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# BAILMENT: COLD STORAGE OF GOODS: THE DUTY OF INSPECTION.

ALTHOUGH, in 1922, in a case relating to damage to apples in a cool store, our Court of Appeal applied to cool-storage owners the principles relating to the duties of bailees for reward, the law in that respect does not seem to be as fully known as it should be. In a recent case, *Adams Bruce, Ltd.* v. *Frozen Products, Ltd.* (to be reported), Mr. Justice Hay applied the same principles in respect of the duty of a cool-store proprietor, with which some bags of peanuts had been deposited for keeping under conditions of refrigeration.

As the rights of those many people who, in a producing country such as ours, make much use of cool stores are of considerable and Dominion-wide importance, and as cool storage is provided by many companies, it may be of assistance to the advisers of both the bailors and the bailees, the cool-storage owners, to set out the law of bailment as it affects them respectively, with particular reference to the latest judgment on the question.

In *Aurora Trading Co., Ltd., and Jackson* v. *Nelson Freezing Co., Ltd.*, [1922] N.Z.L.R. 662, the facts were that the plaintiff Jackson sold to the plaintiff company for forward delivery 1,000 cases of Sturmer apples, and, in accordance with his contract, placed them in the cool stores of the defendant company. The apples were apparently in good order and condition when they were placed in the store on March 26, 1920. Jackson gave notice to the defendant company that the apples were the property of the plaintiff company. They were taken out of the store in October and November, 1920, and were then considerably damaged and had deteriorated. The action was brought to recover damages for alleged negligence and breach of duty by the defendant company. Judgment was given for the defendant company, and the plaintiffs appealed.

In the course of its judgment, the Court of Appeal said that the defendant company had contracted for reward to store the apples in its cool store, and it was, therefore, a bailee for hire. Their Honours stated the general principles as enunciated in *Brabant and Co.* v. *King*, [1895] A.C. 632, 640. The obligation of a bailee for hire in such circumstances is to exercise the same degree of care towards the preservation of the goods entrusted to him from injury which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation includes, not only the duty of taking all reasonable precautions to obviate those risks, but the duty of taking all proper measures for the protection of the goods when such risks are imminent or have actually occurred.

Their Honours went on to point out ([1922] N.Z.L.R. 662, 674) that, where goods delivered to a bailee for hire are lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would use in relation to his own property; and they cited as authority for that statement *Phipps* v. *New Claridge's Hotel, Ltd.*, (1905) 22 T.L.R. 49, *Joseph Travers and Sons, Ltd.* v. *Cooper*, [1915] 1 K.B. 73, and *Morison, Pollexfen and Blair* v. *Walton*, an unreported case in the House of Lords in 1909, which was referred to by Buckley and Kennedy, L.JJ., in *Travers's* case, and in which Lord Halsbury stated the law to be that, where there is a bailment for reward made to a particular person, the bailee is bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment, and that the proof of that rests upon him.

After considering two Scottish cases (to which we shall refer later when considering the *Adams Bruce* case), the Court of Appeal held that the cool-store proprietor, in addition to its other duties as a bailee for reward, had the duty to inspect the apples in the store at reasonable times, and, if indications of deterioration were observed, to notify the bailors, and, if necessary and practicable, to take steps to protect the apples from further damage.

*Adams Bruce, Ltd.* v. *Frozen Products, Ltd.*, was an appeal from a Magistrate's judgment in favour of the cool-store proprietor.

In October, 1949, the appellant purchased sixty-seven sacks of shelled Java peanuts; on December 14, 1949, it purchased sixty sacks of shelled Indian peanuts; and on December 23, 1949, it purchased thirty sacks of shelled Java peanuts. On such respective dates the appellant caused the sacks to be placed in the respondent's cool store. In the case of each of the three consignments, the respondent issued a receipt on its printed form acknowledging that the goods therein described were "received for cold storage subject to the conditions printed on the back hereof". In each case, the goods were described simply as so

many sacks (or bags) of peanuts. The conditions printed on the back of the form were as follows:

> Goods are accepted for storage subject to the following conditions:
>
> 1. Contents of packages and condition of goods received are unknown to the Company.
>
> 2. Goods are received at stated weights and the Company accepts no responsibility for such weights or for any alleged change of weight during storage.
>
> 3. The Company accepts no liability for loss by pilferage of goods that are not in substantially constructed and securely fastened packages.
>
> 4. The Company may refuse to accept goods that are in its opinion unfit for storage and may, if the owner fails to do so upon request, remove from storage at the owner's expense and without liability of any sort, goods that have become unwholesome or unfit for storage.
>
> 5. After notifying the owner that goods are unfit for further storage the Company shall not be responsible for any subsequent deterioration in their condition.
>
> 6. The Company is not responsible for damage to goods through causes beyond its control and insurances against fire, earthquake and the like are the owner's responsibility.

It was common ground that the three consignments were received into the cool store in good condition, at least superficially, though there was nothing in the evidence to suggest that, at the respective times the storage commenced, any actual inspection of the contents of the sacks or any of them was made by either party. The appellant at no time gave any information concerning the intended usage of the peanuts; it did not give any instructions or engage in any discussion concerning storage temperatures or other storage conditions; it did not even indicate to the respondent that among the total quantity of 157 sacks there existed peanuts of different grades or different origins. The goods were not booked in for any specific period; but they were received by the respondent as goods to be stored for an indefinite period. They all underwent identical treatment while in the store. The storage charged was at the respondent's schedule rate for peanut storage.

The peanuts were originally intended by the appellant to be used for peanut-butter manufacture, but after a time that idea was abandoned, and it was decided to use them for roasting and for chocolate manufacture. Before using them for the latter purposes, the appellant's branch manager asked for an inspection of the peanuts to see that they were suitable. For that purpose, on June 19, 1950, one sack of each of the three consignments was withdrawn from storage, opened, and inspected. Both the branch manager and the factory foreman examined them, and they were found to be in good condition, with no sign of mould. The appellant drew peanuts from the cool store as required: on August 9 and 21, and on October 4, 10, and 25, 1950, a total of thirty sacks of Java peanuts was withdrawn and found to be in good condition; and on November 3, 10, and 17, a further eleven sacks of Java nuts was withdrawn with no complaint. On November 17 and 24, 1950, eight sacks of Indian nuts were taken from the cool store and found to be affected with mould. The branch manager immediately arranged an inspection of the nuts remaining in cool store, and took his factory manager with him. He said that he then saw extensive mould over many sacks, and that it was obvious. The branch manager, in his evidence, said that he had no knowledge of the correct temperature and humidity for the storage of peanuts, and did not think that anyone in his company had that knowledge; they relied on the respondent as to what should be done. He further stated that the nuts were put into cold storage to stop mould or weevils developing, principally weevils.

The appellant had claimed on two alternative causes of action—namely, (*a*) the breach by respondent of its contract properly to store and take care of the peanuts, whereby it permitted or failed to prevent the growth of mould; and (*b*) negligence in tort. As a result of the alleged breach of contract or the alleged negligence, it claims that a large quantity of the peanuts was so badly affected by mould that it had to be destroyed or sold at a loss, the damages resulting being £293 17s. 6d.

The learned Magistrate, after hearing evidence, gave a written judgment in which he held that the respondent had shown to his satisfaction that the injury suffered by appellant did not occur in consequence of respondent's neglecting to use such care and diligence as a prudent or careful man would use in relation to his own property. The appeal from that judgment to the Supreme Court was by way of general appeal. Additional evidence was taken before Mr. Justice Hay on two aspects of the case where amplification was desirable.

In his judgment, Mr. Justice Hay said that the principles of law bearing on the subject appeared to be beyond doubt. As stated in *1 Halsbury's Laws of England*, 2nd Ed. 751, para. 1234:

> When a chattel intrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred.

That statement of the law was accepted by the Court of Appeal in *Aurora Trading Co., Ltd., and Jackson* v. *Nelson Freezing Co., Ltd.*, [1922] N.Z.L.R. 662, 674, and applied to the case before it, which was an action for damages for alleged negligence and breach of duty on the part of a bailee for hire. The duties of a bailee for reward are set out in somewhat greater detail in the following passage from the judgment of the Judicial Committee in *Brabant and Co.* v. *King*, [1895] A.C. 632, 640:

> Their Lordships can see no reason to doubt that the relation in which the Government stood to the appellant company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred.

The Court of Appeal in the *Aurora Trading Co.'s* case, [1922] N.Z.L.R. 662, after stating the foregoing principle, went on to refer to two specific duties of such bailees, which were laid down by decisions of the Court of Session in Scotland, and which appeared to Mr. Justice Hay to be implicit in the general duty hereinbefore expressed. Those specific duties are, first, that storekeepers (as such bailees are described in Scots law) are bound to store in a proper manner the goods they receive; and, secondly, that they are charged with the further duty of reasonable inspection, so as to see that the goods are not sustaining damage. The Court of Appeal went on to say, at p. 675:

The above statements of law are of general application. The degree of care required from a bailee varies according to the circumstances, including the nature of the goods and the purpose of the bailment. The authorities show that it was the duty of the defendant to provide a cool store fit for the purpose intended, and to maintain the proper temperature and proper circulation of cold air in the store by efficient means, and to store the apples in such manner as would ensure access of the cold air to the fruit. As fruit is liable to be injuriously affected by failure to perform any of these duties, and may become affected at any time, it was the duty of the defendant to inspect the fruit in the store at reasonable times, and, if indications of deterioration were observed, to notify the plaintiffs, and, if necessary and practicable, to take steps to protect the goods from further damage.

Mr. Justice Hay continued:

The two Scottish decisions so followed by our own Court of Appeal are of such importance in relation to the circumstances of the present case as to warrant fuller notice. The first in order of date is *Allan and Poynter* v. *J. and R. Williamson* ((1870) 7 Sc.L.R. 214), where it was held that the keepers of a bonded warehouse with whom a puncheon of whisky had been stored for a number of years had failed to exercise due care and diligence in the requisite inspection and examination of it, and that they were therefore liable to the owners for the value of the contents, which had perished. In his judgment, in which the remaining three Lords concurred, the Lord Justice-Clerk put the matter in these words: "It is proved that a cask of whisky cannot be safely kept unless examined from time to time, and therefore there is no doubt that a duty lies on the storekeepers, and that that duty must be discharged efficiently. It is not necessary to say that that depends on the custom of trade. I think it is implied in the contract itself. The cask having burst, that lays the onus on the storekeepers, and the question is, whether the defenders have proved that they used reasonable care? I don't think the affirmative of that proposition has been proved. The cause of the cask's bursting was the rust of the hoops and consequent decay. The cask had been in the warehouse for nine years and had been examined two years before. Decay from rust is a known risk and a certain risk. That circumstance, that there were symptoms indicative of decay, taken along with the length of time the goods had been stored in defender's premises, was enough to put them on their guard. On the two grounds,—(1) of the indications of weakness of the cask brought home to the defenders' knowledge, and (2) its examination not proved to have been sufficient, I am of opinion that the defenders must be liable" (*ibid.*, 216). *Lord Neaves* in his judgment said: "There is no doubt about the law; and due care means reasonable diligence, such as people show in their own affairs. There are two questions—(1) Was there a duty on the storekeepers? (2) What was it? The duty is certainly not an obligation of insurance, but it is certainly just as little that of merely reporting to the owners when damage has been done. The duty of storekeepers is that of due inspection, and so to inform themselves as to be able to report to the owners as to the approach of danger. Is it proved that there was that inspection that ought to have been made? The length of time during which the cask had been stored, was a material circumstance rendering the examination more careful. I cannot say it is proved that the examination was in the circumstances sufficient" (*ibid.*, 216).

