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NEW YEAR HONOURS.

HER Majesty the Queen was pleased to confer three knighthoods on New Zealanders, on the occasion of the New Year, 1955. It is of particular interest to practitioners that all three knighthoods were conferred on members of the profession. Furthermore, each recipient had served as President of his District Law Society, and one of them had, in addition, served in the highest office that the profession can confer on its members.

Sir Leslie Munro, who was created a Knight Commander of the Most Distinguished Order of St. Michael and St. George, was an Auckland practitioner before his appointment as our Ambassador in the United States of America. He was President of the Auckland District Law Society in the years 1936, 1937, and 1938.

Sir William Cunningham, who was created a Knight Commander of the Most Excellent Order of the British Empire, was President of the Wanganui District Law Society, and he was President of the New Zealand Law Society from 1950 to the end of July of last year. His services to this country also included a distinguished military career. News of his knighthood was received by his fellow-practitioners everywhere as an honour to the profession as a whole, and as the deserved recognition of the valued services of the recipient, whose qualities of mind and heart have endeared him to them all.

His Honour Mr. Justice Finlay, Senior Puisne Judge of the Supreme Court, received the honour of Knight Bachelor. He had a distinguished career at the Bar in the Waikato and in Auckland before his appointment to the Supreme Court Bench in 1943. He was President of the Auckland District Law Society in 1934, 1935, and 1936.

The three new Knights have the congratulations of the whole profession on the deserved recognition of their many fine qualities. It is the fervent wish of those who know and respect each one of them—that is to say, all who are practising law in this country—that they and their wives may long be spared to enjoy their newly-conferred distinctions.

LIMITATION OF ACTION: LEAVE TO BRING ACTION OUT OF TIME.

IN this place, in last year's JOURNAL, at p. 283, in the course of an article, "Accrual of Cause of Action in Tort in Respect of Bodily Injuries," with special reference to the Limitation Act, 1950, we briefly touched upon applications for leave to bring actions which are out of time, either because the action is one claiming in respect of bodily injuries, and is not brought within two years of the accrual of the cause of action, or because notice has not been given of an intended action against the Crown or a public or local authority or the action has not been brought within a year, as required by the statute.

Since that article appeared, there have been several judgments directly bearing on those topics, so that there is now some useful authority in relation to them.

We propose to consider such of those judgments as related to applications for leave, under s. 23 (2) of the statute, to bring actions against persons acting in the execution of a public or statutory duty.

I.—DELAY IN COMMENCEMENT OF ACTIONS AGAINST PUBLIC AND LOCAL AUTHORITIES.

Section 23 of the Limitation Act, 1950, so far as it is relevant here, is as follows:

> 23 (1) No action shall be brought against any person (including the Crown) for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority, unless—
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> (*a*) Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the prospective plaintiff and of his solicitor or agent (if any) in the matter is given by the prospective plaintiff to the prospective defendant as soon as practicable after the accrual of the cause of action; and
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> (*b*) The action is commenced before the expiration of one year from the date on which the cause of action accrued: . . .
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> (2) Notwithstanding the foregoing provisions of this section, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time before the expiration of six years from the date on which the cause of action accrued, whether or not notice has been given to the intended defendant under the lass preceding subsection; and the Court may, if it thinks it it just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the failure to give the notice or the delay in bringing the action, as the case may be, was occasioned by mistake or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the failure or delay.

In *Moeller* v. *New Plymouth Harbour Board*,[1] the intended plaintiff sought leave under s. 23 (2) to bring an action after the expiry of the period of limitation prescribed by s. 2 (1) (*a*). The facts were that the plaintiff, who was an employee of the Board, was working on an operation involving the mooring of the S.S. *Hertford* on November 19, 1952, when a manilla hawser parted and one end of it struck him, fracturing his leg and otherwise severely injuring him. The plaintiff was taken to hospital, and was in and out of that institution for varying periods up to June, 1954, and his condition had not yet reached a point at which his prospects of recovery could be assessed. He had been in receipt of regular payments of compensation from the Board, and, during the whole period, he had been totally incapacitated. No formal notice of the accident was given and no intimation that a claim for damages would be made was given until April, 1954. His application for leave to bring such an action was filed on June 16, 1954.

The application was brought on two grounds: first, that there was reasonable cause for the delay, and, second, that the Board was not materially prejudiced thereby. Mr. Justice Stanton, after distinguishing the facts from those in *Glynn* v. *Taranaki Hunt Club*, [1953] N.Z.L.R. 948, held that it could not properly be said that there was reasonable excuse (or cause) for the intended plaintiff's long delay in ascertaining his rights and putting in his claim.

The learned Judge then considered whether the Board had been "materially prejudiced" by the intended plaintiff's delay. He said:

> It was authoritatively stated by the House of Lords in *Hayward* v. *Westleigh Colliery Co., Ltd.*, [1915] A.C. 540, and confirmed in *Eydmann* v. *Premier Accumulator Co., Ltd.*, (1916) 9 B.W.C.C. 384, that in such a case while the burden of proof rests initially on the plaintiff, yet if he gives evidence from which it may be reasonably inferred that the defendant has not been prejudiced, then the burden of proof is shifted on to the shoulders of the defendant. In the instant case, it would seem to me that, as the accident happened in an operation being carried out by an officer of the Board, that the Board were immediately aware of it with all its attendant circumstances, and that the plaintiff was in touch with them, and available for observation or examination during the whole period, it would be a natural inference that the Board would not be prejudiced by delay, and it therefore became the responsibility of the Board to prove that they had not been prejudiced. The evidence put forward on behalf of the Board was that they and their insurers immediately investigated the accident and satisfied themselves that: (*a*) the system of work was satisfactory, as the Harbourmaster said; and (*b*) the question of negligence did not appear to arise, as Mr. Croxson, manager of the insurance company, said.

It was claimed on the Board's behalf that, if the intended plaintiff had at that time alleged negligence or the possibility of a claim for damages, fuller inquiries would have been made. It was also said that, in this latter case, it might have been possible to locate or identify an officer on the *Hertford* whose name was unknown. Finally, it was said that action could have been taken to test the appliances used in the operation and such tests are not now possible. In dealing with these contentions, His Honour went on to say:

> I cannot think that these matters show that the Board has been materially prejudiced by the plaintiff's delay. It is clear that all the facts were as much within the Board's knowledge as the plaintiff's. The only element missing was any allegation by the plaintiff that he claimed there had been negligence on the part of the Board's officers, not because of facts of which the Board were unaware, but that the proper inference from those facts was that they indicated negligence. That this was a possibility should have been evident to the Board and the affidavits of Mr. Flett and Mr. Croxson show that they gave consideration to it. Mr. Flett, in fact, goes further and says that he was concerned because this was the second accident of the same kind within less than six months. Responsible officers of a public body could not under the circumstances justify an investigation less searching than would have been called for by a clear intimation that the plaintiff claimed that there had been negligence in the carrying out of the Board's operations.
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> I think, therefore, that the plaintiff must be given leave to commence an action against the Board, but this must be done within fourteen days from the delivery of this judgment.

In both *Thomas* v. *Nelson Harbour Board*[2] and in *Madders* v. *Wellington Technical Board of Governors*,[3] Mr. Justice Turner followed the judgment of Streatfeild, J., in *R.B. Policies at Lloyds* v. *Butler*, [1950] 1 K.B. 76, 81; [1949] 2 All E.R. 226, 229, where His Lordship said:

> It is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the Courts in recovering their property; but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands (*ibid.*, 81; 229).

The most important of these cases, in point of principle, is *Thomas* v. *Nelson Harbour Board*, in which Mr. Justice Turner dealt, in particular, with the submission made on behalf of the intended plaintiff that the words of s. 23 of the Limitation Act, 1950, are similar to those of s. 26 (2) of the Workers' Compensation Act, 1922. The Court was invited to construe s. 23 as the latter section has been construed. Counsel, in support of that proposition, cited *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 482 *et seq*, and the corresponding statement in *Willis on Workmen's Compensation*, 37th Ed. 424, which deals with the question of proof whether a defendant has been materially prejudiced in his defence by delay, in excess of the prescribed statutory period, on the plaintiff's part in bringing his claim. It is, in part, as follows:

> Decisions of the House of Lords, reversing those of the Court of Appeal, have established some useful propositions on this subject: *Hayward* v. *Westleigh Colliery Co.*, (1915) 8 B.W.C.C. 278; *Eydmann* v. *Premier Accumulator Co.*, (1916) 9 B.W.C.C. 384; *Kirk* v. *Lochgelly Iron and Coal Co.*, [1917] S.C. (H.L.) 18; 10 B.W.C.C. 1. The propositions which seem to be deducible from the speeches in these cases are that:
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> (1) The whole question is one of fact for the arbitrator [here, the Court];
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> (2) The burden of proving that the employer has not been prejudiced by lack of notice rests in the first place on the applicant, but this burden is not that of establishing the negative proposition that the employers were not prejudiced;
>
> (3) The applicant has not to exhaust the possibilities of prejudice and displace them, but if from the evidence it may be inferred reasonably that the employers have not been prejudiced the burden of proof that they have been prejudiced is shifted on to them; . . .
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> (5) There is no presumption one way or the other, and if there is no evidence that the employers, if proper notice had been given, could have acquired further useful information than they already possessed, it cannot be presumed that they could have done so, and they cannot supplant or rebut the evidence given by mere conjecture or theoretical considerations;
>
> (6) The question in each case is whether the facts before the arbitrator warrant his coming to the conclusion that the great probability is that no prejudice has been incurred, and, if the employers do not give evidence of prejudice, the arbitrator is warranted in coming to the conclusion that no prejudice in fact existed.

[1] [1955] N.Z.L.R. 181.

[2] [1955] N.Z.L.R. 154.

[3] [1955] N.Z.L.R. 157.

Mr. Justice Turner said that the cases under the Workers' Compensation Acts are well known, particularly *Hayward* v. *Westleigh Colliery Co., Ltd.*, [1915] A.C. 540; 8 B.W.C.C. 278; *Eydmann* v. *Premier Accumulator Co., Ltd.*, [1916] W.N. 140; 9 B.W.C.C. 384; and *Lochgelly Iron and Coal Co., Ltd.* v. *Hepburn*, [1917] S.C. (H.L.) 18; 10 B.W.C.C. 1; and, in New Zealand, *McCarthy* v. *Union Steam Ship Co. of New Zealand Ltd.*, [1916] N.Z.L.R. 1154; [1916] G.L.R. 820; and *Sillick* v. *Taupiri Coal-Mines, Ltd.*, [1922] N.Z.L.R. 513. He proceeded:

> It is clear from these cases that, once it is shown by the plaintiff that the circumstances lead to a general inference that the defendant has not been prejudiced, the Court will not place upon the plaintiff the burden of establishing a negative proposition, and it is then for the defendant to demonstrate particular prejudice. These cases have been followed by Stanton, J., in New Zealand in an application recently brought under s. 23 of the Limitation Act, 1950, for leave to commence a common-law action. In *Moeller* v. *New Plymouth Harbour Board (supra)*, he granted leave to issue proceedings in a case where a plaintiff had been injured by the snapping of a hawser when a ship was being moored, after a delay quite comparable with that in the present case. In *Moeller's* case, however, it was clear (to quote the actual words of Stanton, J.'s, judgment): "That the accident happened in an operation being carried out by an officer of the Board and that they were immediately aware of it with all its attendant circumstances." In these circumstances, it seemed a natural inference to Stanton, J., that the defendant Board would not be prejudiced by the delay, particularly as it was shown that immediately after the accident the defendant and its insurers had held a full investigation as to its causes.
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> In the present case, however, the facts are widely different. It is a matter of dispute, even, whether the manner in which the accident is now said to have happened was ever brought to the notice of the Board's officer. The plaintiff's witnesses say that it was. But the only report that he made is to a different effect. It is clear, therefore, that whatever was orally said at the time between the plaintiff's co-employees and the Board's wharfinger, the Board's senior officers were never notified in consequence of attendant circumstances, such as are now alleged, and no attempt was made at any complete investigation of the causes of the accident. This completely distinguishes the present case from *Moeller's* case.

It seemed to Mr. Justice Turner that, although the two statutes contain provisions of almost identical wording, widely different principles may have to be invoked in their application. For, where an accident happens, if workers' compensation only is to be sought, it will be sufficient to prove the employment, the fact of the accident, and that it arose out of and in the course of the employment. If the happening of the accident is contemporaneously brought to the notice of the employer, the details of the attendant circumstances are seldom of importance; but, where negligence is to be alleged, they may be of the highest importance. Questions of safe system may be in issue; details of fact will in such cases often be matters of grave dispute. He added:

> This difference in the importance of the details of surrounding circumstances in the two types of claim seems to me to compel a different approach in applying the provisions of the two statutes and I am disposed to think that, in many cases where the Court would allow a claim to be brought under the Workers' Compensation Act, correctly concluding that the employer would not be prejudiced by lack of notice, it will, nevertheless, decline to authorize the commencement of a negligence action based upon the same facts, holding that the employer would be materially prejudiced in his defence to such a claim.

II.—The Required Notice.

