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DIVORCE: INFANT PARTIES IN DIVORCES FOUNDED ON SEPARATION AGREEMENTS.

AS more than one Judge has remarked, there is a dearth of authority as to whether an agreement for separation—if, in fact, made—can be the foundation of a petition in divorce, if one of the spouses was an infant at the time of entering into the agreement.

In *Hole* v. *Hole*, [1948] N.Z.L.R. 42 ; [1947] G.L.R. 334, in which a divorce was sought upon the ground of a separation agreement made orally, it appeared that the respondent was only eighteen or nineteen at the date of the separation. Fair, J., took the view that an infant wife could not enter into a valid separation agreement with her husband unless it was clearly proved that it was for her benefit to do so ; that, in the absence of such proof, the agreement would be void ; that an infant was not of sufficiently mature judgment to safeguard her own interests and that such an agreement was *prima facie* not beneficial ; and that much more evidence than a doubtful inference from scanty facts would be required to show that it was for the respondent's benefit. The matter stood adjourned to enable evidence to be brought, if it should be available, that it had been, in fact, clearly for the benefit of the respondent to enter into the separation agreement, and also that, if that were the case, it had been ratified on her attaining twenty-one. (There is no record of any resumption of the proceedings.)

In the course of his judgment, Fair, J., observed :

> There is, it appears, no direct authority as to an infant wife's power to enter into a separation agreement. But there are decisions in respect of employment and apprenticeship agreements which are closely analogous to the present case, and which authoritatively decide that an infant cannot, during his infancy, put an end to a contract which is for his benefit. It is beyond question that the law regards an infant as capable of entering into a marriage contract. In this respect, marriage is somewhat analogous to apprenticeship contracts. But the authorities also establish that an infant has no right to terminate a beneficial contract of this sort, unless it is clearly shown that it was for his benefit to do so. The position in the present case seems to me closely analogous to that considered in relationship to an apprenticeship agreement in *R.* v. *Great Wigston* (*Inhabitants*), (1824) 3 B. & C. 484 ; 107 E.R. 813 . . . . This decision was applied by *Horridge*, J., in *Waterman* v. *Fryer*. It seems to me to apply with even stronger force to the contract of marriage.

In the latest case, *McGurn* v. *McGurn*, to which further reference will be made, Mr. Justice Turner was unable to agree with the foregoing observations in that he did not consider a useful analogy could be drawn between contracts of marriage or of separation on the one hand, and contracts of apprenticeship or service on the other.

In *Nicholson* v. *Nicholson*, [1952] N.Z.L.R. 53 ; [1952] G.L.R. 139, the petition for divorce was based upon a written agreement for separation made at a time when the petitioner wife was only nineteen years of age, though she was twenty-three when she instituted the petition. That case is distinguishable from *Hole* v. *Hole* (*supra*), in which the petitioner had been the husband, who had sought a dissolution, relying, against his wife, on an agreement for separation entered into by her while she was an infant. Mr. Justice North was disposed to take the view that a contract to separate made by an infant was a voidable contract and not a contract void *ab initio*. He said :

> It cannot, I think, be predicated by an examination of the agreement itself that it is necessarily void. It may well be an agreement in the interests of the infant, or, at any rate, it may contain provisions beneficial to the infant which the infant may wish to enforce (*ibid.*, 54 ; 140).

After an examination of the authorities, North, J., concluded that, in his view, there was no reason why she should not invoke the agreement for separation which she had never repudiated, but that, if that were a wrong view, he was of the opinion that she had, in the circumstances of the particular case, shown that the contract was for her benefit and in her interests.

In *Bell* v. *Bell*, [1953] N.Z.L.R. 805, the wife respondent was eighteen years of age at the time of her marriage, and an oral agreement for separation was entered into about a month before she attained the age of twenty years. On being served with the petition, the respondent cabled her opposition and subsequently filed an answer denying the agreement. Subsequently, through her counsel, she sought (and was allowed) to withdraw the answer ; but, in the circumstances of the case, Mr. Justice Gresson said it was her immediate reaction to the petition which was important. His Honour held that the petitioner had failed to establish his right to a decree of dissolution, and he accordingly dismissed the petition. He based his decision upon the conclusion that there had not been, in fact, such an agreement as was alleged.

