. *Austin and Austin Motor Co., Ltd.*, [1935] A.C. 346, followed.) Appeal from the judgment of *Cornish*, J., allowed, and case remitted to the Supreme Court for the entry of judgment for the defendant company with appropriate costs. *Shaw Savill and Albion Co., Ltd.* v. *Skilton*. (C.A. Wellington. May 24, 1950. Northcroft, Finlay, Hutchison, JJ.)

FAMILY PROTECTION.

Evidence—No Provision made for Daughter—Testator's Statement that she had disowned her Parents—Onus on Daughter claiming Provision to disprove Statement—Family Protection Act, 1908, s. 33 (2). On giving instructions for his will, a testator said that his reasons for omitting from his will any provision for his daughter were that she had disowned her parents and that she had received £12,000 from the estate of her grandmother. In fact, all that she did receive from that estate was £483. She denied that she had disowned her parents. On a claim by the daughter under the Family Protection Act, 1908, for provision out of her father's estate, *Held*, That, as, under s. 33 (2) of the Family Protection Act, 1908, the question for the Court was whether the conduct of the daughter was such as to disentitle her to the benefit of an order, the onus rested on her to disprove that she had disowned her parents; and that burden had not been discharged. (*In re Duncan*, [1939] V.L.R. 355, followed.) *In re Green (deceased), Zukerman* v. *Public Trustee*. (S.C. Wellington. May 26, 1950. Hutchison, J.)

Final Distribution of Estate—Determination whether Estate held by Executor or by Trustee—Completion of Executorship and Assent as Trustee—Evidence of Assent—Family Protection Act, 1908, s. 33 (9). The "final distribution" of an estate within the meaning of those words as used in s. 33 (9) of the Family Protection Act, 1908, takes place when an executor or administrator has ceased to hold the estate as such and holds it as trustee for the beneficiaries. (*In re Donohue, Donohue* v. *Public Trustee*, [1933] N.Z.L.R. 477, followed.) An executor or administrator holds the estate in his hands as trustee when he has completed his executorship or administratorship and has assented to the trusts imposed on him. Some evidence of assent by the executor or administrator is required; he may assent informally, and his assent may be inferred from his conduct. (*George Attenborough and Son* v. *Solomon*, [1913] A.C. 76, and *In re Anderson*, [1921] N.Z.L.R. 770, followed.) (*Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839, mentioned.) *In re Perry, Smith* v. *Public Trustee*. (S.C. Auckland. May 5, 1950. Stanton, J.)

ROAD TRAFFIC.

Traffic at Controlled Intersection—Tram-car and Motor-vehicle moving in Same General Direction but on Converging Courses—Vehicles not approaching Each Other—"Approaching vehicles"—Traffic Regulations, 1936, Reg. 4 (5). Regulation 4 (5) of the Traffic Regulations, 1936, after requiring traffic at an intersection controlled by signals in the form of coloured lights to comply with the directions given by those lights, contains the following proviso: "Provided that drivers or riders of vehicles making a turn shall always yield the right of way to approaching vehicles not making a turn." The words "approaching vehicles" in that proviso—used, as they are, in relation to "drivers or riders of vehicles making a turn"—mean "vehicles approaching those drivers or riders." (*The Franconia*, (1876) 2 P.D. 8, applied.) Consequently, where a tram-car and a motor-vehicle, after halting before reaching an intersection controlled by coloured lights, were moving on courses in the same general direction, but converging so as to result in a bisection of those courses, and, as happened, in a collision, such vehicles were not "approaching vehicles." The driver of the tram-car, which was making a turn to the left, was, accordingly, not obliged to yield the right of way to the motor-vehicle, which, intending to proceed straight ahead, overtook the tram and collided with it when it was on the rails turning to the left. *Bland* v. *Holt*. (Auckland. May 23, 1950. Astley, S.M.)

SALE OF FOOD AND DRUGS.

Offences—Adulteration of Food—Information laid by Police Officer—Not a Proceeding under Section dealing with Special Powers of Officers—Constable competent to lay Information—Sale of Food and Drugs Act, 1947, ss. 6, 12, 15, 16, 17. An officer of the Department of Health bought meat which on analysis was found to contain prohibited preservatives, but omitted to make payment or tender of the current market value of the sample he obtained. In a prosecution for a breach of s. 6 (2) of the Food and Drugs Act, 1947, the information was laid by a Police constable and not by an "officer" within the meaning of that term as defined in s. 2 of the statute. (*Lincoln* v. *Sole*, [1939] N.Z.L.R. 176, followed.) (*Dairy Farmers' Co-operative Milk Supply Co., Ltd.* v. *Findon*, [1946] N.Z.L.R. 205, referred to.) *Held*, That any person is empowered to take proceedings for adulteration of food under s. 6 of the Food and Drugs Act, 1947, and the provisions of ss. 12, 15, 16, and 17 of that statute need not be complied with in such a case. As it was proved that there was a sale of beef within the meaning of s. 3 (1), that it was exposed for sale, and that a prohibited preservative was used, the defendant was convicted. *Bulger* v. *Botting*. (Dunedin. May 15, 1950. Willis, S.M.)

TRANSPORT.

Motor-vehicles Insurance (Third-party Risks) Regulations, 1950 (Serial No. 1950/81).

VENDOR AND PURCHASER.

Options. (Russell Fox.) *24 Australian Law Journal*, 7.

WILL.

Attestation—Attestation Clause—Validity—Omission of Statement that Witnesses "subscribed their names as witnesses"—Wills Act, 1837 (c. 26), s. 9. A codicil was attested in the following form: "Signed by the testatrix in our presence and attested by us in the presence of her and of each other." *Held*, That the word "attest" in its ordinary meaning was wide enough, when employed in connection with a will, to include the word "subscribe," and, therefore, the attestation clause was sufficient to comply with the requirements of the Wills Act, 1837, s. 9, and an affidavit of due execution of the codicil ought not to be required. *Re Selby-Bigge (deceased)*, [1950] 1 All E.R. 1009.

As to Mode of Attestation, see *36 Halsbury's Laws of England*, 2nd Ed. 62-66, paras. 78-83; and for Cases, see *44 E. and E. Digest*, 266-272, Nos. *951-1044*.

COURT OF APPEAL.

Form of Cyclostyled or Typewritten Case.

The Registrar of the Court of Appeal has drawn attention to the following matter:

At the recent sitting of the Court of Appeal, the question of cyclostyled and typewritten cases on appeal was discussed by their Honours, who, while not directing that a practice note should be issued, decided that, where leave had been granted to have the case on appeal cyclostyled or typewritten, *double spacing* in either the cut of the stencil or typewriting of the case must be used throughout, with the appropriate numbering for each five lines entered in the margin, and that, where the cyclostyled or typewritten case is bulky, the Court would prefer that a departure be made from the quarto size paper required by the rules, foolscap size being used instead.

Attention should also be directed that in a recent cyclostyled case on appeal an index of the large number of witnesses giving evidence was omitted.