The second Scottish case to which Mr. Justice Hay referred was *J. and R. Snodgrass* v. *Ritchie and Lamberton*, (1890) 17 R. (Ct. of Sess.) 712, where a firm of millers brought an action against a firm of storekeepers for damages for alleged deterioration to 240 bags of flour belonging to the pursuers which had been deposited with the defenders. The pursuers pleaded that the flour had deteriorated through the neglect of the defenders to inspect it periodically. The defenders denied the alleged duty of inspection. The bags were stored in tiers, so that the weight of those above rested entirely on those below. It was proved that this method of storage produces deterioration in flour unless the bags are periodically turned. It was held that the storekeepers, having adopted this method of storing bags of flour, were under an obligation to turn the bags periodically, and were liable in damages in consequence of the flour having deteriorated through neglect to turn the bags. The Court of Session founded its decision on grounds different from that on which the Sheriff-substitute in the Court below had based his decision in favour of the pursuers. He had held that the defenders had been negligent by reason of a breach of duty to keep a look-out as to the state of the flour, and, if they found it getting into bad order, to inform the merchant, or even themselves to take measures to prevent it from taking further damage. The Court of Session, on the appeal, preferred to decide the case on the improper method of storage, and, in particular, upon the failure on the part of the defenders to turn the bags from time to time. The principal judgment (that of Lord Rutherfurd Clark) makes it clear that the Court did not question the law as laid down in *Allan and Poynter's* case, (1870) 7 Sc.L.R. 214, that storekeepers were (in addition to being bound to store in a proper manner the goods which they received) charged with the further duty of reasonable inspection, so as to see that the goods were not sustaining damage.

Mr. Justice Hay went on to say that, looking at the facts of the *Adams Bruce* case in the light of the foregoing principles, it was clear, on the admission of respondent itself, that no routine inspection of the peanuts had been made during the lengthy period of storage down to the discovery of the mould. The respondent's technical engineer, a man of impressive academic and professional qualifications, and of extensive practical experience as a professional engineer, particularly in refrigeration work, quite frankly stated that, with the exception of pip fruit (to which he said special considerations applied), the respondent company, during the thirteen years he had been in its employment, had not ever undertaken detailed routine inspection of goods in storage, or led owners of goods to believe that it would do so as part of its normal storage service; and he considered that regular inspection would be impracticable and contrary to trade custom or practice.

His Honour said that the standard laid down by the law is one of reasonable inspection only, varying according to the circumstances, including the nature of the goods and the purpose of the bailment. Thus, in the circumstances of the case before him, one would imagine that no higher standard would be called for than a routine inspection at frequent intervals of the exterior of the stack of peanuts and the examination of a moderate number of samples of the nuts themselves from different portions of the stack. There is surely nothing onerous or impracticable in performing a duty of that kind, but nothing whatever in that direction was done. It was no answer to say, as suggested by the technical engineer, that, as the respondent had not been informed of the difference in varieties of the peanuts, the contents of a great number of bags might have been examined without the existence of mould being revealed at all. That, His Honour added, seemed undoubtedly to be true, as the technical engineer's comprehensive examination of all the sacks remaining in store on December 18, 1950, revealed that those comprised in the first consignment (Java nuts) were only slightly infected with mould fungus on the nuts immediately adjacent to the inside surface of the sacks, while those in the second consignment (Indian nuts) were heavily infected in the zone adjoining the sack wall, with a less infection spreading right through the contents, and those in the third consignment (Java nuts) were completely free of mould, it

being incidentally of some importance to note that they were packed in sacks of very good quality. The point, however, was that, whether or not the taking of samples in the course of regular inspection would have disclosed the differentiation, the respondent disabled itself from obtaining any knowledge on the subject by its failure to inspect.

As regards the contention on behalf of respondent that a duty of regular inspection of goods was contrary to trade custom or practice, His Honour was satisfied that there was no sufficient evidence to warrant such a finding. He could not see any relevance in the further contention that inspection was not allowed for in the standard schedule of cold-storage charges. The respondent's technical engineer had pointed out that there was a difference between the charges for nuts for storage and for pest-killing, the latter being, he said, a special treatment, which was not cold storage. But there was no evidence to show that, at the time the contract between the parties was made, any discussion took place as to the purpose for which the storage was being made; and His Honour considered that the duty was surely upon the respondent at that time to draw attention to the different methods of treatment involved in the different schedule rates, and, if necessary, to lay down any special conditions for the storage of these particular goods. It held itself out on its inward warrants as a specialist since 1924 in the refrigeration of perishable foodstuffs; and the appellant, in entrusting the goods to its care, was justified in relying upon that experience. There was nothing in the conditions endorsed on the inward warrants to exclude the duty of regular inspection of the goods; and the general law imposing that duty must, therefore, be deemed to apply, notwithstanding what was said to the contrary by the technical engineer, who conceded that, in the case of pip fruit (apples and pears), it was the custom of cold-storage proprietors to do a limited amount of inspection; but he went on to say that such fruit was stored, not at the schedule rates, but by special contract.

So far as the duty of reasonable inspection is concerned, Mr. Justice Hay could see no difference in principle between the storage of pip fruit and the storage of a perishable commodity such as peanuts. The latter are liable to be injuriously affected (though possibly not to the same degree) by failure on the part of the cool-storage proprietor to provide a cool store fit for the purpose and to maintain the proper temperatures; and the duty of inspection at reasonable times therefore existed.

After reviewing the technical evidence called on both sides, Mr. Justice Hay concluded that there was a definite causal connection between the failure of the respondent to perform the duty of reasonable inspection and the damage suffered by appellant.

Those conclusions were sufficient to dispose of the appeal in favour of the appellant; but His Honour, having regard to the exhaustive argument addressed to him on other aspects of the case, felt that some reference to them was necessary. On matters apart from the duty of inspection, the appellant's submissions fell broadly under two heads—namely, (*a*) that the respondent failed to prove that it had taken adequate care to ensure that the humidity was maintained at the proper degree for the storage of peanuts, and (*b*) that it failed to prove that the temperature was kept sufficiently low.

His Honour said that the respondent had been at pains to establish that it had discharged all the duties resting upon it in relation to the appellant's goods. No question could arise as regards its plant and equipment, with the efficiency of which His Honour said he had been much impressed on a view undertaken at the request of the parties. Apart from the question of inspection, with which he had already dealt, the real difficulties arose in determining on the evidence whether respondent had discharged the onus of proving that throughout the period of storage the proper temperature and humidity were maintained, so as to prevent the growth and development of mould. The mould was undoubtedly there, and the onus was clearly on the respondent to satisfy the Court that it did not arise from the conditions as to temperature and humidity which it adopted from time to time. His Honour did not propose to make any decision on the point, contenting himself with a discussion of some of the relevant matters to which attention would require to be paid, without by any means exhausting the important points made by the appellant in reply to the case presented by the respondent.

Having regard to the conclusion reached on the matter of inspection, the appeal was allowed and the case remitted to the Court below for the assessment of damages and the entry of judgment in favour of the appellant, with the appropriate costs.

It is pointed out in *Cheshire and Fifoot's Law of Contract*, 3rd Ed. 66, that bailment is a relationship *sui generis*. It is a contract, but one analogous to that of a deposit, where there is, as in the cases above referred to, what may be termed "a hire of custody". The two contracts, however, differ materially, in that, whilst in deposit there is no reciprocity of advantage (all the benefit being conferred on the bailor), there is a mutual advantage in a contract of hire of custody, both to the owner of the goods and to the person who undertakes to keep them safely for reward for services which in fact cover the custody. Given the necessary conditions, the obligations of a bailee for reward, such as a cool-store proprietor, commence as soon as he, by any overt act, evidences an intention of exercising responsibility over the goods intrusted to him.

Both the judgment in the *Adams Bruce* case and the judgment of the Court of Appeal in the *Aurora Trading Co.'s* case, which it followed, make clear the duty of cool-store proprietors. Part of that duty is to make a regular inspection of the perishable goods committed to their care. The standard laid down is one of reasonable inspection only, varying according to the circumstances, including the nature of the goods and the purpose of the bailment. As Mr. Justice Hay put it, no higher standard would be called for than a routine inspection at frequent intervals of the exterior of the goods and the examination of a moderate number of samples of the goods themselves from different portions of the total amount in cool store.

Apparently, cool-storage owners have not protected themselves fully in their contracts with their customers. In view of the effects of both the New Zealand judgments to which we have referred, it would seem that it is in their own hands to provide themselves with adequate protection from the consequences of any breach of their duties as bailees of perishable goods.

# SUMMARY OF RECENT LAW.

## ACTS PASSED, 1952.

Administration (No. 56).
Agricultural Emergency Regulations Confirmation (No. 63).
Air Services Licensing Amendment (No. 57).
Amusement Tax (No. 10).
Appropriation (No. 83).
Arbitration Amendment (No. 27).
Chattels Transfer Amendment (No. 25).
Companies Amendment (No. 66).
Cook Islands Amendment (No. 32).
Counties Amendment (No. 75).
Crimes Amendment (No. 42).
Dairy Industry (No. 55).
Dairy Produce Amendment (No. 61).
Death Duties Amendment (No. 76).
Deaths by Accidents Compensation (No. 35).
Diplomatic Immunities (No. 72).
Education Amendment (No. 39).
Electric Power Boards Amendment (No. 74).
Electricians (No. 73).
Emergency Regulations Amendment (No. 64).
Evidence Amendment (No. 50).
Finance (No. 57).
Finance (No. 2) (No. 81).
Fire Services Amendment (No. 7).
Forest and Rural Fires Amendment (No. 15).
Geothermal Steam (No. 5).
Government Railways Amendment (No. 82).
Government Service Tribunal Amendment (No. 23).
Harbours Amendment (No. 78).
Imprest Supply (No. 1).
Imprest Supply (No. 2) (No. 2).
Imprest Supply (No. 3) (No. 3).
Imprest Supply (No. 4) (No. 19).
Industrial and Provident Societies Amendment (No. 45).
Inland Revenue Department (No. 33).
Joint Family Homes Amendment (No. 77).
Judicature Amendment (No. 24).
Justices of the Peace Amendment (No. 44).
Land Amendment (No. 46).
Land and Income Tax (Annual) (No. 16).
Land and Income Tax Amendment (No. 80).
Land Drainage Amendment (No. 47).
Land Settlement Promotion (No. 34).
Land Transfer (No. 52).
Law Practitioners Amendment (No. 29).
Licensng Amendment (No. 79).
Local Legislation (No. 68).
Maori Land Amendment (No. 9).
Maori Purposes (No. 70).
Married Women's Property (No. 53).
Massey Agricultural College (No. 11).
Married Women's Property (No. 53).
Military Training Amendment (No. 8).
Minimum Wage Amendment (No. 18).
National Parks (No. 54).
Patriotic and Canteen Funds Amendment (No. 60).
Poisons Amendment (No. 28).
Police Force Amendment (No. 14).
Police Offences Amendment (No. 40).
Police Offences Amendment (No. 2) (No. 43).
Property Law (No. 26).
Public Revenues Amendment (No. 51).
Public Service Amendment (No. 4).
Public Works Amendment (No. 58).
Rabbit Nuisance Amendment (No. 62).
Rehabilitation Amendment (No. 6).
Reserves and Other Lands Disposal (No. 69).
River Boards Amendment (No. 48).
Samoa Amendment (No. 31).
Scientific and Industrial Research (No. 12).
Secondhand Dealers Amendment (No. 36).
Sharebrokers Amendment (No. 21).
Shipping and Seamen (No. 49).
Soil Conservation and Rivers Control Amendment (No. 38).
Sovereign's Birthday Observance (No. 13).
Stamp Duties Amendment (No. 22).
Stock Amendment (No. 71).
Summary Jurisdiction (No. 41).
Supply Regulations Amendment (No. 65).
Wages Protection and Contractors' Liens Amendment (No. 59).
Whanganui College Board of Trustees Empowering (No. 37).
Wool Commission Amendment (No. 20).
Wool Industry Amendment (No. 30).
Workers' Compensation Amendment (No. 17).

## COMPANY LAW.

Companies Act Revision (Victoria). *26 Law Institute Journal*, 147.

## CONVEYANCING.

Drawing A Will. *96 Solicitors' Journal*, 610.

## CRIMINAL LAW.

*Appeal from Sentence—Principle of Non-interference—Qualification where Sentence follows Plea of "Guilty" or when Further Evidence heard by Appellant Tribunal—Justices of the Peace Act, 1927, s. 315 (1A).* An appellate Court, while reluctant to interfere with sentences, does not adhere to the principle of non-interference with the same degree of inflexibility when the sentence follows a plea of "guilty" and not a trial. The reluctance to interfere is further lessened when the appellate tribunal has heard evidence which was not given in the lower Court. (*Preston* v. *Richardson*, [1949] G.L.R. 391, referred to.) The appellant, which was prosecuted for erecting buildings on Kawau Island without obtaining a permit from the Building Controller, contrary to the Building Control Emergency Regulations, 1939, pleaded "guilty" and was fined £750. (The maximum penalty was £1,000.) The appellant appealed against the sentence, and, on such appeal, evidence was given on the appellant's behalf that a large part of the material used was timber grown on Kawau Island, which was not marketable on the mainland, and that the labour used was that of the appellant's own employees and did not, therefore, diminish greatly, if at all, the resources of labour available for ordinary building work. *Held*, That, in fixing the penalty appropriate to the circumstances as disclosed on the appeal, the sentence should be varied to a fine of £500. *Mansion House Kawau, Ltd.* v. *Jebson*. (S.C. Auckland. October 20, 1952. Stanton, J.)

