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LAND TRANSFER: JOINT TENANTS OR TENANTS-IN-COMMON (AT LAW AND IN EQUITY).

LAST week, Mr. Justice Henry, in *In re Foley, Public Trustee* v. *Foley* (to be reported), delivered a judgment which conveyancers will find both interesting and valuable. In it, His Honour differentiates *between* the position of joint tenants for the purposes of registration under the Land Transfer Act, where, if no interest is specified, two transferees or mortgagees are deemed, under s. 61, to be entitled as joint tenants with right of survivorship, *and* the presumption in equity, in the case of money advanced on mortgage, in favour of a tenancy in common, as here, where the registered instrument was silent on the point.

Subsidiary to the foregoing, His Honour draws the distinction *between* a devise of a share in real property owned by the testator *and* the disposition by will of the beneficial interest in a mortgage. The result that a devise of a tenancy in common in realty is not sufficient, *after the sale of that property before the death of the* testator, to pass his interest, as tenant in common, in the mortgage debt of unpaid purchase-money secured by mortgage executed after the date of the will on the same realty. He concluded that the words of the devise in the will were not wide enough to include the mortgage debt.

We are indebted to the learned Judge for what follows.

The testatrix, who died on June 23, 1952, was registered as mortgagee together with her sister, under Memorandum of Mortgage No. 309390, Wellington Registry, which mortgage secured a principal sum of £4,000. The principal sum was to become payable on January 31, 1962, together with interest in the meantime. The sister survived the testatrix for a period of slightly over two months.

The relevant portion of cl. 2 of the will of the testatrix was as follows:

> I give devise and bequeath to my sister . . . all that my share estate and interest owned by me at my decease . . . in the shop premises and living rooms and appurtenant land thereto . . . together with the adjoining vacant section of land the said shop premises living rooms and lands being at present owned by my sister and me in equal shares.

From October, 1923, until December, 1951, the testatrix and her sister were registered proprietors of the fee simple as tenants-in-common in equal shares of the land described in Certificate of Title Vol. 306, fol. 121, Wellington Registry. Upon this land was erected the shop premises with living rooms, and part of the land was a vacant section. This is the land indicated in the will.

By an agreement dated December 15, 1951, the testatrix and her sister agreed to sell the whole of the land for £4,000. The agreement provided that the payment of the purchase price should be satisfied by the purchaser's executing in favour of the vendors a mortgage over the land securing the principal sum of £4,000 and interest. On February 25, 1952, a transfer of the land to the purchaser and the mortgage to the testatrix and her sister as mortgagees, were registered in the Land Transfer Office at Wellington.

The mortgage provided that the principal sum was

> lent to the mortgagor by Catherine Annie Foley and Gertrude Mary Foley, both of Muritai, spinsters (hereinafter called the "mortgagees").

The charge on the land was given in the following words:—

> . . . the mortgagor do (*sic*) hereby mortgage to the mortgagee (*sic*) all his estate and interest and all the estate and interest which he is entitled or able to transfer or dispose of in all that piece of land.

Here followed a legal description of the land.

There were no express words in the mortgage which defined the respective interests of the two mortgagees.

On an originating summons, the following were the questions for determination:

> (1) Upon the death of the said Catherine Annie Foley, did Gertrude Mary Foley as survivor become solely entitled both in law and in equity to Mortgage No. 309390 and to the principal and other moneys secured thereby?
>
> (2) Did Gertrude Mary Foley become entitled, by virtue of the provisions of Clause 2 of the Will of the said Catherine Annie Foley, deceased, to all the estate right title and interest of the said Catherine Annie Foley in and to Mortgage No. 309390 and the principal and other moneys secured thereby?

The subject naturally divides itself into two parts.

I.

Section 61 of the Land Transfer Act, 1952, provides as follows:—

> Subject to any Act of the General Assembly for the time being in force relating to the tenure of land by persons of the Maori race, any two or more persons named in any Crown grant or in any instrument executed under this Act as transferees, mortgagees, or proprietors of any estate or interest, shall, unless the contrary is expressed, be deemed to be entitled as joint tenants with right of survivorship, and every such instrument, when registered, shall take effect accordingly.

The learned Judge said that, so far as the legislative position was concerned, the testatrix and her sister were "mortgagees" within the meaning of that word

in s. 61 ; and, they were, upon registration of the said mortgage, deemed under s. 61 to be entitled as joint tenants with right of survivorship.

Counsel for the second defendants had argued that s. 61 concluded the matter, and, that the Court was bound to hold, in the absence of a contrary expression in the instrument, that registration caused the instrument to have the effect of creating a joint tenancy in the mortgagees both in law and equity with right of survivorship. Mr. E. C. Adams, who appeared for the first defendants, had argued that s. 61 is a " registration " section ; and, that the section does not interfere with the jurisdiction of the Court in " trust matters." His Honour said that Mr. Adams did not advance this argument any further except to cite, in support of it, the cases of *Taitapu Gold Estates, Ltd.* v. *Prouse*, [1916] N.Z.L.R. 825, [1916] G.L.R. 646, and *Cameron* v. *Smith*, (1910) 13 G.L.R. 193.

In the course of his judgment, Mr. Justice Henry said :

> It will be observed that s. 61 used the expression " shall, unless the contrary is expressed, be *deemed* to be entitled as joint tenants."
>
> Where the Legislature uses the word " deemed," the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to: per James, L.J., in *Re Levy, Ex parte Walton*, (1881) 17 Ch.D. 746, 756 ; *Tobin* v. *Dorman*, [1937] N.Z.L.R. 937, 942, [1937] G.L.R. 689, 691 ; *Muller* v. *Dalgety and Co., Ltd.*, (1909) 9 C.L.R. 693, 696, per Sir Samuel Griffith, C.J., and *Searle* v. *Purnell*, [1952] N.Z.L.R. 95, 99, [1952] G.L.R. 94, 96. The Legislature has not enacted in s. 61 that the persons " *shall be entitled* as joint tenants " but that they " *shall be deemed to be entitled* as joint tenants."

In order to ascertain the effect of s. 61, His Honour said, it was necessary to consider ss. 61 to 64 (inclusive), which sections are all grouped under the heading " Registered Proprietors." Section 62 provides that the estate of the registered proprietor shall, with certain exceptions, be paramount. Section 63 protects the registered proprietor against ejectment except in the cases appearing in paras. (*a*) to (*e*). Section 64 prevents any person from acquiring by possession or adverse user any title in derogation of the title of the registered proprietor. Sections 62, 63, and 64 evince a clear intention on the part of the Legislature to protect the title of the registered proprietor, thus enabling third persons to deal in safety with the registered proprietor. If s. 61 had not been enacted, anyone dealing with the survivor of the persons referred to would be faced with questions as to the exact estate which the survivor took. The section is clearly intended to define the position of a survivor so that the registered instrument may be looked at for the purpose of ascertaining who the person or persons are who are entitled to deal with the estate. Mr. Justice Henry proceeded :

> So far as s. 62 is concerned it has been laid down that third parties may in certain circumstances enforce rights against the registered proprietor notwithstanding the provisions of the section. In *Assets Co.* v. *Mere Roihi*, [1905] A.C. 176, N.Z.P.C.C. 275, it was said :
>
> > " Then it is contended that a registered owner may hold as *trustee* and be compelled to execute the trusts subject to which he holds. This is true ; for, although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged *cestui que trust* is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a *cestui que trust* is to destroy all benefit from registration " (*ibid.*), 204, 205 ; 293.
>
> In *Watson* v. *Cullen*, (1886) N.Z.L.R. 5 S.C. 17, Williams, J., granted relief from a mistake ; and see, also, *Taitapu Gold Estates, Ltd.* v. *Prouse* (*supra*). In *Cameron* v. *Smith* (*supra*), Sim, J., found in favour of a tenancy in common although the registered proprietors on the certificate of title were registered as joint tenants.

After considering ss. 61 to 64 (inclusive) in the light of the above, His Honour was of the opinion that the intention of the Legislature was to make registration conclusive so far as concerns parties who act in reliance on the registered instrument. In the case of two or more registered mortgagees appearing in a memorandum of mortgage they may be treated by the Registrar and by all persons dealing with them as joint tenants with right of survivorship, and the registered estates and interests will pass accordingly. But this did not, in His Honour's view, exclude the jurisdiction of the Court in determining questions between the mortgagees themselves. He continued :

> The purpose of the fiction in s. 61 is to make the Register, in so far as the mortgagees are described in the instrument, paramount as between the mortgagees on the one hand and any person dealing with the survivor of them on the other hand. In the result, my conclusion is that s. 61 does not preclude the Court from entering upon an inquiry as to whether or not a tenancy in common exists between registered mortgagees where the registered instrument is silent on that point.

Mr. Justice Henry went on to say that the principle which governs joint advances is stated in *2 White and Tudor's Leading Cases in Equity*, 9th Ed., p. 882, as follows :

> Where money is advanced by two persons, either in equal or unequal shares, who take a mortgage to themselves jointly, and one dies, although the debt and security will at law belong to the survivor, in equity there will be a tenancy in common, the survivor being a trustee for the personal representatives of the deceased mortgagee in respect of his share and interest in the security.

He referred also to *In re Jackson* : *Smith* v. *Sibthorpe*, (1887) 34 Ch.D. 732 ; *Steeds* v. *Steeds*, (1889) 22 Q.B.D. 537, 541 ; *Robinson* v. *Preston*, (1858) 27 L.J. Ch. 395 ; 70 E.R. 211. His Honour continued :

> In equity, therefore, there is, in effect, a presumption in favour of a tenancy in common in the case of money advanced on mortgage. The question here is whether or not there is evidence sufficient to displace this presumption. Sim, J., in *Cameron* v. *Smith*, (1910) 13 G.L.R. 193, admitted evidence of surrounding circumstances and subsequent dealings as proof of the intention of the parties although the certificate of title described the estate as a joint tenancy.

The only matters which were adverted to in this case as throwing any light on the intention of the two sisters were :—

(*a*) That the debt secured by the mortgage was the purchase money of land held by them as tenants-in-common.

(*b*) That no instructions were proved to have been given by the sisters, or either of them, when the mortgage was drawn as to how the mortgage was to be held by them.

(*c*) That each sister had executed a will devising the mortgaged premises to the survivor.

(*d*) That neither sister is known to have perused the mortgage ; and, of course, it is executed only by the mortgagor.

(*e*) That neither sister was likely to know the difference between a joint tenancy and a tenancy in common.

The learned Judge concluded that each one of those factors tended to support an intention to hold the mortgage debt in the same manner as they held the land, rather than that there was an intention to change the nature of the interest held.

In the result, Mr. Justice Henry found that, while the legal estate passed in law to the survivor, she held as trustee for the personal representatives of her sister so far as the share of that sister was concerned.

The answer to the first question was, accordingly, that the survivor, on the death of the testatrix, became solely entitled in law as mortgagee under the mortgage; but, in equity, the survivor held one half-share thereof in trust for the personal representatives of the testatrix.

II.

His Honour then considered the second question—namely, whether the surviving sister acquired, under the will of the testatrix, the deceased's interest in the mortgage and in the moneys secured by it. This question, he said, required an examination of clause 2 of the testatrix's will. The relevant portion of that clause was as follows:

> I give, devise and bequeath to my sister . . . all that my share estate and interest owned by me at my decease . . . in the shop premises and living rooms and appurtenant land thereto known at the date hereof as Number 401 Muritai Road Eastbourne Wellington aforesaid together with the adjoining vacant section of land the said shop premises living rooms and lands being at present owned by my said sister and me in equal shares.

As already stated, at the date of the making of the will the two sisters were registered as tenants-in-common of the fee simple of the property described in cl. 2; but it had been sold before the date of death of the testatrix and the whole of the purchase price was secured by the mortgage given by the purchaser.

His Honour had, first, construed the will with a view to ascertaining what the testatrix intended to give; and, then he had to ascertain whether there was anything which, at the date of death, came within that construction.

The testatrix described the gift as being:

> all that my share estate and interest owned by me at my decease . . . in the shop premises etc . . . the said shop premises living rooms and lands being at present owned by my said sister and me in equal shares.