The requirement of notice enacted in s. 23 (1) (*a*) of the Limitation Act, 1950, was the main subject of Mr. Justice Turner's judgment in *Madders* v. *Wellington Technical School Board of Governors*. The intended plaintiff's failure to give the notice required by s. 23 (1) (*a*) was relied upon by the defendant Board as the material ground for opposing the intended plaintiff's application under s. 23 (2) for leave to bring a common-law action after the expiry of the period of limitation prescribed by s. 23 (1) (*a*). The learned Judge said that, if adequate notice of intention to bring the action had been given, it was difficult to see how the defendant Board would have been prejudiced merely by delay in bringing the action. Both parties conducted the argument on the basis that the failure to give notice was the material matter for consideration.

The learned Judge gave some important interpretations of s. 23 (1) (*a*). He held that the notice required by s. 23 (1) (*a*) of the Limitation Act, 1950, must contain an intimation that it is intended that an action shall be brought; and it should further contain reasonable details of the cause of action alleged, and of the facts which are alleged to support it.

In cases where the intended plaintiff's delay is attributable to his solicitor, His Honour, following *Morrison* v. *Liddle Construction, Ltd.*, [1951] G.L.R. 219, and *Stewart* v. *Papakura Borough*, [1952] N.Z.L.R. 799, held that failure by an intended plaintiff's solicitor to give the notice required by s. 23 (1) (*a*) does not excuse such intended plaintiff, as he must accept the consequences of his solicitor's action or inaction.

After distinguishing *Moeller* v. *New Plymouth Harbour Board* (*supra*), His Honour held that where, owing to delay in giving the notice required by s. 23 (1) (*a*), it has become impossible for an intended defendant to make adequate inquiry into matters on which a defence might be based, application to grant leave under s. 23 (2) should be refused.

III.—The Principles Applicable.

From the judgments which we have summarized, it emerges that the paramount principle applicable, when considering whether or not the Court, under s. 23 (2) of the Limitation Act, 1950, should grant leave to an intended plaintiff to commence an action after he has allowed the statutory period of limitation to expire, is that enunciated by Streatfeild, J., in *R.B. Policies at Lloyds* v. *Butler* (*cit. supra*); and it applies to delay in giving the notice required by s. 23 (1) (*a*) as well as to delay in commencing the action within the time required by s. 23 (1) (*b*), whether or not such a notice has been given to the intended defendant.

The question of the burden of proof as to the intended defendant's being, or not being, prejudiced by delay on the intended plaintiff's part, has worried those whose duty was to advise the parties thereon. Great assistance is now afforded by Mr. Justice Stanton's judgment in *Moeller* v. *New Plymouth Harbour Board*, especially if that judgment is read with Mr. Justice Turner's judgment in *Thomas* v. *Nelson Harbour Board*, which makes it clear that s. 23 (2) of the Limitation Act, 1950, is not *in pari materia* with s. 26 (2) of the Workers' Compensation Act, 1922, notwithstanding the similarity in wording of both "escape clauses." As Mr. Justice Turner put it, "widely different principles may have to be invoked in their application," when the Court has to consider whether or not the intended defendant was materially prejudiced in his defence, or otherwise, by the delay. A different approach is compelled by the difference in the importance of the details of surrounding circumstances in the two types of cases. While an employer may not be prejudiced

in his defence of a claim for workers' compensation because the happening of the accident was contemporaneously brought to his notice, the attendant circumstances, where negligence is alleged, may be of the highest importance in resisting the common-law action.

The requirements of the notice prescribed by s. 23 (1) (*a*) are given detailed consideration in *Madders* v. *Wellington Technical School Board of Governors.* The resulting judgment should prove of great assistance to litigants and their advisers.

All these cases show clearly the soundness of the learned Judge's observation in the last-mentioned case that the stringent requirements of the Limitation Act, 1950, are not as widely known as they should be.

SUMMARY OF RECENT LAW.

BILLS OF EXCHANGE.

Bank—Crossed Warrant for Payment—Conversion—Order to "Pay A for B"—"True owner" of warrant—No Estoppel—Duty of Bank to make Inquiry—Bills of Exchange Act, 1882 (cl. 61), s. 82 (Bills of Exchange Act, 1908, s. 82).

In August, 1948, M. was appointed manager of three sheep-farms in the Island of Bute, belonging to the plaintiff. It was part of the terms of M.'s employment that all sums received by him in respect of these farms should be brought to the plaintiff's estate office (*i.e.* the office of the factor and assistant factor) for payment by the factor into the plaintiff's home farm account. It was also M.'s duty to apply for hill sheep subsidies. The plaintiff's factor knew that the warrants for hill sheep subsidies were drawn in M.'s favour with the addition of the words "for Marquess of Bute" (the plaintiff) and were sent direct to M. by the Department of Agriculture. In January, 1949, M. forwarded three applications for subsidy payments. On April 1, 1949, M. resigned his post as manager and in May of that year left the plaintiff's service. Between August 31 and September 27, 1949, three warrants in satisfaction of the applications made in January, 1949, were delivered to M. On September 27, 1949, M. opened a personal account at the defendants' Barnsley branch with the three warrants which were credited to the account. The warrants were specially crossed by a rubber stamp bearing the defendants' name and were forwarded for payment. On or about September 30 the proceeds of the warrants were credited to the defendants. The warrants were headed "Department of Agriculture for Scotland (Food Production Services) Vote" and were to the following effect: "If this form, duly receipted, is presented through a bank within one month, the King's and Lord Treasurer's Remembrancer will pay: Mr. [M.], Kerrylamont, Rothesay, Bute £133 10s. [or other the amount of the warrant] in respect of Hill Sheep Subsidy, 1949." M.'s name and address was within a printed rectangle. Immediately opposite the name of M., but outside the printed rectangle, appeared the words in brackets "for Marquess of Bute" (*i.e.* the plaintiff). The warrants were signed by the secretary. At the foot of the form was the following note: "The receipt must be signed with exactly the same name as is shown in the address." The warrants bore in print the crossing "Not Negotiable . . . & Co." In an action to recover a sum equal to the total amount of the warrants as damages for conversion or, alternatively, as moneys had and received by the defendants to the use of the plaintiff, *Held:* (i) That to enable a plaintiff to sue for conversion it is sufficient if he is entitled to immediate possession of the property converted, but it is not necessary for him to be the true owner of the property; and, as the plaintiff was at the material time entitled to require M., whose employment by the plaintiff had ended, to deliver the warrants to the plaintiff as and when M. received them, the plaintiff was entitled to recover their amount from the defendants with interest at four per cent. per annum from the date of the conversion. *Per curiam*: As the warrants contained, in effect, a promise "to pay M. for B.," and were warrants for hill sheep subsidy, the plaintiff, not M., was on the construction of the warrants their "true owner" within the meaning of that term in the Bills of Exchange Act, 1882. (ii) The plaintiff was not estopped from alleging as against the defendants that M. was not entitled to receive the proceeds of the warrants for his own account, as the warrants clearly indicated that M. was to receive the money as agent or in a fiduciary capacity; accordingly the defendants should not have credited the proceeds of the warrants to M.'s personal account without making inquiry. (iii) The defendants had not discharged the onus of proving that they had acted without negligence and were not entitled to the protection of s. 82 of the Bills of Exchange Act, 1882. *Bute* (*Marquess*) v. *Barclays Bank Ltd.* [1954] 3 All E.R. 365 (Q.B.D.).

As to Conversion of Orders for Payment, see *2 Halsbury's Laws of England*, 3rd Ed., p. 187, para. 354; and for Cases, see *3 English and Empire Digest*, p. 243, Nos. *693*, *694*.

As to Bankers' Duty to Inquire, see *2 Halsbury's Laws of England*, 3rd Ed., p. 182, para. 345: and for Cases, see *3 English and Empire Digest*, p. 242, No. 687, and Digest Supp., Bankers, Nos. *691a-691e*.

DIVORCE AND MATRIMONIAL CAUSES—SEPARATION.

Oral Agreement for Separation—Proof of Agreement—Onus on Petitioner—Corroboration not Essential—Divorce and Matrimonial Causes Act, 1928, s. 10 (i). Where an oral agreement for separation is the ground of a petition for dissolution of marriage, the onus of proof of the agreement is on the petitioner. Corroboration is not essential; but, where the issue depends entirely on the evidence of one spouse, which is denied by the evidence of the other spouse, the Court looks to see what corroboration, if any, there is of the evidence of either or both; and, in the absence of any corroboration, it looks to see where the burden of proof lies. (*D.B.* v. *W.B.*, [1935] P. 80; *Stone* v. *Stone*, [1949] P. 165, and *Tilley* v. *Tilley*, [1949] P. 240, [1949] 2 All E.R. 1113, followed.) *Baker* v. *Baker*. (S.C. Wellington. October 1, 1954. F. B. Adams, J.)

Separation Agreement—Husband returning to Matrimonial Home in Endeavour to save Marriage for Sake of Children—Intention of Parties—Tentative or Experimental Resumption of Family Life—Separation Agreement not in Full Force and Effect—Divorce and Matrimonial Causes Act, 1928, 5, 10 (e). On May 18, 1951, the parties entered into a written agreement for separation. On September 10, 1954, the wife asked the husband to return home as a guest or lodger, which he agreed to do. According to the petitioner's evidence, this return was more or less in an endeavour to save the marriage for the sake of the children. He returned the following day. He occupied a separate bedroom, and he stayed in the house for approximately five weeks. During that time no sexual intercourse took place, and on October 17, the wife left the house with the children. During the time the husband was at the house, he had the weekly evening meals with the family, and likewise had meals with them during the weekends. He did the garden, and assisted in painting and papering the house. His wife attended to his washing and likewise attended to his requirements, including the care of the separate bedroom occupied by him. The wife in her evidence said that the husband came home at her request, she having asked him if he would keep the home together more for the sake of the children. She further said that the intention was that he should come back permanently if the parties could be happy together, and that the husband finally agreed to come home on that basis. On a petition by the husband for a dissolution of the marriage on the ground that the separation agreement had been continuously in full force and effect since May 18, 1951, *Held*, That the intention of the parties was that they should come together in an endeavour to save the marriage for the sake of the children; that, in such circumstances, and considering the temporary association which was envisaged and did take place, there was a tentative and experimental resumption of family life; and, consequently, the petitioner had not established that the separation agreement was in full force and effect. (*Leslie* v. *Leslie*, [1954] N.Z.L.R. 414); *Daniels* v. *Daniels*, [1949] N.Z.L.R. 70; [1949] G.L.R. 3; and *Buhck* v. *Buhck*, [1947] N.Z.L.R. 709; [1947] G.L.R. 313, considered.) *Neilands* v. *Neilands*. (S.C. Invercargill. December 3, 1954. McGregor, J.)

DIVORCE AND MATRIMONIAL CAUSES—SEVEN YEARS' SEPARATION.

Parties living Together before Husband's Admission to Hospital and Subsequent Transfer to Mental Hospital—Husband discharged from Mental Hospital as recovered, and re-admitted to Public Hospital and remaining there for Two Years — After his Dis-

LEGAL ANNOUNCEMENTS.

Continued from page i.

MESSRS. R. E. TRIPE, R. T. PEACOCK and P. B. A. SIM, who have heretofore practised in partnership under the name of Hadfield, Peacock, Tripe & Sim, wish to announce that Mr. P. B. A. Sim is retiring from the firm as at the 31st January, 1955, to take up a University appointment. Messrs. R. E. Tripe and R. T. Peacock will continue the partnership under the firm name of HADFIELD, PEACOCK & TRIPE at the same address, D.I.C. Buildings, Brandon Street, Wellington.

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charged from Hospital, Parties not again living Together—Consortium not ended by Husband's admission to Hospital—Parties not "living apart for not less than seven years"—"Living apart"—Divorce and Matrimonial Causes Act, 1928, s. 10 (jj). A husband and wife are living together, not only when they are residing together in the same house, but also when they are living in different places, provided the consortium has not been determined. They still have their common home, and still act from the same base. (*R.* v. *Creamer*, [1919] 1 K.B. 564, and *Eadie* v. *Commissioners of Inland Revenue*, [1924] 2 K.B. 198, applied.) On March 5, 1947, the husband respondent was admitted to the Balclutha Hospital and was transferred therefrom to the Seacliff Hospital on April 2, 1947. He was discharged from the latter Hospital as recovered on October 29, 1948, was on the same day re-admitted to the Balclutha Hospital, and remained continuously a patient in that Hospital until November 16, 1950, apart from a period from July 19, 1949, to October 10, 1949, during which he was in the Dunedin Hospital. Up to the date of his admission to Hospital the husband and wife lived and cohabited together. After the husband's discharge from Hospital, the parties did not again live together. The petitioner claimed, in these circumstances, that she had been "living apart" from her husband since March 5, 1947, a period of not less than seven years. *Held*, That an end was not put to the consortium by the husband's admission to Hospital; and it had not been proved that, during his period in Hospital, the parties were "living apart" within the meaning of s. 10 (*jj*) of the Divorce and Matrimonial Causes Act, 1928. *Wilson* v. *Wilson*. (S.C. Invercargill. December 3, 1954. McGregor, J.)

EXECUTORS AND ADMINISTRATORS.