It will be observed that neither *Hole* v. *Hole*, where the matter was not finally determined, nor *Nicholson* v. *Nicholson*, where the petitioner was the wife, who, in infancy, had entered into the separation agreement, was authority applicable in *Bell's* case. The judgment in that case is valuable for the observations made by Mr. Justice Gresson as to whether an agreement for a separation entered into by a spouse who was an infant, is binding upon him or her. His Honour, at page 808, said, *obiter* :

The question arising for determination in this case must, since there is no direct authority in New Zealand or elsewhere upon the point, be decided by an application of general principles. But there is considerable confusion as to when an infant's contract is binding upon him. All the text-book writers recognize this, and the cases speak with a very uncertain voice. It would seem that the common-law principle that an infant could not bind himself in contract by reason of incapacity became somewhat whittled down; first, it became established that an infant's contract for necessaries was binding upon him but only to the extent of a reasonable price; even in this field the full capacity of an adult was not attributed to him. Subsequently, there grew up in relation to contracts of apprenticeship and of service the doctrine that the infant was bound where it was for his benefit, although even in regard to such a contract it was a matter of doubt whether he was fully liable *ex contractu*. Whether or not a contract is for the benefit of an infant has to be judged by looking at the whole contract, weighing its terms—the onerous against the beneficial—and ascertaining whether on balance it is favourable to the infant. But, even where the contract is for an infant's benefit, it is very doubtful whether it is binding on him if it is other than a contract of apprenticeship or of service. It is stated in *Cheshire and Fifoot on Law of Contract*, 3rd Ed., 333:

> The essential fact to appreciate is that for a beneficial agreement to be valid, it must either be a service or apprenticeship contract properly so called or else closely analogous to such a contract.

His Honour then referred to *Cowern* v. *Neild*, [1912] 2 K.B. 419; *Doyle* v. *White City Stadium, Ltd.*, [1935] 1 K.B. 110, which was to some extent based on *Clements* v. *London and North Western Railway Co.*, [1894] 2 Q.B. 482; and *Mercantile Union Guarantee Corporation, Ltd.* v. *Ball*, [1937] 3 All E.R. 1, in which the range of contracts into which an infant may validly enter was again considered. After citing *Stephens* v. *Dudbridge Iron Work Co.*, [1904] 1 K.B. 225, and *In re Parsons*, [1940] Ch. 973, Mr. Justice Gresson said that, in applying the principles there enunciated to the case before His Honour, it appeared to him that *prima facie* an agreement of an infant wife to separate—that and nothing more—is not for the benefit of the wife. There might be cases in which it secured for her a freedom from the society or the control of a drunken or cruel husband, or where, for other reasons, it was beneficial to become separated by agreement. But there was nothing in the case to show that the agreement was advantageous to her, and he held that it had not been established that it was for her benefit. It therefore, if in fact made, lacked validity. The learned Judge continued:

> Upon the basis that, if there were such an agreement as alleged, it was not for the respondent's benefit, the next question to consider is whether it was void or voidable. The better opinion appears to be that it would only have been voidable, not void as was at one time supposed; it seems that the use of the term "void" in the past has been a misapplication of language and that in such cases "voidable" was meant: *Chitty on Contracts*, 20th Ed. 580; *Pollock on Contracts*, 13th Ed. 47, 48. But some difficulty arises from the fact that voidable contracts fall into two classes: (*a*) those which bound the infant unless he actually repudiated them, and (*b*) those which were not binding upon him unless and until he ratified them after attaining his majority. In the first class fall contracts involving the acquisition of an interest in property of a permanent nature with continuing obligations attached to it. But the larger class comprises those not binding upon him unless he expressly ratified them on coming of age. This class appears to have included "all contracts other than those for necessaries and for his benefit and all those of a continuing character which were valid unless expressly avoided": *Chitty on Contracts*, 20th Ed. 595. But it is stated in *17 Halsbury's Laws of England*, 2nd Ed. 606, note (*n*) that voidable means valid until repudiated, not invalid until confirmed.