THE RULE IN FOSS *v.* HARBOTTLE.

Application to Trade Unions.

By R. M. Collins, LL.M.

The rule in *Foss* v. *Harbottle*, (1843) 2 Hare 461; 67 E.R. 189, has been the subject of judicial consideration by Finlay, J., in the recently reported case of *Humphries* v. *Auckland Tailoresses' and Other Female Clothing and Related Trades Employees' Industrial Union of Workers*, [1950] N.Z.L.R. 380. In his judgment, the learned Judge has extended this well-known principle of company law to a dispute regarding the internal management of a trade union. For this extension, the learned Judge had a ready precedent in the Court of Appeal decision in *Cotter* v. *National Union of Seamen*, [1929] 2 Ch. 58, where it was held in England that the rule in *Foss* v. *Harbottle* applied to trade unions. Nevertheless, *Humphries'* case is the first reported New Zealand case wherein the principle has been extended to this field of the law.

That such an extension of the principle is logical can now no longer be questioned. In *Humphries'* case, the learned Judge apparently had no doubts, as, in his careful judgment, he gives no consideration to this particular aspect. He states baldly without comment, at p. 384:

> That this principle applies to trade unions was expressly held by the Court of Appeal in *Cotter* v. *National Union of Seamen* ([1929] 2 Ch. 58).

Before this last-mentioned decision, it had frequently been argued that a trade union, though a legal entity, had characteristics which differentiated it from a registered company. As is clear from the judgment of Lord Hanworth, M.R., in *Cotter's* case, this argument was strenuously pressed before the Court of Appeal in that case. Nevertheless, the Court held that, notwithstanding the differences between the two, a trade union was a legal entity acting through agents in the same way as a company. Lord Hanworth says, at pp. 103, 104:

> Its entity is to be controlled, and is controlled by action taken under its rules, with the result that in the present case, if some irregularity has been committed, it would be quite possible for the legal entity, by means of further meetings, further notices, and the like, to make regular what apparently, or what it is argued, is irregular, and reason and good sense would certainly dictate that the principle which applies to the entities of incorporated companies should also apply to entities created by registration under the Trade Union Acts.

The facts of *Cotter* v. *National Union of Seamen* (*supra*) were briefly as follow: The plaintiffs, who were members of a registered trade union, commenced proceedings against the Union and certain officials of the Union. The plaintiffs purported to sue on behalf of themselves and all the members of the Union other than the named defendants. They claimed a declaration that a certain special general meeting was invalidly convened and that certain resolutions which were passed at that meeting were invalid, and they sought injunctions restraining the Union from acting on those resolutions. The Court of Appeal held that the resolutions were not invalid, that the alleged irregularities could be easily regularized, and that the Court should not, therefore, interfere.

The cardinal rule of company law is that *prima facie* a majority of the members of an incorporated company is entitled to exercise the powers of the company, and generally to control its operations. It is upon this basis of "majority rule" that the so-called rule in *Foss* v. *Harbottle* (*supra*) is founded. The position is most easily explained by reference to the oft-quoted judgment of Mellish, L.J., in *MacDougall* v. *Gardiner*, (1875) 1 Ch.D. 13, 25:

> In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the cases of *Mozley* v. *Alston* (1 Ph. 790) and *Foss* v. *Harbottle* (2 Hare 461). In my opinion that is the rule that is to be maintained.

In *Foss* v. *Harbottle* (*supra*), two members of an incorporated company took legal proceedings against the directors and others to compel them to make good losses sustained by the company by reason of the fraudulent acts of such directors, and the Court held that, as the acts were capable of confirmation by the majority of the members, the Court would not interfere. In other words, it was left to the majority to complain or to condone as they might think best. In both *Mozley* v. *Alston* (*supra*) and *MacDougall* v. *Gardiner* (*supra*), a single shareholder complained of a breach of the articles. It was held that the litigation ought to be in the name of the company, as it was for the majority to say whether or not they wished to complain.

Too much emphasis cannot be placed, however, on the fact that it must be abundantly clear that the majority of the members who might be interested do support the purpose sought to be achieved. This qualification was emphasized by the learned Judge in *Humphries'* case (*supra*), where, however, the facts proved showed that the majority of the members of the trade union were enthusiastically in favour of the steps taken and the purpose to be achieved—namely, the adoption of a new set of rules. The facts were briefly as follow: The rules of the defendant Union provided that a proposal in precise terms should be moved at the meeting of the Union at which an amendment of the rules was first proposed. At a meeting of the Union, it was proposed "that the rules of this Union be amended as soon as possible," and the resolution was approved and passed by a great majority of the members present. No particulars of the proposed amendments were given then nor thereafter until the special meeting called to approve the amendments. At this meeting, the proposed amendments, which involved a completely new set of rules, were read at length and continuously, no explanations whatever being offered. A small minority, including the plaintiff,

protested vigorously from time to time during the reading against this process. In the face of this opposition, the motion adopting the amended rules was carried decisively by the meeting.

In his judgment, the learned Judge has given a full exposition of the rule in *Foss* v. *Harbottle* (*supra*) and the various explanations of it given in subsequent cases considered by the English Courts—in particular, *MacDougall* v. *Gardiner* (*supra*) and *Burland* v. *Earle*, [1902] A.C. 83. The last-mentioned case appears to be the first case of any real importance wherein the limitations on the broad scope of the rule were seriously considered. In delivering the judgment of the Judicial Committee, Lord Davey says, at p. 93 :

> It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself.

His Lordship then refers to an exception " to the second rule," but qualifies that exception carefully (at p. 93) :

> But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.

The minority, however, in *Burland* v. *Earle*, [1902] A.C. 83, were unsuccessful in their attempt to upset a decision of the directors that the profits of the company should be invested, and not paid out to the shareholders in the form of a dividend. The Judicial Committee were satisfied that no question of fraud or of *ultra vires* acts arose, with the result that whether profits should be invested or distributed amongst the shareholders was for the majority to determine. Lord Davey says, at p. 95 :

> Their Lordships are not aware of any principle which compels a joint stock company while a going concern to divide the whole of its profits amongst its shareholders. Whether the whole or any part should be divided, or what portion should be divided and what portion retained, are entirely questions of internal management which the shareholders must decide for themselves, and the Court has no jurisdiction to control or review their decision, or to say what is a " fair " or " reasonable " sum to retain undivided, or what reserve fund may be " properly " required . . . These are questions for the shareholders to decide.

After considering the leading English authorities on the rule and the exceptions thereto, Finlay, J., says in *Humphries*' case, [1950] N.Z.L.R. 380, at p. 386 :

> From the authorities quoted, I deduce two conceptions—namely, (i) that there must be no doubt that the purpose sought to be achieved has the support of a majority of the members who might be interested ; and (ii) that a suit by private corporators in their own names is possible where the interests of justice require it and there is no adequate alternative remedy.