Public Trustee—Appointment—Executor according to Tenor entitled to apply for Appointment of Public Trustee as Sole Executor—"Executor"—Public Trust Office Act, 1908, s. 13. An executor according to the tenor can appoint the Public Trustee sole executor, subject to the Court's consent, under s. 13 of the Public Trust Office Act, 1908. *In re Griffiths (Deceased)*. (S.C. Wellington. November 8, 1954. Turner, J.)

FAMILY PROTECTION—GRANDCHILDREN.

Testator leaving Three Daughters, His Only Son having predeceased Him—Testator's Son killed on Active Service, leaving Infant Son—Testator's Estate left to Three Daughters—No Provision for Grandson—Testator's Moral Duty to Grandson—Further Provision for His Maintenance and Support—Family Protection Act, 1908, s. 33. The testator had three daughters, who survived him and were all married, and one son, who had died in 1944, while serving overseas. The son left a widow (who had remarried) and one infant son, the plaintiff, who was a normally healthy child, aged twelve years at the time of his application for further relief. The testator's wife died in January, 1953. Under her will, the plaintiff, her grandson, received £1,500, and each of her daughters £500. The testator died in September, 1953, leaving a will made in February, 1953, and a distributable estate amounting to £24,000, which was given to such of his three daughters as should survive him with a substitutionary gift to issue of any daughter who might predecease him. It was conceded by counsel for the three daughters that the infant plaintiff was entitled to some provision. *Held*, 1. That an order should be made which would provide for the adequate maintenance and support of the plaintiff, to whom the testator owed a moral duty to equip him for the battle of life in the same way as his father would presumably have done had he not died at an early age in the defence of his country; and that the testator should have provided for the plaintiff's education and training for his future life work without his having to break into the capital sum of £1,500 left him by his grandmother. 2. That the sum of £1,750 should be set aside out of the estate now held in trust for the plaintiff, and applied, during the plaintiff's minority, for his maintenance, education, advancement or benefit, that sum to be charged equally against the share of the testator's three daughters. *In re Hall (Deceased), Hall* v. *Wakelin and Another*. (S.C. Palmerston North. November 17, 24, 1954. Barrowclough, C.J.)

GAMING—OFFENCES.

Assisting in Conducting Lottery—"Picks" Competition—Selection of Eight Horses at Designated Race-meeting and Payment of Entry Charge—Points allotted for Successful First, Second and Third Horses—Money Prizes awarded to Winners of Aggregate Points—Event in Respect of which Money distributed, Competitor's ability to forecast Results—Winning of Pool not determined solely by Chance—Skill employed in Selecting Winners—Competition not a Sweepstake, and not a "lottery"—Gaming Act, 1908, ss. 36 (1) (b), 41 (c), 44. The appellant was the licensee of an hotel in which, on a Saturday morning there was conducted a competition known as "Picks." Up to 11 a.m., customers might select the names of eight horses as the winners respectively of eight races, write their names on a slip of paper, and making a contribution of two shillings and sixpence. The total amount received was available for prizes. A committee of customers decided upon the prizes, checked the slips, and announced the successful competitors. Three points were allotted for a race-winner, two points for a second, and one point for a third. The appellant accepted the custody of the money until the prizes were paid. He himself entered a slip for the competition held on the material date. The appellant was charged with assisting in conducting an illegal lottery. He was convicted. On appeal from that conviction, *Held*, 1. That, on the facts, the action of the appellant in permitting the competition to take place in his premises was not an offence under s. 36 (1) (*b*) of the Gaming Act, 1908. (*R.* v. *Hobbs*, [1898] 2 Q.B. 647, followed.) 2. That the distribution of the money to the successful competitors was not determined purely by chance, as skill played a part in determining its distribution and the award of the prizes was determined by the degree of success which had attended the forecasting of winners; and that the appellant could not be convicted under s. 41 (*c*). (*Hall* v. *Cox*, [1899] 1 Q.B. 198, *Scott* v. *Director of Public Prosecutions*, [1914] 2 K.B. 868, and *Moore* v. *Elphick*, [1945] 2 All E.R. 155, followed.) (*Caminada* v. *Houlton*, (1891) 60 L.J. M.C. 116, and *Stoddart* v. *Sagar*, [1895] 2 Q.B. 474, applied. 3. That the competition was not a sweepstake, and, was, therefore, not a "lottery" within the meaning of s. 44. *McComish* v. *Alty*. (S.C. Palmerston North. October 21, 1954. Gresson, J.)

IMMIGRATION RESTRICTION.

Person "of British birth and parentage"—Nationality, not Locality, Primary Test—Immigrant born in Western Samoa—Father a British Subject born in Scotland—Such Person "of British birth and parentage"—Immigration Restriction Amendment Act, 1920, s. 5 (1). The expression "of British birth and parentage," as used in s. 5 of the Immigration Restriction Amendment Act, 1920, does not prescribe a locality test, but it points to nationality as the primary test under the section. The expression "of British birth" in s. 5 has the same meaning as the words "natural-born British subject" in Part I of the Second Schedule to the British Nationality and Status of Aliens (in New Zealand) Act, 1928 (now repealed); and the words "and parentage" remove from the category of those who are free from the restriction of s. 5 everyone, who, while being "of British birth," as being within the definition of "natural-born British subject" in Part I of the Second Schedule to the British Nationality and Status of Aliens (in New Zealand) Act, 1928, is not the child of a British father. It, therefore, excludes from that category all persons who would have been within s. 5 (1) (*a*) or s. 5 (1) (*b*) as having been born within Her Majesty's Dominions and allegiance or on board a British ship, but who are of foreign parentage. The appellant was born in Western Samoa on June 28, 1924. His father was a natural-born British subject, a Scotsman, and his mother was a Samoan. The appellant entered New Zealand on March 7, 1951, applying for, and obtaining, for that purpose a permit under s. 5 of the Immigration Restriction Amendment Act, 1920. The permit was for six months but two extensions were given, each for twelve months, the second extension expiring on September 7, 1953. He had thereafter remained in New Zealand. It was common ground that the appellant, under the terms of the British Nationality and Status of Aliens (in New Zealand) Act, 1928 (now repealed), had been a natural-born British subject, and was, by virtue of s. 16 (3) of the British Nationality and New Zealand Citizenship Act, 1948, a New Zealand citizen. The appellant was convicted on a charge, laid under s. 8 (5) of the Immigration Restriction Amendment Act, 1920, that on September 8, 1953, and thereafter until January 20, 1954, he committed an offence against Part I of that statute, in that, being a person to whom a temporary permit was granted under Part I on March 7, 1951, and having been granted extensions of such permit up to September 7, 1953, he remained in New Zealand after the extended period of such permit. On appeal from that conviction, *Held*, allowing the appeal, That the fact that the appellant's father was a British subject born in Scotland made the appellant "of British parentage," and that, whatever the status of Western Samoa was at the time of his birth, he was, consequently, "a person of British birth and parentage," within the meaning of that expression in s. 5 (1) of the Immigration Restriction Amendment Act, 1920. *Annandale* v. *Collector of Customs*. (S.C. Wellington. November 8, 1954. Hutchison, J.)

JUSTICES OF THE PEACE.

Mandamus—To issue Summons for Careless Driving—Discretion of Prosecutor over Offence to be charged—Road Traffic Act, 1930 (c. 43), s. 11, s. 12. On an application by an inspector of the Warwickshire Constabulary to the Nuneaton justices for the issue of a summons against a respondent for careless driving under the Road Traffic Act, 1930, s. 12, the chairman of the justices informed the applicant that he would not issue a summons for careless driving and that an information for dangerous driving, under s. 11, would have to be laid. On a motion for mandamus, *Held*: the discretion as to what charge should be preferred in a particular case must be left to the prosecutor and, consequently, an order of mandamus should issue. Dicta of *Devlin*, J., in (*Re Beresford* (1952) (36 Cr. App. Rep. 1), explained). *R.* v. *Nuneaton Justices, Ex parte Parker.* [1954] 3 All E.R. 251 (Q.B.D.).

LIMITATION OF ACTION.

Action in Respect of Bodily Injury—Accident causing Injury—Intended Defendant notified of Intention to bring Action Six Years and Four Months after Accident—Delay not due to Mistake—Intended Defendant "materially prejudiced" by Delay—Limitation Act, 1950, s. 4 (7). On an application for leave to bring an action in respect of bodily injury after two years from the date on which the cause of action occurred, the Court will exercise its discretion under s. 4 (7) of the Limitation Act, 1950, only in favour of an intended plaintiff who has taken reasonable steps to investigate the position relating to his bodily injury, and will not exercise that discretion in favour of an intended plaintiff who has been plainly dilatory in exercising his rights. Where the intended defendant would be called upon to have the intended plaintiff examined some six or seven years after an accident in order to say whether her present condition was due to a slight injury at the time of the accident, such a situation would be seriously prejudicial to the defence of the proposed action, and the Court should be slow to exercise a discretion in favour of the intended plaintiff. (*R.B. Policies at Lloyds* v. *Butler*, [1950] 1 K.B. 76; [1949] 2 All E.R. 226, applied.) *Henderson* v. *Stewart.* (S.C. Wellington. August 5, 1954. Hay, J.)

Actions against Public and Local Authorities -Action out of Time—Notice of Intended Action not given—Burden of Proof that Intended Defendant "not materially prejudiced" by Delay—Evidence by Plaintiff giving rise to Reasonable Inference that Defendant not materially prejudiced—Onus of Proof shifted to Intended Defendant—Accident, on which Intended Common-law Action to be based, within knowledge of Local Authority's Officer and Intended Plaintiff available for Observation during Whole Period of Delay—Intended Defendant's Responsibility to Show It had not been materially prejudiced in Its Defence—"Materially prejudiced"—Limitation Act, 1950, s. 23 (2). Where leave to bring an action is sought under s. 23 (2) of the Limitation Act, 1950, after the time for commencing it had expired, on the ground that the intended defendant "was not materially prejudiced in his defence" by the delay in bringing such action, the burden of proof rests initially on the plaintiff, yet if he gives evidence from which it may be reasonably inferred that the intended defendant has not been prejudiced, then the burden of proof is shifted on to the shoulders of the defendant. (*Hayward* v. *Westleigh Colliery Co., Ltd.*, [1945] A.C. 540, and *Eydmann* v. *Premier Accumulator Co., Ltd.*, (1916) 9 B.W.C.C. 384, followed.) It is a natural inference that an intended defendant was not materially prejudiced in his defence when the accident, on which an intended common-law action was to be based, happened in an operation being carried on by an officer of a local authority, the intended defendant became immediately aware of it with all its attendant circumstances, and the intended plaintiff was in touch with the defendant and available for observation during the whole period of the delay. In such circumstances, it became the intended defendant's responsibility to prove that it had not been prejudiced. Where the proper inference from the facts within the knowledge of the intended defendant was that they indicated negligence, it was not materially prejudiced in its defence by the intended plaintiff's not having alleged negligence or the possibility of a claim for damages at the time of the accident. *Moeller* v. *New Plymouth Harbour Board.* (S.C. New Plymouth. August 30, 1954. Stanton, J.)

—— —— *Material Prejudice of Intended Defendant—Distinction between Principles applicable to Intended Workers' Compensation Claim and Intended Common-law Action alleging Negligence—Limitation Act, 1950, s. 23 (1) (2)—Workers' Compensation Act, 1922, s. 26 (2).* The purpose of s. 23 of the Limitation Act, 1950, is to protect public authorities from stale claims. (*R.B. Policies at Lloyds* v. *Butler*, [1950] 1 K.B. 76; [1949] 2 All E.R. 226, followed.) A claim is barred by the direct words of s. 23 (1) (*a*) of the Limitation Act, 1950, unless the intending plaintiff (if unable to show that his failure to give the required notice or his delay in bringing the action was occasioned by mistake or other reasonable cause) shows circumstances from which the Court can draw the inference that the proposed defendant was not materially prejudiced by the lack of notice. Although s. 23 (2) of the Limitation Act, 1950, and s. 26 (2) of the Workers' Compensation Act, 1922, have almost identical wording, different principles are applicable to them. When an accident happens, if workers' compensation only is to be sought, it is sufficient to prove the employment, the fact of the accident, and that it arose out of and in the course of the employment. Where negligence is to be alleged, the details of the attendant circumstances may be of the highest importance, and details of fact may become matters of grave dispute. Thus, in cases where the Court would allow a claim to be brought under the Workers' Compensation Act, 1922, correctly concluding that the employer would not be prejudiced by lack of notice, it would, nevertheless, decline to authorize the commencement of a common-law action for negligence based upon the same facts, holding that the employer would be materially prejudiced in his defence to such claim. (*Moeller* v. *New Plymouth Harbour Board* (*supra*), distinguished.) (*Thomas* v. *Nelson Harbour Board.* (S.C. Nelson. November 10, 1954. Turner, J.)