His Honour went on to say that if the separation agreement required express ratification, certainly there was no such ratification. He added, at page 811:

> It may be, however, that an agreement of separation made between spouses one of whom is an infant at the time is such as to become valid if, after attaining twenty-one years of age, the infant party does not repudiate it. An infant partner who does not avoid the partnership on attaining full age is as between himself and his partners completely bound by the terms upon which he entered it without any formal ratification; and an infant shareholder who does not disclaim may, after he has attained full age, be made liable for calls without any express ratification, the burden of proof being upon him to show that he repudiated the shares within a reasonable time: *Pollock on Contracts*, 13th Ed. 52. Where an infant became a party to a marriage settlement under which he took considerable benefits and nearly four years after coming of age repudiated the settlement, it was held that a contract of that nature was binding unless repudiated within a reasonable time of the attaining of majority and that he was too late: *Carter* v. *Silber*, [1892] 2 Ch. 278; *Edwards* v. *Carter*, [1893] A.C. 360. Assuming, again without deciding, that such an agreement as was here alleged was valid until disaffirmed, I think that her contract was tantamount to a repudiation. The respondent on being served with the divorce petition cabled her opposition and subsequently filed an answer denying the agreement. It is true that she subsequently, through her counsel, sought to (and was allowed to) withdraw the answer; but it is her immediate reaction to the petition which is important. It is true that the agreement was alleged to have been made in April, 1949, and that what I regard as repudiation was not until the latter part of 1952, but what is a reasonable time depends, of course, upon the particular circumstances of each case. Having regard to all the circumstances and especially to her sworn statement that the petitioner wrote to her on September 12, 1951, that he was coming to stay, I do not think the repudiation was too late, if repudiation was necessary. I think, therefore, that a decree of dissolution could not properly be based upon such an agreement of separation as is alleged in this case.

As we have already said, His Honour dismissed the petition on another ground,—namely, that the petitioner had not proved that, in fact, there had been any agreement for separation as alleged.

The latest of these cases, *McGurn* v. *McGurn* (to be reported) was a husband's petition for divorce, which came before Mr. Justice Turner as an undefended suit. The grounds of the petition were that the petitioner and the respondent were parties to a written agreement for separation dated July 10, 1951. The parties were married in Wellington on November 23, 1950. The marriage certificate showed that, at the date of the marriage, the husband was twenty-one years of age and the wife was sixteen. She reached the age of seventeen on January 7, 1951; and was, therefore, only seventeen years old when the agreement for separation was executed. At the date when the petition was presented, she was twenty years of age; and she reached the age of twenty-one on January 7, 1955, *i.e.*, after being served with the petition, but before the date of the hearing.

When the petitioner had given evidence of the agreement and of the continuance of the separation, His Honour raised the question of the validity of the agreement, and mentioned the three New Zealand cases which had been before the Courts in recent years on somewhat similar facts: *Hole* v. *Hole* (*supra*), *Nicholson* v. *Nicholson* (*supra*), and *Bell* v. *Bell* (*supra*). (To these may be added *Blair* v. *Blair*, [1952] N.Z.L.R. 662, which had an inconclusive ending.) The petition was consequently adjourned to enable counsel for the petitioner to make submissions in writing.

In the memorandum which was later lodged, counsel made full and detailed submissions on the matters of principle involved. His main contention was that, notwithstanding the New Zealand decisions mentioned above, the agreement, even if not enforceable against the respondent-wife because of her infancy, was "in full force" until and unless repudiated by her; and that the words "in full force" mean simply "implemented by actual separation."

Mr. Justice Turner, in an interim judgment, said he was not prepared to accept that submission, and he continued :

> I propose to follow the decision of North, J., in *Nicholson* v. *Nicholson* (*supra*). I respectfully agree with that learned Judge that an agreement such as the one now under consideration is voidable at the instance of respondent upon reaching twenty-one years of age, or within a reasonable time thereafter. This appears to have been the view accepted also by Gresson, J., in *Bell* v. *Bell* (*supra*), at p. 811 ; though it must be admitted that the remarks made by Gresson, J., on this subject appear to be *obiter dicta*. I am of the opinion that, in the present case, as in *Nicholson* v. *Nicholson*, the agreement left the respondent in the position, up till the time when she attained the age of twenty-one years on January 7, 1955, and for a reasonable time thereafter, of being able to repudiate. I should add that I am in further agreement with North, J., that no question of ratification appears to me capable of arising in considering this case.

In these circumstances, His Honour held that petitioner could not succeed on the petition, since the agreement was one which could still, at the date when the petition was presented, have been repudiated by respondent. His Honour went on to say :

> I do not decide, any more than did North, J., and I do not need to decide, whether the petitioner could have succeeded on the facts proved, if a new petition were presented by him now, or at a later stage, alleging an agreement not repudiated by respondent, and submitting therefore that such agreement was in force and had been in force for the requisite period. It appears to me to be fatal to the present petition that at the date when it was presented there was still time for respondent to repudiate. To hold otherwise, would be to say that an infant wife's right to repudiate an agreement to separate on reaching the age of twenty-one years could be defeated by reason of a petition in divorce having been presented against her before she attained her majority.