He then refers to various cases referred to him by counsel in the main involving trade unions, and, having dealt with these, he applied the " two conceptions " referred to by him to the case before him, in the following manner, at p. 387 :

> In the present case, there was undoubtedly irregularity and informality in the way in which the new rules were made and adopted, but no question of *ultra vires* arises, for the Union clearly had power to alter its rules ; no peremptory rule of law, such as applies to special resolutions and the majority necessary to carry them, was involved ; no private injustice was inflicted on any individual, for by the new rules all members are treated upon a common basis, and in all respects alike ; and, finally, only a small minority raised objections, whilst the great majority of the members approbated the method by which the new rules were made, and approved of the adoption of the rules.
>
> Upon principle, therefore, it would appear that, the departure from the rules being a mere matter of irregularity, the principle enunciated in *Foss* v. *Harbottle* ((1843) 2 Hare 461 ; 67 E.R. 189) applies.

In the result, the plaintiff was held to have no remedy.

Humphries' case (*supra*) is essentially, of course, a case involving trade-union law, and it is not surprising, therefore, to find from the reports that apparently no reference was made, either by counsel or by the learned Judge, to the New Zealand cases on company law wherein the rule in *Foss* v. *Harbottle* has been considered. It is, therefore, felt appropriate at this juncture to make some reference to these New Zealand cases.

The first in point of time appears to be *Macdougall* v. *Duthie*, (1885) N.Z.L.R. 3 S.C. 334, where Richmond, J., held that an action against a director of a company for the refund of profits made by him in dealings with the company must be brought at the suit of the company, and not at that of a single shareholder. Such dealings were capable of ratification by the members of the company, and concerned the internal management of the company. Apparently, the majority of the shareholders had ratified the defendant's transactions, but no evidence to that effect had been given at the hearing. Nevertheless, the learned Judge felt bound by the rule relating to internal management laid down in *MacDougall* v. *Gardiner* (*supra*).

In 1887, it fell to Johnston, J., to consider one of the exceptions to the rule—namely, where private rights are involved. In *Fryer* v. *Aynsley*, (1887) 5 N.Z.L.R. S.C. 380, it was held that the rule did not apply, as the plaintiff was claiming to be entitled to sit and vote as a director of the company. In such circumstances, the plaintiff was entitled to sue in his own name, without joining the body of shareholders. The Court granted a writ of mandamus directing the plaintiff to be admitted as a director of the company.

A further exception to the rule was considered by Williams, J., in *Gray* v. *Equitable Insurance Association of New Zealand*, (1888), 6 N.Z.L.R. 450—namely, the case where *ultra vires* acts are involved. It has been clear, particularly since the decision in *Burland* v. *Earle* (*supra*), that the rule in *Foss* v. *Harbottle* has no application when the acts or transactions attacked are *ultra vires* the company. In *Gray's* case, the learned Judge came to the conclusion on the evidence that no *ultra vires* act was involved. Nevertheless, he made it quite clear that, if the carrying on of the particular business in issue had been forbidden expressly or impliedly by the memorandum, an action by a single shareholder would have been maintainable. As, however, no *ultra vires* acts were involved, whether or not this particular business should be continued was for the shareholders to decide, and not for the Court.

It was some twenty years before the rule was once more considered by the Courts in New Zealand. In *Reed* v. *Levin Co-operative Dairy Co., Ltd.*, (1908) 10 G.L.R. 375, Cooper, J., applied the rule and enunciated it in the following terms, at p. 379 :

> That rule is that nothing connected with internal disputes between shareholders is to be made the subject of a bill by one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent, something *ultra vires* on the part of the company, *qua* company, or on the part of the majority of the company, so that every litigation must be in the name of the company, if the company really desires to entertain it.

Here, an election of directors was challenged, on the ground that certain proxies had been wrongly disallowed. The chairman had acted *bona fide* on the advice of the company's solicitor, which advice was erroneous. The evidence showed that the majority approved of the election, and were against the proceedings which had been instituted. In addition, the election had been confirmed at an extraordinary general meeting expressly called for the purpose. The Court held that the case involved matters of internal management approved by the majority, and also that in any case the election had been expressly confirmed by a majority of the members.

The rule was again applied in *Tataurangi Tairuakena* v. *Carr*, [1927] N.Z.L.R. 240, by Ostler, J., but his decision was upset by the Court of Appeal ([1927] N.Z.L.R. 688), on the ground that there is a clear distinction between an ordinary company and a trust corporation such as was concerned in that case. There, the body corporate consisted of the owners of certain Native land who were incorporated under Part XVII of the Native Land Act, 1909. It was pointed out by the Court of Appeal, at p. 694, that such a corporation was in fact a trustee for the equitable owners of the land vested in it. These owners have distinct rights in the trust property, which can be enforced by them individually. The complete set-up is in marked contrast to that of a company and its shareholders. Consequently, the Court of Appeal considered the rule to be inapplicable.

In *Maddams* v. *Miller's (Invercargill), Ltd.*, [1937] N.Z.L.R. 843, Kennedy, J., carefully expounded the internal-management rule and its exceptions, and his judgment was unanimously affirmed by the Court of Appeal: [1938] N.Z.L.R. 490. The learned Judge explained that the Court, while reluctant to interfere with the judgment of a majority of the shareholders, will do so where it is satisfied that the action of the majority is of a fraudulent character, in effect depriving the minority of their rights. He held that a defendant's voting and taking an inordinate amount of director's fees in substance amounted to an appropriation of the company's funds, an abuse of his undoubted majority powers, and a deprivation of the minority of their rights, and that such action was of a fraudulent character. Thus, the rule did not apply, with the result that an action by a single shareholder was maintainable.

The latest application of the rule is in *Humphries'* case (*supra*). The rule in *Foss* v. *Harbottle* cannot, therefore, be regarded as a stranger to the New Zealand Courts. Nevertheless, it is a principle of sufficient importance to require a restatement from time to time of its wide scope and acknowledged exceptions. In *Humphries'* case (*supra*), this restatement has taken the form of an extension of the principle from its acknowledged field of company law to the field of trade-union law. As a result of the decisions above referred to, it can fairly be said that the rule in *Foss* v. *Harbottle* has become firmly established in the law of New Zealand.

The conclusions deducible from the New Zealand decisions may be summarized conveniently as follows :

(i) The rule in *Foss* v. *Harbottle* (*supra*) applies in New Zealand : *Macdougall* v. *Duthie* (*supra*) and *Reed* v. *Levin Co-operative Dairy Co., Ltd.* (*supra*).

(ii) The rule is not limited to disputes regarding the internal management of incorporated companies, but extends to disputes regarding the internal affairs of trade unions : *Humphries'* case (*supra*).

(iii) It does not, however, extend to a body corporate consisting of the owners of certain Native land incorporated under Part XVII of the Native Land Act, 1909 (now Part XVII of the Maori Land Act, 1931) : *Tataurangi Tairuakena* v. *Carr*, [1927] N.Z.L.R. 688.

(iv) The acknowledged exceptions to the rule are also applicable in New Zealand, and may be illustrated briefly as follows :

(*a*) Where *ultra vires* and illegal acts are involved : *Gray* v. *Equitable Insurance Association* (*supra*).