—— —— *Notice to contain Intimation of Intended Action—Solicitor's Failure to give Notice not Excusing Intending Plaintiff's not giving Notice in Time—Delay in giving Notice making Inquiry into Matters affecting Defence—Leave to commence Action refused—Limitation Act, 1950, s. 23 (1)* (a), *(2).* The notice required by s. 23 (1) (*a*) of the Limitation Act, 1950, must contain an intimation that it is intended that an action should be brought; and it should further contain reasonable details of the cause of action alleged, and of the facts which are alleged to support it. Failure on the part of an intending plaintiff's solicitor to give the notice required by s. 23 (1) (*a*) does not excuse such intending plaintiff, as he must accept the consequences of his solicitor's action or inaction. (*Morrison* v. *Liddle Construction, Ltd.*, [1951] G.L.R. 219, and *Stewart* v. *Papakura Borough*, [1952] N.Z.L.R. 799, followed.) Where, owing to delay in giving the notice required by s. 23 (1) (*a*), it has become impossible for an intended defendant to make adequate inquiry into matters on which a defence might be based, application to grant leave under s. 23 (2) to commence an action should be refused. (*R.B. Policies at Lloyds* v. *Butler*, [1950] 1 K.B. 76, 81; [1949] 2 All E.R. 226, followed.) (*Moeller* v. *New Plymouth Harbour Board, supra*, distinguished.) (*Henderson* v. *Stewart, supra*, referred to.) *Madders* v. *Wellington Technical School Board of Managers.* (S.C. Wellington. November 10, 1954. Turner, J.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Wife, while driving Plaintiff Husband's Car, involved in accident—Her Share of Responsibility assessable at Seventy-five Per Cent—Wife not in Husband's Employment or acting as His Agent—Husband entitled to Full Amount of Damages proved—Contributory Negligence Act, 1947, s. 3 (1). In an action arising out of the collision between a motor-car and a road-grader, it was found as a fact that the accident was caused in part by the negligence of the driver of the grader, and there was contributory negligence on the part of the driver of the motor-car. The driver of the car was the wife of the plaintiff, whose negligence, if it could be attributed to the plaintiff, would be reduced by 75 per cent., having regard to her greater share in the responsibility for that damage. *Held*, 1. That, on the evidence, the plaintiff's wife, who had his authority to drive the car, was not in his employment or acting as his agent in performing any task or duty which had been delegated to her by him in driving his car at the time of the accident; and he was not vicariously responsible for the damage caused to his car. (*Hewitt* v. *Bonvin*, [1940] 1 K.B. 188, applied.) 2. That the damages suffered by the plaintiff were, therefore, not reducible by virtue of s. 3 of the Contributory Negligence Act, 1947; and that he was entitled to judgment for the full amount of the damages proved. *Rowe* v. *Manawatu County.* (S.C. Palmerston North. December 3, 1954. Barrowclough, C.J.)

NEW YEAR HONOURS.

Knight Commander of the Most Distinguished Order of Saint Michael and Saint George (K.C.M.G.)—

Mr. Leslie Knox Munro, Ambassador of New Zealand in the United States of America.

LEGAL ANNOUNCEMENTS.

Concluded from page iv

PARTNERSHIP NOTICE.

MESSRS. CHARLES STEWART THOMAS, RALPH PATRICK THOMPSON and EWART MORELL HAY, practising as Barristers and Solicitors in partnership under the name of Charles S. Thomas, Thompson and Hay, have pleasure in announcing that they have admitted into partnership with them as from the 1st day of January, 1955, MESSRS. HAMISH STEWART THOMAS, B.A. (Cantab), Gray's Inn and FREDERICK JOHN SHAW, LL.B., who have been members of their staff for a number of years. The practice will continue to be carried on under the firm name of CHARLES S. THOMAS, THOMPSON AND HAY at the same address, 168-170 Hereford Street, Christchurch.

CHARLES S. THOMAS RALPH P. THOMPSON EWART M. HAY.

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MESSRS. ARTHUR THOMAS BELL and EDWARD BICKMORE ELLISON TAYLOR, practising as Barristers and Solicitors in partnership under the name of Bell & Taylor at 176 Hereford Street, Christchurch, wish to announce that they have admitted into partnership with them as from 1st January, 1955, MR. NEIL GORDON HATTAWAY, LL.B., who has been a member of their staff for some time. The practice will continue to be carried on under the same firm name of BELL & TAYLOR at the same address.

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GODFREY WILLIAM HARVEY, LL.B., wishes to announce that as from the 1st day of January, 1955, he will continue Practice as a Barrister and Solicitor at Raetihi and Ohakune under the firm name of HARRIS TANSEY AND HARVEY and not as before.

G. W. HARVEY. 21st December, 1954.

Knight Commander of the Most Excellent Order of the British Empire (K.B.E.)—

Major-General William Henry Cunningham, C.B.E., D.S.O., of Wellington.

Knight Bachelor—

The Honourable Mr. Justice George Panton Finlay, of Auckland.

Commander of the Most Excellent Order of the British Empire (C.B.E.)—

Mr. Stanley Logan Paterson, Stipendiary Magistrate, of Hamilton.

PROBATE AND ADMINISTRATION—PROBATE.

Home-made Document—Intention of Testamentary Effect gathered from Contents—No Attestation Clause—Neither Witness available—Signature of Witnesses apparently Genuine—Omnia Praesumuntur Rite Esse Acta—*Consent to Grant by All Persons (Except One) entitled on Intestacy—Presumption of Due Execution.* A document, propounded as a will, was home-made. It was undated. It was signed by two persons apart from its maker; it did not contain an attestation clause; and it did not in express terms appoint an executor. No other testamentary writing of the deceased had been located. On an application by the Public Trustee, as appointee of the person appearing in the document propounded as its executor according to the tenor. *Held*, 1. That the document propounded was intended to have testamentary effect, and this was confirmed by its contents; and it was, accordingly, a will. 2. That, in the circumstances, although the persons who apparently attested the signature of the testatrix could not be produced, the maxim *omnia praesumuntur rite esse acta* applied to the document, and due execution could be presumed. (*In the Goods of Peverett*, [1902] P. 205, *Denby* v. *Denby*, (1905) 7 G.L.R. 616, and *In re Archibald*, [1919] G.L.R. 350, followed.) *In re Griffiths (Deceased)*. S.C. Wellington. November 8, 1954. Turner, J.)

Practice—Place where Application to be made—Differing meanings of "Domiciled"—Testator domiciled in New Zealand but Resident out of New Zealand at Date of His Death—Application to be Filed in Registry in District where Deceased resided before leaving New Zealand—Code of Civil Procedure, R. 517. The word "domiciled" in the first paragraph of R. 517 of the Code of Civil Procedure is not used in its proper sense as a legal conception whose area is a country subject to one system of law, but in the lax sense, meaning no more than residence. (*In re Cleary*, (1893) 12 N.Z.L.R. 151, and *In re Taylor*, (1902) 22 N.Z.L.R. 388, referred to.) The word "domiciled" is used in its proper sense in the expression "domiciled in New Zealand" in the second paragraph of R. 517; and a case does not fall within that paragraph unless the deceased, at the time of his death was both resident out of New Zealand and domiciled out of New Zealand. (*Whitley* v. *Stimbles*, [1930] A.C. 544, referred to.) Where the deceased, of whose will probate is sought, at the time of his death was domiciled in New Zealand but was resident out of New Zealand, an application for probate may be dealt with under R. 604, "as nearly as may be in accordance with R. 517." Thus, the proper Registry in which to make the application for probate is the principal registry of the Judicial District in which the deceased resided before he left New Zealand. *In re Raitt (Deceased)*. (S.C. Wellington. December 3, 1954. Cooke, J.)

PUBLIC REVENUE—INCOME TAX.

Offences—Wilfully Making False Returns of Income—Appeal to Supreme Court on Point of Law—Informations charging Offence dismissed—Magistrate's Finding of Fact—Such Finding not applicable unless Appellant could Show duly some Conclusion to be drawn from Facts that False Return made wilfully—Land and Income Tax Act, 1923, s. 149 (b). Each of ten informations under s. 149 (*b*) of the Land and Income Tax Act, 1923, charged the respondent with wilfully making a false return of income. At the hearing in the Magistrate's Court, pleas of not guilty had been entered in respect of all ten informations. At the close of the informant's case, the respondent, in respect of three of the informations, reversed its plea to a plea of guilty. The other seven informations were dismissed. The informant (the present appellant), appealed by way of Case Stated against the dismissal of three only of the seven informations which were dismissed. *Held*, 1. That the Magistrate's finding in each case was a finding of fact, and it was not reviewable in an appeal on a point of law unless the appellant could show, on some subordinate fact or facts stated in the Case, that there must have been a conviction in the sense that the fact that a false return had been made wilfully was the only true conclusion which could be drawn. (*Stokes* v. *Mitchison*, [1902] 1 K.B. 857, and *Stonehouse* v. *Owles*, [1943] N.Z.L.R. 50; [1943] G.L.R. 39, followed.) 2. That the appellant had not shown that upon the facts stated there must have been a conviction. *Commissioner of Inland Revenue* v. *H. R. Eccleston, Ltd.* (S.C. Palmerston North. November 11, 1954. Barrowclough, C.J.)

PUBLIC WORKS.

Soil Conservation and Rivers Control—Land taken for Flood-protection—Stand of Poplar Trees on Land used for making and marketing Fencing Battens—Claim for Loss of Trees—Potentiality Principle not extended to Produce of Land—Compensation payable on Basis of Capitalization of Receipts in Nature of Royalties—Soil Conservation and Rivers Control Act, 1941, s. 145—Finance Act (No. 3), 1944, s. 29 (1). Certain land was taken by the respondent Board for flood-protection purposes under the Soil Conservation and Rivers Control Act, 1941. On this land there was a stand of 900 poplar trees, which had matured into a fine stand of poplar timber grown under forestry conditions. This timber was split into battens, of which the owner had sold about 31,000 battens and 2,220 stakes, all within two years. On a claim for £14,961 representing compensation for the land taken by the respondent Board, the greater part of the amount was claimed in respect of the loss of the timber represented by the poplar trees. *Held*, 1. That compensation for the loss of the claimant's timber was to be assessed on the basis of the amount the claimant could expect to receive by way of royalty from a person engaged in the business of reducing standing timber to merchandise, as the production of fencing battens was not a potentiality of the land taken, but a use to which the produce of the land could at once be put. (*Marshall* v. *Minister of Works*, [1950] N.Z.L.R. 339; [1950] G.L.R. 20, distinguished.) 2. That, accordingly, the claimant was not entitled to have his loss of the timber stand computed by reference to the profit he might have made on the realization of it by himself had he remained in possession of the land and had continued in the business of a successful producer of fencing battens. 3. That by virtue of s. 29 (1) (*b*) of the Finance (No. 3) Act, 1944, a claimant is to be regarded as a willing seller at the specified date; but an owner who virtually insists that in addition to immediate payment for the value of his land, he shall have the right to remain in possession for a number of years in order to dispose of the fruit of that land to its best advantage does not qualify as a willing seller; and any allowance therefore made to expedite delivery of possession before he has achieved his purpose would probably be classed as made on account of the taking of any land being compulsory, an allowance which is directly prohibited by s. 29 (1) (*a*) of the Finance Act (No. 3), 1944. 4. That the claim had to be determined on the basis of the capitalization of receipts on the nature of royalties which could have been obtained for the timber at the specified date. *Nelson* v. *Hawke's Bay Catchment Board*. (Napier. June 17, 1954. Harlow, S.M.)

SETTLEMENT.

Rule in Lassence v. *Tierney—Trustees directed to divide the Trust Fund or without Actual Division to treat the Same as divided into Two Equal Parts and to appropriate One of Such Parts as the Share of Each of Settlor's Two Daughters—Daughter's share not to vest Absolutely in Her—Life interest to Daughter with Remainder to Issue—Accruer clause—Both daughters Dying Without Issue—Destination of Trust Fund.* By a settlement, made on April 10, 1919, the settlor settled certain investments for the benefit of his two daughters, A.B. and I.B. By cl. 2 the trustees of the settlement were directed to stand possessed of the trust fund and of the annual income thereof "upon trust to divide the trust fund or without actual division to treat the same as divided into two equal parts and to appropriate one of such parts as the share of each" of the two daughters, A.B. and I.B., respectively. By cl. 3, "the share of the trust fund of each of the said two daughters" was not to vest absolutely in such daughter but should be retained by the trustees on trust during the life of such daughter to pay the income of such share to her, and after the death of such daughter, on trust for her issue. By cl. 4 it was provided, "If the trusts hereinbefore declared concerning the share of either such daughter shall fail then . . . such share shall go and accrue by way of addition to the share of such other daughter and shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning her original share or as near thereto as circumstances will admit." On August 31, 1927, A.B. died a spinster. In 1932 the settlor died. On September 25, 1952, I.B. died, also a spinster. On an application to the Court by

the trustee of the settlement to determine the destination of the trust fund, *Held*: on the true construction of the settlement, there was no initial absolute gift to the daughters and the direction for division of the trust fund expressed in cl. 2 of the settlement was an administrative direction which did not create beneficial interests; therefore the rule in *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 551, and *Hancock* v. *Watson*, [1902] A.C. 14, did not apply, and, as the beneficial trust created by cl. 3 of the settlement had failed, there was a resulting trust for the settlor's personal representatives. *Per curiam*: Even if there had been an initial absolute gift to or between the settlor's daughters, so that the rule in *Lassence* v. *Tierney* (*supra*) would have applied to the shares originally given to them, the rule would not, on the true construction of the settlement, have applied a second time to the accruer clause, because that clause was not so expressed as to contain an initial absolute gift to a donee, but provided for an accruing share to accrue to the share of the other daughter not to her as a gift (see p. 235, *post*). (*Re Litt*, [1946] 1 All E.R. 314, distinguished.) *Re Burton's Settlement Trusts, Public Trustee* v. *Montefiore and Others*, [1954] 3 All E.R. 231 (Ch.D.)