In His Honour's view, these words were not wide enough to include memorandum of mortgage. He added that the general rule is stated thus in *2 Jarman on Wills*, 8th Ed. 960.

> With respect to the beneficial interest in the mortgage, it is clear that a general devise of lands will not commonly have the effect of including it.

Again, at p. 961:

> Nor is it, I apprehend, universally true, that an *express* devise of the lands, or (which seems to be the same in effect) a devise of all the testator's lands in a particular place, he having no other than mortgaged lands there, will carry the beneficial interest to the devisee, though the affirmative has been sometimes laid down in very unqualified terms.

The cases quoted in support of the above propositions are all cases where the legal estate was vested in the testator as mortgagee, but equity considered the mortgagee as holding the land in a fiduciary capacity only, and the estate as still substantially belonging to the mortgagor: see *Attorney-General* v. *Meyrick*, (1750) 2 Ves. Sen. 44; 28 E.R. 30. It has been held otherwise when the mortgagee is in possession; but that did not apply in the present case. This was so held on the facts in *In re Carter: Dodds* v. *Pearson*, [1900] 1 Ch. 801.

In re Clowes, [1893] 1 Ch. 214, was a case where the testator, being absolutely entitled to a freehold estate specifically devised it. He sold the estate and took a re-conveyance by way of mortgage for securing part of the purchase money. It was held that the sum secured did not pass to the specific devisee.

In *Sligo* v. *Keenan*, [1918] N.Z.L.R. 395, after the testator leased two parcels of his land with an option to purchase he made a will specifically devising the two parcels separately. The words used in the devise were: "I give devise and bequeath unto . . . my real property at . . ." The lessee exercised his option to purchase and paid a deposit. The testator died shortly afterwards. Sim, J., held that there was nothing in respect of which the devise could operate and that the general rule as regards ademption applied. In *Re Starr*, [1926] G.L.R. 465, Sir Charles Skerrett, C.J., held that the devise had been adeemed. The words of the devise do not appear in the report.

It had been contended in this case that the language used by the testatrix in her will was sufficient to pass her beneficial interest in the sum charged on the land. This contention was based (*inter alia*) on the Irish cases of *Mackesy* v. *Mackesy*, [1896] 1 I.R. 511; and *Kilkelly* v. *Powell*, [1897] 1 I.R. 457. Both these cases, His Honour said, were cases of a particular set of facts, and they were both distinguished in *Davy* v. *Redington*, [1917] 1 I.R. 250, 255, 256. They were clearly cases where the construction of the particular wills, in the light of the fact that the testator had two separate interests in the one property, viz., that of a beneficial owner and that of a mortgagee, required the Court to hold that the intention was to pass both interests and not merely one of them.

The learned Judge, after referring to *In re Galway's Will Trusts*, *Lowther* v. *Viscount Galway*, [1950] Ch. 1, [1949] 2 All E.R. 419 (following *Drinkwater* v. *Falconer*, (1755) 2 Ves. Sen. 622; 28 E.R. 397; *Powys* v. *Mansfield*, (1837) 3 Myl. & Cr. 359, 40 E.R. 964; and *Watts* v. *Watts*, (1873) L.R. 17 Eq. 217), where it was held that compensation moneys under a contract to sell coal did not pass in a devise of certain estates "including the mines and minerals thereof," said that, at the date of her will, the testatrix owned an undivided half-share of the estate and interest as a tenant-in-common in the property in question. The words used in cl. 2 of her will described exactly what she owned. His Honour said that this was

> a specific devise of what share, estate, or interest she *owned* in the property in question at the date of her death. It is provided by s. 100 of the Land Transfer Act, 1952, that a memorandum of mortgage shall have effect as security, but shall not operate as a transfer of the estate or interest charged. This section appears to put into legal effect as a substantive enactment the equitable rule that, when the estate is conveyed to the mortgagee, he holds the same in a fiduciary capacity as a security only and the estate is treated as being that of the mortgagor: see *Attorney-General* v. *Meyrick*, (1750) 2 Ves. Sen. 44, 28 E.R. 30.

Submissions had been made to the effect that the clause in question was not a gift of a particular kind of property, but was a specific gift of a generic nature, the quantum of which could increase or decrease in the period between the date of the will and the date of death. Reliance was placed on *In re Mitchell: New Zealand Insurance Co., Ltd.* v. *James*, [1950] N.Z.L.R. 85, [1950] G.L.R. 446, and the cases which that case followed. *In re Mitchell* was a case which turned on the wording of the particular will and the circumstances surrounding it; but, in His Honour's view, it had no application to this case:

> The testatrix here expressly speaks of "my share, estate and interest *owned* by me at my decease" and then she

describes the property. She owned no "share estate or interest" in the described property at the date of her death. What she owned was a portion of a mortgage debt in respect of which there was a security over the said property. The mortgage debt is the principal thing and the security is merely accessory: see *In re O'Neill: Humphries* v. *O'Neill*, [1922] N.Z.L.R. 468; [1922] G.L.R. 112, and *In re Balmforth: Public Trustee* v. *Richards*, [1934] N.Z.L.R. 190; [1934] G.L.R. 757.

It was also argued that the deceased had an "estate or interest" in the property by reason that she was registered as a "mortgagee." This argument was based on s. 2 of the Land Transfer Act, 1952, which provides that, unless the context otherwise requires, "estate or interest" means "every . . . mortgage or charge on land under this Act." But, His Honour said, s. 100 expressly negatives the transfer of any estate or interest to the mortgagee; and s. 2 cannot create any such estate or interest. All the mortgagee gets is a "security." This, as the last-cited cases show, is merely accessory to the mortgage debt and the mortgage debt carries the security with it. Such rights as the mortgagee may have in respect of the mortgaged premises, in the view of the learned Judge, are carried with and form part of the disposition of the mortgage debt and not *vice versa*.

Mr. Justice Henry concluded that the devise in the will was a specific devise of the share, estate, or interest *owned* by the testatrix in the property at the date of her death. At the date of her death, she did not own any such share estate or interest. What she owned was an interest in a mortgage debt secured on the property; and the words of the will were not wide enough to include the mortgage debt, which, therefore, did not pass under cl. 2 of the will.

The answer to the second question was that the survivor did not become entitled under cl. 2 of the will to the estate, right, title, and interest of the testatrix in and to the mortgage and the principal and other moneys secured thereby.

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Sub-Delegated Legislation. 28 *Australian Law Journal*, 486.

BANKS AND BANKING.

Bank of England—Register of Securities—Removal of Name—Bank acting on Forged Transfers—Forgery by One of Two Joint Tenants of Stock—Liability of Bank to Second Joint Tenant—Necessity to join Transferees of Stock—Negligence of Second Joint Tenant—Limitation of Action—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), ss. 2, 21 (1), since repealed. The plaintiff and H.W.M. were the trustees of a settlement and were registered as joint holders of £10,002 four per cent. consolidated stock which formed part of the settled funds. By forging the plaintiff's signature to seven deeds of transfer and to other documents, H.W.M. disposed of the consolidated stock for his own purposes. The Bank of England accepted the transfers as genuine and altered the register accordingly. H.W.M. having died, the plaintiff brought an action against the bank for an order that her name be restored to the register as the holder of £10,002 four per cent. consolidated stock. In order to obtain possession of the stock or the proceeds of sale for his own purposes, H.W.M. had carried out seven separate transactions falling into three categories as follows: (*a*) He sold to a purchaser by means of a transfer bearing his own and the plaintiff's signatures (the plaintiff's signature having been forged by H.W.M.), and the purchasers drew a cheque in favour of both trustees. H.W.M. endorsed the cheque with his own and the plaintiff's signatures and attempted to pay it into his private account. The bank into which he attempted to pay the cheque telephoned to the plaintiff for confirmation of her signature. The plaintiff telegraphed in reply: "I agree what H.W.M. wishes done," and the amount of the cheque was credited to H.W.M.'s private account. (*b*) H.W.M. sold stock to a purchaser by means of a transfer to which he forged the plaintiff's signature. He produced a forged authority from the plaintiff to enable the proceeds to be paid to him alone, and the purchase price was paid in compliance with it. (*c*) H.W.M. forged the plaintiff's signature to transfers and the proceeds were paid into the trust banking account standing in the joint names of both trustees. On the following day, H.W.M. withdrew the proceeds by means of cheques which had been signed in blank and which were intended to enable H.W.M. to withdraw income. None of the plaintiff's signatures appearing on the relevant documents (apart from those on the blank cheques) was genuine, and she had not authorised the signatures to be made. The transaction in category (*a*) and one transaction in category (*b*) took place more than six years before action was brought, and all transactions took place more than one year before the action was brought; but the action was brought within a year after the refusal of the Bank of England to restore the plaintiff's name to the register. *Held*, 1. The bank was a person within the Limitation Act, 1939, s. 21 (1) (which dealt with the limitation of actions against public authorities), and was not (having regard to the Bank of England Act, 1946) as now constituted a profit-making company (*A.-G.* v. *Margate Pier and Harbour (Company of Proprietors)*, [1900] 1 Ch. 749, considered); and, as the keeping of the registers and the removal of the plaintiff's name from the register were acts done by the bank directly in intended execution of an Act of Parliament, viz., the Finance Act, 1942, s. 47, the bank was within the terms of s. 21 (1) of the Act of 1939; but time did not run against the plaintiff until the bank refused to restore the plaintiff's name to the register, and, on the facts, therefore, the action was not barred by lapse of time. (*Barton* v. *North Staffordshire Ry. Co.*, (1888) 38 Ch.D. 458, applied.) 2. Similarly, as a forged transfer was a nullity, s. 2 of the Act of 1939 was no bar to the plaintiff's action in respect of the removal of her name from the register following one of the transactions more than six years before the action was brought. *Welch* v. *Bank of England (Francis and Praed and Others, Third Parties)*, [1955] 1 All E.R. 811 (Ch.D.).

CHARITIES.

Gift of Residue of Estate to Charity—Whether Gift of Corpus or Income—Gift expressed in Form of Perpetual Gift of Income—Whether intention in Will that Beneficiary to receive only Income—Beneficiary being Charitable Institution Important Factor in ascertaining intention of Testator. Unless there is a contrary intention in a will creating a trust, a perpetual gift of income carries the corpus. This rule applies to a gift to a charity as well as to a gift to an individual. The use in the will of the words "income", "interest" and "dividends" is not sufficient to exclude a gift of the corpus. The fact that the gift is not direct but is through the intervention of trustees is also an insufficient basis for excluding the rule. Where the beneficiary is a charitable institution that is a matter to be considered in ascertaining whether testator's intention is to make a gift of income only. (*Congregational Union of New South Wales* v. *Thistlethwayte*, (1952) 87 C.L.R. 375, considered.) *In re Williams (deceased), Bendigo and Northern District Base Hospital of Bendigo* v. *Attorney-General*, [1955] V.L.R. 65.

COMPANY LAW.

Director—Managing Director—Duties—Duties limited by Board of Directors. The respondent, who was a director of the appellant company, was appointed managing director of the appellant company for a period of five years from October 1, 1948. Clause 1 of the agreement, which was dated April 1, 1949, was in the following terms:—the respondent "shall be and he is hereby appointed a managing director of the company and as such managing director he shall perform the duties and exercise the powers in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies at the date hereof which may from time to time be assigned to or vested in him by the board of directors of the company." The agreement further provided that the respondent should devote his whole time, attention and abilities to his duties under the contract and should obey the orders and directions of the board. At the date of the agreement the appellant company had three subsidiary companies, of which one company was a textile company of which the respondent was full-time managing director under a prior agreement. After his appointment by

LEGAL ANNOUNCEMENTS.

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MR. L. I. MURDOCH who has for some time past practised at Auckland as a Barrister and Solicitor under the name of Baxter Shrewsbury Milliken & Murdoch and more recently under the name of L. I. Murdoch, *desires to announce* that he has admitted MR. KEVIN SIMPSON, Barrister and Solicitor, formerly a member of his staff, to partnership as from the 1st April, 1955.

The practice will continue to be carried on at the same address, 3rd Floor, A. & N.Z. Bank Chambers, Vulcan Lane, Auckland, under the name of MURDOCH & SIMPSON.