(*b*) Where private rights are involved : *Fryer* v. *Aynsley* (*supra*).

(*c*) Where fraud is in issue : *Maddams* v. *Miller's (Invercargill), Ltd.* (*supra*).

The Gladsome Light of Jurisprudence. I have made myself to-day the self-appointed spokesman and defender of the philosopher in the field of law. I am not concerned to vindicate philosophy, either in jurisprudence or outside of it, as an inquiry of cultural value or speculative interest. Pretensions, thus limited, would perhaps be feebly contested, or even grudgingly allowed. My concern is with the relation of philosophy to life. The significance of this relation should be brought home to the student while he is yet standing on the threshold. You think perhaps of philosophy as dwelling in the clouds. I hope you may see that she is able to descend to earth. You think that in stopping to pay court to her, when you should be hastening forward on your journey, you are loitering in bypaths and wasting precious hours. I hope you may share my faith that you are on the highway to the goal. Here you will find the key for the unlocking of bolts and combinations that shall never be pried open by clumsier or grosser tools. You think there is nothing practical in a theory that is concerned with ultimate conceptions. That is true perhaps while you are doing the journeyman's work of your profession. You may find in the end, when you pass to higher problems, that instead of its being true that the study of the ultimate is profitless, there is little that is profitable in the study of anything else : Cardozo, *The Growth of the Law*, 1924.

ATHLETES AND THE LAW.

By Gilchrist Alexander.*

Ever since the days when it was my good fortune to gaze with some awe on a spectacle which is not likely to recur—a Court of Appeal constituted of Lords Justices all of whom had been rowing Blues—Lord Esher, M.R., Chitty and A. L. Smith, L.JJ.—in a period when one could also see another Court of Appeal composed of ex-Senior Wranglers—Romer, Stirling, and Moulton, L.JJ. —ever since those days, it has been a matter of gratification to note how often the youthful athlete has crowned his career by attaining a position of eminence in the law. Two at least have reached the Woolsack. Lord Maugham was a member of the Cambridge crews of 1888 and 1889. Lord Loreburn was a cricket Blue. Rowing, indeed, of all forms of athletics, seems to have been the favourite youthful exercise of those successful in the law.

When one gazed at the powerful frame of Lord Macnaghten, even in his latest days, or at the tall figures of Eldon Bankes, L.J., and Branson, J., it was not difficult to envisage them as members of a University crew. E. G. Hemmerde, K.C., who died not long ago, in spite of his seventy-six years retained to the last his athletic figures as he strode through the Temple. He won the Diamond Sculls fifty years ago. Thirty years before that, Channell, J., won the Colquhoun Sculls. Old members of the legal profession will remember him as a Judge of the Queen's Bench Division and son of a Baron of the Exchequer. Rowing men may recall other names, but these will suffice.

The athlete of the Bar *par excellence* in my time was undoubtedly the Hon. Alfred Lyttelton. A cricketer of world-wide fame, amateur champion of tennis, expert at all ball games, and an International in Association football, in the days when that form of sport was not commercialized and players bought and sold like cattle, he brought to the Bar the finest traditions of English sport. Whenever he appeared in the Courts in London or on the Oxford Circuit, he suffused around him that spirit of fair play and tolerance, that camaraderie and friendly regard for an opponent, which are the pride of the athletic life of England. Naturally his prestige was enormous, but he did not allow it to affect in the slightest his attitude to the humbler members of the profession. On one occasion, when I was very young, I was led by him in a small case at Stafford Assizes. I have never forgotten the elder-brotherly kindness with which he treated me. At the Bar mess, he was in his element, and the dinners of that period at which he was present stand out in my memory as landmarks. In the House of Commons he was as popular as at the Bar. In due course he became Secretary of State for the Colonies. I would not say that he was a man of outstanding intellectual ability, but he possessed qualities of character and charm which carried him very far in the political world. When he died, he was mourned deeply and sincerely, both in the House and outside, and Asquith paid tribute to his memory in a speech which, for its moving felicity and deep feeling, has become historic.

A. G. Steel, of Lancashire, was a cricketer of renown who practised at the Bar as a "local" in the north.

In the days when the Corinthians were a power in the land of Association football, they had two powerful full-backs, P. M. Walters and his brother, who were the backbone of the English International team. Both were members of the legal profession. Not long ago, I noted the death of one at a great age.

The Rugby code, however, contributed more names to Bench and Bar than did the other. Luxmoore, L.J., who gained his cap for England, I remember as a stalwart forward in the Richmond team. An equally robust figure, who, however, never attained international status at the game, was the late Lord Caldecote, at one time Lord Chancellor and later Lord Chief Justice. "Tom" Inskip, in the days of his youth, played for Bristol. Anyone who knows West Country football can imagine the rigours of the game which that learned Judge experienced when he scrummaged and struggled in the pack of that club.

From the West Country, too, came G. F. Roberts, K.C. (known familiarly in the Temple, why I do not know, as "Khaki" Roberts). A glance at his powerful frame explains his success as a member of the Devonshire and England teams. There there is C. D. Aarvold, one time Captain of England, a centre three-quarters whose sportsmanship and skill made him a firm favourite at Blackheath and Twickenham.

Of an earlier date was Shearman, J. Montague Shearman gained his Rugby Blue at Oxford, but it was as a runner that he gained athletic fame. He was amateur champion in the hundred yards and quarter-mile events. There was little of the lawyer in his appearance. Absolutely devoid of all side or starchiness, he moved about the Temple in the friendliest fashion, and even when on the Bench eschewed all formality. He was a familiar figure at the championships of the Amateur Athletic Association, and was President of the Association for fourteen years, in succession to Lord Alverstone.

Those who remember the massive form of Lord Alverstone as he sat on the bench as Lord Chief Justice have some difficulty in visualizing him as a slender young man in running togs. Yet his book, *Recollections of Bar and Bench*, contains a photograph of him in just such a costume. There he is, slim and upright, with the abundant whiskers of the period. Indeed, he is more whiskered than the mature Lord Chief Justice. He recounts his triumphs at Cambridge and at the University Sports on the running-track, and his successful work in founding the University Athletic Club, and later the London Athletic Club. The Amateur Athletic Association owed much to him, and he was its President for twenty-four years, from 1891-1915. He was also President of the M.C.C., the Surrey County Cricket Club, and Queen's Club.

A later Lord Chief Justice, Lord Goddard, was also a running Blue and is now a Vice-patron of the Amateur Athletic Association. That Association owes much to a member of the Bar, H. M. Abrahams, an old Olympic champion, who has worked ceaselessly in the Press, on the wireless, and at the White City on its behalf. His brother, Sir Sidney Abrahams, an old Cambridge running Blue, was Chief Justice of Ceylon. D. G. A.

* Reproduced, by permission, from *209 Law Times*, 209.

Lowe, another Olympic runner, who was Secretary of the A.A.A. from 1931-38, is also a member of the Bar.