As to the Rule in *Lassence* v. *Tierney*, see *34 Halsbury's Laws of England*, 2nd Ed., p. 214, para. 270; and for Cases, see *43 English and Empire Digest*, pp. 643-645, Nos. *790-799*, and Vol. 44, pp. 554-556, Nos. *3715-3724*.

SHIPPING AND SEAMEN.

Shipping Casualty—Rehearing of Formal Investigation—Limitation of Time for making Order for Rehearing—Shipping and Seamen Act, 1952, s. 326—Shipping Casualty Rules, 1937 (Serial No. 19372[21]), R. 22 (b). Section 326 of the Shipping and Seamen Act, 1952, confers jurisdiction to order a rehearing where a formal investigation of a shipping casualty has been heard under s. 325, but neither that statute nor the Shipping Casualty Rules, 1937, expressly limits the time within which such an order may be made. *The M.V. "Hauiti"* (S.C. Wellington. December 2, 1954. Cooke, J., with Assessors.)

WORKERS' COMPENSATION.

Dermatitis—Worker suffering Dermatitis intermittently while working for Past Employers—Necessity of Proof that Dermatitis contracted in Present Employment left Him more prone to Future Attacks than before Entering that Employment—Workers' Compensation Act, 1922, s. 3. Where a worker, who has suffered from attacks of dermatitis in previous employment but has then recovered, suffers dermatitis as the result of his work with his last employer, he is not entitled to compensation for it from that employer, unless he can establish that the attack of dermatitis which he contracted in his last employment had left him more prone to future attacks than he was before entering that employment. The plaintiff, who was twenty-eight years of age, commenced as an apprentice when he was about eighteen years of age, and finished his apprenticeship, which was interrupted by military service overseas, at about the beginning of 1950. At that time he developed dermatitis which affected his hands, forearms, and neck. On February 1, 1950, it was ascertained by patch tests that he was sensitive to certain materials which he had been handling, or with which he had come in contact during the course of his employment, and was given a different type of work. Later, he went back on to his old job, whereupon the dermatitis flared up again, and, at the end of 1951, he went to work as a service-station attendant. Although he was handling oils and greases and petropine while working as a service-station attendant, he did not suffer from dermatitis. The plaintiff worked at the service-station for a few months only. His next employment involved engineering work, in which a cutting oil, to which his skin was sensitive, had to be used. After about two months, the dermatitis reappeared. It was not so severe and did not cover such a large area on this occasion. During this attack, he was medically treated, and on July 17, 1952, the condition, which a week earlier had seemed to be more or less static, had flared up and his doctor changed the treatment. By the end of August, 1952, the dermatitis condition appeared to have cleared up. On September 4, 1952, the plaintiff commenced his employment with the present defendant as a maintenance fitter. After the first few weeks he was engaged almost entirely in pipe fitting which involved the use of cutting oil. By using a barrier cream and gloves, etc., he took every precaution to avoid a recurrence of dermatitis. The rash again developed on the back of his hands and early in November, 1952, the defendant company's doctor put him off work. He was off work for a period of two weeks. Acting on medical advice, he subsequently took employment as a clerk at a lower rate of wages.

The plaintiff was paid compensation in respect of the time during which he was unemployed, but no compensation had been paid in respect of any loss of earnings after his return to employment. He claimed that he had been trained as an apprentice and was a journeyman in a particular type of work, and that, as the result of the dermatitis, he was unable to work in the employment for which he was trained, as it involved, or is liable to involve, contact with oils which have been responsible for the dermatitis. He claimed compensation on the basis that his avenues of employment were restricted, and on the basis that he was suffering an actual loss of earnings as a result of the dermatitis. *Held*, That, in the whole of the circumstances, and having regard to the plaintiff's medical history, and bearing in mind that he had suffered from this particular type of dermatitis since early in 1950, and had had recurrences while still in the employment of his original employer and while working for another employer before he commenced to work for defendant, the plaintiff had not established that he had suffered any increased sensitivity to dermatitis as the result of his work with the defendant and that he was, therefore, not entitled to compensation as claimed. *Costigan* v. *General Motors New Zealand, Ltd.* (Comp. Ct. Wellington. August 31, 1954. Dalglish, J.)

Psychiatric Nurse—Attack by Patient causing Injury—Fear concerning Possibility of Further Attacks—Natural Fear, not in nature of Neurosis—Suitable Employment available at Mental Hospital without Possibility of Further Attack—Worker not Entitled to Compensation based on Loss of Earnings in Respect of Her Fears—Compensation payable in Respect of Back Injuries. On September 16, 1953, a psychiatric nurse, when acting as a nurse at the Auckland Mental Hospital, was attacked by a patient, who attempted to strangle her. As a result, she became for a short time unconscious, and subsequently received treatment for a back injury. She was on sick leave for six months. On March 16, 1954, the plaintiff resumed work at the Auckland Mental Hospital, and she then arranged with the Medical Superintendent that she would be put on duties which did not involve her in the lifting of patients, and she also arranged that she would be put in wards and on duties where the likelihood of any attack by any of the patients was very remote indeed. She continued working there for two and a half months. In June, 1954, she went off work on annual leave; but, before returning to work on July 4, she obtained six months' leave without pay. At the beginning of July, she commenced a light job in a factory, making sandwiches, etc., for the workers there, her wages being £5 18s. 4d. per week less than her average weekly earnings at the Mental Hospital. The plaintiff claimed that, as a result of the attack in September, 1953, she was suffering from a neurosis or fear which prevented her from returning to her duties as a psychiatric nurse, and claimed compensation on the basis of loss of earnings claimed to be due to the accident. *Held*, 1. That, on the evidence, the plaintiff had a natural fear concerning the possibility of further attacks: the fear was in the nature of a neurosis; but there was an element of malingering so far as her fear was concerned. (*Maples* v. *Fountain and Burrley Ltd.*, (1944) 37 B.W.C.C. 20, distinguished.) 2. That, although there was present an element of fear of further attack, it was not of such a nature as to prevent the plaintiff from working in a mental hospital at jobs in suitable locations where the possibility of further attack would be reduced to an absolute minimum, if not completely excluded; and that there was suitable employment available to her at the Auckland Mental Hospital at the same wages as she would have been earning if there had been no attack on her in September, 1953. (*Turner* v. *Brooks and Doxley, Ltd.*, (1909), 3 B.W.C.C. 22, referred to.) 3. That, as suitable employment had been found for her by her employer, and was available to her at the same wage as she was earning in her former job, she was not entitled under s. 5 of the Workers' Compensation Act, 1922, to compensation based on loss of earnings in respect of her fears. 4. That, as there was still an element of neurosis which was related to the symptoms of which the plaintiff complained concerning her back, but it was not more serious than the ordinary case of neurasthenia for which compensation is payable in that regard; and she was entitled to compensation at the rate of £4 14s. 8d. from July 4, 1954, to the date of judgment plus a lump sum representing a commutation of three months' compensation at the same rate. *Wright* v. *Attorney-General*. (Comp. Ct. Auckland. October 22, 1954. Dalglish, J.)

THE NEW ATTORNEY-GENERAL.

The Hon. J. R. Marshall, B.A., LL.M.

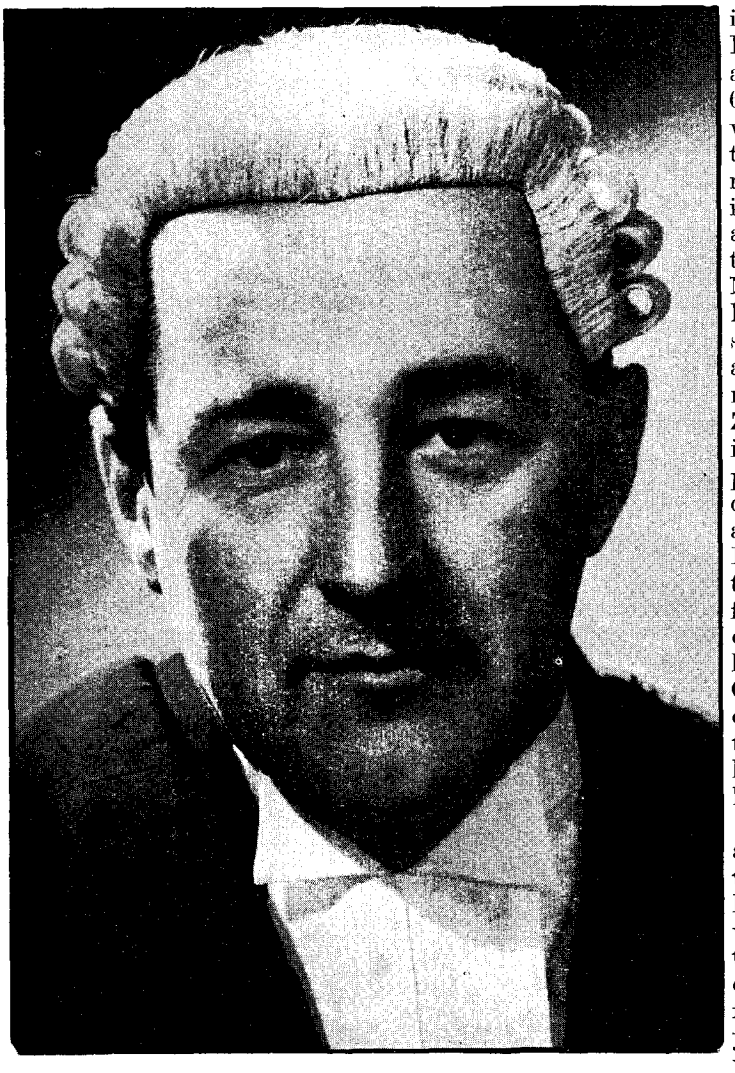
Her Majesty's Attorney-General for New Zealand, by virtue of his appointment the Head of the Bar, is entitled to precedence over all King's Counsel. This proud position now falls to the lot of John Ross Marshall at the comparatively early age of forty-two.

The Hon. Mr. Marshall was born in Wellington, and he has spent most of his life there. When a boy, he moved with his parents to Dunedin for a year, and he afterwards lived in Whangarei for eight years.

Mr. Marshall's father came to New Zealand as a young man from Falkirk, Scotland; and his ancestry is also Scottish on his mother's side. Her parents came to New Zealand from Scotland in the 'seventies. His father, who was a public servant, and for many years District Public Trustee at Whangarei, died many years ago; but his mother is still living.

Mr. Marshall had distinction in both study and sport as a schoolboy. He was dux of the Whangarei primary school. He played in the first Rugby fifteen and the first cricket eleven at Whangarei High School, and later at Otago Boys' High School.

At Victoria University College, he first graduated LL.B. and finally took his Master's Degree in Law. He also completed an Arts degree, advancing in political science. He is the only Member of Parliament to have done this.



The Hon. J. R. Marshall,
Attorney-General.

His career in employment began in the Wellington legal office of Messrs. Luke, Cunningham, and Clere, where he was for five years. He was admitted as a barrister and solicitor in 1936. He was next in the office of the City Solicitor in Wellington from 1936 to the Second World War. After the war, he returned from active service to practise on his own account, first as a barrister, and, later, as a solicitor. When he was appointed a Cabinet Minister he amalgamated his practice with that of Messrs. Rothwell, Gibson, and Page, the firm now being known as Rothwell, Gibson, Page, and Marshall.

While with the City Solicitor, he first appeared in the Court of Appeal as junior to the late Mr. John O'Shea, K.C., subsequently appearing with that Court on numerous occasions. He appeared in such leading cases as *Kinsman* v. *Wellington City Corporation*, *McRae* v. *Wellington City Corporation*, and *Harris* v. *General Manager of Railways*.

He was a lecturer in Law in Victoria University College from 1948 to 1951, and he was also an examiner to the University of New Zealand in legal subjects.

Mr. Marshall gave outstanding active service in the Second World War. He entered the Army as a private with the 6th Reinforcements, went with the 36th Battalion to the Pacific, and rose rapidly to command an infantry company. As a Major, he was sent to the United States Marine Corps Staff College in Virginia for special training in amphibious warfare. He returned to the New Zealand Third Division in the Pacific, and took part in the attacks which drove the Japanese finally from the Solomon Islands. Later, he went to the Middle East and fought in the final Italian campaign, as a squadron-leader in the Divisional Cavalry, until the end of the war. Before returning to New Zealand he visited Germany, and he also went to Greece.

More than academic achievements have contributed to his knowledge. Apart from his war service, he has travelled widely. His early travelling stemmed from his life interest in youth and church work, with the Presbyterian Church. He attended a World Youth Conference organised by the World Council of Churches at Amsterdam. That was in 1939, and he spent a year travelling in Great Britain, Europe, America, Canada, and Australia. It was on his return to New Zealand from these journeyings that he enlisted for active service.