*Evidence—Evidence tending to show Commission of Other Crimes—Murder—Evidence of Previous Murders in Similar Circumstances—Prisoner's Answers to Questions by Police—Need of Caution—"Person in custody"—Broadmoor Patient—"Judges' Rules", r. 3.* The appellant, who was a patient at Broadmoor Institution, was charged with the murder by strangulation of a girl of five years of age, which was committed during a period when he was at large, having escaped from the Institution. After his recapture, the appellant was interviewed at the Institution by Police officers, who, without administering a caution, questioned him as to his movements while he was at large. At the trial, evidence was admitted of these questions and the appellant's answers thereto, and also of the previous murders by strangulation of two other young girls to which the appellant had confessed, the circumstances of those murders being similar to those of the murder charged. The appellant having been convicted, on appeal, *Held*, That the prosecution were entitled to adduce evidence of the previous murders as tending to identify the person who had committed the murder charged as being the same person as he who had confessed to having murdered the other two girls in precisely the same way—namely, the appellant—and, therefore, the evidence was rightly admitted. (*Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, and *Thompson* v. *The King*, [1918] A.C. 221, applied.) *The Queen* v. *Straffen*, [1952] 2 All E.R. 657 (C.C.A.).

*Evidence—Evidence tending to show Commission of Other Crimes—Question on behalf of One Prisoner involving Character of Another—Separate Trials—Charge of conspiracy—Question asked on behalf of One Prisoner involving Character of Another.* During the course of the trial of A, B, and C on a charge of conspiracy to evade duties of Customs payable on the importation of stockings, the defence of B was that he was not concerned in the illegal acts, but that C masqueraded as him (B) and used his (B's) office for their commission. In furtherance of that defence, B's counsel asked a witness for the prosecution whether C was not in prison during a period when no illegal importations had taken place. Counsel for C objected to the question, and applied for a new trial. *Held*, That, in the circumstances, the question was relevant; there was *prima facie* evidence that B and C were fellow-conspirators; and the application would be refused. Per *Devlin*, J., The principle that a question as to the character of an accused person is only admissible if it is relevant applies equally to questions put by counsel for a co-

defendant as to those put by the prosecution. If in any case such a question is relevant and is put by counsel for a co-defendant, that counsel ought to show, so far as is possible, the same restraint as would the prosecution, and should confine his questions strictly to those required for the purpose of his case. Moreover, counsel should first inform counsel for the other accused person that he proposes to put the question. *The Queen* v. *Miller and Others*, [1952] 2 All E.R. 667 (C.C.A.).

What is A Brothel? *116 Justices of the Peace Journal*, 614.

## DIVORCE AND MATRIMONIAL CAUSES.

*Appeal—Security for Costs—Wife's Appeal to Court of Appeal against Decree* Nisi*—Appeal neither Frivolous nor Unmeritorious—Security for Costs dispensed with—Court of Appeal Rules, R. 22.* A wife had given notice of appeal against a decree *nisi* granted to her husband in a suit which was based on a written agreement, and in which the wife alleged that the separation was induced by the husband, and that, owing to acts of intercourse, the agreement had not remained in full force and effect. She asked, under R. 22 of the Court of Appeal Rules, that security for appeal be dispensed with. *Held*, That it could not be said that the appeal was frivolous or otherwise unmeritorious; and that the appellant should be allowed to prosecute it without being required to give security for the payment of costs, which it was improbable that she would be called on to pay, even if unsuccessful. (*Russell* v. *Stainton and Co., Ltd.*, [1922] G.L.R. 422, applied.) An order was made dispensing with security, but without costs. *Wright* v. *Wright*. (S.C. Auckland. October 14, 1952. Stanton, J.)

## EASEMENT.

*Right-of-way—Right restricted to "vehicular traffic only"—No Right to User as Foot-way.* The defendant purchased a section having a frontage to a public road, for the purpose of building a home for himself and his family. The access to the property from that road was very difficult, owing to the fact that the section was steep and the road was protected by a stone wall. When the defendant purchased the section, he assumed that he would be entitled to use as access to his land a formed private road on the plaintiff's land running from further along the public road to the back of his section. The right-of-way was appurtenant to the defendant's land, and its existence was noted on the titles to the parties' lands, as it was granted by conveyance by the plaintiff's predecessor in title. The terms of the right-of-way as set out in that conveyance were as follows: "together with the full right and liberty to the purchaser his executors administrators and assigns the owner or owners occupier or occupiers for the time being of the said parcel of land hereditaments and premises intended to be hereby conveyedthe right in common with the Mortgagee and the Vendor and all others deriving title through them or either of them being owner or owners occupier or occupiers for the time being of the allotment numbered One (1) on the deposited plan in the said Schedule referred to or any part thereof to pass and repass vehicular traffic only over and along that part of the said allotment One (1) coloured yellow on the said deposited plan and on the plan drawn hereon to the end and intent that the Right of Way hereby granted shall be for ever hereafter appurtenant to the said parcel of land intended to be hereby conveyed and every or any part thereof." On motion for a perpetual injunction to restrain the defendant from using the right-of-way otherwise than for the passage of vehicular traffic, *Held*, That the words "vehicular traffic only" showed that the defendant was not entitled to use the right-of-way as a foot-way. (*Robinson* v. *Bailey*, [1948] 2 All E.R. 791, followed.) (*Ballard* v. *Dyson*, (1808) 1 Taunt. 279; 127 E.R. 841, applied.) *Semble*, That, *prima facie*, the word "vehicular" was used in its widest sense, and may include all manner of vehicles, whatever their mode of propulsion may be; and it may even extend to vehicles which, by their very nature, are drawn by manpower. (*Kain* v. *Norfolk*, [1949] 1 All E.R. 176, and *Hansford* v. *London Express Newspaper, Ltd.*, (1928) 44 T.L.R. 349, referred to.) *Barry* v. *Fenton*. (S.C. Dunedin. October 14, 1952. North, J.)

## EMERGENCY REGULATIONS.

Pursuant to the Emergency Regulations Amendment Act, 1952, the following Emergency Regulations have been revoked:

Cargo Control Emergency Regulations, 1942.
Cargo Control Emergency Regulations, 1947.
Transport Licences Emergency Regulations, 1942.

The following Emergency Regulations, with current amendments, remain in force until December 31, 1953, unless sooner revoked:

Coal Mines Council Emergency Regulations, 1940.
Earthquake Damage Emergency Regulations, 1942.
Enemy Property Emergency Regulations, 1939.
Finance Emergency Regulations, 1940 (No. 2).
Licensing Act Emergency Regulations, 1940.
Local Authorities (Temporary Housing) Emergency Regulations, 1944.
Patents, Designs, Trade-marks, and Copyright Emergency Regulations, 1940.
Shipping Transfer Emergency Regulations, 1939.
Soldiers' Wills Emergency Regulations, 1939.
War Service Gratuities Emergency Regulations, 1945.
Waterfront Industry Emergency Regulations, 1946.

## EVIDENCE.

Courts and Doctors. (Edson L. Haines, Q.C., and Dr. Alexander Gibson.) *30 Canadian Bar Review*, 483.

## HUSBAND AND WIFE.

Claims for Ownership and Possession of the Matrimonial Home. *96 Solicitors' Journal*, 601.

*Consortium* and *Servitium*. *214 Law Times*, 111.

## INCOME-TAX.

*Annuity—Annuity Free of Income-tax—"Net income of £10 per week"—Annuitant not entitled to £10 Free of Tax.* By his will, a testator directed his trustees to set aside a sum out of his residuary estate sufficient at the time of appropriation to produce "a net income of £10 per week", and he directed his trustees to pay such income to H. during her life or until she should marry. *Held*, That the word "net" was not of itself sufficient to free H. from the burden of income-tax in respect of her annuity, and, there being no context to show clearly that the testator intended the contrary, her annuity was not payable free of income-tax. (*Re Wells's Will Trusts*, [1940] 2 All E.R. 68, *Re Loveless*, [1918] 2 Ch. 1, and *Re Batley*, [1951] Ch. 558, applied.) *Re Wright (deceased), Barclays Bank, Ltd.* v. *Wright and Others*, [1952] 2 All E.R. 698 (Ch.D)

As to "Free of Tax" Gifts in Wills, see *17 Halsbury's Laws of England*, 2nd Ed. 259, para. 528; and for Cases, see *39 E. and E. Digest*, 166-168, Nos. *572-593*.

Points in Practice. *102 Law Journal*, 495.

## LAND TRANSFER.

Estoppel and the Torrens System. (J. Baalman.) *26 Australian Law Journal*, 303.

## LANDLORD AND TENANT.

*Lease—Covenant to keep "in good and tenantable repair"—Nature of Repair for which Tenant Liable—Regard to Condition of Building at Time of Demise—Present Use irrelevant—Tenant not liable for Ornamental or Decorative Repairs.* In a lease for a term of forty-two years, which had expired in 1951, the lessee covenanted to erect after the commencing of the term a building of a specified value, and this had been done. The lease contained the usual covenants by the lessee, including the following covenants: "during the term and at the end or sooner determination to yield up the premises and every part thereof and all buildings at any time thereon in good and tenantable repair and condition." The building was originally used mainly as an auction room. At the end of the term, the front consisted of a shop and milk-bar, with a large restaurant and kitchen, servery and conveniences at the back, and an upstairs hall (used as a dance-hall) and other rooms. At the end of the term, the lessor, alleging that the premises were not in good and tenantable repair and condition in accordance with the covenant, claimed from the lessees (who were the executors of the original lessee) an estimated cost of remedying the alleged breaches. *Held*, 1. That the defendants were liable for the cost of putting the building in that state of repair in which it would be found if it had been managed by a reasonably-minded owner having regard to what, at the time of the demise, were the age, character, and ordinary uses of the premises, or the requirements of the class of tenants, at the time of the demise, likely to take it. (*Anstruther-Gough-Calthorpe* v. *McOscar*, [1924] 1 K.B. 716, followed.) (*Proudfoot* v. *Hart*, (1890) 25 Q.B.D. 42, referred to.) 2. That, in performing their obligations under the covenant, the lessees were not bound to do any repairs that were merely ornamental or decorative and were not required for the preservation of the building. (*Crawford* v. *Newton*, (1886) 2 T.L.R. 877, followed.) 3. That the present use of the premises was irrelevant, but the lessees were liable for the cost of making good damage so as to leave the building

as far as possible as though it had not been damaged, and that might involve the repair or renewal of subsidiary parts. 4. That it was a question of fact whether a portion of the building, such as the roof, could be reasonably repaired; if not, it must be renewed. (*Lurcott* v. *Wakely and Wheeler*, [1911] 1 K.B. 905, applied.) *New Zealand Insurance Co., Ltd.* v. *Keesing and Another*. (S.C. Wanganui. June 13, 1952. Sir Humphrey O'Leary, C.J.)

## LIMITATION OF ACTIONS.

Public Authorities. *214 Law Times*, 164.