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the agreement of April 1, 1949, the respondent was, in fact, the only managing director of the appellant company. Differences having arisen, the board of the appellant company resolved on May 10, 1950, that the respondent should confine his attention to the textile company only. Thereafter the respondent performed no executive or managerial functions for the appellant company. The respondent claimed that the resolution was a repudiation of the agreement of April 1, 1949, and brought an action against the appellant company for breach of contract. *Held*, (Lord Keith of Avonholm dissenting), the appellant company was not in breach of the agreement of April 1, 1949, because the appointment of the respondent to be a managing director of the appellant company by cl. 1 of the agreement and his description therein as such managing director did not limit the powers of the board under the subsequent words of the agreement and, on the true construction of the clause, the respondent's duties could be confined to the management of a subsidiary company of the appellant company. Appeal allowed. *Harold Holdsworth and Co. (Wakefield), Ltd.* v. *Caddies*, [1955] 1 All E.R. 725 (H.L.).

COURTS.

The Court of Chivalry. *219 Law Times*, 57.

CRIMINAL LAW.

Attempt—Act or Omission not to be too remote ("Proximity" Rule)—Overt Act to be Sufficient Evidence of Intent to commit Particular Crime ("Equivocality" Rule)—No Conviction if Overt Act Equivocal—Crimes Act, 1908, s. 93 (2)—Criminal Law—Appeal from Conviction—Amendment of Conviction on Appeal—Deprivation of Right to Trial by Jury—Inferior Courts Procedure Act, 1909, s. 10. Section 93 (2) of the Crimes Act, 1908, is to be applied, in the natural sense of the words, to the question whether the act or omission relied on is, or is not, too remote (the "proximity" rule); and it is to be applied, also, in the sense that an overt act, no matter how proximate it may be, and even if it be the last step requiring to be taken in the commission of the crime, frustrated only by miscalculation or circumstances beyond the control of the actor, cannot be an attempt unless the act is in itself sufficient evidence of the intent to commit the particular crime (the "equivocality" rule). If the overt act is equivocal, there cannot be a conviction on any charge of attempt, no matter how clearly a specific criminal intent may be proved by subsequent confession or other extrinsic evidence of intent. (*R.* v. *Yelds*, [1928] N.Z.L.R. 18, and *R.* v. *Moore*, [1936] N.Z.L.R. 979; [1937] G.L.R. 10, applied.) (Judgment of *Salmond, J.*, in *R.* v. *Barker*, [1924] N.Z.L.R. 865; [1924] G.L.R. 393, considered.) Observations on the unfairness, on an appeal from a conviction, of amending the conviction under s. 10 of the Inferior Courts Procedure Act, 1909, where this would deprive an appellant indirectly of the right to trial by jury. (*Taylor* v. *Seymour*, (1915) 34 N.Z.L.R. 919, referred to.) *Quaere*, Whether s. 10 applies to a general appeal. *Campbell and Bradley* v. *Ward*. (S.C. Christchurch. February 2, 1955. F. B. Adams, J.)

EVIDENCE.

Facts peculiarly within Knowledge of Accused—Driving without Licence—Onus of Proof—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 4 (1). The driver of a motor-vehicle was summoned for driving without a licence contrary to s. 4 (1) of the Road Traffic Act, 1930, which provides: "A person shall not drive a motor vehicle on a road unless he is the holder of a licence . . ." The driver did not appear at the hearing of the summons but sent a letter saying that he was guilty. It was not proved that the letter had been written by him and there was no evidence before the justices whether the driver did or did not hold a licence when he drove the motor-vehicle. The justices dismissed the information. *Held*, The burden of proof that the defendant had a licence lay on him because that fact was peculiarly in his own knowledge, and in the absence of proof on his part that he had a licence the justices ought to have convicted. (*R.* v. *Oliver*, [1943] 2 All E.R. 800, applied). *John* v. *Humphreys*, [1955] 1 All E.R. 793 (Q.B.D.).

Murder without a Body. *219 Law Times*, 69.

DIVORCE AND MATRIMONIAL CAUSES.

Artificial Insemination, Legal Aspects of, *28 Australian Law Journal*, 490.

Costs—Party Cited—Adultery admitted—Liability of Party Cited for Issues not connected with Adultery. The wife filed a petition dated July 9, 1952, for divorce on the ground of the husband's cruelty. By his answer the husband denied the allegations of cruelty and cross-prayed for a decree on the ground of the wife's adultery with the party cited. By her reply the wife admitted the adultery, but claimed that the husband had condoned the adultery and had conduced to it by his cruelty. In her discretion statement dated December 14, 1953, the wife admitted adultery with the party cited on two occasions in addition to the occasion alleged in the answer. The party cited did not dispute the adultery alleged against him, entered no appearance and was not present or represented at the hearing of the suit. On December 16, 1953, the wife's petition was dismissed, her pleas of condonation and conduct conducing were rejected, and a decree *nisi* was granted in favour of the husband on his cross-prayer. The party cited was ordered to pay the husband's costs and the husband was ordered to pay the wife's costs, such costs to be recoverable by the husband from the party cited as costs in the cause. The matters relied on by the wife as constituting cruelty were in no way caused or contributed to by the party cited. On appeal by the party cited against the order as to costs, *Held*, It was wrong in principle to saddle a party cited whose adultery with the wife was proved or admitted with the costs of the issue of cruelty alleged by the wife against the husband with which the association and adultery of the wife with the party cited were not closely connected; in the circumstances the proper order was to the effect that: 1. The husband should bear and pay so much of his own and his wife's costs as would have been incurred if the answer had been confined to contesting the charges of cruelty without raising the issue of adultery; 2. The party cited should pay the balance of the husband's costs; and 3. The husband should pay the balance of the wife's costs but should be entitled to recover that balance from the party cited. (*Kara* v. *Kara and Holman*, [1948] 2 All E.R. 16, distinguished.). Appeal allowed. *Mearns* v. *Mearns and Bullen*, [1955] 1 All E.R. 684 (C.A.).

Insanity—Respondent of Unsound Mind and "unlikely to recover"—Standard of Proof required of Petitioner—Distinction between Paraphrenia and Schizo-affective Disorder—"Unlikely to recover"—Divorce and Matrimonial Causes Act, 1928, s. 10 (gg)—Divorce and Matrimonial Causes Amendment Act, 1953, s. 6 (1). Where a petition in divorce on the ground set out in s. 10 (*gg*) of the Divorce and Matrimonial Causes Act, 1928 (as added by s. 6 (1) of the Divorce and Matrimonial Causes Amendment Act, 1953), namely, that the respondent "is a person of unsound mind and is unlikely to recover," it is sufficient if the petitioner can satisfy the Court that there is a definite balance of probability that the respondent will not recover from the mental defect; but the balance of probability must be substantial. (*Davis* v. *Davis*, [1943] S.A.S.R. 203, applied.) (*W.* v. *W.*, [1952] N.Z.L.R. 812; [1952] G.L.R. 548, referred to.) It was common ground among the psychiatrists who gave evidence in this case that (*a*) If the correct diagnosis of the respondent's illness is paraphrenia (which is one division of a group of mental disorders characterized chiefly by delusions), there is little hope of recovery even to the lower standard mentioned in *W.* v. *W.* (*supra*) (a return to a mental condition in which the patient is no longer certifiable but is capable of returning home and, perhaps, returning to his or her former life; this may be termed "the Class II standard"). (*b*) If the correct diagnosis of the respondent's illness is schizo-affective disorder (which is one illness of a category in which emotional disturbance predominates), there is not only a good prospect of his or her recovery to the Class II standard, but there is also a prospect, that cannot be described as a bad prospect, of recovery with a complete return to mental health (which may be termed "the Class I standard"). *D.* v. *D.* (S.C. Wellington. April 1, 1955. Hutchison, J.)

FAMILY PROTECTION.

Social Security—Applicant for Further Provision receiving Invalidity Benefit—Court to disregard Any Present or Prospective Social Security Benefit as Part of Applicant's Income when considering Any Breach of Moral Duty owed by Testator—Social Security Amendment Act, 1950, s. 18 (3). Section 18 (3) of the Social Security Amendment Act, 1950, goes no further than a direction that the Court should not regard any present or prospective benefit of any person concerned in the application (other than those benefits specially mentioned in the subsection) as part of the means of income of the person concerned for the purpose of considering whether or not there has been a breach of the moral duty owed by the testator in the particular circumstances. The Court, in making an order under the Family Protection Act, 1908, must apply the principle that testators who can afford to do so should wholly relieve the general taxpayer from burdens which the law imposes in respect of persons to whom such testators have statutory duties, and who have insufficient means for their own maintenance. (*In re Wood*, [1944] N.Z.L.R. 567, 570, followed.) The judgment is reported

on these points only. In the present case, in addition to the sum of £1,000 provided by the will of her father, an invalid daughter was in receipt of an invalidity benefit of £13 12s. 6d. a week. An order was made directing that, in addition to the provision provided by the will, she should receive from the estate an annuity of £208, as from the testator's death, during her life until she becomes eligible to receive a superannuation benefit under the Social Security Act, 1938, and thereafter an annuity of £78 during the remainder of her life. (*In re Calder, Calder* v. *Public Trustee*, [1950] G.L.R. 465, applied.)

Social Security Amendment Act, 1950. Section 18 (3). In making any order on an application under Part II of the Family Protection Act, 1908, for provision out of the estate of a testator, the Court shall disregard any benefit under Part II of the Principal Act (other than a superannuation benefit, a miner's benefit, or a family benefit) which is or may become payable to any person. *In re McGookin (deceased), Rowland and Others* v. *McGookin and Others.* (S.C. Dunedin. March 21, 1955. McGregor, J.)

HUSBAND AND WIFE.

Marriage—Foreign—Lex loci celebrationis—Invalid Marriage—Retrospective Validation—Requirement of Registration not Complied with. On August 4, 1946, the parties, who were both Poles, went through a ceremony of marriage in a Roman Catholic church in the Hamburg area of Germany. There was never at any time a civil ceremony of marriage between them. In 1947 the parties came to England where they had since remained. At all material times by German law only a civil marriage before a registrar was valid, and non-civil marriages were void *ab initio*. On November 18, 1947, notice of the marriage was entered in the register of Papenburg. On August 13, 1948, a German decree was promulgated whereby a marriage such as the present would be validated retrospectively if duly registered at the register office at Hamburg not later than December 31, 1950. According to expert evidence the registration on November 18, 1947, merely recorded that there had been a religious marriage ceremony; it was not due registration under the decree of August 13, 1948, and was not effective to validate the marriage in German law. *Held*, In English law the validity of a marriage abroad, unless it came within the ambit of the Foreign Marriage Acts, 1892 to 1947, was governed as to form and formalities by the *lex loci celebrationis*; as the requirement of the decree of August 13, 1948, for registration was not complied with in time or at all the decree did not validate the invalid marriage in the present case. (Observations of Viscount Dunedin in *Berthiaume* v. *Dastous*, [1930] A.C. 83, applied.) (*Starkowski (by his next friend)* v. *A.-G.*, [1953] 2 All E.R. 1272, distinguished.) *Pilinski* v. *Pilinska*, [1955] 1 All E.R. 631 (P.D.A.).

Tort committed by Husband—Motor Collision—Wife Injured because of Husband's Negligence—Not competent to Sue for Personal Injury—Entitled to Sue for Damage done to Separate Property—Married Women's Property Act,1928 (No. 3727), ss. 4, 15 (1). It is not open to a wife who suffers, through the negligence of her husband, personal injuries in a road collision to recover from him damages, including medical and hospital expenses for which she may be liable, for the injuries inflicted on her person; but she is entitled to sue him for damages, occasioned by his negligence, to her separate property, such as clothing and a wristlet watch. *McKinnon* v. *McKinnon*, [1955] V.L.R. 81.

INSURANCE.