Mr. Marshall maintains his close association with all work of the Presbyterian Church and he is a member of the Public Questions Committee of the Presbyterian Church of New Zealand and a member of the session of St. John's Church, Wellington. It is interesting and important to note that this Church has a wonderful record in production of youth leaders and youth activity.

In November, 1946, Mr. Marshall was elected as Member of Parliament for Mt. Victoria with a majority

of 911 votes, and re-elected in 1949 with a majority of 1,808 and in 1951 with a majority of 2,198. The Mt. Victoria electorate was abolished in 1952; and he was the successful National Party candidate for the Karori electorate at the recent general election.

Mr. Marshall married Miss Margaret Livingston, of Perth, Western Australia, in 1944, while on furlough from overseas service. They have two sons and two daughters.

He has worked closely with the former Attorney-General, the Hon. T. C. Webb, on many Cabinet sub-committees. His address to the Legal Conference, deputizing for Mr. Webb, at Napier in 1954, will be remembered by the profession for its quality and breadth of view.

The Hon. Mr. Marshall, when he first became a Minister in 1949, at the age of 37, was the youngest member of the Cabinet, and after five years in office is still one of the younger members.

When he was elected to Parliament for the Mt. Victoria electorate in 1946, and, as a young man with Liberal views, a broad background of academic achievements, world travel, and wide active service in Second World War, he was regarded as one of the most promising of the younger Parliamentarians. His career has justified those expectations. Speeches, in which marked analytical ability was allied with a broad and tolerant outlook, prepared political observers for his elevation to Cabinet rank. That came after only three years in Parliament.

In 1949, Mr. Marshall was appointed Minister without portfolio, Assistant to the Prime Minister and Minister in Charge of the State Advances Corporation, Census and Statistics Department, and Public Trust Office. In 1951, he added the portfolio of Health to those duties and also became Minister in Charge of Publicity and Information.

In 1953 Mr. Marshall represented New Zealand at the Colombo Plan Conference in New Delhi and he visited Singapore, India, Pakistan, Ceylon and Indonesia.

In the fields of Health and State Advances, Mr. Marshall has left a record of substantial and lasting achievement.

He initiated the reform of the hospital system, the establishment of Child Welfare Clinics, the establishment of industrial health centres, and the policy for health recovery centres and civilian rehabilitation. He introduced a new policy for private hospitals to enable them to expand and supplement the work of public hospitals. He was responsible for the expansion of facilities available in the successful campaign which is being waged against tuberculosis, and he introduced measures which reduced, for the first time, the total cost of free medicine.

As Minister in Charge of State Advances, he initiated the policy for the sale of State houses, under which more than 10,000 houses have been sold. He was also the driving force behind the Government's measures introduced to expand home-building and owning. He initiated and organized the National Housing Conference of 1953. He also re-organized the Government Publicity and Information Services.

Mr. Marshall possesses qualities which eminently fit him for the position of Attorney-General. He possesses the qualities essential to success in the legal profession, great industry and patience in research, a wide and generous outlook on life, and an ability to make decisions. When he enlisted in the Second World War he had already had considerable and valuable experience at the Bar, and had the 'ball at his toe.' After returning from overseas service; the opportunity occurred of entering politics, which, if accepted, meant that, if he was to put his heart into a political career, his great chances of succeeding at the Bar had to be sacrificed. The law is a jealous mistress. The choice was made and has turned out well. As an experienced Cabinet Minister, he now succeeds to the office of Attorney-General which takes him back in large measure to his old love of the law.

With experience in the field in time of war a young man matures more quickly than in time of peace. As Ruskin says, "The habit of living lightly hearted in daily presence of death always has had, and must have, power both in the making and testing of honest men."

Our new Attorney-General with his inherent love of the law, his experience both as a soldier on active service, and in the portfolio of Health, is well equipped to fulfill this high office with credit to himself and satisfaction both to the profession and his colleagues in Cabinet.

MORTGAGEE'S EXERCISE OF POWER OF SALE.

By E. C. Adams, I.S.O., LL.M.

This is a most important matter which always requires the closest care from the mortgagee's solicitor and the purchaser's solicitor.

The relevant statutory law will now be found in ss. 104 and 105 of the Land Transfer Act, 1952, and ss. 89-103 of the Property Law Act, 1952. It is explained in *Garrow's Real Property in New Zealand*, 4th Ed., 498-504.

The power of sale is a matter of contract between the mortgagor and the mortgagee: *Wright* v. *New Zealand Farmers' Co-operative Association of Canterbury Ltd.*, ([1935] N.Z.L.R. 614; [1935] G.L.R. 497), approved by the Privy Council: [1939] N.Z.L.R. 388. It is possible to have a mortgage without a power of sale, although the writer of this article has never encountered such a mortgage. The exercise of that power of sale so created by contract is regulated by the statute law of New Zealand.

When a transfer by a mortgagee in exercise of his power of sale is being drawn up, the following relevant points should be considered by the solicitor acting for the purchaser:—

(1) Is there a power of sale expressly or impliedly conferred by the mortgage itself?

As *Garrow* puts it, at p. 498,

> a mortgagee may sell either under the express power (if any) in the mortgage deed, or under powers implied by statute, *if these have not been negatived in the deed.* It is quite usual to rely on the statutory powers with a modification as to the requirements of notice, etc.

The present *implied* power of sale will now be found in cl. 8 of the Fourth Schedule to the Property Law Act, 1952; but, if the mortgage is dated before January 1, 1953, the relevant provision will probably be cl. 7 of the Fourth Schedule to the Land Transfer Act, 1915.

(2) If there is a power of sale expressly or impliedly conferred by the mortgage, does it authorise the transfer's being drawn up, later to be presented for registration ?

It must be remembered that a power of sale does not include power to effect an exchange : *Taylor* v. *Parkinson* ((1911) 31 N.Z.L.R. 354).

The implied power of sale in cl. 8 of the Fourth Schedule to the Property Law Act, 1952, or in cl. 7 of the Fourth Schedule to the Land Transfer Act, 1915, authorizes a mortgagee not only to sell the whole of the land for cash (which is the usual case), but also to sell *any part* of the land. The mortgagee may also sell under agreement for sale and purchase; but this last power was not always included in the power implied by the statute: see, for example, the judgments of Sir Michael Myers, C.J., and Smith, J., in *Wright* v. *New Zealand Farmers' Co-operative Association of Canterbury Ltd.*, [1935] N.Z.L.R. 614, 623, 629; [1935] G.L.R. 497, 500, 504).

(3) At the date of the exercise of the power of sale by the mortgagee, was there any moratorium in force ? If so, have the provisions of the statute or the regulations creating the moratorium been complied with ?

For this purpose, the crucial date is the date of the transfer, or the date of the auction sale, if the land has been sold for cash, or, if it has been sold on credit, the date of the first agreement for sale and purchase ? At the present time, there is no moratorium in force; but if the land has been held by the purchaser under agreement for sale and purchase from the mortgagee, it must be ascertained whether or not a moratorium was in force at the date of the agreement.

(4) Is the transfer in the proper form ?

Precedents will be found in *Goodall's Conveyancing in New Zealand*, 2nd Ed., 188, 196, and in *Goodall's New Zealand Supplement to the Encyclopaedia of Forms and Precedents*, 772, 777. These two precedents must now be brought up to date by appropriate reference to the Property Law Act, 1952, and the Land Transfer Act, 1952.

The mortgagee must purport to transfer the estate of the mortgagor. It is suprising how often, in practice, the conveyancer makes the mortgagee purport to transfer the estate of the mortgagee, which of course is not what is intended.

(5) Has the transfer been executed by the appropriate person ?

If the sale has been through the Registrar of the Supreme Court and the mortgagee has been declared at such sale the purchaser, the Registrar of the Supreme Court must transfer, whether the transfer is in favour of the mortgagee himself or in favour of the mortgagee's nominee. But, in all other cases, it is the mortgagee who transfers.

Thus, if the sale is through the Registrar of the Supreme Court under ss. 99-102 of the Property Law Act, 1952, and a person other than the mortgagee is a purchaser at such sale, the transfer must be executed by the mortgagee : *Goodall op. cit.*, 188 (*b*).

(6) Have the provisions of s. 92 of the Property Law Act, 1952, been complied with ?

The nature of the evidence required hereunder is a matter for the discretion of the Registrar of the Supreme Court or the District Land Registrar. Appropriate precedents (to be brought up to date) will be found at *Goodall, op. cit.*, 517-519. It must be borne in mind that they may require an order for substituted service by the Court under s. 152 of the Property Law Act, 19 2, before the one month's notice is given to the mortgagor. An appropriate precedent will also be found hereunder (No. 1).

(7) Has the transfer been made subject to all prior subsisting registered estates, and to those registered subsequently which the transfer will not extinguish ?

The solicitor for the purchaser must see that his client gets a good title.

The effect of s. 101 (6) of the Property Law Act, 19 2, and s. 105 of the Land Transfer Act, 1952.

As a general rule, when a mortgagee exercises his power of sale upon the registration of the transfer in exercise of that power, all estates and interests registered subsequent to the mortgagee's mortgage are extinguished by operation of law and can be so noted as extinguished on the register. But there are several exceptions to this rule which must be borne in mind.

First, the legal priorities may have been altered under s. 103 of the Land Transfer Act, 1952, or under s. 30 of the State Advances Corporation Act, 1934-35.

Secondly, the subsequent registered instrument may be a statutory land charge duly registered under the Statutory Land Charges Registration Act, 1928, or some special statute. Most statutory charges are to protect improvements effected on the land which benefit all estates and interests therein and when once duly registered subsist as against all estates in the land : *Goodall's Conveyancing in New Zealand*, 2nd Ed., 449, 714.

The subsequent registered estate or interest may be an easement or *profit à prendre* to which the mortgagee exercising his power or his predecessor in title may have consented to; the latter part of s. 90 (1) of the Land Transfer Act, 1952, reads :

> No easement or *profit a prendre* created as aforesaid in respect of any mortgaged or encumbered land shall be binding on the mortgagee *except so far as he has consented thereto.*

In practice, it will probably be found that the transfer in exercise of the power of sale has been made subject to the easement or *profit à prendre.*

The subsequent registered estate or interest may be a lease to which the mortgagee has consented. With respect to this, it should be borne in mind that a subsequent lease may be binding on a mortgagee, although it was not consented to by him at the date of the lease : the mortgagee may have become bound by it by his subsequent express consent or by his course of conduct which will have the same effect.

EXERCISE OF POWER OF SALE: PROCEDURE.

A solicitor, for a mortgagor contemplating the exercise of his power of sale, will find much useful information in *Ball's Law of Mortgages*, 208-255: one must not overlook the supplement to this work, which was published in 1946.

A mortgagee may exercise his power of sale himself in accordance with the mortgage contract, or he may sell at auction sale under conduct of the Registrar of the Supreme Court.

MORTGAGEE SELLING OTHERWISE THAN AT A REGISTRAR'S SALE.

If the first method is adopted (which is usually the speedier and less costly of the two), the mortgagee, although not strictly a trustee for the mortgagor, must nevertheless have due regard to the interests of the mortgagor. A mortgagee selling otherwise than at a Registrar's sale should use the same prudence as an ordinary vendor selling his own land would use. If he sells at an undervalue, he may be liable to an action for damages at the suit of the mortgagor; in certain circumstances he may even be liable to a subsequent mortgagee.

As pointed out in *Ball's Law of Mortgages*, at p. 217, the sale should be conducted in strict accordance with the power conferred on the mortgagee, and a mortgagee would take upon himself a great risk if he were to depart from the terms of his mortgage.

And as pointed out, where a mortgagee not selling under conduct of the Registrar of the Supreme Court has power to sell by public auction or private contract, he is not bound in the first place to put it up to auction to test the market (*ibid.*, 219). A Crown leasehold, however, can be sold only at public auction: see s. 94 of the Land Act, 1948. He is justified in accepting a fair offer by private contract without first advertising But, needless to say, it must be a *fair* offer. The mortgagee must not sell at a gross undervalue; he must obtain a fair and proper price for the property.

If the mortgagee sells by public aucton, he must see that the sale is adequately advertised. As *Ball* puts it, at p. 220, a mortgagee selling at auction should act reasonably in bringing the sale before possible purchasers, and, if he does so by advertisement the advertisement should state reasonably full particulars of the land, and apparently particulars which might be adequate in a local paper would be inadequate if inserted in a newspaper published a considerable distance from the property. In the conditions of sale the mortgagee should be careful to fix an adequate reserve price; he will be responsible to the mortgagor if the property is sacrificed at the sale.

Before registering a transfer by a mortgagee, in exercise of his power of sale, the District Land Registrar will require to be satisfied that the mortgagor has received the necessary one month's notice required by s. 92 of the Property Law Act, 1952. This is usually done by a statutory declaration by the mortgagees, very much in the form of Precedent No. 1 hereunder, being a declaration to satisfy the Registrar of the Supreme Court at a Registrar's sale. In passing, it may also be mentioned that if the term of the mortgage has expired and the mortgagee has subsequently accepted payment of interest, three clear months' notice will also have to be given under s. 90 of the Property Law Act, 1952, but the two notices may be combined in the one instrument: s. 92 (3).