## MASTER AND SERVANT.

*Unsafe System of Work—Employee operating Sandmill—Oil emitted on to Employee's Back from Unfenced Cog-wheel Six Feet from Ground—Employee cleaning Wheel in Motion when Hand crushed — Alleged Breach of Employer's Statutory Duty—Test of Reasonable Foreseeability applicable thereto—Breach of Master's Common-law Duty—Inspection of Machinery Act, 1928, s. 16 — Negligence — Contributory Negligence — Jury's Apportionment of Damages—New Trial applied for on Ground that Such Apportionment against Weight of Evidence—Principles applicable—Contributory Negligence Act, 1947, s. 3 (1) —Code of Civil Procedure, R. 276 (i).* The plaintiff was required to operate a sandmill, and, after the sand had been mixed and ground, he removed it and took it to the moulders. The mill consisted of a shallow pan at about ground level, out of which rose a vertical rotating shaft, surmounted (about 6 ft. from the ground) by a large toothed wheel. This was engaged by a pinion on a horizontal shaft operated by an electric motor situated 2 ft. or 3 ft. higher. The plaintiff, after shovelling sand into the container, would start the motor, run it for about fifteen minutes, and then remove the sand and refill the container. The machine would therefore be stopping and starting at about quarter-hour intervals. The big wheel threw out oil on to his back as he worked. The foreman knew of this happening, and on occasion helped the plaintiff to remove the oil, and the latter decided to try to stop the oil from falling. Taking some cotton waste supplied in the foundry, and holding it in his gloved hand, he used to clean the cog-wheel as it rotated. On the morning of the accident, he was performing this operation when his gloved hand was caught by the moving large wheel, pulled round and dragged under the smaller wheel on the shaft, and badly crushed. The reason given by the plaintiff for adopting that method of cleaning was that this was the only reasonable method. When the mill was at a standstill, only about half of the circumference of the wheel was accessible, as the mill stood in the corner, and it was preferable to do the cleaning whilst the wheel was moving rather than to adopt the course of switching on and off so as to bring successive segments of wheel opposite him. It was difficult to get the wheel to stop in the right place. He claimed damages for his injury on two grounds—namely, (*a*) that the defendant company was negligent in adopting a dangerous system of work, so that he was required to work under such conditions as required him from time to time to clean moving machinery, with the result that he suffered his injuries; and (*b*) that the large cog-wheel was not securely fenced, in breach of the statutory duty cast upon defendant by s. 16 of the Inspection of Machinery Act, 1928, and, in consequence of such breach of statutory duty, the accident happened. The jury found in favour of plaintiff on both issues—(*a*) adopting an unsafe system of work, and (*b*) failing to guard the large cog-wheel—and awarded damages, reduced by one-third on account of the plaintiff's contributory negligence. The defendant company moved for an order setting aside the jury's verdict and asking for judgment, or, alternatively, for nonsuit, or for an order for a new trial. The learned trial Judge, having held that the finding for plaintiff on the count of absolute liability based on the breach of statutory duty was justified, and therefore entitled the plaintiff to succeed, considered he was not required to deal with the common-law count, and he dismissed the motion. From that judgment the defendant appealed. *Held, per totam curiam*, That the appeal should be dismissed. For the reasons, Per *Finlay* and *Hutchison*, JJ. (*Cooke*, J., dissenting, *Sir Humphrey O'Leary*, C.J., *dubitante*), That the appellant was under a duty, imposed by s. 16 (1) of the Inspection of Machinery Act, 1928, to provide a guard for the cog-wheel; but that there was no evidence that there was any causal relationship between the damage and the absence of a guard, and that there was equally no evidence from which the existence of any such relationship could be inferred or evidence that the breach of the appellant's duty contributed to the accident suffered by the respondent. (*Atkinson* v. *London and North Eastern Railway Co.*, [1926] 1 K.B. 313, applied.) (*Thorogood* v. *Van den Berghs and Jurgens, Ltd.*, [1951] 1 All E.R. 682, referred to.) Per *Cooke*, J., That the test of reasonable foreseeability should be treated as applicable to the provisions of s. 16 of the Inspection of Machinery Act, 1928; and that there was evidence on which the jury was entitled to hold that there was a breach by the appellant of the obligations created by that section, and that the complete absence of a guard was a material or substantial cause of the accident. (*Lyon* v. *Don Brothers Buist and Co., Ltd.*, [1944] S.C. (J.) 1, *Carroll* v. *Andrew Barclay and Sons, Ltd.*, [1948] A.C. 477; [1948] 2 All E.R. 386, and *Watts* v. *Enfield Rolling Mills (Aluminium), Ltd.*, [1952] 1 All E.R. 1013, followed.) (*Burns* v. *Joseph Terry and Sons, Ltd.*, [1950] 2 All E.R. 987, *Inglis* v. *New South Wales Fresh Food and Ice Co., Ltd.*, (1943) 44 N.S.W.S.R. 87, and *Biddle* v. *Truvox Engineering Co., Ltd.*, [1951] 2 All E.R. 835, referred to.) Per *Sir Humphrey O'Leary*, C.J., and *Finlay* and *Hutchison*, JJ., That there was evidence on the common-law issue from which the jury could find that the appellant had adopted an unsafe system of work and should have foreseen the method of cleaning employed by the respondent. (*Re Polemis and Furness, Withy and Co., Ltd.*, [1921] 3 K.B. 560, and *Winter* v. *Cardiff Rural District Council*, [1950] 1 All E.R. 819, applied.) (*Rooney* v. *Aberdeen and Commonwealth Line, Ltd.*, (1945) 78 Ll.L.R. 551, distinguished.) Per *Hutchison*, J., That the question whether the employer was negligent in taking no steps to guard against the danger to the respondent workman should be considered without relation to the exact details of how the workman went about cleaning the wheel. *Held*, further, *per totam curiam*, That the jury's apportionment of damages could not properly be interfered with. For the reasons, Per *Sir Humphrey O'Leary*, C.J., That, in ordinary circumstances, an appellate Court or a trial Judge cannot displace the reduction of the assessment of damages by a jury made by virtue of s. 3 of the Contributory Negligence Act, 1947, which empowers the Court to say to what extent it is just and equitable, having regard to the claimant's share in the responsibility for the damage, that the damages shall be reduced. Per *Hutchison* and *Cooke*, JJ., That, while an application for a new trial, on the ground that the verdict of the jury in apportioning damages under the Contributory Negligence Act, 1947, was one that the jury could not find, must be considered on the principles applicable to other applications for a new trial on the ground stated in R. 276 (i) of the Code of Civil Procedure, on the application of those principles the jury's apportionment could not properly be interfered with. (*Petrie* v. *Frank M. Winstone (Merchants), Ltd.*, [1949] N.Z.L.R. 886, applied.) (*White* v. *Tip Top Ice Cream Co. (Wellington), Ltd.*, [1950] N.Z.L.R. 406, referred to.) Per *Cooke*, J., *Quaere*, Whether the Court should not be even more reluctant to review the jury's answer to an issue relating to the apportionment of damages on the ground that it is against the weight of evidence than it is to review the answer to any other issue on that ground. (*British Fame* (*Owners*) v. *Macgregor* (*Owners*), *The Macgregor*, [1943] A.C. 197; [1943] 1 All E.R. 33, *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*) [1948] A.C. 140; *sub nom. Admiralty Commissioners* v. *North of Scotland and Orkney and Shetland Steam Navigation Co., Ltd.*, [1947] 2 All E.R. 350, and *Helson* v. *McKenzies (Cuba Street), Ltd.*, [1950] N.Z.L.R. 878, referred to.) Appeal from the judgment of *Gresson*, J., dismissed. *Hibberds Foundry, Ltd.* v. *Hardy*. (C.A. Wellington. September 5, 1952. Sir Humphrey O'Leary, C.J.; Finlay, J.; Hutchison, J.; Cooke, J.)

Workmen lent by Employers. *96 Solicitors' Journal*, 605.

## MENTAL DEFECTIVES.

Liability of Lunatics in The Law of Tort. (E. C. E. Todd.) *26 Australian Law Journal*, 399.

## NEGLIGENCE.

*Air Rifle—Liability of Parent.* The defendant, who lived in a populous district of Liverpool, allowed his son, aged thirteen years, to have an air rifle on condition that it was never used outside the house. There was a large cellar to the defendant's house where the son was allowed to use the air rifle. Behind the house, and providing access to it and other houses, was an alleyway where children came to play. Without the defendant's knowledge, the son fired the air rifle in the alleyway and injured the plaintiff, a child aged five, who was standing at the entrance to the alleyway. *Held*, That there was no ground for disturbing the finding of fact in the Court below that there was no such lack of supervision by the defendant of his son's activities as would constitute negligence on his part, and, therefore, the tort was that of the defendant's son alone, and the defendant was not liable in damages. Decision of *Pearson*, J. ([1952] 1 All E.R. 1213), affirmed. *Donaldson* v. *McNiven*, [1952] 2 All E.R. 691 (C.A.).

As to Dangerous Articles, see *23 Halsbury's Laws of England* 2nd Ed. 629, para. 883; and for Cases, see *36 E. and E. Digest* 56-58, Nos. *353-364*.

**PRACTICE.**

As to Inconsistent Gifts, see *34 Halsbury's Laws of England*, 2nd Ed. 218, para. 273; and for Cases, see *44 E. and E. Digest*, 606-609, Nos. *4335-4365*.

**PROBATE AND ADMINISTRATION.**

Points in Practice. *101 Law Journal*, 635.

**SUPPLY REGULATIONS.**

In pursuance of the Supply Regulations Amendment Act, 1952, the following Supply Regulations are continued in force until December 31, 1953, unless sooner revoked:

Building Emergency Regulations, 1939, and Amendments Nos. 1, 2, and 5-7.

Export Prohibition Emergency Regulations, 1939, and Amendments Nos. 1 and 2.

Supply Control Emergency Regulations, 1939, and Amendments Nos. 1 and 2.

**TENANCY.**

*Contracting-out—Endorsement by Rents Officer approving Contracting-out Agreement subject to Variation of Term of Tenancy—Approval of Contracting-out Agreement subject to Acceptance of Variation of That Term—"Agreement"—Tenancy Act, 1948, s. 48 (1)—Tenancy Amendment Act, 1950, s. 2 (1).* The "agreement" referred to in s. 48 (1) of the Tenancy Act, 1948 (as substituted by s. 2 of the Tenancy Amendment Act, 1950), is the agreement that Part III and ss. 41, 42, and 43 of the Tenancy Act, 1948, are not to apply. The words "and incorporating the terms and conditions of the tenancy" do not require those terms and conditions to be set out in the operative part of the tenancy agreement; and, accordingly, they are not part of the agreement for contracting-out which the Rents Officer has to consider. If the Rents Officer considers that the contracting-out is otherwise proper, but that one of the terms of the tenancy ought to be varied, and he endorses the agreement accordingly, that is a written approval of the contracting-out, subject to the acceptance by the parties to the proposed tenancy of the variation of that term. Alternatively, the word "agreement" in s. 48 (1) bears more than one meaning according to its position in the subsection: the words "have agreed" refer to an agreement on the question of contracting-out; the word "agreement" in the phrase "the agreement shall have effect according to its tenor" is the agreement on the question of contracting-out. The word "agreement" as used in the expression "by agreement in writing" and the word "agreement" as used in the expression "copy of the agreement" refer to the document; and the word "agreement" as used in the phrase "and the agreement has been approved in writing" means the agreement for contracting-out. (*Watson* v. *Haggitt*, [1928] A.C. 127, followed.) Accordingly, when the tenancy agreement is put in in time, the written approval of the Rents Officer is required only for the contracting-out, and not for the detailed terms; and, when that approval is given subject to the qualification as to one or more of the terms of the tenancy, and acceptance is given to that by the parties, the written approval for contracting-out is in operation. *Gubbins* v. *Bell and Another*. (S.C. Wellington. October 16, 1952. Hutchison, J.)

Tenancy Regulations, 1951, Amendment No. 1 (Serial No. 1952/194). On the hearing of any application to fix the fair rent of any property under the Tenancy Act, 1948, the Court shall not have regard to any general or local increase in values in excess of a value determined in accordance with the Valuation of Land Act, 1951, as at the date of the application to the Court. On the hearing of any application to fix the fair rent of any dwellinghouse or property, the Court may regard as a "special circumstance" within the meaning of s. 9 (2) of the Tenancy Act, 1948, any increase in rates payable by the landlord and also any increase in expenditure which relates to the tenancy and is met by the landlord for the benefit of the tenant. These Regulations will come into force on November 17, 1952.

**TRANSPORT.**

*Offences—Carrying Goods without a Goods-service Licence—Market-gardeners supplying Retail Shop and Rural-delivery Service and selling Surplus in Market—Truck returning from Market carrying Fruit and Vegetables bought for Retail Shop and Delivery-round—Goods within Exempted Class—"Goods carried in connection with . . . business" of Market-gardeners—Transport Act, 1949, ss. 95, 96 (2)* (b). The appellants carried on a considerable business as market-gardeners near Ashburton. Part of the produce of the market-gardeners went to a retail shop they maintained in Ashburton, part was sold on rounds served by the appellants in rural areas around Ashburton, and any surplus was sold in the markets in Christchurch. On the material date, the appellants, after taking in their truck produce from their market-garden to the markets in Christchurch, were, on the return trip to Ashburton, carrying to their market-garden some cases of fruit and a case of vegetables bought in Christchurch and to be sold on their country circuit. On an information charging the appellants with a breach of s. 95 of the Transport Act, 1949, in that they had carried on a goods-service otherwise than in conformity with the terms of a goods-service licence, the appellants were convicted. On appeal from that determination, *Held*, That no offence had been committed, as a goods-service licence was not required by the appellants, who were market-gardeners carrying on the business of growing and selling market produce, and the goods in their truck on the occasion in question were "goods carried in connection with that business" within the meaning of the exception stated in s. 96 (2) (*b*) of the Transport Act, 1949. *King and Others* v. *Fox*. (S.C. Christchurch. October 30, 1952. Northcroft, J.)