Burglary—Claim—Repudiation of Claim without Repudiation of Policy by Insurance Company. The claimant, intending to insure the contents of his house made a proposal for insurance against burglary in which he declared that the full value of the contents was £500. The proposal form required an intending assured to state the value of jewellery if it exceeded one-third of the declared value, but the claimant made no statement as to this. The insurance company accepted the proposal and issued to the claimant a policy of insurance against, among other risks, loss by burglary, and the policy provided that the proposal and declaration should be the basis of the contract and should be considered as incorporated therein. A burglary took place at the claimant's residence and the claimant's loss was agreed at £530 5s. in respect of jewellery, £26 17s. 6d. in respect of personal effects and £56 in respect of cash. The claimant having claimed for this loss, which was a loss within the terms of the policy, the insurance company repudiated the claim on the ground of material mis-statement or non-disclosure relating to the value of the contents of the residence, but did not repudiate the policy. *Held*, The insurance company could not repudiate the claim without repudiating the policy, and therefore, although it might have been open to the insurance company to repudiate the policy if they had wished to do so, the claimant was entitled to recover. Appeal dismissed. *West* v. *National Motor and Accident Insurance Union, Ltd.*, [1955] 1 All E.R. 800. (C.A.).

LICENSING.

Offences—Keeping Liquor for Sale at Unauthorized Premises—Selling Liquor at Such Premises—Wholesale Licence to operate from Licence-holder's Premises only—Sale by Licensee through Country Agent—No Contract of Sale Until Delivery to Customer—Agent meanwhile in Possession of Liquor on Licensee's Behalf—Agent's Premises not Place where Wholesale Licensee authorized to Keep Liquor for Sale—Sale by Agent to Person other than Customers giving Orders—Wholesaler vicariously liable for Agent's Unlawful Act—"Keep for sale"—Licensing Act, 1908, s. 195 (1) (3)——Licensing Amendment Act, 1948, s. 114 (1). The appellant was the holder of a wholesale licence under the Licensing Act, 1908, which authorized it to operate from premises in Auckland only. It was not licensed to make sales at Matamata. On October 2, and for some time previously, R. had been acting as the appellant's agent in Matamata for the receiving of orders for spirits and ales. These orders were addressed to the appellant, and were on printed forms which contained the words "Enclosed find remittance £——— for the following:" and also a notice: "This order will be executed only when full payment is received at the office unless special arrangements are made with office." The customer paid on collection or delivery of the liquor, but, on occasions, R. collected the cash from customers when they placed their orders. The practice was for R. to send a batch of such orders to the appellant, and to retain a copy of each order. The orders were serially numbered. The appellant then sent to R. the exact amount of liquor comprised in the batch of orders. For each consignment of liquor sent by the appellant to R., the appellant sent an invoice that indicated the serial numbers of the orders that were comprised in the consignment, and also indicated the quantities of each kind of liquor comprised in the consignment. Except on one or two occasions, R. did not pay the appellant for the liquor until after he received it and the invoice. The cartons containing beer were each labelled with the appropriate customer's name, and were addressed to the customer care of R. The appellant did not make up each order for spirits in a separate package, but sent in one consignment or lot the total number of bottles ordered by the customers who had given the orders; and each such consignment was sent addressed to R. only. No part of the spirits in such lot was addressed to, or marked as sent in fulfilment of the order of, any particular customer; and the appellant left it to R. to allocate the spirits to the individual orders, which he did by referring to the copies of those orders that he had retained. The appellant was convicted (*a*) of aiding, assisting, counselling or procuring R. to sell liquor, namely, twelve bottles of beer and one bottle of brandy to Constable T. without R.'s being licensed to sell the same; (*b*) of keeping liquor, a quantity of spirits, for sale at R.'s premises, the appellant not being authorized by its licence to keep liquor for sale there; and (*c*) of selling liquor (one bottle of brandy) to Constable T. at R.'s premises, being a place where the appellant was not authorized by its licence to sell the same. On an appeal from each conviction, *Held*, That there was no evidence that the appellant intended that R. should sell, or knew that R. was likely to sell, liquor (a bottle of brandy) to someone other than a person who had previously signed an order for it, or that it had deliberately shut its eyes to such a transaction; that there was nothing that could be inferred from the evidence to bring the matter within s. 54 of the Justices of the Peace Act, 1927, and that the appellant was wrongly convicted on the first charge. (*Thomas* v. *Lindop*, [1950] 1 All E.R. 966, and *Gough* v. *Rees*, (1929) 46 T.L.R. 103, referred to.) 2. That, as regards the charge of keeping liquor (a quantity of spirits) for sale in a place not authorized by the appellant's licence, there was no contract of sale until the time of delivery to the customer, and, until there was at R.'s premises an acceptance by performance of the offer contained in the order, the property in the spirits remained in the appellant; that R. was in possession of the spirits on behalf of the appellant, and, in effect, had the appellant's authority to accept the offers contained in the orders by making delivery and thus to conclude sales on its behalf; and that this constituted, within the meaning of s. 195 of the Licensing Act, 1908, a keeping by the appellant of spirits for sale in a place where it was not authorized by its licence to keep the same; and that the appellant was rightly convicted on the second charge. (*Abel* v. *Goodson*, [1924] N.Z.L.R. 444; [1924] G.L.R. 247, applied.) 3. That, as R., at the time when he sold the liquor (a bottle of brandy) to the

LEGAL ANNOUNCEMENTS.

Concluded from page ii

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constable was not without any authority to sell at all, but was in effect, authorized to sell to a limited class of persons, (namely, the persons who had previously given the orders), his action in selling to someone else—even if he were previously forbidden to do so—must be treated as an act for which the appellant was vicariously liable; and that the appellant was rightly convicted on the third charge. (*Tocker* v. *Mercer*, [1917] N.Z.L.R. 156, *Kenning* v. *Forster*, [1919] N.Z.L.R. 156, and *Woodley* v. *Lawrence*, [1924] N.Z.L.R. 1153, applied.) 4. That the fines imposed by the Magistrate on the second and third charges of £50 and £25 respectively, and forfeiture of the liquor seized, were not manifestly excessive or arrived at on a wrong principle. *Corban and Sons, Ltd.* v. *Duncan*. (S.C. Hamilton. March 7, 1955. Cooke, J.)

PRACTICE.

Affidavit—Affidavit sworn before Justice—"No Solicitor resident within five miles"—Affidavit to be sworn before Solicitor, if Solicitor residing in His Home within Five Miles—Code of Civil Procedure, R. 187. An affidavit may not be sworn before a Justice of the Peace, in terms of R. 187 of the Code of Civil Procedure, if there is a solicitor residing in his home within five miles, the distance being measured in a straight line on a horizontal plane ("as the crow flies"). (*Egmont National Park Board* v. *Blake*, [1949] N.Z.L.R. 177, applied.). (*Attenborough* v. *Thompson*, (1857) 27 L.J. Ex. 23; 157 E.R. 230, referred to). *In re Taylor, (deceased)*. (S.C. Christchurch. February 23, 1955. F. B. Adams, J.).

[NOTE:—By the Supreme Court Amendment Rules, 1935, (Serial No. 1955/29), a new R. 187, substituted for the former R. 187, an affidavit may be sworn before a Justice of the Peace if there is no qualified solicitor, and no Registrar or Deputy Registrar, *available at his office* within five miles of the place where it is desired to swear the affidavit. The above judgment, *accordingly has been superseded by the new R. 187.*].

Court of Appeal Bound by its Previous Decision—Decisions given per incuriam—Stare decisis. As a general rule, the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned: so that in such cases some part of the decision, or some step in the reasoning on which it is based, is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, consistently with the *stare decisis* rule, which is an essential feature of our law, be of the rarest occurrence. A decision cannot be treated as given *per incuriam* simply because of a deficiency of parties. (*Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; *Huddersfield Police Authority* v. *Watson*, [1947] 2 All E.R. 193; *Penny* v. *Nicholas*, [1950] 2 All E.R. 89, and *A. & J. Mucklow, Ltd.* v. *Inland Revenue Comrs.*, [1954] 2 All E.R. 508, considered.). *Morelle, Ltd.* v. *Wakeling*, [1955] 1 All E.R. 708. (C.A.).

TRANSPORT—LICENSING.

Heavy Motor-Vehicles—Offences—Operating Heavy Motor-Vehicle with Weight in Excess of Permanent Maximum Load—Vehicle driven by Employee of Operator—Admissions by Employee admissible on Prosecution of Employer—Heavy Motor-Vehicle Regulations, 1950, (Serial No. 1950/26) Reg. 11 (2). The act of the driver in hauling excess weight in the course of his employer's operating through the driver makes the employer liable under Reg. 11 (2) of the Heavy Motor-Vehicle Regulations, 1950, and the evidence of the actions and admissions of the employee-driver is admissible as they are part of the *res gestae*. (*Pearks, Gunston and Tee, Ltd.* v. *Ward*, (1902) 87 T.L.R. 51, followed.) *Transport Department* v. *Polwart*. (Whangarei. November 17 1954. Herd, S.M.)

TRUSTS AND TRUSTEES.

Investment—Power to invest in Shares of Companies in any British "colony or dependency"—Companies in Dominion of Canada—Statute of Westminister, 1931 (22 Geo. 5 c. 4), s. 7. By a settlement made in 1936 trustees were empowered to invest money subject to the settlement in any of the ordinary stock or shares of any "company . . . in . . . any British colony or dependency." The trustees, wishing to invest in shares of banking companies in Canada, applied to the Court to determine the question, among other questions, whether the description "any British colony or dependency" extended to the Dominion of Canada. They further asked, if the settlement did not authorise such investment, that power for the purpose should be conferred under s. 57 of the Trustee Act, 1925. *Held*, The description "British colony or dependency" in the investment clause of the settlement did not include the Dominion of Canada, and accordingly the investing of funds subject to the settlement in the stock or shares of Canadian banking companies was not authorised by the settlement; but, under the Trustee Act, 1925, s. 57, the Court would confer an appropriate power on the trustees to invest settled funds in the shares of banking companies in any British Dominion. (*Re Maryon-Wilson's Estate*, [1912] 1 Ch. 55, considered.) *Re Brassey's Settlement. Barclays Bank, Ltd.* v. *Brassey*, [1955] 1 All E.R. 577 (Ch. D.)

WILL.

Evidence Rebutting Presumption of Advancement. *99 Solicitors' Journal*, 36.

Testamentary Nonsense. *98 Solicitors' Journal*, 880.

ADMISSION OF AN ALIEN AS A BARRISTER.

By K. C. T. SUTTON, B.A., LL.M.

A position which should be clarified when the Law Practitioners Act, 1931, comes up for consolidation later this year is the eligibility of an alien to be admitted as a barrister of the Supreme Court of New Zealand.

As the law now stands, the right of a foreigner to admission is not free from doubt. A graduate in law from, say, an American university, might be able to satisfy the University of New Zealand that he is worthy of admission to the status of a holder of an LL.B. degree of that University and hence that he has fulfilled the educational requirements specified under ss. 4 (2) (*a*) and 12 (2) (*a*) of the Act for admission as a barrister and solicitor—subject, of course, to his passing an examination in the statute-law of New Zealand and in the practice of law relating thereto.[1] It will be recalled that these sections require the applicant for admission to have "passed or been credited with a pass in the prescribed examination in general knowledge and in law," while, by ss. 5 and 13, the University of New Zealand is the body empowered to prescribe the nature and conditions of the examination and the educational and practical qualifications of candidates and to conduct the actual examination. A proviso to ss. 5 and 13 (added by s. 26 of the Statutes Amendment Act, 1942) allows the Senate of the University to credit with a pass in any examination any person who satisfies that body that he has passed at another university an examination substantially equivalent to that prescribed.

Apart from the necessary educational requirements, s. 14 of the Act specifies that, before a candidate can be admitted as a solicitor, he must be of good character and a fit and proper person to be admitted, and that he must take the oath of allegiance and the oath of honest demeanour prescribed in the succeeding section. In *In re Heyting*, [1928] N.Z.L.R. 233, the Supreme Court (Sir Charles Skerrett, C.J., Sim, Reed, and Mac-

[1] See *New Zealand Univ. Calendar*, 9-10 and 152; ss. 5 (2) and 13 (2) of the Law Practitioners Act, 1931.

Gregor, JJ.) decided that an alien was not eligible to be admitted as a solicitor. The judgment of the Court was delivered by Sir Charles Skerrett, C.J., who relied on three grounds for his decision.