THE MORTGAGEE'S SELLING AT A REGISTRAR'S SALE.

This procedure is in substitution for the old foreclosure proceedings. The great advantage of this procedure is that it protects a mortgagee from any action by the mortgagor, if the property is sold for less than its real value and it gives the mortgagee power to buy in at the auction sale, thus effectually extinguishing the mortgagor's rights in the land, and enabling the mortgagee to have the mortgaged land vested in him absolutely.

The papers to be filed in the office of the Registrar of the Supreme Court are:

1. Particulars and Conditions of Sale.
2. Copy of advertisement to be inserted in newspapers.
3. Declaration by solicitor to mortgagee as to service of notice under s. 92 of Property Law Act, 1952.
4. Application by mortgagee to the Registrar to conduct the sale.

Particulars and Conditions of Sale:—Precedents will be found in *Goodall's Conveyancing in New Zealand*, 2nd Ed. 92, and in *2 Goodall's New Zealand Supplement* to the *Encyclopaedia of Forms and Precedents*, 725. Clause 7 of these precedents requires watching: it appears to be adapted for a case where a mortgagee is in possession. In all probability the mortgagor nowadays will be in possession; if so, care must be taken not to warrant *vacant* possession to the purchaser.

Copy of Advertisement to be inserted in Newspaper:—A precedent will be found in *Goodall's Conveyancing in New Zealand*, 2nd Ed. 521. This precedent also includes conditions for a sale of chattels by the grantee of a Bill of Sale, which is rather an unusual procedure. The advertisement should also contain a description of the land to be sold couched in popular language. A suitable form of advertisement will be found in Precedent No. 2, hereunder.

The Registrar will direct what newspapers the advertisement is to appear in and fix the number of insertions. He will insist on the first advertisement being not more than three months, and not less than one month, from the date of the sale. Before submitting the papers to the Registrar for approval, it is advisable to get a tentative date from a reputable auctioneer.

Declaration as to compliance with s. 92 of the Act:—Precedent No. 1 hereunder appears suitable. If the mortgagee's application discloses equitable interests not protected by registration (*e.g.*, a transferee from the mortgagor holding under an unregistered transfer) he may require service of the advertisement on the owner of such equitable interests. Precedent No. 3 hereunder is a declaration as to service of notice of sale on an equitable owner.

Application by Mortgagee to the Registrar to Conduct a Sale:—Precedent No. 4 hereunder appears suitable. The mortgagee's solicitor must exercise great care in fixing a proper amount for the mortgagee's estimate of value. As pointed out in *Ball's Law of Mortgages*, 245, the mortgagee is strictly bound by his estimate, which will not be lightly rectified against the mortgagor

after a sale on the ground of mistake: *Bank of Australasia* v. *Scott* ([1926] G.L.R. 274), *cf. In re Thomas Horton*, ([1925] N.Z.L.R. 739; [1925] G.L.R. 388).

As pointed out by the Court of Appeal in the leading case of *Wellington City Corporation* v. *Government Insurance Commissioner*, ([1938] N.Z.L.R. 308; [1938] G.L.R. 43), every conveyancer knows that it has been a common practice for the mortgagee to estimate his security at the figure which will return him principal and interest owing under the mortgage plus costs of sale. That common practice was expressly approved of in that case. It is not the real value of the land which has to be stated, but the mortgagee's *estimate* of the value of the land to himself. In other words the mortgagee does not want to be out of pocket as a result of the sale, and his solicitor should estimate the value accordingly.

At a Registrar's sale, a reserve price cannot be fixed: *Public Trustee* v. *Wallace*, ([1932] N.Z.L.R. 625; [1932] G.L.R. 254). It is essential that the property should not be sold at the auction at a price less than the amount of the mortgagee's estimate. Therefore the mortgagee in the conditions of sale should reserve the right to bid by himself, or by his agent, or by the auctioneer. It is a good practice for the mortgagee's solicitor to be present at the sale and start the bidding at the amount of his estimate of value. The next bid accepted by the auctioneer should be sufficient to pay the auctioneer's commission.

PRECEDENT No. 1.

EVIDENCE OF COMPLIANCE WITH S. 92 OF THE PROPERTY LAW ACT, 1952.

IN THE SUPREME COURT OF NEW ZEALAND
HAMILTON DISTRICT
HAMILTON REGISTRY

IN THE MATTER of The Property Law Act, 1952

AND

IN THE MATTER of a certain Memorandum of Mortgage bearing date the day of 1952 and registered in the Land Registry Office at Auckland as Number .

I G.H. of Wellington, Solicitor, do solemnly and sincerely declare as follows:

1. I am solicitor for the the mortgagee under and by virtue of Memorandum of Mortgage Registered Number (Auckland Registry).

2. That on the 27th day of May, 1954 I forwarded on behalf of the mortgagee by A.R. Registered Post to A. B. formerly of , Builder but now of a notice in accordance with the provisions of Section 92 of the Property Law Act, 1952 calling on the said A. B. to remedy the default complained of therein, a true copy of which notice is attached hereto and marked with the letter "A."

3. That the said notice was served on the said A. B. on the 2nd day of June, 1954 and the A.R. acknowledgement signed by the said A. B. is attached hereto and marked with the letter "B."

4. That to the best of my knowledge and belief the said A. B. has failed to remedy the default complained of in the said notice.

AND I make this declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act, 1927.

DECLARED at Wellington by the said G. H. this 29th day of September, 1954, before me: } G. H.

I. J.
A Solicitor of the Supreme Court of New Zealand.

PRECEDENT No. 2.

ADVERTISEMENT OF SALE BY MORTGAGEE.

UNDER CONDUCT of the Registrar of the Supreme Court of New Zealand at Hamilton at the request of the Mortgagee and in exercise of the powers of sale contained or implied in Memorandum of Mortgage Registered Number .

LIMITED acting under instructions from the Registrar of the Supreme Court of New Zealand at Hamilton at the request of the Mortgagee will offer for sale by public auction at their rooms in the Company's premises in Street on Thursday 1954 at 2.15 p.m. the freehold property being ALL THAT piece of land *situate in the* City of containing [*Set out here area*] be the same a little more or less being Lot on the plan deposited in the Land Registry Office at Auckland as Number (Town of) being portion of allotment of the Parish of and being all the land comprised and described in Certificate of Title Volume Folio , together with the buildings and improvements thereon and being situate at the junction of Road and Avenue, City of .

The property consists of an attractive and well built dwelling-house situated on a level corner section in a good residential area of City, within two miles of the Chief Post Office. The dwelling is a one-storey brick veneer house with an area of 1,581 square feet containing 2 bedrooms, sunroom, breakfast room, lounge, kitchen, bathroom and laundry. There are also a garage, a carport and shelter.

The Mortgagee's application containing his estimate of the value of the freehold property to be sold may be seen at the office of the Registrar at any time during office hours prior to the sale without payment of fee and also in the auction room at the time of the sale without payment of fee.

PRECEDENT No. 3.

SERVICE OF NOTICE OF SALE ON AN EQUITABLE OWNER.

IN THE SUPREME COURT OF NEW ZEALAND No. ——
HAMILTON DISTRICT
HAMILTON REGISTRY

IN THE MATTER of the Property Law Act 1952

AND

IN THE MATTER of a certain Memorandum of Mortgage bearing date the day of 1952 and registered in the Land Registry Office at Auckland as Number .

I, K. L. of , Solicitor, make oath and say as follows:

1. THAT on the 11th day of 1954 I called at a house property on the corner of Road and Avenue in the City of . I was directed to this house by the occupants of a house on another corner of the same streets as that belonging to C. D. This house at which I called was a one-storied brick dwelling.

2. THAT at this house I served a document a copy of which is hereunto annexed marked with the letter "A" upon a man who said he was Mr. C. D. and that he was the husband of Mrs. C. D. and that this man thereupon signed and placed the date at the foot of the said annexed document as now appears thereon in receipt for the document served on him.

3. THAT at my request this man then introduced me to his wife who admitted to me that she was Mrs. C. D. and that her husband had authority to receive the document on her behalf. I explained to her that it was a notice that the house was to be put up for auction because the mortgage payments were in arrears.

4. THAT the house at which I called appeared to me to have a floor area consistent with that mentioned in the document annexed hereto.

5. THAT I am a member of the firm of agents for solicitors for the Commissioner in this matter.

6. THAT my firm has been advised by that previous to service as aforesaid there had been served on Mrs. C. D. a notice under Section 92 of the Property Law Act, 1952, and the

document attached hereto and marked "b" is a copy of the notice so served and the document attached hereto and marked "C" contains the acknowledgement of receipt received through the Post and Telegraph Department who served the notice through the mail.

SWORN at this day of 1954 before me:

M. N.

A Solicitor of the Supreme Court of New Zealand.

PRECEDENT NO. 4.

APPLICATION BY MORTGAGEE AND ESTIMATE OF VALUE.

IN THE SUPREME COURT OF NEW ZEALAND
HAMILTON DISTRICT
HAMILTON REGISTRY

IN THE MATTER of The Property Law Act 1952

AND

IN THE MATTER of a certain Memorandum of Mortgage bearing date the day of , 1952 and registered in the Land Registry Office at Auckland as Number .

THE COMMISSIONER the Mortgagee under and by virtue of the abovementioned Memorandum of Mortgage HEREBY APPLIES to the Registrar of the Supreme Court of New Zealand at Hamilton to conduct the sale of the land comprised in the said Memorandum of Mortgage and more particularly described in the annexed declaration by E. F. the said Commissioner.

For the purposes of this application the value of the said land is estimated to be £ [*Words and figures*].
DATED at Wellington this 30th day of September, 1954.

SIGNED by COMMISSIONER and sealed with his seal of office in the presence of: E. F.

Commissioner.

Witness: Name:
Occupation:
Address:

To:
The Registrar of the Supreme Court of New Zealand, HAMILTON.

IN THE SUPREME COURT OF NEW ZEALAND
HAMILTON DISTRICT
HAMILTON REGISTRY

IN THE MATTER of The Property Law Act 1952

AND

IN THE MATTER of a certain Memorandum of Mortgage bearing date the 20th day of August 1952 and registered in the Land Registry Office at Auckland as Number .

I E. F. of Wellington, Commissioner, do solemnly and sincerely declare as follows:

1. That the Commissioner is the mortgagee under and by virtue of Memorandum of Mortgage Registered Number (Auckland Registry).

2. By the abovementioned Memorandum of Mortgage A. B. then of Tauranga a Builder but now of Raglan (hereinafter called "the Mortgagor") mortgaged to the Commissioner all his estate and interest in ALL THAT piece of land situate in the City of containing [*Set out here area*] be the same a little more or less being Lot on the plan deposited in the Land Registry Office at Auckland as Number (Town of) being portion of Allotment of the Parish of and the whole of the land comprised and described in Certificate of Title Volume Folio .

3. That the amount of advance secured under the abovementioned Memorandum of Mortgage was the sum of Two thousand eight hundred and thirty pounds (£2,830) with interest thereon calculated from the 20th day of August, 1952 at the rate of Four pounds ten shillings (£4 10s. 0d.) per centum per annum and computed and adjusted with half-yearly rests on the 20th day of the months of August and February in each year with a first such computation and adjustment on the 20th day of February, 1953, as provided for by Memorandum of Variation thereof dated 19th February, 1953 and duly registered.

4. That the Mortgagor is still the registered proprietor of the said land.

5. That by the abovementioned Memorandum of Mortgage it is provided (*inter alia*):

If default shall be made by the Mortgagor in payment of any of the said half-yearly instalments (whether original or altered) or of any interest on any unpaid payments or of any other moneys becoming payable hereunder or any part of the same respectively on the days and in the manner hereinafter appointed for payment thereof and for fourteen days thereafter or if there shall be any breach non-observance or non-performance by the Mortgagor of any covenant or condition herein contained expressed or implied on the part of the Mortgagor to be kept observed or performed or if the Mortgagor shall become bankrupt or compound with or assign his estate for the benefit of his creditors then and in any such case the whole of the moneys hereby secured shall at the option of the Mortgagee be deemed to have become due and payable notwithstanding that the time or times herein appointed for payment thereof respectively may not have arrived AND it shall be lawful for the Mortgagee immediately or at any time thereafter without waiting any time or giving any notice to sell the lands hereby mortgaged or any part or parts thereof in one or several lots by public auction or private contract and upon such terms and conditions whether as to time or mode of payment of the purchase money or otherwise as the Mortgagee shall think fit and to exercise all such incidental powers in that behalf as are conferred by the Land Transfer Act, 1915, subject however to the provisions of Section Three of the Property Law Amendment Act, 1939.

6. That the Mortgagor has made default under the provisions of the abovementioned mortgage in that he has failed to make payment of an instalment of principal and interest due under the abovementioned Memorandum of Mortgage and there is due and owing by way of arrears of instalment as at the 20th day of August, 1954, the sum of [*Words and figures*].

7. That the total amount of principal outstanding under the abovementioned Memorandum of Mortgage together with interest thereon computed to the 20th day of August, 1954, is the sum of [*Words and figures*].