**VENDOR AND PURCHASER.**

*Option to Purchase—Option to Purchase given during Currency of Servicemen's Settlement and Land Sales Act, 1943—Promise to give by Will Right to Purchase—Statute applying to Both Agreement* inter vivos *and Testamentary Promise—Transaction not completed before Expiry of Statute—Such Expiry not validating Same—Vendor not estopped from denying Statutory Invalidity of Agreement and Promise—Servicemen's Settlement and Land Sales Act, 1943, s. 43 (1)* (d)*—Law Reform (Testamentary Promises) Act, 1949, s. 3.* In an action claiming a declaration and an injunction restraining the defendant from dealing with his land in derogation of the plaintiff's rights, the general purport of the statement of claim was that, in 1946, the defendant let certain lands to the plaintiff, and also promised that, if and when the Crown could no longer take the lands on an application for consent under the Servicemen's Settlement and Land Sales Act, 1943, he would grant plaintiff an option to buy the land for £75 per acre, and, further, that he would by a codicil to his will confer on the plaintiff the right to acquire the lands at that price. On argument before trial of the following question of law: Whether the provisions of the Servicemen's Settlement and Land Sales Act, 1943, or the Servicemen's Settlement Act, 1950, rendered unlawful and of no effect any option, covenant to grant an option, or other agreement alleged in the statement of claim, *Held*, 1. That, assuming the option *inter vivos* to be otherwise binding, the promise was a "contract or agreement for the granting of an option to purchase or otherwise acquire" the lands within the meaning of s. 43 (1) (*d*) of the Servicemen's Settlement and Land Sales Act, 1943, as it was equivalent to an option granted *in praesenti* but exercisable on a future contingency. 2. That the operation of s. 43 (1) (*d*) could not be limited to transactions which were completed during the currency of the statute. (*Boissevain* v. *Wail*, [1950] A.C. 327; [1950] 1 All E.R. 728, referred to.) 3. That the expiry of the statute did not validate a contract entered into in breach of its provisions; and that, accordingly, any transaction that was rendered unlawful and invalid by Part III of the Servicemen's Settlement and Land Sales Act, 1943, remained invalid notwithstanding the repeal of that statute and the subsequent expiry of the repealing statute. (*Jaques* v. *Withy and Reid*, (1788) 1 H.Bl. 65; 126 E.R. 40, followed.) 4. That a promise to give by will an option to purchase freehold land is a transaction within Part III of the Servicemen's Settlement and Land Sales Act, 1943, with the result that the promise alleged was unlawful and of no effect. 5. That, as the statute invalidated the defendant's promises on grounds of public policy, he was not estopped from alleging their statutory invalidity. (*Mansion House Kawau, Ltd.* v. *Stapleton*, [1948] N.Z.L.R. 1015, *In re A Bankruptcy Notice*, [1924] 2 Ch. 76, and *In re An Arbitration between Mahmoud and Ispahani*, [1921] 2 K.B. 716, applied.) The answer of the Court to the question submitted was that both the agreement or promise *inter vivos* and the promise or agreement to grant an option by will were transactions to which Part III of the Servicemen's Settlement and Land Sales Act, 1943, applied; but that answer was without prejudice to any question of estoppel, and was also without prejudice to any right or claim which the plaintiff might have or make under the Law Reform (Testamentary Promises) Act, 1949. *Todd* v. *Parker*. (S.C. Auckland. October 10, 1952. F. B. Adams, J.)

# THE LAND SETTLEMENT PROMOTION ACT, 1952.

## The Control of Sales and Leases of Farm Land.

By E. C. ADAMS, LL.M.

Part II of the much-debated Land Settlement Promotion Act, 1952, is of vital importance to the conveyancer, dealing as it does with the control of sales and leases of farm land in New Zealand and the Chatham Islands. The expressed purpose of this Part of the Act is to prevent the undue aggregation of *farm* land, and to require that, for a period of three years from the passing of the Act, persons acquiring *farm* land shall personally reside on and farm the land.

The progenitor of the Land Settlement Promotion Act, 1952, is, of course, the Servicemen's Settlement and Land Sales Act, 1943, the expressed purposes of which, however, were much wider—to provide for the control of sales and leases of land (not just farm land, be it noted) in order to facilitate the settlement of discharged servicemen, and to prevent undue increases in the price of land, the undue aggregation of land, and its use for speculative or uneconomic purposes. Early in 1950—*i.e.*, as from February 23, 1950—controls of urban land were lifted, and leases and dealings with leases (except leases and sales of leases of West Coast Settlement land) ceased to be subject to control after the coming into operation of the Servicemen's Settlement Act, 1950. The Land Settlement Promotion Act, 1952, reintroduces the control of leases of *farm* land. The following table shows the main differences in the legislation since the coming into operation of the Servicemen's Settlement and Land Sales Act, 1943, and may be of some practical use to conveyancers, for transactions commenced on or after October 18, 1943 (being the date of the coming into operation of the Servicemen's Settlement and Land Sales Act, 1943), must, in accordance with the Acts Interpretation Act, 1924, be completed in accordance with the law in force when the particular transaction was commenced.

### SUMMARY OF LAND SALES CONTROL LEGISLATION.

The Acts control *transactions* with land, rather than instruments dealing with land. Therefore, in every case the crucial date is the date of the first agreement, if there is an agreement. If there was no prior agreement, the date of the transfer or of the lease, as the case may be, is the relevant date.

A. *Control of Transactions affecting urban land.*

(*a*) From October 18, 1943, to February 22, 1950—
Sales of freehold and of leases of (*b*) and (c) below.

(*b*) From October 18, 1943, to December 6, 1945—
Leases of not less than three years.

(*c*) From December 7, 1945, to February 22, 1950—
Leases of not less than two years.

(*d*) From October 18, 1943, to February 22, 1950—
Grant of an option to purchase any freehold or leasehold estate as in (*a*), (*b*), and (*c*) above.

B. *Control of Transactions affecting farm land.*

(*a*) From October 18, 1943, to June 30, 1952—
Sales of freehold.

(*b*) From October 18, 1943, to December 6, 1945—
Leases of not less than three years and sales of same.

(*c*) From December 7, 1945, to October 31, 1950—
Leases of not less than two years and sales of same.

(*d*) From November 1, 1950, to June 30, 1952—
Sales of West Coast Settlement leases.

(*e*) From October 18, 1943, to June 30, 1952—
Grant of an option to purchase any freehold or leasehold estate as in (*a*), (*b*), (*c*), and (*d*) above.

(*f*) From July 1, 1952, to October 15, 1952—
No restrictions.

(*g*) From October 16, 1952—
Sales of and options to purchase freehold; leases of not less than three years; and sales of, and options to purchase, such leases. Areas of not more than five acres exempted, except leases.

The previous economic legislation, designed to prevent the undue aggregation of land, long predated October 18, 1943. It was, however, extremely limited in its operation, and did not, I think, very effectively prevent aggregation; it often led to dummyism. This previous legislation applied to:

(*a*) Land alienated from the Crown since November 20, 1907. The original alienee from the Crown and all subsequent purchasers and lessees of such land had to make a declaration that they did not own more than 5,000 acres of third-class land.

(*b*) Maori land which, since the coming into operation of the Maori Land Act, 1909—*i.e.*, March 31, 1910—became European land—*i.e.*, became beneficially owned by Europeans. Alienees had to make a similar declaration.

Restriction (*a*) above was abolished by the Land Act, 1948, and four years later the Legislature also abolished (*b*) above by enacting s. 3 of the Maori Purposes Act, 1952. These previous provisions dealing with aggregation of land were contained in Part XIII of the Land Acts 1908 and 1924, and in Part XII of the Maori Land Acts 1909 and 1931.

Many of the Court decisions under the Servicemen's Settlement and Land Sales Act, 1943, and the Servicemen's Settlement Act, 1950, will still apply to the Land Settlement Promotion Act, 1952, especially those dealing with general principles.

The appropriate tribunal to grant consent under the Land Settlement Promotion Act, 1952, is a Land Valuation Committee or the Land Valuation Court: these are not concerned in any way with the question of title to land. If competing transactions are submitted for the consent of a Land Valuation Committee or the Land Valuation Court, the applications must be heard, the parties being left to enforce their rights in the ordinary Courts: *In re A Proposed Sale, Hendry to Weir*, [1945] N.Z.L.R. 744.

The purposes of the Land Settlement Promotion Act, 1952, are to be found in its Preamble, and Acts previous

to October 18, 1943, dealing with land settlement, cannot be said to be *in pari materia* : *In re A Proposed Sale, Stoffel to Smith*, [1944] N.Z.L.R. 764. As Finlay, J., pointed out in that case, before October 18, 1943, the acquisition of land in unlimited areas had not been prohibited or restricted by law in New Zealand except in respect of such Crown lands and Maori lands as had fallen or fell into certain clearly-defined statutory categories.

An *exchange* of farm land, either for other farm land or for other land not farm land, is a sale for the purposes of Part II of the Land Settlement Promotion Act, 1952 : *In re Sales, Wall to Harper, Harper to Wall*, [1947] G.L.R. 83. It is submitted, however, that a partition of land, where nothing is being paid by way of equality, is not caught by Part II of the Act.

Part II of the Act applies to transactions, and the word " transaction " is employed in the Act in a generic sense so as to include all those particular kinds of transactions which are comprehended in s. 23 (1) of the Act : *In re A Proposed Sale, Lee to Taylor*, [1945] N.Z.L.R. 217. If a transaction comes within s. 23 (1) of the Act, then it is subject to Part II of the Act, unless there is applicable thereto some express exemption therefrom. Thus, a transfer of farm land by the Registrar of the Supreme Court under the Rating Act, 1925, comes within Part II of the Land Settlement Promotion Act, 1952 : *In re A Proposed Sale, Registrar of the Supreme Court to Britton*, [1946] N.Z.L.R. 67.

Section 23 (1) of the Act, which enumerates the transactions which come within the ambit of Part II of the Act, reads as follows :

> Subject to the provisions of this section, this Part of this Act shall apply to every contract or agreement—
>
> (*a*) For the sale or transfer of any freehold estate or interest in farm land, whether legal or equitable :
>
> (*b*) For the leasing of any farm land for a term of not less than three years :
>
> (*c*) For the sale or transfer of any leasehold estate or interest in farm land, whether legal or equitable, of which a period of not less than three years is unexpired :
>
> (*d*) For the sale or transfer of a lease of Crown land (being farm land) where, by virtue of section two hundred and eight of the Land Act 1924 or the corresponding provisions of any former Land Act, the consent of the Land Settlement Board is not required to the sale or transfer :
>
> (*e*) For the granting of an option to purchase or otherwise acquire any freehold or leasehold estate or interest in farm land as aforesaid or to take any lease as aforesaid.

With regard to leases of farm land or the sale or transfer of any leasehold farm land, it is specifically provided that, where any lease or contract or agreement for a lease contains a provision enabling the lease or the contract or agreement for a lease to be renewed for any period or successive periods upon the expiration of the original term thereof, the period or periods for which the lease or contract or agreement may be so renewed shall, for the purposes of Part II of the Act, be deemed to be part of the original term thereof : s. 23 (2). As to leases, some interesting questions are posed in *Fairhall* v. *Gillies*, [1948] N.Z.L.R. 184, 187. Does this provision catch agreements made at one time for successive terms each less than three years ? Although Gresson, J., declined to answer this question, it appears clear that, where, for example, an agreement for lease for a term of three years less than one day has been entered into, and the lessee assigns the unexpired residue of the term, and then six months later, and within three months of the expiry of the term, the assignee negotiates for and obtains a lease to himself for a term of three years less one day as from a date just before the expiry of the lease then current, then such lease does not come within Part II of the Land Settlement Promotion Act, 1952.