There was, first, he said, " the inveterate practice of the centuries " that an alien was under a disability to be admitted as a solicitor in England. His Honour referred to the statement of Lord Coke, in his *Commentary on Littleton*, at p. 128 (*a*), that " Fems ne poient estre attorneyes . . . ne nul que n'est a le foy le roy . . . " The authority of the first half of that quotation had been upheld in *Bebb* v. *Law Society*, [1914] 1 Ch. 286; and it followed, in the view of the Chief Justice, that there was and always had been a disability on the part of aliens to be admitted as solicitors. It was clear, he continued, that the Law Practitioners Act, 1908 (which was then in force) and any earlier statutes did not intend to destroy or remove any common-law disability relating to the admission as practitioners existing at the date of the constitution of the Colony; and it was therefore necessary to construe the Act with reference to such disability.

Secondly, the Act contained provisions for the admission of persons admitted as solicitors elsewhere in the British Dominions; but there was no such recognition of admitted practitioners in foreign Courts. The learned Chief Justice regarded this omission as significant.

Thirdly, His Honour said, the Act required that every applicant for admission must take the oath of allegiance; and it was clear that this requirement involved the assumption that the applicant must be a British subject. The oath of allegiance contemplated an oath of allegiance to the King as sovereign of the whole Empire—as one Empire. His Honour referred to the remark of A. T. Lawrence, J., in *R.* v. *Francis, Ex parte Markwald*, [1918] 1 K.B. 617, 624, to the effect that allegiance was owed even by a foreigner resident within the realm and that the oath of allegiance merely consecrated the allegiance already existing. From there, the Chief Justice appeared to adopt the view that such allegiance owed by an alien was more limited than in the case of a natural-born subject.[2] That the oath required under the Law Practitioners Act was a general oath not limited in any way, and, hence, that an alien could not take the oath of allegiance under the Act, but that a naturalized person might.

If this be a correct interpretation of the remarks of the learned Chief Justice, it seems clear that the observations of Lord Jowitt, L.C., in *Joyce* v. *Director of Public Prosecutions*, [1946] A.C. 347, 366, on the allegiance owed by an alien resident within the realm does not affect the position of the alien seeking admission as a solicitor. Lord Jowitt, said:

> Allegiance is owed to their sovereign Lord the King by his natural-born subjects; so it is by those who, being aliens, become his subjects by denization or naturalization (I will call them all "naturalized subjects."); so it is by those who, being aliens, reside within the King's realm . . . The natural-born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm.

This is only a recognition of the position referred to by A. T. Lawrence, J., in *R.* v. *Francis*. The importance of *Joyce's* case is, of course, that it emphasizes that, in certain circumstances, an alien may owe allegiance to the Crown even though he himself is without the realm, and, to that extent, his position is assimilated to that of a natural-born or naturalized subject.

However, certain observations made by members of the High Court of Australia in *Kahn* v. *Board of Examiners* (*Vict.*), (1939) 62 C.L.R. 422, on the ability of an alien resident within the realm to take the oath of allegiance are worthy of mention here. That case concerned the right of an alien, already admitted to the Bar in England, to be admitted as a barrister in Victoria. The Court's decision rested on its interpretation of the relevant State legislation and the rules made thereunder. But Sir John Latham, C.J. (at pp. 430B-1,) was not prepared to hold that an alien could not take the oath of allegiance; while Rich, J. (at p. 434) and Evatt, J. (at p. 448) thought that an alien could take such an oath. Only Starke, J., inclined to the view (at pp. 441-4) that an alien could not take the oath or be admitted as a barrister.

It will be noted that *In re Heyting*, [1928] N.Z.L.R. 233, did not deal with the eligibility of an alien to be admitted as a barrister. The point does not appear to have arisen for decision in this country. The Law Practitioners Act, 1931, is silent on the matter—as were the earlier Acts. Further, it would appear that no rule to meet the position has been made by the Judges under the powers conferred on them by s. 38 of the Act.

There is, first of all, the question whether a disability for an alien to be admitted as a barrister exists at common law, as it does for his admission as a solicitor. In the quotation from Coke cited by Sir Charles Skerrett, C.J., the proposition is made that he who is not in " le foy " of the King cannot be an attorney. The precise meaning of the word " le foy " can only be conjectured; but it is submitted that the term " attorneyes " did not include barristers. It appears to have been used to mean solicitors as opposed to barristers.[3] Further, the fact that in *Kahn's* case an alien was shown to have been called to the Bar in England, would seem to be cogent evidence that, at common law, no disability on the part of aliens to be admitted as barristers existed: see the observations in that case of Starke, J. (at p. 441) and Evatt, J. (at p. 447). But, even if it be assumed that such a disability did exist at common law, the further question arises whether the common-law rule has been incorporated into the law of New Zealand. This again would depend on how far the rule is deemed to be applicable to the circumstances of New Zealand.[4] It is arguable that the series of Law Practitioners Acts passed in New Zealand from 1861 onwards, being silent on the question of the alien, has abrogated any such common-law rule, but, in view of the remarks of Sir Charles Skerrett, C.J., noted above, that these enactments did not remove any common-law disability relating to the admission of practitioners in New Zealand at the date of the founding of the Colony, this argument would not appear to be of any great weight.

Secondly, there is the vital point that s. 6 of the Law Practitioners Act, 1931, in directing that an applicant shall be admitted as a barrister if he is duly

[2] In *Markwald* v. *Attorney-General*, [1920] 1 Ch. 348, the English Court of Appeal drew a similar distinction between the allegiance owed by a natural-born subject and that owed by a naturalized person.

[3] See *Ex parte Warner*, (1842) 6 Jur. 1016; *Ex parte Bateman*, (1845) 6 Q.B. 853; 115 E.R. 322; *Wharton's Law Lexicon*, 14th Ed. (1938), 95; *1 Stroud's Judicial Dictionary*, 3rd Ed. (1952), 235.

[4] See s. 2 of the English Laws Act, 1908.

qualified, and is of good character and a fit and proper person to be so admitted, makes no reference to the necessity of his taking an oath of allegiance as a pre-requisite to admission. In England, from the middle of the sixteenth century a series of statutes had enacted that barristers were required to take the oath. Thus, the Statute 5 Eliz. 1, c. 1., extended the provisions of 1 Eliz. 1., c. 1., (whereby the oath of allegiance was required of the holders of offices of State, etc.) to barristers: see, too, 1 Jac. 1., c. 6. In 1 Will. & Mar., c. 8., the form of the oath and the manner of taking it were altered, but the rule was preserved that all persons called to the Bar had to take the oath of allegiance to the Sovereign. This position lasted until 1868, when the Promissory Oaths Act was passed. This Act, in effect repealed the Act of William and Mary, for s. 9 stated that no person was to be required to take the oath of allegiance except certain persons therein specified, "any Act of Parliament, charter, or custom to the contrary notwithstanding." Barristers were not included in the category of persons obliged to take the oath. On a reference being made to the Judges on the point, it was decided that s. 9 had effectively done away with the necessity for barristers on admission to swear an oath of allegiance.[5] This is still apparently the position in England, although rules have now been made by the Inns of Court whereby an alien is not eligible for admission as a student or for call to the Bar, unless there are special reasons.[6]

Section 10 of our Promissory Oaths Act, 1908, which re-enacted s. 11 of the Promissory Oaths Act, 1873, is similar to s. 9 of the English Act of 1868, stating that only specified persons are to be required to take the oath of allegiance "any Act, ordinance, statute, or charter to the contrary notwithstanding."[7] It is submitted that this conclusively decides the issue, that a barrister is not required to take an oath of allegiance as a pre-requisite to admission, and that, therefore, there is no objection to the admission of an alien as a barrister on the ground that he is not qualified to take the oath of allegiance. If it be said that the law of England as at 1840 is deemed to be incorporated into New Zealand law so far as applicable, and hence that the statute 1 Will. & Mar., c. 8, is in force in this country, it is submitted that the Promissory Oaths Act, 1873, overrode it. The Court disregarded s. 10 of the Promissory Oaths Act, 1908, in *In re Heyting* on the ground that that Act and the Law Practitioners Act, 1908, were both re-enacted in the same year, and that effect must therefore be given to the requirements of the latter Act.[8] It seems obvious that this reasoning is inapplicable when the Act makes no mention of the need for an oath of allegiance as a pre-requisite for admission as a barrister.

It is open, of course, for the Supreme Court to hold that an alien, as such, is not a fit and proper person to be admitted as a barrister of the Court, and hence that he does not fulfil the requirements of s. 6 of the Law Practitioners Act, 1931. That an applicant might not be a fit and proper person for admission, although he was unquestionably of good character, was emphasised by Kennedy, J., in delivering the judgment of the Court, in *J.* v. *New Zealand Law Society*, [1944] N.Z.L.R. 351, 356. In *Martin* v. *British Columbia Law Society*, [1950] 3 D.L.R. 173, the Court of Appeal of British Columbia held that a Communist was not a fit and proper person for admission.[9]

In *Korteb* v. *Bar Association of New South Wales*, (1941) 59 N.S.W.W.N. 29, affirming (1943) 66 C.L.R. 672, the Full Court of New South Wales refused to make an order for the admission of an applicant who had been rejected by the Barristers' Admission Board on the ground that, being an enemy alien, he was not a fit and proper person to be admitted as a barrister. The Court held that, even assuming that the applicant was not an alien enemy, the burden rested on him to satisfy the Court that he was a fit and proper person to be admitted to the Bar; and that this burden had not been discharged. In delivering the judgment of the Court, Halse-Rogers, J., said:

> This matter is one of discretion and not of right. I do not think it could be argued that an alien has a *right* to be admitted to the Bar. The exercise of discretion in his favour depends upon the view the Court takes as to whether he falls within the category of a fit and proper person. Now it is clear that the disqualification of aliens in some other States, and the impending disqualification in this State already referred to, must be based on the view that only British Subjects are fit and proper persons for admission. This seems a cogent reason against our making any order for the admission of the applicant.

This dictum affords further support for the view that, at common law, there exists no disability for the admission of an alien as a barrister.[10]

It will be seen that the position is not free from difficulty, and it is suggested that advantage should be taken of the projected consolidation of the Law Practitioners Act to clarify the matter. It can hardly be supposed that the Legislature intended that an alien could be admitted as a barrister, while, in effect, it denied his right to admission as a solicitor.

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[5] See the article by W. C. Bolland in (1907) 23 *Law Quarterly Review*, 438, and *In re Perara*, (1887) 3 T.L.R. 677.

[6] See *3 Halsbury's Laws of England*, 3rd Ed. 6, 7.

[7] It will be noted that any *custom* to the contrary is not expressly negatived. It would seem clear that s. 13 (e) does not affect the operation of s. 10. A similar paragraph appears in s. 14 of the English Act.

[8] [1928] N.Z.L.R. 233, 239.

[9] Cf. *Re Julius*, [1941] Q.S.R. 247.

[10] In New South Wales, a Rule of Court barring aliens, whether friendly or enemy, from admission as barristers came into force in 1942: see (1942) *15 Australian Law Journal*, 354. Rules 35 and 36 of the Victorian Rules of the Council of Legal Education are similarly designed to prevent the admission of aliens: so, too, in South Australia and Western Australia: see *Kahn's* case, (1939) 62 C.L.R. 422, per Rich, J., at pp. 432-4.

CARRIERS: THE LAW OF COMMON CARRIAGE IN NEW ZEALAND.

By D. P. O'Connell, B.A., LL.M. (N.Z.), Ph.D. (Cantab.)

(*Continued from p. 26.*)

Who is a Common Carrier?

Until 1948, therefore, a common carrier was still, in respect of most goods, subject to a heavy burden. It was common for a carrier to enter into a "special contract" limiting his liability, but if he failed to do so he was still an insurer. In most cases that came before the Courts it was therefore in the interests of the plaintiff to attempt to prove that the carrier was a common carrier and not merely a private carrier. The test for determining this question, contrary to what is often believed, renders most carriers of goods common carriers. It has merely to be shown that the carrier undertakes for hire to carry the goods of all persons.[1] He is one who "holds himself out either expressly or by a course of conduct that he will carry for hire so long as he has room the goods of all persons indifferently who send him goods to be carried".[2] The criterion, it has been held, is "whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract".[3]

This test was formulated at about the time that common carriers were having imposed upon them the liability of an insurer. The Courts were anxious to spread the net as widely as possible, and hence enunciated their formula in the most general terms.[4] In one case it was even held that where a barge was let to one person for a separate agreement, with no fixed point of departure or arrival, its operator was a common carrier.[5] It was to be expected, however, that as social and economic conditions changed the test of whether a man is or is not a common carrier would be related to circumstances other than the generality of the persons for whom he holds himself out to carry. There has been a tendency to qualify the criterion of generality, but in no case has any alternative or more restricted test been proposed. It remains to discover from an analysis of more recent cases whether or not there is any alternative test.