At the present day, the game which appeals most to members of the legal profession is undoubtedly the game of golf. Ever since the days when A. J. Balfour popularized in England a game which up to his time had hardly been known outside of Scotland, the cult of golf has spread all over the world. Sedate lawyers and Judges have found in it a recreation which, if it is not pursued in too competitive a spirit, affords a pleasant relaxation in the open air, carried on with suitable dignity, accompanied with unrivalled opportunities for social diversion. The list of competitors, in any contest between Inns of Court or in any Bar Meeting, suggests that the full Bench of Judges and most of the leading silks are engaged. A member of the Bar, Bernard Darwin, has done incalculable service to the best interests of the game by the admirable articles he has written and the broadcasts he has given on championships and leading events. There are those who have been known to scoff at the game. Even the scoffers have been entranced by Bernard Darwin.

Of all the lawyer-golfers, it is fitting that the most distinguished should have been a Scot; and what a versatile athlete he was! L. M. Balfour-Melville, a member of that somewhat exclusive body of lawyers in Edinburgh known as the Writers to the Signet, was amateur champion of golf in 1895 and near the top on four or five other occasions. He won innumerable medals on the classic links of St. Andrews, and capped his golfing and social career by becoming captain of the Royal and Ancient Club there. He gained an International Cap in that Rugby match in which it is the ambition of every Scottish player to appear, that against the "auld enemy," England. He won the Lawn Tennis Championship of Scotland, and for many years was Scotland's leading cricketer. This Admirable Crichton of games excelled at almost everything—shooting, skating, curling, billiards. No sport seemed to come amiss to him.

He was, indeed, not as distinguished in the law as was a contemporary of his, that sound Judge and man of affairs Lord Dunedin. In the 'nineties, the legal circles of Edinburgh contained many athletes in their midst. Prominent among them was Graham Murray (as Lord Dunedin then was), a debonair young man, leader of fashion and at the Bar, and subsequently Captain of the Royal and Ancient Club at St. Andrews.

Then there was Grant Asher, who with Don Wauchope formed probably the most brilliant pair of half-backs (quarter-backs they were called, in those days) who have ever appeared in Scotland's Rugby team.

The young advocates who clustered round the fire-places in Parliament House had plenty of time to indulge in every variety of sport. St. Andrews was not far off, and even nearer were many historic golf courses. For the younger, the numerous clubs in Edinburgh afforded a plethora of Rugby matches, and the Grange Club found many of them active in the cricket field. The subsequent careers of many of them demonstrated beyond a peradventure that they were by no means "muddied oafs" or "flannelled fools."

MEMORANDUM OF INCUMBRANCE.

Under the Land Transfer Act, 1915.

By E. C. Adams, LL.M.

The Torrens system of registration of title to land has been criticized for its rigidity, its inelasticity, and in New Zealand the Land Transfer Act, 1915, has even been blamed for the alleged decline in the art of conveyancing. In truth, there is still plenty of scope for the exercise of the skill of the conveyancer, but what has happened in New Zealand during this present century, which has half run its course, is that the nature of conveyancing has gradually changed. It is true that it is only estates and interests which are authorized to be registered which may be registered under the Land Transfer Act—*e.g.*, *Wellington and Manawatu Railway Co., Ltd.* v. *Registrar-General of Land*, (1899) 18 N.Z.L.R. 250. But let us consider for instance the definition of "mortgage" in the Land Transfer Act, 1915. In s. 2 it is defined as follows:

> "Mortgage" means and includes any charge on land created under the provisions of this Act for securing—
>
> (*a*) The repayment of a loan or satisfaction of an existing debt;
>
> (*b*) The repayment of future advances, or payment or satisfaction of any future or unascertained debt or liability, contingent or otherwise;
>
> (*c*) The payment to the holders for the time being of any bonds, debentures, promissory notes, or other securities, negotiable or otherwise, made or issued by the mortgagor before or after the creation of such charge;
>
> (*d*) The payment to any person or persons by yearly or periodical payments or otherwise of any annuity, rent-charge, or sum of money other than a debt.

This definition is very wide, and is not confined to what the man in the street would regard as being perhaps the only form of mortgage—namely, the taking of security for the repayment of a loan.

In conjunction with this definition, we must read s. 101 (1) of the Land Transfer Act, 1915, which provides as follows:

> Whenever any estate or interest under this Act is intended to be charged with or made security for payment of any money, the registered proprietor shall execute a memorandum in the Form E or F in the Second Schedule hereto as may be applicable to the case, and every such instrument shall contain a precise statement of the estate or interest intended to be charged, and shall, for description of the land, refer to the proper folium of the Register, and shall give such other description as may be necessary.

In the Second Schedule, Form F is called "Memorandum of Incumbrance for Securing a Sum of Money": Form E, simply "Memorandum of Mortgage." It is convenient, therefore, to refer to a mortgage in Form E as an ordinary memorandum of mortgage, and to one in Form F as a memorandum of incumbrance. Every conveyancer must have pondered at times whether he should draw his security for the payment of any money in Form E, which is the usual Form, or as a memorandum of incumbrance in Form F. Section 101 of the Act itself will not solve the problem: the words "as may be applicable to the case" (words beloved by those who draw our statutes) are words, not of comfort,

but of mere irritation. The problem, however, will become somewhat easier if we carefully study the directions given in the two Forms; these directions are in italics. In the ordinary memorandum of mortgage (Form E), there is space for the insertion of the consideration, and the directions in italics read: "*Here state circumstances of indebtedness, present or future, in respect of which the security is intended to be given.*" In the memorandum of incumbrance, on the other hand, there is no provision for the insertion of the consideration; in lieu thereof, we find these words:

> and desiring to render the said land available for the purpose of securing to and for the benefit of C.D. the sum of money [annuity *or* rent-charge] [hereinafter mentioned].

The operative clause in Form E may also be usefully compared with that in the memorandum of incumbrance. In the ordinary memorandum of mortgage, it reads:

> And, for the better securing to the said E.F. the repayment in manner aforesaid of the said principal sum and interest, I hereby mortgage to the said E.F. all my estate and interest in the said land above described.

In the memorandum of incumbrance, the operative part reads:

> do hereby incumber the said land for the benefit of the said C.D. with the sum [annuity *or* rent-charge] of £ , to be raised and paid at the times and in the manner following—that is to say.

Then there follow directions which will not be found in the ordinary memorandum of mortgage:

> [*Here state the times appointed for the payment of the sum, annuity, or rent-charge intended to be secured; the interest, if any; and the events on which such sum, annuity, or rent-charge shall become and cease to be payable* . . .]

From this comparison we are driven to the conclusion that the memorandum of incumbrance is intended only for transactions which come within para. (*d*) of the definition:

> The payment [not repayment, be it noted] to any person or persons by yearly or periodical payments or otherwise of any annuity, rent-charge, or sum of money other than a debt.