Section 23 (3) of the Act sets out the classes of transactions which are free from the control imposed by s. 23 (1). All the exemptions contained in the corresponding provisions of the Servicemen's Settlement Act, 1950, have been carried forward into the new Act. As practitioners have become familiar with these provisions, little comment thereon is necessary. An exemption which often causes argument is subs. 3 (*f*), which reads as follows :

> Any contract or agreement for the transfer by a trustee, executor, or administrator to a beneficiary of any estate or interest *to which the beneficiary is entitled* under any trust, will, or intestacy.

It appears that the cases dealing with liability to *ad valorem* stamp duty of transfers to beneficiaries are in point on the interpretation of this paragraph. If the transfer is strictly in accordance with the terms of the trust, will, or intestacy, then it is free from *ad valorem* duty, and also presumably not within the ambit of Part II of the Land Settlement Promotion Act, 1952. But, if, on the other hand, before having title conferred on him, the transferee beneficiary has had to bargain with the trustee, executor, or administrator, or with his co-beneficiaries, then *ad valorem* duty is payable, and also presumably the transaction is within s. 23 (1) of the Land Settlement Promotion Act, 1952. But any contract or agreement for the sale or transfer of any estate or interest by a trustee, executor, or administrator to a purchaser pursuant to an *option* given in any trust or will, although liable to *ad valorem* stamp duty (*Commissioner of Stamp Duties* v. *Schultz*, [1934] N.Z.L.R. 652) is exempted from Part II of the Land Settlement Promotion Act, 1952 : s. 23 (3) (*g*).

A noteworthy omission from the list of exemptions is para. (*c*) of s. 43 (2) of the Servicemen's Settlement and Land Sales Act, 1943, which reads as follows :

> Any renewal of a lease or of a contract or agreement for a lease pursuant to a provision in that behalf contained in the lease or contract or agreement.

Presumably, therefore, renewals of leases of *farm* land are now subject to the Act if the term thereof is not less than three years. If this is correct, then conveyancers will have to keep a sharp eye on renewals of leases of *farm* land.

There are several very useful additional exemptions. Paragraph (*d*) of s. 23 (3) reads as follows :

> Any contract or agreement for the sale or transfer of any estate or interest to a trustee for the benefit of the wife or husband or a child or children or a grandchild or grandchildren of the vendor.

*Leases* of farm land are not within this exemption, although transfers of leasehold estates would be.

Paragraph (*q*) of s. 23 (3) reads as follows :

> Any contract or agreement for the sale or transfer or lease of any estate or interest pursuant to an *option* to which the consent of the Court has been granted under this Act.

This will be found to be a very useful provision in practice, and abrogates the rather awkward decision of the Land Sales Court in *In re A Proposed Lease,*

*Hood to Woolworths (New Zealand), Ltd.*, [1949] N.Z.L.R. 297, in which it was held that the consent of the Land Sales Court was necessary to the *exercise* of an option entered into after the coming into operation of the Servicemen's Settlement and Land Sales Act, 1943, although that Act also required the option itself to be consented to by the Land Sales Court.

Perhaps the most useful of the new exemptions is para. (*r*) of s. 23 (3), which reads as follows :

> Any contract or agreement for the sale or transfer of any estate or interest in *farm* land of an area of not more than five acres.

If the transaction is a *sale* and the area of the parcel of land does not exceed 5 acres, there are no restrictions imposed by the Act. " Farm land " is defined in the Act as follows :

> " Farm land " means land that, in the opinion of the Land Valuation Committee or, as the case may be, of the Land Valuation Court, is or should be used exclusively or principally for agricultural purposes :
>
> Provided that, where land that is being used exclusively or principally for agricultural purposes could, in the opinion of the Committee or, as the case may be, of the Court, be used with greater advantage to the community generally for non-agricultural purposes, it shall for the purposes of this Act be deemed not to be farm land :

" Agricultural purposes " is defined as follows :

> " Agricultural purposes " has a meaning corresponding to the term " agriculture ", which for the purposes of this definition means the cultivation of the soil for the production of food products and other useful products of the soil, and includes the use of land for horticultural or pastoral purposes, or for the keeping of pigs, bees, or poultry :

Under the law previously in force, a small area of land situate, for example, in an important city could very well be " farm " land. Thus, in *In re A Proposed Sale, Smith to McPheat*, [1950] N.Z.L.R. 734, an area of 1½ acres used as a poultry farm and containing a modern dwellinghouse, and situate within the City of Dunedin, was held by the Land Valuation Court to be farm land. I think that most of the borderline cases, which have cropped up in practice since the enacting of the Servicemen's Settlement and Land Sales Regulations, 1942, Amendment No. 1 (Serial No. 1950/15), have consisted of areas of less than 5 acres. But the question immediately arises : Why are not *leases* of farm land of an area not exceeding 5 acres also automatically exempted ?

But it does not necessarily follow that a transaction affecting *farm* land coming within s. 23 (1) of the Act, and not specifically exempted therefrom, requires the consent of the Land Valuation Committee or Land Valuation Court. If the alienee is able to make the declaration referred to in s. 24 (1) of the Act and prescribed by the Land Settlement Promotion Regulations, 1952 (Serial No. 1952/193), and files such declaration with the District Land Registrar *within one month* after the date of the transaction, no consent of the Land Valuation Court or of a Land Valuation Committee is necessary. If the alienee cannot make the declaration, then he must apply for the consent of a Land Valuation Committee or of the Land Valuation Court within one month after the date of the transaction, unless, of course, it is specifically exempted from Part II of the Act. Failure to lodge the declaration or to obtain the consent of a Committee or of the Court is serious. Section 25 (4) provides that, where any transaction is entered into in contravention of Part II of the Act, or where any condition upon or subject to which the Court grants its consent to any transaction is not complied with, the transaction shall be deemed to be unlawful *and shall have no effect*. Therefore, from the point of view of the practitioner acting for an alienee, time is truly of the essence of the contract.

With regard to the reception of the statutory declaration, the duties of the District Land Registrar are ministerial, and not judicial. This appears clear from s. 26, which reads as follows :

> The District Land Registrar or the Registrar of Deeds, on receipt of a statutory declaration in the prescribed form as to the matters provided in paragraphs (*a*), (*b*), and (*c*) of subsection one of section twenty-four of this Act, or on being satisfied by such evidence as he deems necessary that this Part of this Act does not apply to the transaction, shall, if the instrument or instruments relating to the transaction are otherwise in order, accept the same for registration.

The declaration must be precisely within the prescribed form, and, if it is, the District Land Registrar must receive it. He cannot check up to see from the records of his office or elsewhere that the declaration is correct ; but, if it is untrue, the declarant is liable to be prosecuted for making a false declaration. The Land Settlement Promotion Regulations, 1952 (Serial No. 1952/193), may be obtained from the Government Printer, Wellington, at a cost of 3d. Apparently, the alienee himself must make the declaration : there is no provision, as there was in the Land Act, 1924, or the Maori Land Act, 1931, enabling some other person—*e.g.*, a solicitor or attorney—to make the declaration on behalf of the alienee.

From the view-point of the conveyancer, the most important section in the Act is s. 24, subss. 1 and 2 of which read as follows :

> (1) Notwithstanding anything in this Part of this Act, the consent of the Court shall not be required to any contract or agreement to which this Part of this Act applies where—
>
> (*a*) The purchaser or lessee does not own, lease, hold, or occupy in fee simple or under any tenure of more than one year's duration, either severally, jointly, or in common with any other person, any farm land outside a city or borough or town district ; and
>
> (*b*) The purchaser or lessee has not after the passing of this Act transferred, granted, leased, or otherwise disposed of any estate or interest in farm land to any person as a trustee for any person or created any trust in respect of any estate or interest in farm land ; and
>
> (*c*) In the case of a transaction entered into before the thirty-first day of August, nineteen hundred and fifty-five, the purchaser or lessee intends to reside personally on the land and personally to farm it exclusively for his own use and benefit or the Minister has consented to the transaction ; and
>
> (*d*) The purchaser or lessee makes a statutory declaration as to the matters provided in paragraphs (*a*), (*b*), and (*c*) of this subsection, and deposits that declaration with the District Land Registrar or the Registrar of Deeds, as the case may require, within one month after the date of the transaction or, in the case of a transaction relating to land situated in the Chatham Islands, within three months after the date of the transaction.
>
> (2) If a true copy of the declaration referred to in paragraph (*d*) of subsection one of this section is presented to the Registrar, he shall without payment of any fee certify on that copy that the original has been duly presented in accordance with the provisions of that paragraph.

Paragraph (*c*) of subs. 1, which proved highly contentious during the passage of the Bill through Parliament, applies to transactions entered into on or after October 16, 1952, and before August 31, 1955. It will thus be seen that the precise date a transaction is first entered into is always a vital factor in this matter of control of sales and leases of land.

# FIJI LAW REPORTS.

## Legal Tales of the South Pacific.

By R. L. MUNRO, LL.B.

Six litigious and leisurely years after the learned editor handed his copy to the printer, the third volume of the *Fiji Law Reports* has recently appeared. And, despite the editor's depreciation of his efforts, the *Reports*, unlike more widely read series, which boast several expensive volumes a year, will entertain as well as instruct.

Where else, for example, but in the preface to a volume of South Seas law reports would one find this candid admission :

> The reports in this volume are themselves far from satisfactory; it is particularly regrettable that the arguments of counsel are in most cases lost forever. The reports are compiled entirely from Court records, and, so far as they go, they are believed to be accurate.

One might here join issue with the learned editor by suggesting that perhaps no great damage has been suffered in the pursuit of truth if counsel's arguments have been irretrievably lost, but that surely it might be conceded that Court records, even in the South Pacific, bear a close relation to fact! Maybe the answer is that life in the South Seas still possesses some of its old charm, and, anyhow, what more can one expect from a two-guinea volume which only *purports* " to contain reports of a selection of the cases " determined in the Fiji Islands ?

Before dealing further with the lighter side only of the *Fiji Law Reports*, we state for the record that the first volume was edited in 1902 from as far afield as the Leeward Islands, West Indies, and covers the years 1875-1897. The second volume, covering the years 1908-1925, was published in 1928. It can only be assumed that the locusts were rather busy between 1898-1907 inclusive, yet no great harm seems to have been done by the lack of recorded judgments delivered in those years, however momentous the decisions seemed at the time. And, in the second volume, it is fairly stated, as a note, presumably by the anonymous editor, who might have had the best of reasons for not proclaiming himself to posterity :

> the cases reported in this volume do not represent a complete record of all cases and matters of importance decided in the Supreme Court during the years under review, no sufficient material being available in other cases from which any report could be prepared.

There is an amusing footnote to the case of *George A. Moore and Co. (Inc.)* v. *Henry Marks and Co.*, (1919) 2 F.L.R. 63, heard in February, 1919, the headnote of which succinctly states : " Breach of contract. *Held*, parties not *ad idem* about interpretation of contract." The footnote reads, in small print :

> Before proceeding with the Cause List I should like to refer to a report in yesterday's paper purporting to give the effect of my judgment in the case of *Moore* v. *Marks*, but containing a grave perversion of it. I refer to the words " By the cablegrams there was a contract at $86.75, but the error by defendants offering to sell at $86.00 waived the contract." It tends to bring the administration of justice into contempt when arrant nonsense of this sort is put into the mouth of the Judge. It would be arrant nonsense to say that a party to a contract could put an end to it by misquoting its terms to the other party. Of course I said nothing of the kind; nor did I find that any offer came from defendants. In accepting plaintiffs' offer, defendants misquoted its terms, and plaintiffs, attempting to take advantage of this, reopened the negotiations. A typed copy of the judgment is at the disposal of the paper; there is no obligation to publish this, but its effect must not be misrepresented. I am willing to suppose that the misrepresentation was not intentional, and do not, therefore, propose to take any further steps.

Perhaps the following report, taken without loss of a syllable from p. 131 of Vol. 2 of the *Reports*, points the ultimate in brevity in law reporting, omitting as it does not only counsel's arguments (now regrettably lost for ever), but, even worse, the learned, and conclusive, judgment itself! We quote :

> CIVIL JURISDICTION
>
> ACTION No. 14, 1925.
>
> In the matter of the application of Robert Lepper for registration of title of land by adverse possession.
>
> Real Property Ordinance 1876—Adverse Possession—Tenants in Common—No Survivorship—Section 24 of the Real Property Ordinance—Possession of One Tenant in Common not deemed to be the Possession of Persons entitled to the Other Share or Shares of the Land, see 3 and 4 Will. 4, c. 27, s. 12. Indefeasible Owner—Title of—Subject to Challenge on the Grounds of Adverse Possession for the Prescriptive Period under section 14 of the Real Property Ordinance.
>
> *Held*, Title by adverse possession can be acquired against a registered title, *cf. Belize Estate and Produce Co.* v. *Quilter* ([1897 A.C. 367); see also a note on section 14 in *Hogg's Empire Digest*, 87.
>
> *Sir Alfred Young*, C.J.
>
> (No written decision) [*sic*].