In *Belfast Rope Work Co.* v. *Bushell*,[6] the High Court was called upon to decide whether a certain haulage contractor was a common carrier. The contractor in question used several lorries for the carriage of sugar from Liverpool to Manchester. At Manchester he invited offers of all kinds of goods except machinery for carriage to Liverpool, without a regular tariff. Sometimes he accepted and sometimes he rejected these offers. Bailhache, J., found that he was not a common carrier, and was not therefore liable for the accidental destruction of a consignment of hemp. He purported to reject the test of generality, saying that what was decisive was the ground on which the carrier rejected or accepted goods. If the consignor refused to pay charges beforehand, the learned Judge thought a carrier entitled to refuse to carry, and therefore he would be a common carrier.[7] But, if a carrier reserves to himself the right to accept or reject offers "*being guided in his* decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements", then he is not a common carrier. In *Watkins* v. *Cottell*,[8] it was admitted that the defendant, a furniture remover, was not a common carrier because he never carried furniture without first giving an estimate.[9]

Both these cases were considered by Sir Robert Stout, C.J., in giving judgment on a case stated in *Wilson* v. *New Zealand Express Co., Ltd.*[10] in 1923. In that case the defendant company tendered for removal of furniture, quoting a price, and limiting liability to £10 in respect of each parcel carried. Because of the tender it was held that the company could have refused to "pack and forward the furniture, and that is the test to be applied in finding whether a person who carried goods is a common carrier."[11]

From a review of these cases it has been suggested that a furniture remover is not, by virtue of his office, a common carrier.[12] In at least one Australian case this conclusion has been doubted, but Dr. Kahn-Freund argues that not only can furniture removers never be common carriers, but that "with the possible exception of forwarding agents, all carriers of goods by road must be regarded as private carriers."[13] Desirable as this conclusion may be, it does not appear to be warranted by the cases quoted.[14] The test of generality was still the determinant in each of these cases, and the status of common carrier was rejected only because in the particular circumstances of each case there was no generality. From them the following formula is the most that can be derived: A carrier is a common carrier if he undertakes to carry for anyone provided (*a*) his trucks are available, (*b*) he does not reserve the right to refuse offers,[15] (*c*) he does not tender for each

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[1] *Gisbourn* v. *Hurst*, (1710) 1 Salk. 249; 91 E.R. 220. The principal book on the subject is *MacNamara on The Law of Carriers* (1925). Also, see Paton, *Bailment in the Common Law*, (1952) Ch. 14.

[2] *Nugent* v. *Smith*, (1875) 1 C.P.D. 19, per Brett, J., at p. 27.

[3] *Ingate* v. *Christie*, (1850) 3 C.B. & Kir. 61; 175 E.R. 463, per Alderson, B. See, also, *Story on Bailments*, 9th Ed. s. 495. This test was adopted by Wilde, C.J., in *Bennett* v. *Peninsular Steamboat Co.*, (1848) 6 C.B. 775, 787; 136 E.R. 1453, 1458: *Clarke* v. *West Ham Corporation*, [1909] 2 K.B. 858, per Farwell, L.J., at p. 877; *Great Northern Railway* v. *L.E.P. Transport and Depository Co., Ltd.*, [1922] 2 K.B. 265, per Scrutton, L.J.; *Belfast Rope Work Co.* v. *Bushell*, [1918] 1 K.B. 210.

[4] See *Kahn-Freund on The Law of Carriage by Inland Transport*, (1949) 121.

[5] *Liver Alkali Co.* v. *Johnson*, (1874) L.R. 9 Exch. 338.

[6] [1918] 1 K.B. 210.

[7] That a carrier may require payment in advance has been held in *Wyld* v. *Pickford*, (1841) 8 M. & W. 443; 151 E.R. 1113; *Grand Junction Railway Co.* v. *White*, (1841) 8 M. & W. 214, 151 E.R. 1015; *Great Western Railway Co.* v. *Sutton*, (1869) L.R. 4 H.L. 226; *Carr* v. *Lancashire and Yorkshire Railway*, (1852) 21 L.J. Exch. 261; 155 E.R. 1133.

[8] [1916] 1 K.B. 10.

[9] See also *Electricity Supply Stores* v. *Gaywood*, (1909) 100 L.T. 855; *Turner* v. *Civil Service Supply Association, Ltd.*, [1926] 1 K.B. 50; *Bontex Knitting Co., Ltd.* v. *St. John's Garage* [1943] 2 All E.R. 690; [1944] 1 All E.R. 381; *Alderslade* v. *Hendon Laundry, Ltd.* [1945] 1 All E.R. 244.

[10] [1923] N.Z.L.R. 201; [1923] G.L.R. 214.

[11] At p. 204.

[12] See *4 Halsbury's Laws of England*, 2nd Ed., p. 4, para. 2.

[13] *Op. cit*, p. 124.

[14] In 1916, the New Zealand Express Co., Ltd., was held to be a common carrier: *New Zealand Express Co., Ltd.* v. *Minahan*, [1916] N.Z.L.R. 816; [1916] G.L.R. 552.

[15] *Rosenthal* v. *London County Council*, (1924) 88 J.P. 157.

job but has a fixed scale of fees from which he cannot depart.[16] These are, in substance, the criteria employed by F. B. Adams, J. in *Drinkrow* v. *Hammond*,[17] where it was held in addition that the Transport Licensing Regulations, 1950, impose on a licensed carrier the obligation to carry generally, and hence confer on him the characteristics of a common carrier in the absence of evidence to the contrary.

Although the test of generality, therefore, remains, it is possible to perceive other influences underlying this formula, particularly the concept of "regularity". This concept was approved in the *New Zealand Express Co.* case[18] with a quotation from an American decision, *Retzer* v. *Wood*[19]. To constitute him a common carrier, the judgment in that case reads, a man's "business must involve the idea of regularity as to route or time, or both, and that one carrying goods solely on call and at special request without regularity is not engaged in such express business as to bring a company within the definition of 'carrying on express business'". Regularity appears to have been the criterion adopted in another American case, in which an independent company operating a business of coke-shifting from a coke plant to the local railway was held to be a common carrier, although the service was not a public utility, and was available only to the coke firm.[20] The test of regularity offers a basis for common carriage more consonant with modern conditions than that of "generality". The only reason for preserving a common carrier's liability as an insurer is the difficulty of proving his negligence. In these days of complicated transport systems the goods of many people are carried in the same truck. These goods are handed in at a depot, and loaded on the truck, which then proceeds on its appointed rounds, delivering parcels at the most convenient points and times. There is in this case "regularity" as to route and time. There is also difficulty in proving negligence if a parcel fails to arrive by this system of transport. In such case there is an argument in favour of the operator being an insurer.

Circumstances are different if I order a carrier for a special job. A carrier who shifts my furniture is not organized for delivery like a railway train. If he loses some of my goods it is not difficult to prove negligence—there might, in fact, even be a presumption of negligence. The argument against such a carrier being a common carrier is much stronger when the carrier holds himself out, as certain of them do, as a "heavy haulage specialist" who undertakes the job of transporting particular classes of heavy machinery from one place to another. Here there is no "regularity". Nor is there "regularity" if a "carrier" insists on the consignor doing his own loading or unloading, or if he has different bases of charges, charging sometimes on an hourly basis, and sometimes on a mileage basis, according to the amount of profit he expects to derive from the contract. *Drinkrow* v. *Hammond*, however, establishes that even a "heavy haulage specialist," if he carries generally, can be a common carrier.

Unfortunately there is no real evidence that "regularity" and not "generality" is the test. Generality is still invoked in the Courts of Canada,[21] Australia,[22] the United States[23] and New Zealand.[24] Whether a man is a common carrier or not is a question of fact for the jury,[25] and a judge can only direct a jury by reference to the formula proposed in the early English cases. It is not to be supposed that the jury will act upon any other criterion. As it happens, judges in unreported cases have tended to decide whether a man is a common carrier or not solely by reference to what he holds himself out to be. This might have been satisfactory in an age of free competition. In this age of special licences, restricted entry into the carriage trade, zoning, and highly-developed systems of specialist haulage, it is outmoded. It is especially outmoded where transport is nationalized, or where special vehicles and equipment for abnormal operations are required and for which special local body authorization must be obtained.[26] As the law stands a man can be a common carrier of special goods.[27] If he holds himself out as willing to carry baby elephants for all and sundry, he is a common carrier of baby elephants. He might be a common carrier of anything or everything; he might be a "specialist" common carrier of match boxes on the one extreme, or prefabricated houses on the other.[28] In one United States case the Court went so far as to hold the operator of a grain elevator a common carrier.[29] It is to be feared that unless the theory of "regularity" obtains currency, almost everyone who shifts goods on the highway is a common carrier,[30] a matter of tremendous importance when considering the effect of the Carriers Act, 1948.

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[16] *Scaife* v. *Farrant*, (1875) L.R. 10 Exch. 358.

[17] [1954] N.Z.L.R. 442.

[18] At p. 204.

[19] (1883) 109 U.S. 185, at p. 187.

[20] *Kenna* v. *Calumet*, 120 N.E. 259 (Ill.).

[21] *Vipond* v. *Furness Withy and Co.*, (1916) 54 S.C.R. 521; 35 D.L.R. 278 (See annotation on pp. 285 *et seq.*)

[22] *Boyes* v. *Moss and Co.* (1892) 18 V.L.R. 225; *Fairbairn* v. *Miller*, [1918] V.L.R. 615, 617.

[23] *Illinois Central Railroad* v. *Frankenberg* 54 Ill. 88; *Lloyd* v. *Haugh*, 223 Pa. 148.

[24] *Hodge* v. *Wellington City Corporation*, (1943) 3 M.C.D. 197, 200; *Andrew Lees Ltd.* v. *Brightling*, [1921] N.Z.L.R. 144; [1920] G.L.R. 277.

[25] *Belfast Rope Work Co.* v. *Bushell*, [1918] 1 K.B. 210; *Boyes* v. *Moss and Co.*, (1892) 18 V.L.R. 225: see also "Business Jurisprudence" (Adler) in 28 *Harvard Law Review* 135.

[26] See *Kahn-Freund*, *op. cit.*

[27] "That one is a common carrier means only that he is in the business of carriage. It does not matter what he carries:" *Dickson* v. *Great Northern Railway Co.*, (1886) 18 Q.B.D. 176, per Lindley, L.J.

[28] *Johnson* v. *Midland Railway Co.*, (1849) 4 Exch. 367; 154 E.R. 1254: "A person may profess to carry a particular description of goods only", per Parke, B., at p. 373. See, also, *Dickson* v. *Great Northern Railway Co.*, (1886) 18 Q.B.D. 176, per Lindley, L.J., at p. 183.

[29] *Munn* v. *Illinois* (1876), 94 U.S. 113. It has been held, however, that a company which stored frozen meat awaiting shipment in a hulk was not a common carrier: *Canterbury Frozen Meat and Dairy Export Co. Ltd.* v. *Shaw Savill and Albion Co. Ltd.*, (1889) 7 N.Z.L.R. 708.

[30] It has, for example, been held that a bus is a common carrier, and that loss of passengers' luggage included in the fare renders the bus company liable: *McCormick* v. *Peninsula Motor Service*, (1948) 4 M.C.D. 363. On the other hand, luggage carried on a tram by a passenger had been held to be outside a contract of common carriage: *Rosenthal* v. *London County Council*, (1924) 88 J.P. 157; *Hodge* v. *Wellington City Corporation*, (1943) 3 M.C.D. 197. Recently, in *Harwood* v. *Watts*, (1955) 8 M.C.D. 416, it was held that a taxi-driver was not a common carrier of his passengers' luggage since he was not authorized by the Transport Act, 1949, to carry on a goods-service business.

(To be concluded.)