This is also the view of leading text-book writers on the Torrens system—*e.g.*, *Hogg's Registration of Title to Land throughout the Empire*, 295-298, and *Jessup's Lands Titles Office Forms And Practice*, 2nd Ed. 149. The repayment of a loan or debt should be secured by a memorandum of mortgage in the ordinary Form, and not by a memorandum of incumbrance. Payment of a gross sum of money (other than repayment of a loan or debt) may apparently be secured by either form: *Hogg's Registration of Title to Land throughout the Empire*, 296. But, as *Jessup* points out, it is very important to note that in *all* cases the incumbrance must secure a money payment. And, as *Hogg* points out, at p. 295, the incumbrance is for the purpose of securing on land payment of moneys other than such loans or debts as are usually secured by ordinary memorandum of mortgage.

The incumbrance in New Zealand is principally used for securing rent-charges or annuities arising out of:

(*a*) a testator's will;
(*b*) a voluntary settlement *inter vivos*;
(*c*) a sale of land, the grant of the annuity or rent-charge being the consideration, or part of the consideration, for the sale of the land.

Annuities or rent-charges arising under (*b*) above will render the land liable to death duty on the death of the settlor: *In re Bethell, Bethell* v. *Commissioner of Stamp Duties and Church Property Trustees*, [1947] N.Z.L.R. 49. Those arising out of a genuine sale of land may or may not be liable to death duty, but, if part of a *family* settlement, they will be liable: *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520.

The grant of the annuity or rent-charge may itself be by way of pure gift, in which case it is liable to death duty only if the grantor dies within three years of the creation of the incumbrance, but any arrears owing at the date of the death or future payments cannot be deducted as a debt in ascertaining the final balance for death-duty purposes: *Holmes* v. *Commissioner of Stamp Duties*, [1927] N.Z.L.R. 753.

The annuity or rent-charge may be for life or other limited period only. Thus, it may be given to a person so long as she remains a widow, or on various conditions. Apparently—*e.g.*, *Hogg's Registration of Title to Land throughout the Empire*, 298—the annuity or rent-charge may be perpetual, but the writer has never encountered a perpetual one in practice.

As pointed out previously, a memorandum of incumbrance may secure a gross sum. Thus, the writer has seen an incumbrance so moulded to secure a charge of the rents arising from the land charged.

On the other hand, in *Marshall* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 317, a mortgage by way of gift, from a father to his daughter on her attaining the age of twenty-one years, was secured by a memorandum of mortgage in the ordinary form. (Probably that form was chosen in preference to a memorandum of incumbrance because the donor desired to assume personal liability for payment of the sum secured, together with interest thereon.)

The normal function, therefore, of a memorandum of incumbrance under the Land Transfer Act, 1915, is to secure payment of an annuity, rent-charge, or sum of money other than a debt. And, for that purpose, as pointed out by Sir Michael Myers, C.J., in a most illuminating judgment, *Walker* v. *Walker*, [1932] N.Z.L.R. 1440, *prima facie* an incumbrance has all the remedies of a mortgagee under the ordinary form of mortgage—*e.g.*, payment of arrears out of the sum payable under a fire-insurance policy. But the memorandum of incumbrance may also be employed when its principal purpose is, not the securing of an annuity, rent-charge, or sum of money, but the performance of a restrictive covenant or personal covenant, the securing of the sum of money in the prescribed form being merely the means by which that principal purpose is achieved. (It will be borne in mind, of course, that, in instruments transferring land under the Land Transfer Act, 1915, restrictive covenants and personal covenants—excepting fencing covenants, for which special provision has been made in the Fencing Act, 1908—may not be inserted, nor may they be noted, on the Register Book: *Wellington and Manawatu Railway Co., Ltd.* v. *Registrar-General of Land*, (1899) 18 N.Z.L.R. 250, and *Staples and Co., Ltd.* v. *Corby and District Land Registrar*, (1900) 19 N.Z.L.R. 517. It is the rule laid down in the leading case of *Mahony* v. *Hosken*, (1912) 14 C.L.R. 379, which conveyancers avail themselves of, and that rule is that in a memorandum of incumbrance it is permissible to insert provisions for the *defeasance* of the sum or sums of money otherwise payable. Thus, in a memorandum of incum-

brance affecting licensed premises provision may be made that the annuity or other sum secured will not be payable if the incumbrancer purchases all beer from the incumbrancee: *Kerr's Torrens System*, 355. The following is also permissible: For valuable consideration, A agrees with B to maintain him for the remainder of his life, and executes a memorandum of incumbrance securing an annuity of £100 per annum during the life of B; a covenant may be inserted that A will maintain B during his life, that each year during which B is so maintained he will on request give an acknowledgement to operate as a release of the annuity for that year, and that, while B is properly maintained, the right given by the incumbrance shall not be enforced.

Hogg's Registration of Title to Land throughout the Empire, 298, sums the matter up thus:

> That an annuity created by means of a statutory charge (*i.e.*, a memorandum of incumbrance in New Zealand) is merely a security for the performance of a covenant is no objection to the registrability of the instrument; in this way the beer covenants relating to a tied public house have been secured, the periodic sums not being payable so long as the covenants are duly observed.

In this connection, however, with respect to restrictive covenants, I desire to repeat what I wrote in (1938) 14 NEW ZEALAND LAW JOURNAL, 322:

> Therefore a restrictive covenant could, in New Zealand, be secured in a similar manner—*e.g.*, let the servient land be duly charged with a yearly rent-charge of £20 per annum, with a provision in the memorandum of incumbrance (in the Form F, Second Schedule to the Land Transfer Act, 1915) that it would be reduced to one peppercorn if the provisions of a restrictive covenant were not broken. With each change of ownership of the dominant tenement the memorandum of incumbrance would have to be transferred to the new owner to secure continuity of benefit of the restrictive covenant.
>
> It may be argued that, if it is possible to secure restrictive covenants under the Land Transfer Act by such an indirect method, why not bring the New Zealand law into force with the English in this respect, and make restrictive covenants freely registrable and, when registered, notice to all the world. But the writer of this article is against such a proposal, for the following reasons:—
>
> 1. The securing of restrictive covenants by these indirect methods has not become very common in New Zealand and is not likely to become so, because to be fully effective the memorandum of incumbrance would have to be a first mortgage, and that would embarrass the servient proprietor in securing the necessary finance. One cannot imagine a solicitor advising his client to sign such a memorandum of incumbrance, unless the client had legally bound himself so to do.
>
> 2. The device of a memorandum of incumbrance appears unsuitable in the case of a *building scheme*, where there are mutual restrictive covenants by many proprietors of land.
>
> 3. The doctrine of restrictive covenants appears alien to New Zealand conception of rights in property. Any contract tending to restrict the free transfer of land and the full use thereof is distinctly against public opinion in these newly settled countries, whatever may be the position in older settled and more thickly populated countries like England.

The following precedent is an example of a memorandum of incumbrance drawn to secure performance of a personal covenant. As to the protection of a personal covenant by the device of a rent-charge under the general law, see *Austerberry* v. *Oldham Corporation*, (1885) 29 Ch.D. 750, 783.