The foregoing impertinent remarks also apply to what to the parties was no doubt a matter of great importance in the case of *Sun Hing Tiy and Co.* v. *Fukayama* (2 F.L.R. 138), where no judgment was printed.

A case which might interest members of the Inner Temple and those New Zealand practitioners who know the Colony's very sedate Fiji Club is *Berkeley* v. *O'Brien* (3 F.L.R. 38) :

> Slander—Conversation between Governor and Acting Chief Justice—Whether absolutely privileged—Reference to Barrister being kicked out of Fiji Club—Whether touching Plaintiff in His Profession—Procedure on Demurrer—Effect of Plaintiff's Failure to plead Special Damage
>
> This decision was on the averments of a statement of claim, as follows :
>
> " (1) The plaintiff is and on the 22nd day of July, 1901, was a barrister and solicitor of the Supreme Court of Fiji. On the same day the defendant had a conversation with Francis Oswald Edlin Esquire then Acting Chief Justice of the said Supreme Court. The said conversation (so far as material) commenced by the defendant asking the said Francis Oswald Edlin ' Do you know Humphrey Berkeley ? ' to which the latter replied ' Yes ; he is a barrister practising in my Court.'
>
> " (2) During the said conversation the defendant falsely and maliciously spoke and published of the plaintiff in reference to his said profession of barrister and solicitor the words following, that is to say, ' Do you call on him ? You do call on him then. Do you know he has been kicked out of the Fiji Club ? ', meaning thereby that the plaintiff was a low practitioner and had been expelled from the Fiji Club as such and as a person of ill fame and was therefore an improper associate for an occupant of the Bench.
>
> " (3) By reason of the premises the plaintiff has sustained great loss in his said profession and lost clients that he would otherwise have had.

" And the plaintiff claims :—

" (1) One thousand pounds damages for the things complained of and costs."

*Held*, (1) A conversation between two officers of State in the course of their official duty is absolutely privileged.

(2) A statement to the effect that a barrister at law of Inner Temple and solicitor of the Supreme Court of Fiji has been kicked out of the Fiji Club does not touch him in his profession and will not bear the innuendo that he is a low practitioner and an improper associate for an occupant of the Bench.

Apparently the action caused quite a stir locally, because counsel for Sir Michael O'Brien, Governor of the Colony at the time, numbered no fewer than three, the leader being the Acting Attorney-General. The plaintiff, Mr. Humphrey Berkeley, was content with one counsel, or, if you like, two, counting himself. The first footnote to the case makes it clear how versatile one had to be in the South Seas in 1901, when the case was heard, for the Acting Chief Justice, who tried the case, " resumed his former duties as Collector of Customs " a few months later.

*Parvati* v. *Saidamma* (3 F.L.R. 309) perhaps illustrates the charming wording of some of our old informations and the quaintness of the Indian mind in affairs of the heart. Quoting from the report :

Parvati preferred an information against Saidamma and others in the following terms :

" For that they, of evil and wicked minds, and wickedly, maliciously and unlawfully contriving and intending to injure, vilify and prejudice the said Parvati and to bring her into public contempt, scandal and infamy, disgrace, and to deprive her of her good name, fame, credit and reputation, on the 23rd day of January in the year of Our Lord 1941, at Nadi, wickedly, maliciously and unlawfully did utter, and publish and cause and procure to be uttered and published a false, scandalous, malicious, and defamatory slander of and concerning the said Parvati according to the tenor and effect following—*i.e.* : ' Make love with me, my heart is yours, you are loving this man, how long am I to wait and see, embrace me, dear '—meaning thereby that the said Parvati was a woman of loose character, to the great damage, scandal and disgrace of the said Parvati and provoking the said Parvati, her mother and sister immediately upon the utterance of the said slander to commit a breach of the peace to the evil example of all others in the like case offending and against the peace of Our King, His Crown and Dignity."

We must bring this account to a close by merely supplying an anecdotal editorial note to the report of *R.* v. *Mortlemans* (3 F.L.R. 77). Mortlemans was often referred to as the last pirate in the South West Pacific, and, after being tried for piracy in the Supreme Court of Fiji in 1909, he was sentenced to penal servitude for life, part of which sentence he served in the more bracing climate of New South Wales. The note, which is rather more colourful than one usually finds in law reports, reads :

Vide *Law Times* of September 15, 1945, for an article on this case by Mr. Gilchrist Alexander. Also the same author's book *From the Middle Temple to the South Seas* for a graphic account of the trial.

So our South Pacific tale ends, and we trust that this trifle, intended as a mere diversion, will not disparage our *Fiji Law Reports*, which would grace any law library.

# ASSIGNMENT OF TRADE-MARK WITHOUT GOODWILL.

## A Correction.

By E. C. ADAMS, LL.M.

I am much indebted to Mr. J. E. L. Baldwin of Wellington, registered patent attorney, for pointing out to me an error which I inadvertently allowed to creep into *Goodall's Conveyancing in New Zealand*, 2nd Ed. 268. Carrying on from the first edition of *Goodall* at p. 173, I permitted the following statement of the law to be repeated in the second edition :

Designs and trade-marks are likewise assignable, *but the latter may be assigned only in connection with the goodwill concerned in the goods for which the trade-mark has been registered.*

The words which I have italicized in the above quotation should have been omitted from the second edition, for s. 24 (1) of the Patents, Designs, and Trade-marks Amendment Act, 1939 (altering the law as laid down in *In re Ducker's Trade-mark*, [1929] 1 Ch. 113, and *In re John Sinclair Ltd.'s Trade-mark*, [1932] 1 Ch. 598), provides as follows :

Notwithstanding any rule of law or equity to the contrary, a registered trade-mark shall be, and shall be deemed always to have been, assignable and transmissible either in connection with the goodwill of a business or not.

One will find that at p. 705 of the second edition of *Goodall* I have correctly stated the law and referred to the appropriate statutory provision.

I should be pleased, if readers of the NEW ZEALAND LAW JOURNAL who have purchased the second edition of *Goodall* would make the necessary correction at the top of p. 268.

The following precedent appears suitable for the assignment of a trade-mark without goodwill :

PRECEDENT.

ASSIGNMENT OF TRADE-MARK WITHOUT GOODWILL.

THIS DEED made the day of One thousand nine hundred and fifty-two (1952) BETWEEN A. & B. LIMITED, of Lambton Quay, Wellington, New Zealand, Manufacturers (hereinafter called " the Assignor "), of the one part AND THE C. & D. COMPANY, of Queen Street, Auckland, New Zealand, Merchants (hereinafter called " the Assignee "), of the other part WHEREAS the Assignor is the registered proprietor and sole owner of Trade-mark in New Zealand Number dated the AND WHEREAS the Assignor has agreed with the Assignee for the transfer to the Assignee of the whole right title and interest of and in the said Trade-mark NOW THIS DEED WITNESSETH that IN CONSIDERATION of the sum of pounds (£ ) New Zealand Currency, paid by the Assignee to the Assignor (the receipt whereof the Assignor hereby acknowledges) the Assignor doth hereby assign and transfer unto the Assignee the whole right title and interest of and in the said Trade-marks TO HOLD the said Trade-marks UNTO AND TO the use of the Assignee, its successors and assigns absolutely.

IN WITNESS WHEREOF, &c.

# BUTTERWORTHS AND THEIR PREDECESSORS.

## A Long Record in Publishing Law-books.

Mr. F. W. S. Emery, who is a joint managing-director of Butterworth and Co., Ltd., was a recent visitor to the Dominion. His stay was a short one, and he was unable to visit the South Island.

Opportunity was taken during Mr. Emery's few days in Wellington to record a radio interview which formed part of the " Radio Digest " broadcast from Station 2YA on November 2.

In the course of the interview, Mr. Emery related some interesting facts about the past and present history of Butterworths. He said that, as a publishing house, they went back to the reign of Henry VII. He continued :

" For just over four hundred years our business was carried on from the same premises, No. 7 Fleet Street, London ; and even now we are only 100 yards away from our original premises. We know for a fact that, in 1578, Richard Tottell was the owner, and that he held a patent for the printing of law books that had been running for about a hundred years. He was at No. 7 Fleet Street ; and, when he retired, he handed over the business to one of his ex-apprentices, John Jaggard.

" Sir Francis Bacon must often have been in John's shop, and almost certainly Shakespeare too. John Jaggard was for some time a warden at St. Dunstan's Church, and his fellow-warden was Izaak Walton, that delightful countryman, who, as we all know, wrote *The Compleat Angler*.

" But to return, if I may for a moment, to William Shakespeare, who, we know, was an intimate friend of John Jaggard's twin brother William.

" William Jaggard also had a shop almost opposite No. 7 Fleet Street ; and between 1585 and 1592 we know nothing of what Shakespeare was doing ; but he must have been earning a living ; and it is surely safe to assume that it would be in some sort of literary capacity. He was absorbing knowledge, and in those days, of course, there were no night schools, public libraries, and so forth. Whole passages from *Holinshed's Chronicles* appear in Shakespeare's plays. The printer of *Holinshed* was Harry Denham, to whom William Jaggard was apprenticed. Surely it is not going too far to claim that the friendship between the two Williams commenced during William Jaggard's apprenticeship, and was carried on during the business lives of the two Jaggards. Bacon's immortal *Essays* and Shakespeare's *Passionate Pilgrim* were published by the Jaggards ; and so was Sir Walter Raleigh's *History of The World*, which, as everyone knows, was written while its author was a prisoner in the Tower of London.

" After the Jaggards, in due course came the Butterworths, and after another hundred years or so came the Bonds, who built the business as we know it to-day. Stanley Bond died in 1943, having commenced in 1907 the publication of our greatest work, *Halsbury's Laws of England*."

Mr. Emery said that they felt in London it was a good thing, not only from the business point of view but also from the point of view of the brotherhood of the nations within our Commonwealth, that visits should be made as often as is practicable by Londoners to the Dominion, and *vice versa*. After he left New Zealand, he was going to Australia, then to Ceylon, and he hoped to be home again in time for Christmas.

Mr. Emery said he was sorry that his visit was such a short one. He proceeded :

" I shall not have an opportunity of seeing more than a small fraction of this beautiful country, or of meeting nearly as many of its people as I would like to. But, from what I have seen of New Zealand, I think you have a wonderful country ; and I am greatly impressed with the amazing amount of work that has been done here in a century. Then you have Rotorua and Wairakei, with their variety of awe-inspiring wonders. But I do not think you realize the tourist asset you have in that drive from Rotorua to Napier. I have motored and travelled in the Pyrenees and in the Canadian Rockies, but nowhere else have I been so impressed as I was on that trip."

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**Liberal Education and the Law**

I recently came across the following statement by Eugene V. Rostow :

> The ultimate element which distinguishes the good lawyer from the mediocre one is also the quality which marks the difference between a civilized man and a Philistine.

It is true that this statement was made by a lawyer about lawyers ; but, lest I be supposed to be offering it as an opinion of my own about the legal profession, let me reword it in terms of professions generally. The ultimate element which distinguishes the good professional man from the mediocre one is the same quality that makes the difference between a civilized man and a Philistine. A Philistine is an ignorant, narrow-minded person. By contrast a civilized man has knowledge, understanding, and wise judgment.

It is obvious that, in his professional education, the student must be brought into touch with the accumulated knowledge in his field. However, in view of limited time (even in the relatively protracted periods now required in some professional programmes), it is necessary to select from the wide range of knowledge. In the first place, if formal, institutional education is to be more effective, only those things should be taught which tan be taught in the class-room, leaving to practice and experience those lessons best acquired by this means. Secondly, because in any profession there are many attractive specialties, the undergraduate professional programme of studies should have breadth and variety, as well as depth. Thirdly, the graduate has to live and work in a dynamic world, and consequently his education should encourage flexibility of mind and stimulate the capacity for adaptation to changing circumstances.—Dr. Andrew Stewart, President of the University of Alberta, to the Annual Meeting of the Law Society of Alberta, January 9, 1952.

# IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

**Nagging and Cruelty.**—The nagging wife was a familiar figure of Restoration drama, and is not unknown in modern fiction. Says Robert Burns:

> "*Curs'd be the man, the poorest wretch in life,*
> *The crouching vassal to the tyrant wife!*"

In *King* v. *King*, [1952] 2 All E.R. 584, she makes a recent appearance in the House of Lords. Here, the husband successfully sought a decree from Barnard, J., on the ground that his wife so persistently nagged at him and made false allegations of adultery that her cruelty in this regard had injured his health. The Court of Appeal reversed the decision. The House of Lords (Lords Jowitt, Normand, Oaksey, Reid, and Asquith) has held that the general circumstances must be considered, including conduct of the petitioner calculated to afford provocation or excuse for the making of charges which are untrue and which, in the absence of excuse, would have been unjustifiable. On the other hand, it is proper to have regard to conduct of the respondent which is not the result of provocation, but is designed to hurt the petitioner for the sake of hurting him. On a petition by a husband based on cruelty consisting of nagging by the wife in the form of reiterated and false charges of adultery, if the trial Judge, in the exercise of his discretion, after considering the conduct of both parties and the whole of the circumstances in relation to the temperament and character of the wife, comes to the conclusion that the wife's conduct is, notwithstanding the provocation received or the difficulties and stresses endured, an inexcusable offence against the husband, his judgment should be treated as conclusive.

**The Convenience of Counsel.**—Sir William Valentine Ball in the most recent of his interesting reminiscences entitled "A Master's Memories" in the *Law Times* recalls a story of Mr. Justice Swift that is entertaining and salutary for the Bar. It concerns a practitioner arrayed in a new wig, who at four o'clock rose to his feet to ask that a case which was on the list for hearing on the following day might be adjourned. It was the only case in the list. "What is the ground of your application?" said the Judge. "It is for my personal convenience, my Lord," said the youth. "The other side consent." "I suppose you have a case in the House of Lords?" said the Judge. "No, my Lord." "Or in the Court of Appeal?" "No, my Lord." By this time, Swift, J., was getting restive. "Possibly you have a case in a Police Court?" said he. "Your Lordship is quite correct," said the youth. "You are a most impertinent young man," said the Judge, "and, because of this impertinence, I shall grant your application. But never dare to do such a thing again."

**Newspapers in Court.**—A second story recalled in the same reminiscences concerns an occasion when Swift, J., was sitting with another Judge hearing an appeal, and a member of the Bar, who was not concerned with the case actually being heard, was seen to be reading a newspaper. "Look at that!" said the second Judge to Swift. "We can't have counsel reading newspapers in open Court." "Better leave him alone," said Swift. "You'll only burn your fingers." But the junior Judge would not be advised. "We can't have you reading a newspaper in Court," he said. "May it please your Lordship," said the offender, rising to his feet, "this is a copy of *The Times*, which contains the only known report of a case which I hope to cite to your Lordships in due course." Swift, J., was heard to mutter: "I warned you." Enjoying a reputation for great kindliness and patience, especially towards younger men, Rigby Swift once performed a remarkable feat, at the trial of a number of truculent Communists, in keeping it on a peaceful note throughout by threatening to rap his pencil hard if they showed signs of getting out of hand.

**Quaere.**—The Rt. Hon. Lord Cooper, Lord Justice-General of Scotland, has just published *Supra Crepidam*, a little book containing four erudite and outstanding addresses delivered by him to the Scottish History Society, of which he is president. If Mr. Justice Finlay's forecast in the last Court of Appeal is correct—namely, that in twenty years New Zealand practitioners will not know the meaning of Latin tags when they encounter them—then they will remain in ignorance of the fact that the title of Lord Cooper's book is derived from the saying *Ne supra crepidam sutor*—"Let the cobbler stick to his last". The more difficult question to answer is whether the profession will be any the worse. In a speed-ridden world, does anyone want Horace or Livy as a bedside companion when he can have Agatha Christie?

**Law Dinner Reflections.**—"Certainly the new code, so far as it concerns us here, presents a most disconcerting gallimaufry", says the President in *The State* v. *Judge Roe*, (1951) I.R. 172, 181. Scriblex's well-worn dictionary defines "gallimaufry" as a hash of liver and other organs—a sort of ante-speech savoury.

"A fine quotation is a diamond on the finger of a man of wit, and a pebble in the hand of a fool": Joseph Roux in *Meditations of a Parish Priest.*

"If the Romans had been obliged to learn Latin, they would never have found time to conquer the world": *Heinrich Heine.*

**Combings from Beachcomber.**—A pompous K.C. met a younger barrister and asked him, with heavy affability, "How's the case going?" "Only two bottles left," said the young man dejectedly.

A deputation of dwarfs waited on Lady Cabstanleigh yesterday and presented her with a copy of the Access to Mountains Bill. "What has this to do with me?" she asked. "You are a mountain," they chanted in chorus, "if ever there was one, and we would like to scale your northern shoulder and boil our little kettles on your crest."

This Mr. Pleviot died half intestate. His will was written out on two bits of paper, but only one bit was signed, witnessed, sealed, and all the rest of the mumbo-jumbo. An extraordinary meeting of the Law Lords was called, and some held that it was no will, while others held that half a will was better than none.

—From J. B. Morton ("Beachcomber"), in *Here and Now.*

# LEGAL LITERATURE.

## Law of Road Traffic in New Zealand.

**Chalmers and Dixon's Road Traffic Laws of New Zealand,** 2nd Ed. By R. T. DIXON. Pp. xxiii + 513 (incl. Index). Wellington: Butterworth and Co. (Aust.), Ltd. Price 82s. 6d., post free.

The Transport Act, 1949, not only consolidated the whole of the statutory provisions relating to road traffic and road transport, but it also made considerable amendments in the existing law. Mr. Dixon, who was one of the authors of the first edition of this work, is Solicitor to the Transport Department. He is consequently well fitted to undertake the onerous task of bringing out in one volume a well-annotated statute and a collection of regulations forming part of our transport and traffic legislation. The law, as stated, is as at January 1, 1952, with the exception that the included English and overseas cases are complete to the end of all reports available in New Zealand as on that date.

Mr. Dixon has made an exhaustive study of the law of transport, and his annotation of the Transport Act, 1949, and the various Regulations should prove of great value to all whose work brings them to consider the multifarious provisions affecting motor-vehicles and other vehicles operating on our roads which make up our current law on the subject. He has also brought together the various ramifications of subject-matter appearing in his work in a comprehensive general index, which appears to be very usefully compiled and conducive to easy reference. Use of the work is extended by the inclusion in a series of appendices of a speed table, a general summary of the law of negligence with special reference to negligent driving, and a reprint of the agreement relating to " hit and run " drivers in connection with third-party insurance. Mr. Dixon is to be congratulated on his effective arrangement of his subject-matter and on the completeness of his text.

## Jurisprudence.

**Cohen and Cohen's Readings in Jurisprudence and Legal Philosophy.** New York, Prentice Hall (1951).

A review by R. O. MCGECHAN, Professor of Jurisprudence and Constitutional Law, Victoria University College, Wellington.

The pleasing and valuable feature of this book is not only its insistent bringing together, but, in the words of the authors, bringing together " in co-operation ", of law and philosophy. If we look back over the histories of law and philosophy, we find that only since the begining of the nineteenth century have Judges and practitioners forsaken philosophy in the daily work of the law and — equally significant — has philosophy forsaken law. The ideal of the nineteenth century was of a law pure from the contamination of all else. We now know that the ideal was not the reality of daily work in the Courts, whether of Bar or Bench, but we also know to just what extent the ideal frustrated development of the law. The authors, by the materials they have brought together, remind us that to-day this separation of law and philosophy is at an end.

The authors define jurisprudence as " the jurist's quest for a systematic vision that will order and illumine the dark realities of the law ", and legal philosophy as " the philosopher's effort to understand the legal order and its role in human life ". For our consideration under both jurisprudence and legal philosophy they have brought together materials under four main headings: I. Legal Institutions—*e.g.*, Property, Contract, Torts and Liability, Crime and Punishment; II. The General Theory of Law, comprising the Nature of Law, the Nature of the Judicial Process, and Legislation; III. Law and General Philosophy, including Law and Logic, Law and Ethics, Law and Metaphysics; and IV. Law and the Social Sciences, including Law and History, Law and Anthropology, Law and Economics, and Law and Politics. These headings go no further than to show you that the authors have brought together in one book for the convenience of students problems of systematizing the law, of the nature and sources of law, and of the relation of law to other fields of human thinking. Their " co-operation " is the carrying-down of this bringing together to each and every subheading of their book. In a subheading of Part I, Contract, we begin with the classifications of contracts from Justinian, the Restatement and a modern Civil Law code, and proceed from classification to, *inter alia*, a passage from Holmes pointing out the moral ideas manifest in the law of contract, Maine's dictum on the movement of progressive societies from status to contract, an abundance of material on the social basis of contract, and the relationship of the nineteenth century's exaggerated emphasis on freedom of contract to the growth and decline of a number of philosophical ideas.

The merit of this contract is that it brings philosophy to earth and takes the law mountaineering. The precise ill in the teaching of jurisprudence which the authors hit at is the divorce of philosophy from actual everyday legal controversy, so that the student regards his jurisprudence as ornament to a bread-and-butter world. If he could be made to see his jurisprudence, not as something added and apart, but as something with an immediate bearing on his present legal argument, jurisprudence would take its real place in legal thinking and in legal training. To achieve their purpose, the authors had perforce to depart from the all-too-easy arrangement of jurisprudence under parts which deal with classification and parts which give the gist of the thought of various schools of jurisprudence; and it is worth quoting them on this arrangement:

> " Analytical, historical, metaphysical, and sociological jurisprudences and their various hybrids and offshoots are exhibited before innocent students like a series of butterflies, all neatly labelled, pinned to their proper cards, and thoroughly dead."

Yet those schools of jurisprudence had each its answer to a variety of legal problems. The authors do not, therefore, develop the thought of any school or writer of jurisprudence or philosophy of law, but focus our attention on certain minor and certain major legal problems, and on the ideas the schools and writers have brought to these problems.

I think they are right. The glory of American legal education, the essence of its " case " method, is, and has been for eighty years, the insistence on seeing theory and practice as one. The so-called principle of law lives and lives only in its application in the cases. To put the difference, no doubt too broadly, but accurately enough to bring out the contrast, where English law-teaching has started from principle and refined the cases to illustrations of principle, American legal education has started from the concrete case in its native complexity and shown the struggle of competing principle within it. The same approach to legal training can be taken in teaching jurisprudence. You can start with a concrete legal controversy and bring together a battery of jurisprudential thinking on that problem; the student will then learn the way in which jurisprudential thinking has been born and the way in which it actually moulds and develops the law. I venture to suggest that the student's jurisprudence would, by this teaching, begin to mean something to him.

If we turn to the later part of the book, we see the same tying of the student's reading to basic problems, this time seen in more generalized form, but still manifestly as problems every lawyer, even the one who is quite unaware of what he is doing, faces, and in argument, advice, and judgment resolves one way or another every day. The chapter on Law and Ethics is pinned down to the specific difficulty of the law in reconciling and integrating human ideals, more particularly those of yesterday with those of to-day. Kant, Kelsen, and Bentham, Bertrand Russell and the authors themselves, not to mention representatives of the " Realists " of modern American jurisprudence, are brought to bear on this conflict. You maintain you are not bothered with this business of reconciling and integrating human ideals? Take a look at the materials presented you here and then a good look at that last argument where you felt strongly that your opponent's proposition of law would work injustice, and argued the case with some vigour and the eloquence of conviction on that basis, carrying the Court with you. The law is made up of competing ethics, and you argue on the basis of competing ethics; probably you know, albeit intuitively, which ethic it is the Bench will listen to in any particular case. It is a teacher's business to introduce the young lawyer learning his trade to the notion that he will ignore the potentialities of such argument at his peril. He could learn a great deal by becoming familiar with the sort of materials gathered together here.

I regret to add that this book illustrates rather forcibly one of the major problems of legal education in New Zealand. We cannot publish for our own students a thousand-page book of materials in Jurisprudence or anything else; there are no equivalents from England, for legal education does not go along these lines in England; and we cannot afford to import the products of the United States. I can find no answer to this problem. We can add the books to our libraries and refer students to them, but this does not answer our basic need.