LAND TRANSFER: LEASE TO COMPANY CONTAINING RIGHT OF PURCHASE AND RIGHT OF RENEWAL.

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

Explanatory Note.

Trustees for a company about to be formed have bargained with the vendor company, for a lease of its business premises, together with an option to purchase the fee simple, or, in the alternative, to have a renewed lease. The new company, having been incorporated, has adopted the agreement to lease, and it has been decided to register a memorandum of lease under the Land Transfer Act.

The advantage of this course is that not only will the new company obtain a State-guaranteed term of years, but it will also get an indefeasible right to purchase the fee simple or, alternatively, obtain a lease for a further term: *Fels* v. *Knowles*, (1906) 26 N.Z.L.R. 604; 8 G.L.R. 627, and *Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542; [1945] G.L.R. 205.

It will be observed that the right of renewal is not perpetual: if it is desired to create a perpetual right of renewal, the words in cl. 3 (*b*), "except this present covenant for renewal," should be altered to "including this present covenant for renewal."

It will also be observed that the right to purchase does not extend to the renewed term.

As *ad valorem* lease duty was paid on the preliminary agreement, the lease will be liable to stamp duty of 1s. 3d. only: Stamp Duties Act, 1954, s. 117. The option to purchase will not attract *ad valorem* conveyance duty, unless and until the right is exercised.

Precedent.

Memorandum of Lease of Business Premises with Right of Purchase and Right of Renewal.

Whereas Limited a company duly incorporated and having its registered office in the City of Wellington (hereinafter called "the lessor") is seised as registered proprietor of an estate in fee simple . . . situate in the Borough of containing [*set out area*] more or less being Lot on Deposited Plan No. being part of Section District and being all the land in Certificate of Title Volume Folio And Whereas by deed dated the 1st day of *February 1955* and made between the lessor of the one part and A. B. of Auckland Solicitor and C. D. of Wellington Company Director (as trustees for and on behalf of a company to be incorporated under the Companies Act 1933 under the style or name of Ltd.) it was agreed that the lessor should grant a lease of the said land upon the terms hereinafter set forth And Whereas the intended company has been duly incorporated as aforesaid and is now known as Ltd. the registered office whereof is situate at (hereinafter called "the lessee") Now Therefore in pursuance of the said deed and in consideration of the rent hereby reserved and the covenants conditions and agreements on the part of the lessee herein expressed and implied the lessor Doth Hereby Demise and Lease to the lessee all that the said land together with the buildings now erected thereon to be held by the lessee as tenant from and inclusive of the 1st day of April 1955 down to the 1st day of April 1958 at the annual rental of £250 payable in advance by equal calendar monthly payments of £20 16s. 0d. on the 1st day of each and every calendar month during the term hereby created the first of such monthly payments having been made on or before the date hereof subject to the following covenants conditions and restrictions that is to say:

1. The lessee doth hereby covenant with the lessor in manner following:

(*a*) The lessee will duly and punctually pay the rent herein before reserved as and when the same shall become payable to the lessor free from any deduction whatsoever.

(*b*) That the lessee shall not nor will at any time during the term hereby created do or suffer any act or omission whereby any policy or policies of insurance held by or on behalf of the lessor against loss or damage of or to the said buildings or any part thereof by fire or otherwise shall or may become void or voidable or whereby the rate or rates of premium thereon may be increased and all costs and expenses incurred by the lessor in or about the renewal of such policy or policies or obtaining fresh policies in respect of the said buildings or keeping such insurance on foot as are rendered necessary by a breach by the lessee of this covenant shall be borne by the lessee.

(*c*) That the lessee shall not nor will at any time during the term hereby created assign sub-let mortgage charge or part with possession of the demised premises or any part thereof without the previous consent in writing of the lessor first had and obtained.

(*d*) The lessee "will not carry on offensive trades" within the meaning ascribed to those words in the fourth schedule to the Land Transfer Act 1952.

(*e*) The lessee shall and will at all times during the term hereby created repair and keep in the like repair and good clean and serviceable and tenantable order and condition the demised premises and the doors windows fixtures and fittings and the sanitary and water apparatus and drains thereof fair wear and tear and damage by fire flood tempest earthquake or inevitable accident without neglect of the lessee alone excepted and will at the expiration or sooner determination of the term quietly yield up the demised premises and the said parts thereof in the like repair and good clean and serviceable and tenantable order and condition except as aforesaid.

2. The lessor doth hereby covenant with the lessee in manner following:

(*a*) That the lessor shall and will pay all rates taxes assessments and other outgoings in respect of the demised premises during the term hereby created.

(*b*) That if the lessee shall duly and punctually pay the rent hereby reserved and observe all and singular the covenants conditions and restrictions herein on the part of the lessee expressed and implied the lessee shall quietly hold and enjoy the demised premises throughout the term hereby created without any interruption or disturbance by the lessor or any person lawfully claiming under it.

3. And it is hereby agreed and declared and mutually covenanted as follows:

(*a*) That if the lessee shall duly observe and perform all covenants conditions and agreements hereinafter expressed and implied and shall have given to the lessor one calendar month's notice in writing of its desire to purchase the freehold of the said land then the lessor on the 1st day of April 1958 and upon payment to it by the lessee of the sum of £3,125 in cash and of all rent then due or accruing due to the lessor will transfer to the lessee free from encumbrances all the estate and interest of the lessor in the said land such transfer to be prepared by and at the expense of the lessee and tendered to the lessor for execution.

(*b*) That if the lessee shall during the term hereby created pay the rent hereby reserved and observe and perform the covenants and conditions on the part of the lessee herein contained and implied up to the expiration of the said term and shall have given notice in writing to the lessor at least three calendar months before the expiration of the said term of its desire to take a renewed lease of the premises hereby demised then the lessor will at the cost of the lessee grant to the lessee

a renewed lease of the said premises for a further term of three years at the same rental and upon and subject to the same covenants and conditions as are herein contained and implied except this present covenant for renewal and except the option to purchase contained in clause 3 (*a*) hereof.

(*c*) If at any time during the said term the demised premises shall be destroyed or so damaged by fire tempest or earthquake or inevitable accident without neglect of the lessee as to be rendered wholly untenable or unfit for business and occupation the said term shall cease and determine but without prejudice to the claim of either lessor or lessee for rent accrued due up to the time of such cessor or determination or for damages for any antecedent breach of covenant or condition herein expressed or implied AND in case the demised premises shall be partially destroyed or damaged by fire tempest earthquake or inevitable accident but not so as to be rendered wholly untenantable or unfit for business and occupation the lessor will with all reasonable despatch reinstate the same and during the course of such reinstatement the rent hereby reserved shall abate in fair and reasonable proportion to the extent to which the demised premises shall for the time being be untenantable and unfit for business and occupation and in the event of any dispute as to the tenantable condition of the said premises or as to any abatement of rent the same shall be referred to the arbitration of two arbitrators and their umpire in accordance with the provisions of the Arbitration Act 1908 and its amendments.

(*d*) The lessor shall have the right at all reasonable times by himself his agent or servants to enter upon the demised premises to inspect the state of repair thereof and to repair amend or renew the same or any other parts of the said building or any pipes or drains in connection therewith but for all purposes in connection with the repair or maintenance of the lessor's property as a whole the necessary work shall be done at such times and in such manner as will cause as little inconvenience as possible to the lessee.

(*e*) If and whenever the rent hereby reserved shall be in arrear the same may be levied by distress.

(*f*) If the rent hereby reserved or any part thereof shall be in arrear and unpaid for the space of twenty-one days whether the same shall have been legally or formally demanded or not or if and whenever there shall be any breach or non-observance or non-performance of any covenant condition or agreement herein on the part of the lessee contained or implied it shall be lawful for the lessor forthwith or at any time thereafter without making any demand or giving any notice or doing or seeing to the doing of any act matter or thing to re-enter upon and take possession of the demised premises or any part thereof in the name of the whole whereupon the term hereby created shall absolutely cease and determine and that without releasing the lessee from liability for any rent due or accruing due hereunder or from liability for any antecedent breach of covenant or condition hereunder.

IN WITNESS WHEREOF etc.

Correct for the purposes of the Land Transfer Act.

E. F.,

Solicitor for the lessee.

GROUP HOUSING SCHEME.

Certain inquiries have been made in relation to various aspects of the above and the following has been submitted by the Wellington District Law Society for the guidance of practitioners :

(1) It is customary for the Lands and Survey Department to issue to the group builder a form of " Licence to Occupy " comprising one or more sections. The group builder prepares plans and specification and obtains for each section a purchaser who completes a form of questionnaire, the builder signing at the foot of the questionnaire a statement that he nominates the purchaser as the purchaser of the section in question. This form is forwarded to the Lands and Survey Department together with the building contract for perusal, and the Department, after all necessary payments have been made, issues to the purchaser his title according to the type of title chosen by him. The " Licence to Occupy " provides that the group builder will not assign or otherwise dispose of the whole or any part of thw land without the prior consent in writing of the Department and includes a further provision that as each house is completed, provided that the Department is satisfied that the group builder has entered into an enforceable agreement to dispose of such house and the section upon which it is situated to a specified purchaser, the Department will, upon being requested so to do, issue the appropriate form of title to the purchaser. In view of the fact that these two provisions appear in the form of licence, practitioners have been in some difficulty, if the foregoing provisions were enforced, in arranging finance by progress payments on buildings in the course of erection. Practitioners are informed, therefore, that it is not the practice of the Department to enforce compliance with the provisions above mentioned and the following is the procedure adopted, at any rate, in the Wellington District :

(*a*) The Lands and Survey Department requires in the first place that the questionnaire and nomination relating to the particular section be completed by both purchaser and group builder and a building contract entered into by both these parties. These two documents should be submitted to the Department without delay.

(*b*) It is also required that the State Advances Corporation approve the plans and specifications whether or not the Corporation is providing finance.

(*c*) The Lands and Survey Department then requires to be satisfied that the erection of the dwellinghouse has in fact been commenced.

(*d*) All initial payments due to the Department up full price of the section if freehold, the necesary to that point must have been made, *e.g.*, the full price of the section if freehold, the necessary deposit if on deferred payment licence, or the first half-year's rent if under renewable lease.

(*e*) As soon as all the foregoing conditions have been complied with the Department will immediately issue to the purchaser his title in whatever form that title is to take. No formal agreement for sale and purchase or other assurance is required as between the group builder and the purchaser, compliance with the provisions of the licence to occupy in that connection not being insisted upon. It is found by the Department that this system works smoothly ; and, so far as the purchaser is concerned, his standing as purchaser is recognised by the Department and his title issued as soon as the above-mentioned requirements have been satisfied, and, therefore, in ordinary cases, before he is called upon to make any progress-payment to the builder.

If for any reason it is desired on behalf of the purchaser to obtain some formal recognition by the Department of the purchaser's standing in relation to the section at a date earlier than is provided by following the normal procedure as above outlined, it is recommended that in addition to the usual form of nomination, he should obtain a formal assignment of the builder's rights in respect of such section at a very early stage and notify the Department of his interest therein and of his arrangements with the builder. In such a case, the formalities attendant upon the issue of the purchaser's title can be expedited, thus giving him greater protection so far as his title is concerned.

(2) There is no *ad valorem* stamp duty payable in respect of such a transaction where it relates to Crown Land, either on any assignment from the group builder to the purchaser of the former's rights in the section or in respect of the purchase of the house. There is, of course, the usual stamp duty (1s. 3d.) on the building agreement.

(3) The question of costs on such a transaction has been referred to the Costs Committee of the New Zealand Law Society.

CRICKET.

De Mortuis Nil Nisi Bunkum.

By ADVOCATUS RURALIS.

About seven years after Mafeking was relieved, Advocatus playing for 2B under the then captaincy of Frity Martyn Renner successfully executed the Hat trick. This fact (it was a fact) and the possession of a voice noted we are told more for penetration than for mellifluence has enabled Advocatus through the succeeding years to express opinions on Cricket.

Through a combination of circumstances Advocatus was present at the third (Melbourne) Test when Tyson did Australia wrong. The first generation Australians (Pommies to the Hoi polloi) thoroughly enjoyed their day and Advocatus was able to intervene in a delightful lunch-time argument which started on whether Denis Compton had got his Soccer Cap and carried on over the seven seas.