8. That notice prescribed by Section 92 of the Property Law Act, 1952, calling upon the Mortgagor to remedy the default complained of therein was served on the Mortgagor by A. R. Registered Post on the 2nd day of June, 1954.

9. That the Mortgagor has failed to remedy the default complained of.

10. That all notices and things required to be given done or suffered and all times required to elapse to enable the Mortgagee to exercise the power of sale and incidental powers contained and implied in the abovementioned Memorandum of Mortgage have respectively been given done suffered elapsed and by reason of the default aforesaid the Mortgagee has been and is now entitled to exercise such power of sale and incidental powers under the abovementioned Memorandum of Mortgage.

11. That a period exceeding one calendar month has expired since the service of the abovementioned notice on the Mortgagor and the default expressed therein still continues.

12. That the Mortgagee desires to sell the said piece of land secured under the abovementioned Memorandum of Mortgage under conduct of the Registrar of the Supreme Court of New Zealand at Hamilton.

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act, 1927.

DECLARED at Wellington by the said E. F. this day of , 1954 before me:

I. J.,

A Solicitor of the Supreme Court of New Zealand.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Importance of Being Earnest.—Although members of the legal profession are not as a rule avid readers of plays, there can be few who have not enjoyed hearing, if not perusing, Wilde's *The Importance of Being Earnest*, generally regarded as the best English comedy of manners since his fellow-countryman wrote *The School for Scandal*. It is of interest, therefore, to mention that H. Montgomery Hyde, a barrister who wrote a first-rate account of the Wilde trials for the "Famous Trials" series, has now been largely instrumental in unearthing a "lost" scene from the play; and this, with the permission of the owner of the copyright, was performed for the first time in the B.B.C. Home Series late last year. The scene comes in the second act, at the country house where Jack Worthing lives with his pretty young ward, Cecily Cardew, and her governess, Miss Prism. Jack pretends he has a spendthrift brother called Ernest. But, although the brother is mythical, Jack actually passes as Ernest Worthing in London, and incidentally has incurred considerable debts under this name. Meanwhile, his friend Algy, who has discovered his real name and the fact that he has a pretty ward, leaves London ostensibly to see an imaginary invalid friend whom he calls Bunbury, but really to visit Jack's country house, pretending to be the equally imaginary Ernest. While Algy is making love to Cecily in the house, Jack arrives from London dressed in deepest mourning for Ernest whom he has decided to kill off. Algy and Cecily now appear and in the presence of Miss Prism and the local Rector, Canon Chasuble, Cecily effects an outwardly touching reconciliation between her guardian and his apparent brother, who, far from being dead, seems to be very much alive. Soon after this the butler enters and hands the so-called Ernest a visiting card on a salver. The card is from Mr. Gribsby of Parker and Gribsby, Solicitors. (He is Gribsby of this firm when on unpleasant business, and Parker on occasions of a less serious kind.) His mission is to serve a writ of attachment for £762 14s. 2d. at the suite of the Savoy Hotel against the mythical Ernest Worthing. ("Seven-and-six should be added to the bill of costs for the expense of the cab which was hired for your convenience in case of any necessity of removal, but that I am sure is a contingency that is not likely to occur.") Amusing passages then occur between the various parties, and, after much argument, Jack (John Worthing, J.P., The Manor House, Wootton) agrees to pay "his brother Ernest's debt." Algy interposes :—

> By the way, Gribsby: you are not to go back to the station in that cab. That is my cab. It was taken for my convenience. You and the gentleman who looks like the betting-man have got to walk to the station. And a very good thing, too. Solicitors don't walk nearly enough. They bolt. But they don't walk. I don't know any Solicitor who takes sufficient exercise. As a rule they sit in stuffy offices all day long neglecting their business."

Poor Oscar! He had good cause to dislike solicitors, whom he found to be a source neither of profit nor of pleasure.

Baron Brougham and Vaux.—Writers have often noted that the forensic oratory that brings an advocate great success at the Bar does not always bring him distinction in politics. David Cecil in his recent biography, *Lord M. or the Later Life of Lord Melbourne*, (Constable, 1954) gives fresh force to the point. During the reign of William IV the Reform Bill had a stormy passage through the House of Commons, and on its first appearance in the House of Lords, Lord Chancellor Brougham was one of the outstanding speakers :

> His speech culminated in a peroration in which, falling on his knees and with outstretched hands, he implored the peers not to throw out the Bill. Unluckily, in order to stimulate his eloquence, he had during his speech drunk a whole bottle of mulled port, with the result that once on his knees he found he was unable to get up until assisted to do so by his embarrassed colleagues.

This Dickensian character, regarded by many of his contemporaries as the cleverest man alive, was a middle-class Scottish lawyer, whose brilliant gifts took him in twenty years to the forefront of the Whig Party. His marked eccentricities are commented upon by Cecil :

> Across the page of history he strides, fidgeting, posturing, scratching his head, picking his nose and incessantly pouring forth a flood of talk in which ideas and scurrility, jokes and voluminous learning were strangely and sparkingly blended. No one could help listening to Brougham when he really got going . . . examined to-day and unassisted by the magnetic light of Brougham's personal presence, his learning shows up as superficial and his ideas as no more than commonplace. Morally he was even less impressive—undignified, boastful, drunken, and directed by no consistent principles whatsoever.

In moments of frolic, he was inclined to intermingle his legal regalia with the fun on hand; and, on one occasion, created scandal "by playing 'Hunt the Thimble' with the Great Seal in an Edinburgh lady's drawing-room, and arriving at the local races dressed in the full regalia of Lord Chancellor's wig and gown—and roaring drunk."

Quiz Question.—"Mr. Rumbold, senior (partner of Messrs. Markby, Wragg,and Rumbold), was in Scotland. He was engaged, like some persistent middle-aged admirer, in courting a golf handicap whose figure increased remorselessly with the years. Mr. Wragg was at Golder's Green arranging, without enthusiasm, for the cremation of a client who had at long last died, leaving behind her a codicil in which she had thoughtfully revoked the charging clause in her will." This is an extract from *Death Has Deep Roots*, by Michael Gilbert —a first-rate trial story, and one of the new Pan books. Scriblex suggests that conveyancers in general, and will-makers in particular, exercise their ingenuity in deciding the normal occupation of the author.

Conundrum.—Evolved during the holiday season at a seaside resort, this conundrum is offered by Scriblex as useful to traffic-enforcement authorities, school-teachers, and those who want the guests at a cocktail party to go home. A motorist is 100 yards from an open level railway crossing and proceeding at 50 miles per hour, while a train at a distance of 125 yards is approaching the crossing at 60 m.p.h. The problem is : Did the motorist get across ? The solution : Yes, the motorist got a cross. The jury gave the widow a sympathetic verdict, and she paid for the cross out of that.

PRACTICAL POINTS.

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

1. Gift Duty.—*Farm put in Wife's name to protect it against Husband's Creditors—Purchase—Money Provided by Husband—Proposed Declaration of Trust by Wife that she holds as Trustee for Husband—Liability to Gift Duty.*

QUESTION: We have a farmer client who purchased his present farm property in 1933. In 1931, our client abandoned to the mortgagees a farm, which, on account of slump conditions, he could no longer afford to manage. By so abandoning this property he lost the result of thirteen years' labour and the whole of his savings. The purchase of his present farm in 1933 was financed by taking over the existing mortgage as to part of the purchase money, by a mortgage back to the vendor for a further portion of the purchase money, and by our client's contributing approximately £200 in cash towards the purchase. This cash was contributed by him out of a substantial legacy, which he had been left by a deceased relative not long before the purchase.

On account of his experiences during the slump and because he believed he was still liable to the mortgagees of the abandoned property for the loss sustained by the mortgagees, our client (for whom we did not act at the time) had the transfer of the farm registered in his wife's name subject of course to the two mortgages. There was apparently no formal arrangement concerning the basis upon which the wife was registered as proprietress of the farm land; but both the husband and the wife are agreed that the land was put in her name for the sole purpose of defeating any claims that might be made by the mortgagees of the abandoned property. Since the purchase of the present farm, it has been farmed and managed solely by our client; and his wife has contributed no money towards its maintenance or operations, nor has she taken any active part in the farming work other than the normal household activities of a farmer's wife. The account at the stock firm is, and apparently always has been, in the name of the husband; and out of this account has been paid outgoings including rates, insurance, interest, and premiums on the mortgages, and into this account has been paid the income from the farming operations. No rent has been paid by the farmer to his wife for the use of the land. For the same reason as he took title to the farm in the name of his wife, our client also prepared his own tax-returns in his wife's name for many years; and, in 1946, when he engaged an accountant to prepare his income-tax returns for him, the accountant carried on filing the returns in the wife's name, and at this stage they are still filed as returns of the wife. Income tax and Social Security tax is paid out of the stock-firm account in our client's name.

For personal reasons our client now wishes it to be recognized formally that his wife is registered as proprietress of the farm lands as trustee for himself; and his wife is prepared to co-operate and admits the truth of the facts set out above.

We have prepared a declaration of trust by the wife's reciting the above facts, and have obtained statutory declarations by both our client and his wife verifying these facts. We enclose a copy of the declaration of trust.

The question is whether the Stamp Office might accept the declaration of trust as constituting a trust of the farm-land, and at the same time not accept the recitals as sufficient evidence that this trust has been in operation since the original purchase, and accordingly assess the transaction for duty as a gift of the land from the wife to the husband. We have attempted to word the trust deed so that it is only to take effect as confirmation of the trust being in existence from the date of the original purchase.

Would you please give us your opinion on whether: (*a*) The evidence briefly recited is sufficient to establish that the land has always been held by the wife on trust for her husband; and (*b*) Whether the Stamp Office can hold that the matter constitutes a present gift from the wife to her husband.

ANSWER: If the facts, as related are established, then the Stamp Duties Office must recognize the existence of the trust as from its inception, and stamp the proposed declaration of trust at 15s.; and no gift duty will be payable. Of course, the Stamp Duties Office is not bound to accept any such declaration of trust at its face value, but is entitled to hold a judicial inquiry in further elucidation of the facts as was done in *Taylor* v. *Commissioner of Stamp Duties*, [1949] N.Z.L.R. 513; [1949] G.L.R. 249.

No copy of the declaration of trust was enclosed; but the perusal of instruments and examination of statutory declarations is beyond the scope of this Practical Points feature; and, if an opinion thereon is desired, conveyancing counsel should be consulted. X2.

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2. Guarantee.—*Guarantor paying off Land Transfer Mortgage—Discharge of Mortgage not registered until Five Years later—Protection of Guarantor—Statute of Limitations*, 1623.

QUESTION: In 1948, A. paid off a registered mortgage on B.'s house which he had signed as guarantor. The release was only registered in 1953. Is there any way A., as guarantor, may claim for his advance or otherwise protect himself to avoid the Statute of Limitations?

ANSWER: The Statute of Limitations, 1623, runs as against the guarantor from the time he discharged the principal's debt: 20 *Halsbury's Laws of England*, 2nd Ed. 609; *Davies* v. *Humphreys*, (1840) 6 M. & W. 153; 151 E.R. 361. The fact that the discharge was not registered until five years after making payment appears irrelevant. Apparently the guarantor's rights against the mortgagor will be statute-barred six years after the date of payment, whatever date it was in 1948, unless he has taken independent security from him. The guarantor should have taken a transfer of the mortgage to himself instead of paying off the mortgage.

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3. Land Transfer.—*Sale of Land under Open Contract—Vendor's Solicitor practising in Town where no Land Registry Office—Purchaser's Solicitor practising in Town where Relevant Land Registry situate—Place of Settlement—Incidence of Exchange.*

QUESTION: The question concerns the place of settlement of a transaction relating to land under the Land Transfer Act, when the purchaser's solicitor is practising in the centre where the relevant Land Registry Office is situated and the vendor's solicitor is practising in a neighbouring country town.

Goodall's Conveyancing in New Zealand, 2nd Ed. 680, seems to state the position to be that settlement must (unless the vendor otherwise agrees) be effected at the office of the vendor's solicitor, and (*semble*) that exchange must accordingly be added to the cheque paid in settlement.

The writer considers that this rule was formulated under the Deeds system and does not now state the position correctly. Technically title to land under the Land Transfer Act does not pass until registration. Under the Deeds system, of course, transfer of title was effected by execution, and registration was not necessary for this purpose.

In theory, it seems that settlement of Land Transfer transactions should take place at the Land Registry Office; and, if that is so, then the vendor is not entitled to ask for exchange to be added to the purchaser's settlement cheque in the circumstances outlined above. If there is any contractual provision to the contrary, such as is usual in mortgages, the matter is of course taken out of the rule.

The matter is perhaps of academic interest only, as, in all cases, it is adapted to local practice. Would you please give your advice on the place of settlement, and the incidence of exchange on the settlement cheque.

ANSWER: The place of settlement is the town where the Land Registry Office is situate: see *Ferguson's Scale of Conveyancing Charges*, 3rd Ed. 11, 12, citing the New Zealand Law Society's Ruling, dated July 7, 1928, and *Common* v. *Rees*, (1890) 9 N.Z.L.R. 555.

In the instant case, therefore, the vendor's solicitor was not entitled to have the exchange added to the cheque.

X2.