We shall revert now to the usual form of a memorandum of incumbrance—namely, one to secure a rent-charge or payment of an annuity or other periodic sum.

The draftsman must be particular to observe the written directions set out in Form F to the Second Schedule of the Land Transfer Act, 1915. As previously pointed out, these directions are printed in italics. It is most important that there should be stated the events on which the annuity or rent-charge shall become and *cease* to be payable. It is often easier to get an incumbrance registered than to get it off the title, as to which, see s. 122 of the Land Transfer Act, 1915. A registered memorandum of incumbrance may be a serious blot on a title. In addition, provision is often made that, in the event of a sale of the land, the incumbrance will be released by the incumbrancee upon the setting aside and investment of such a sum of money as shall be sufficient to provide the amount of the rent-charge or the annuity. Such a covenant will be found set out in *Walker* v. *Walker*, [1932] N.Z.L.R. 1440, 1449, 1450.

The incumbrancee has the remedies of a mortgagee, and, therefore, can sell the land, if default is made by the incumbrancer in payment of the rent-charge or annuity. To ensure payment of future instalments, provision is often inserted for the setting aside and investment of a sufficient sum from the proceeds of the sale or for the purchase therefrom of an annuity from an insurance company. It appears, however, to have been the opinion of Myers, C.J., in *Walker* v. *Walker* (*supra*) that the provisions of s. 111 of the Property Law Act, 1908, apply to an incumbrance under the Land Transfer Act, 1915, securing payment of an annuity or rent-charge. The writer of this article sees no reason why s. 111 should not apply: *cf. Renwick* v. *Renwick*, [1934] G.L.R. 58.

It is advisable to recite in the memorandum of incumbrance the circumstances leading up to the execution of the instrument. This was done in *Allan* v. *Dawson*, [1936] G.L.R. 307, and thereby assisted the Court in construing the instrument, the point at issue being the exact nature of the liability of the incumbrancer. In this connection, see also *Renwick* v. *Renwick*, [1934] G.L.R. 58, where the order of Court authorizing the incumbrance was recited at length in the incumbrance.

The draftsman must also put his mind to this question: Is the incumbrancer to be personally liable for payment of the annuity or periodic sum, or is it to be payable out of the land only? As pointed out in *Allan* v. *Dawson*, [1936] G.L.R. 307, a special covenant may be inserted in Form F by which the incumbrancer may assume personal liability, but there is no such covenant which automatically applies as in Form E, the ordinary memorandum of mortgage. Therefore, it appears to the writer that, unless such a special covenant is inserted in a memorandum of incumbrance, *prima facie* the incumbrancer will not be personally liable. It was held that there was no personal liability in *Allan* v. *Dawson* (*supra*), a devise of land to A, subject to a rent-charge in favour of B. It has been held that a memorandum of incumbrance executed pursuant to an order of the Divorce Court for payment of a gross sum of money or periodic sum by way of maintenance should not contain personal covenants by the incumbrancer for payment of such sums; it should operate as a charge on the land as security for payment only: *In re Christie*, *Public Trustee* v. *Christie*, [1945] G.L.R. 325. It will be observed also that in *Allan* v. *Dawson* (*supra*) the incumbrance was executed, not by the devisee, but by the executors. That appears to be the correct course where the devisee has no personal liability.

PRECEDENT.

MEMORANDUM OF INCUMBRANCE FOR SECURING PERFORMANCE OF A PERSONAL COVENANT AFFECTING LAND UNDER THE LAND TRANSFER ACT, 1915.

I A. B. of &c. being registered as proprietor of an estate of freehold in fee simple in possession subject however &c. in that piece of land situated in the Survey District of containing by admeasurement [*Set out here area*] be the same a little more or less being lot numbered on plan deposited in the said Registry under Number and being part of the land comprised and described in Register Book Volume Folio AND desiring to render the said land available for the purpose of securing to and for the benefit of C. D. of &c. the rent-charge hereinafter mentioned :

DO HEREBY INCUMBER the said land for the benefit of the said C. D. with an annual rent-charge of £10 to be raised and paid at the times and in the manner following that is to say: in one annual sum on the day of 1950 and on the like day of in every year thereafter :

PROVIDED ALWAYS that if during the twelve months immediately preceding the day of in any year there shall have been no breach of any of the obligations of the deed of covenant a copy of which is set out in the Schedule hereunder written then the annual rent-charge payable on such day of shall be reduced to one peppercorn [*or* shall be deemed to have been paid and the incumbrancer shall be entitled to an acknowledgement to that effect] :

PROVIDED ALSO that if and whenever the obligations set out in the said deed shall have been duly and wholly complied with or shall by effluxion of time or otherwise become no longer enforceable then this memorandum of incumbrance shall be wholly discharged by the incumbrancee :

AND subject as aforesaid the said C. D. shall be entitled to all the powers and remedies given to mortgagees and rent-chargees by the Land Transfer Act 1915 and the Property Law Act 1908.

SCHEDULE HEREINBEFORE REFERRED TO.
[*Set out here copy of deed of covenant.*]

IN WITNESS whereof these presents have been executed this day of 1950.
Signed by the above-named A. B. as incumbrancer } A. B.
in the presence of :— }

E. F.,
Solicitor,
Wanganui.

Correct for the purposes of the Land Transfer Act, L.H.,
Solicitor for the incumbrancee.

CONTEMPT OF COURT.

An Amusing Passage of Law French.

Some years ago, counsel in the Supreme Court in a provincial city had occasion to cite as a precedent a case reported in Latch's Reports (temp. 1625-1628), which were written, and have been reprinted in the *English Reports*, in Law French. By way of adverse comment going to the credit of the reporter and his language, opposing counsel cited, as an example of the absurdities of the latter, the sentence " beloved of lawyers " (as Hine puts it in his *Confessions of an Uncommon Attorney*, 8) : " Il ject un brickbat a le dit Justice que narrowly mist."

The passage from which this sentence is taken occurs in the notes added to the 1688 edition of *Dyer's Reports* (*Davis's* case), at p. 188b. The reprint in *73 English Reports* has been translated into English, but the passage is recorded elsewhere, and it seems worth reproducing as an amusing illustration of the degradation which Anglo-French or Anglo-Norman, the official language of the Courts in England till the end of the fifteenth century, and the unofficial language of reporters and of the profession at large till almost the end of the seventeenth, underwent during that time :

> Richardson, ch Just. de C. Banc al Assises at Salisbury in Summer 1631. fuit assault per prisoner la condemne pur felony que puis son condemnation ject un Brickbat a le dit Justice que narrowly mist, & pur ceo immediately fuit Indictment drawn per Noy envers le prisoner, & son dexter manus ampute & fixe al Gibbet sur que luy mesme immediatement hange in presence de Court.