Recently one of our older and more reputable legal firms found it necessary to prosecute a search for the "lost document bundle" and the search took them back to their No. 1 safe. History does not say whether they found the document but they did find a shield which had been used for competition between the Banks and the Law, and, possibly, the Stock and Station Agents. The last date on the shield was 1925, so it cannot really have been treated as lost. The finder—an ex-squadron leader—a man still retaining the non-legal habit of making decisions—thought that the time had come to renew the competition.

A challenge was accordingly sent in due form to the Banks. By a certain amount of chicanery all members born during or before the gay nineties were omitted from the team—although retained as *amici curiae*. By assembly all practitioners within a distance of fifteen miles a team of thirteen was gathered. Students of Stephen Potter or of "Coarse Cricket" will realise that this is an ideal number—allowing as it does for two twelfth men.

Came the Day and as is usual in this district the day was fine. The game started quietly, due in part to having to appoint both punctual spectators as umpires. A certain amount of strain was evident, when it was suggested that the scoring should be subject to legal audit; but, when the Banks agreed not to use their accounting machines, the game got away to a good start.

Advocatus does not agree with the Australians in everything but he agrees that a batsman at the wicket should hit out or get out. Unfortunately opening counsel (a shafter rather than a leader) having scored one run, got out. Junior counsel then took over, and, in a period which would have shocked the M.C.C., seventy runs were on the board. The umpires then took a firmer grip of the game, and junior counsel returned to the grandstand. Advocatus is delighted with the retention of the old-fashined idea of umpires. The graceful and solemn way in which they gave centre to an incoming batsman was felt by all to be a nice compliment both to the bowlers and the batsmen. The efficient way that any batsman was returned to the pavilion on scoring fifty was equalled only by the unanimity with which "not out" was called until the batsman had scored. The former legal Mayor of our neighbouring township had some difficulty in sighting the ball, and, when his wickets were scattered, he was only saved from an ignominious duck by a stentorian appeal for No Ball from the grandstand—which appeal was allowed. After his wicket fell for a second time to a no ball he settled down and made fifteen. Law finally completed its innings for either 227 or 228.

With the Banks at the wicket runs were coming fast so the Legal Captain decided to set a defensive field. This was done by placing one twelfth man at long stop thereby steadying the scoring note.

According to the scorers the game finished 228 to 227, scored in 3 hours 47 minutes; but very considerable doubt exists as to who was 227. The legal profession provided the speaker at the 19th and he in due course presented the Shield to the legal profession.

"*When next John Gilpin forth doth ride*
May I be there to see."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

On Addressing Judges.—Any young practitioner who persists in Court in addressing a puisne Judge as "Your Worship" has only himself to blame if he conducts his argument without the usual background of affability. "Your Honour" is the approved method of address in the Supreme Court; but, unless it is varied with the impersonal "Sir," the speaker may occasionally become as embarrassing as the counsel mentioned in *Cheerful Yesterdays*, who, owing to a nervous affliction, broke into a smile of welcome whenever a member of the Bench spoke to him. Away from the Court, the puisne Judge is referred to as "Mr. Justice Blank," whether he is present or not; although on less formal occasions he is usually addressed as "Judge"—never, however, should he be addressed as "Judge" followed by his surname. In ordinary conversation, use of the word "Judge" is all that is required. "Are you feeling better, Judge?" This will be taken as a kindly inquiry into some recent indisposition, without there being implicit in it the suggestion that, when he pronounced judgment in the last case you were in before him, he was slightly unhinged. Nor does the word "Judge" in such circumstances conjure up, except to avid readers of Wild West stories, the picture of a small-town lawyer with bits of straw sticking out of his ears.

Taxers, Workers, et al.—The observations of Mr. Justice Finlay to a New Zealand and Canterbury cricket representative in the Court of Appeal as to sending down googlies on a sticky wicket (or in terms of like effect) reminds Scriblex that counsel appearing for the Inland Revenue Department in England recently had to withstand some full-pitchers from the Court of Appeal. The case is *Moorhouse* (*Inspector of Taxes*) v. *Dooland*, [1955] 1 All E.R. 93, and it involved the question as to whether the respondent, a professional cricketer employed by the East Lancashire Cricket Club, had to pay taxation upon the large sum of £48 15s. collected for him on the ground, as a result of meritorious performances on eleven different occasions. Both the General Commissioners of Income Tax for Blackburn, and Harman, J. (on appeal), had held that these collections were not taxable as a profit arising from the taxpayer's occupation. But the Court of Appeal considered that the nature of the moneys had to be judged in relation rather to the recipient than to the giver, and that, as the respondent was entitled by the terms of his contract to invite subscriptions, the collections arose in the ordinary course of his employment and accrued from it. Evershed, M.R., qualified his judgment in favour of the appellant by saying that in his view a gift or present made either on some special occasion, such as a wedding, a century at cricket, a birthday, or at a season of the year when it is customary to give presents, does not necessarily cease to be non-taxable merely because the ties that link the recipient and the giver are, or are substantially, those of service. However, in order to achieve victory, the appellant had to stand up to some nasty balls. When counsel put it up to the Court that it should contemplate the anomaly that would arise if cricketers escaped a burden that fell upon footballers, the Master of the Rolls declared himself unmoved by such argument and pointed out that cricketers had had to put up with the 1954 summer, while Birkett, L.J., said that the Department could easily avoid any anomaly by ceasing to tax the footballers. To the submission that the Crown had to administer the law without sympathy for anybody, the Master of the Rolls retorted "if you bring this sort of case you expose yourself to this sort of bowling," following some saturnine references to the taxing of Easter offerings as being "the gravest case of misplaced fiscal enthusiasm" and the Crown's "passion for uniformity." And when counsel, ambitious for a boundary hit, told the Court that, if successful, the Crown would not ask for costs and counsel could imagine nothing more generous than that, Birkett, L.J., replied pithily: "I can"—and for that matter, says a spectator in the *Law Journal* (England) so could all of us.

R. B. Cooke.—In an article "Venire De Novo" in the current number of the *Law Quarterly Review* (January, 1955), R. B. Cooke writes in a learned and interesting fashion upon the finding of a Departmental Committee by a majority of five members to three recommending that the Court of Criminal Appeal (in England) should not be empowered to order a new trial of a convicted person except in cases where the appeal is based on grounds of new evidence. He examines the principle to which the Committee attaches considerable weight—namely, that "it is of the essence of the administration of the criminal law in this country that justice should be swift and should be final," and he reaches the conclusion that, if *R.* v. *Neal*, [1949] 2 K.B. 590, were overruled "no formidable obstacle would seem to preclude the development of a rule that, where an appeal is based on a procedural irregularity so radical that the Court of Criminal Appeal is not prepared to hold that no substantial miscarriage of justice has actually occurred, the Court has in substance a discretion to order a new trial." The only son of Mr. Justice Cooke, the author of the article, who has spent the past four years at Cambridge has now returned to New Zealand. If he elects to practise here, his experience and erudition should add lustre to the Bar.

A Legal Benefit.—Benefit collections for lawyers are rare but not unknown. Legend has it that an attorney in Dublin, having died in great poverty, sympathisers set up a shilling subscription fund to pay the expenses of his funeral. One of the local barristers who had subscribed applied to Mr. Toler, afterwards Lord Chief Justice Norbury, expressing the hope that he also would contribute a shilling to the fund. "Only a shilling!" said Toler, "only a shilling to bury an attorney! Here is a guinea; go and bury one and twenty of them."

Afternoon Haze.—This little tale comes from Auckland where Nature provides a reasonable supply of murder cases to save practitioners from a somnolence which the humidity of its summers engenders. In this instance, however, the case centred on the exciting subject of easements and the only heat about it was atmospheric. The Judge's head nodded drowsily on several occasions, and even the ubiquitous wasps were listless and disinterested. "Would you mind repeating your last submission, Mr. Blank?" asked the Judge, "I'm afraid I wasn't listening." "I'm sorry," replied counsel in that imperturable Blanksian fashion for which he is not unknown, "but I must confess that I wasn't listening either."

OBITUARY.

Mr. C. A. Allen.

The death on April 10 of Mr. Cecil Arthur Allen, of Wellington, New Zealand Manager of Messrs. Butterworth and Co. (Australia), Ltd., removes one who, though not of the legal profession, was well and favourably known to a great many of its members.

Mr. Allen was born in 1888 at Methwold, Norfolk, England. After leaving school he studied at Peterborough College, qualified as a school teacher, and was engaged in teaching until the outbreak of war in 1914. He immediately enlisted and was posted to the 11th Royal Sussex Regiment as a private. He saw much service in France and rose to the rank of Major, which was an unusual achievement in the British regular army in those days. He was badly wounded and gassed in 1917. For his distinguished war-service, he received the Military Cross and Bar. He was selected as one of the wounded officers to lecture in support of the Liberty Loan throughout the United States, and accompanied the Balfour Mission to that country.

As a result of his war disability, Mr. Allen was advised to come to a warm climate. He joined Messrs. *Butterworth and Co., Ltd. in England and he was sent* to Australia in 1920. Some years later, he entered business on his own account. He rejoined his old firm in 1931, and came to New Zealand in 1932, as a representative of Messrs. Butterworth and Co. (Australia), Ltd., in both Islands, commencing with the introduction to practitioners of the *Public Acts of New Zealand (Reprint), 1908-1931*. His genial personality soon made him many friends.

After travelling all over the Dominion for several years, Mr. Allen returned to Australia, and represented his firm in Melbourne for some time. In 1938, he returned to New Zealand, and, in 1945, he was made Branch Manager, a position he occupied until his death. During the past ten years, Mr. Allen was associated with the publication by his firm of many New Zealand legal text-books. He is survived by his widow.

THEIR LORDSHIPS CONSIDER.

By Colonus.

Patent Infringement.—"It is important to bear in mind the different modes in which, in cases of this kind, questions of infringement arise. One mode of infringement would be a very simple and clear one; the infringer would take the whole instrument from beginning to end, and would produce a clipper made in every respect like the clipper described in the specification. About an infringement of that kind no question could arise. The second mode would be one which might occasion more difficulty. The infringer might not take the whole of the instrument here described, but he might take a certain number of parts of the instrument described; he might make an instrument which in many respects would resemble the patent instrument, but would not resemble it in all its parts. And there the question would be, either for a jury or for any tribunal which was judging of the facts of the case, whether that which was done by the alleged infringer amounted to a colourable departure from the instrument patented, and whether in what he had done he had not really taken and adopted the substance of the instrument patented . . . But, my Lords, there is a third way in which it is possible to conceive an infringement of a patent of the kind to which I have referred. In a patent claiming an entire instrument made by a consecutive number of steps, there may at the same time be what I will term as perhaps the most convenient phrase I can think of, an invention which is a subordinate integer in the larger invention . . . In that case you may have to try a farther question; you may have then to look at the patent, not merely as a patent for the whole instrument described, but as a patent which, in addition to claiming protection for the whole instrument so made, claims protection also for the subordinate invention, the subordinate integer which enters into the combination of the whole . . . In a patent of that kind the monopoly would or might be held to be granted, not only to the whole and complete thing described, but to those subordinate integers entering into the whole which I have described. But then, my Lords, the invention must be described in that way; it must be made plain to ordinary apprehension upon the ordinary rules of construction, that the patentee has had in his mind, and has intended to claim, protection for those subordinate integers; and moreover he is, as was said by the Lords Justices, at the peril of justifying those subordinate integers as themselves matters which ought properly to form the subject of a patent of invention": Lord Cairns, L.C., in *Clark* v. *Adie*, (1877) 2 App. Cas. 315, 320.

Accident:—"Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident. The smallest particle of dust swept by a storm is where it is by the operation of natural causes, which if you knew beforehand you could predict with absolute certainty that it would alight where it did. But when the Act now under construction enacted that if in any employment to which the Act applied, personal injury 'by accident' arising out of and in the course of his employment is caused to a workman his employers shall pay compensation, I think it meant that, apart from negligence of any sort—either employers or employed—the industry itself should be taxed with an obligation to indemnify the sufferer for what was an 'accident' causing damage."——*Earl of Halsbury*, L.C., in *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230, 233.