This, as Sir Frederick Pollock has pointed out (*A First Book of Jurisprudence*, 301), is the last stage of corruption ; he describes the language as " an ignominious jumble of corrupt French eked out with Latin and English." It is little wonder that it has perished. It is surprising enough that, at about the time when the above-cited reports were being written, Roger North could write of his brother, the Lord Keeper Guilford (*1 Lives of the Norths*, 29), that he " seldom wrote hastily in any other dialect ; for to say the truth, barbarous as it is thought to be, it is concise, aptly abbreviated, and significative," and, in *A Discourse on the Study of the Laws*, 23, that " the law is scarcely expressible properly in English." Granted that the technical terms of the law were then, and in the majority still are, French in origin and form, one would think that there is nothing in the reports written in Law French that could not, apart from the technical terms (which in many instances formed parts of English contemporary speech), be as concisely and aptly expressed in English. The translation of the above-cited passage, which appears in *73 English Reports*, is neither longer nor more wordy than the original. Indeed, as Pollock has pointed out, the Law French reports of the sixteenth century and after represent no more than a version of what was really said in Court in English.

An amusing pendant to the above passage, with its melancholy tale of the condemned man's last fling, is to be found in Richardson, C.J.'s, own comment on the accuracy of the felon's aim, as recorded in *5 Camden Society's Publications*, 53, under the totle " No Upright Judge " :

> Judge Richardson, in going the Western Circuits, had a great flint stone throwne at his head by a malefactor, then condemned (who thought it meritorious, and the way to be a benefactor to the Commonwealth, to take away the life of a man so odious), but leaning low of his elbow, in a lazie recklesse manner, the bullett flew too high and only tooke off his hatt. Soone after, some friends congratulating his deliverance, he replyde, by way of jeast (as his fashion was to make a jeast of every thing), " You see now, if I had beene an upright Judge [intimating his reclining posture] I had been slaine."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Lewis, J.—Sir Wilfrid Lewis, who died in March, became ill during the early stages of the trial of Brian Hume, which had consequently to be re-opened with Sellers, J., on the Bench. Lewis, J., a Welshman by birth, upbringing, and tradition, sat in the King's Bench Division for fifteen years, and came from legal stock. He was himself Chancellor of the Diocese of Llandaff, as his father was before him. According to long-standing practice, his appointment as junior common-law counsel to the Treasury—" Attorney-General's devil "—carried with it direct promotion to the judiciary, in which sphere his knowledge of the world stood him in good stead. The *Law Times* relates that he once had to try a case concerning the manners of a particular horse, which he arranged should be brought to the quadrangle of the Law Courts. Here, he mounted it, rode it up and down, and tried it between the shafts. " Evidently," says the report, " it recognized a Judge when it saw one, for it behaved perfectly ; its mute evidence came up to the proof in every respect and won the deserved judgment, although it is said that, as soon as it left the Courts, it was up to its old tricks again."

Connivance.—If a husband, accompanied by inquiry agents, watches through a window, sees preparations being made, and then does nothing to prevent his wife from committing adultery, does that conduct amount to connivance ? Hodson, J., in *Mudge* v. *Mudge and Honeysett* (*Goodwin cited*), [1950] 1 All E.R. 607, thought not. Upon the contention that such passive acquiescence was in law connivance, the Court took the view that the position would have been the same if the petitioner, suspicious of his wife's infidelity, had sent agents instead of joining the party himself. He was held not to have " lulled her into a false sense of security "—a phrase which the late P. J. O'Regan was fond of interpolating into his judgments on reasonable cause for delay on the part of workers seeking compensation under the Act—*i.e.*, the Workers' Compensation, not the extra-marital. The Judge proceeded to observe that, if he were to hold that a man who acted as the petitioner had done, and had found his suspicions correct, was guilty of connivance, then the Court would be driven into the position of rejecting the petitions of men who employed others to watch for them. It would seem from the judgment of the Court of Appeal in *Churchman* v. *Churchman*, [1945] P. 44 ; [1945] 2 All E.R. 190, that it has to be decided in each case whether the husband was guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery. In matters of this kind, the suspicious husband is faced with real difficulties in obtaining the proof that he seeks. Professional inquiry agents, as a class, do not commend themselves to the Courts, and, in New Zealand, as elsewhere, juries have been warned against too readily accepting their evidence. A husband, playing a lone hand, is helpless against a later denial. Stendhal relates an incident which illustrates the point. One Madame de Sommery, caught *in flagrante delicto* by her husband, flatly denied the fact. On his protesting, she replied : " Very well, I see you don't love me any more, since you believe what you see before what I tell you."

Parental Murder.—Convicted last month (June) of killing his parents with a hammer, Camilo Leyra of New York made an unusual plea through his counsel that the first of two counts be reversed in its order in the indictment, so that he would go to the electric chair for killing his father rather than his mother. " His mother in heaven should never feel that her own son was sentenced to die for killing her." Apparently impressed by the argument in support of the application, Judge Samuel Leibowitz granted it, adding his own views as to what the murdered lady's own attitude would probably be if discreetly approached in the hereafter. Actually, there appears to be little, if any, authority to justify the belief that a child who insists upon slaying his parents is entitled to any greater consideration for the female than for the male victim, although, if reliance can be placed upon the classic verse of the time, he may show a slightly greater delicacy for the female :

> " *Lizzie Borden took an axe,*
> *And gave her mother forty whacks* ;
> *When she saw what she had done,*
> *She gave her father forty-one.*"

Lizzie, of course, was acquitted, and lived, even with a tarnished reputation, until a ripe old age. On the other hand, the old Roman *Lex Pompeia de Parricidiis*, which dealt with the killing of any relation nearer than or in the degree of a first cousin, created a special punishment for the killing of a father or a mother, in which case the offender was burnt, that punishment having been substituted for the more customary one of being drowned in the company of a cock, a snake, or a dog.

On Criminal Evidence.—" Speaking broadly, there are three kinds of evidence : direct, circumstantial, and expert. It is direct evidence when one man says that he saw a second plunge a dagger into the vitals of a third. It is circumstantial evidence when the knife of a lover is found, stained with blood, by the stabbed corpse of his mistress. But, when test-tubes are mobilized and microscopes unleashed, when crimes are reconstructed and assaults revisualized, when the testimony of onlookers is scornfully swept aside by reference to a shred of skin or a dented metal bar—then the experts have descended on the scene " : Edgar Lustgarten, in *Verdict in Dispute*.

" Spilsbury had indeed done what few hope to do ; he had become a legend in his own lifetime. To the man in the street he stood for pathology as Hobbs stood for cricket or Dempsey for boxing or Capablanca for chess. By the middle 'twenties he had achieved a status merited by none—not even by himself. His pronouncements were invested with the force of dogma —and it was blasphemy to hint he might conceivably be wrong " : *Ibid.*

" Let us recognize the fact that criminal responsibility is a legal concept which the public understands and of which it approves, and that so far psychiatry has not replaced it by anything more precise and practical " : Sir Norward East, M.D., F.R.C.P., in *Society and the Criminal.*

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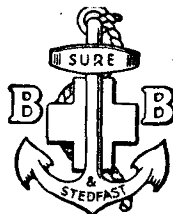

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