Having decided that the petitioner could not succeed on the present petition, the learned Judge had to consider an application by the respondent, lodged immediately after the evidence had been taken, for leave to file an answer claiming relief—namely, a divorce—on the same grounds as were alleged in the petition. This application was lodged after it had become apparent that the Court regarded the three New Zealand decisions above referred to as a possible serious obstacle to the granting of a decree to petitioner. He said, on this point :

> It will be realized that at the date when petitioner's evidence was heard—March 2, 1955—the respondent had reached twenty-one years of age. In this case, the respondent has already filed a memorandum of address for service, but no answer. Rule 20 of the Matrimonial Causes Rules, 1943, implies that a respondent who has filed no answer may in a proper case be allowed extended time in which to do so ; an answer may conclude with a prayer for relief : s. 20 and R. 22. I have been in some doubt whether in this case the application is not made too late ; but, in view of the fact that the matter has been treated as part-heard pending the submission of legal argument, I think that I can still allow it as being (but only just) in time.

His Honour made an order extending the time within which respondent might file an answer to the petition.

In a later oral judgment, Mr. Justice Turner, after hearing the evidence adduced on behalf of the respondent, said he was prepared to grant a decree *nisi* on the prayer in her answer. He continued :

> *Nicholson* v. *Nicholson*, [1952] N.Z.L.R. 53, is a clear authority for this course. In that case, North, J., was able to base his decision on a finding that the agreement was shown in any case to be for the benefit of the infant petitioner. No evidence was placed before me directed specifically to this point ; but I have come to the conclusion, as did North, J., that benefit to the infant is an irrelevant consideration here. It may be fatal to the enforcement of an infant's contract against him if it is positively shown that the contract, taken as a whole, is prejudicial to the interests of the infant : *17 Halsbury's Laws of England*, 2nd Ed., 605, 606 ; but if this does not appear, then it would seem that the only types of contract in which benefit to the infant is a relevant consideration to be positively proved are contracts for necessaries and contracts for apprenticeship and service, or closely related to the latter (*e.g.*, see *Doyle* v. *White City Stadium, Ltd.*, [1935] 1 K.B. 110). In these types of contract, if the agreement is found to be for the infant's benefit, it is binding upon both parties and is not voidable by the infant. Contracts to which infants are parties which fall outside this class, and which are, moreover, neither necessarily prejudicial to the infant nor made void by statute, appear to be voidable at the instance of the infant on attaining the age of twenty-one years or within a reasonable time thereafter.

His Honour said that a typical statement of the law in this regard may be taken from the judgment of Buckley, L.J., in *Nash* v. *Inman*, [1908] 2 K.B. 1, 11, where His Lordship said :

> The action is brought in contract. I understand the law before 1874 to have been this : an infant could contract, and under some circumstances the infant could enforce the contract, although it could not be enforced against him—*e.g.*, *Farnham* v. *Atkins*. At common law, irrespective of statute, the contracts of an infant were voidable except such as were necessarily to his prejudice ; these last were void. Speaking generally, the consequence of the infant's contract was that inasmuch as he was an infant the contract (with the exception of certain contracts) could not during infancy be enforced against him, but when he came to majority he might, if he pleased, ratify and confirm it, and if he did so both parties were bound. The obligation was in contract, but contract of such a kind that as against the infant at any rate it could not be enforced. It was a voidable contract. In that state of things the Act of 1874 was passed. That Act relates to certain contracts and renders them for the first time void. *The classes of contract which are not referred to in the Act remain as they were before.*

Mr. Justice Turner went on to say that the classes of contract referred to in the Infants Relief Act, 1874 (37 and 38 Vict., c. 62), were, of course, the same as those set out in s. 12 of the Infants Act, 1908. Reference may also be made to *Holt* v. *Clarencieux* (*Ward*), (1732) 2 Stra. 937 ; 93 E.R. 954 ; *Keane* v. *Boycott*, (1795) 2 H. Bl. 511, 515 ; 126 E.R. 676, 678 ; and *Martin* v. *Gale*, (1876) 4 Ch. D. 428, 431. Continuing, he said :

> With the greatest respect for the observations of Fair, J., in *Hole* v. *Hole*, [1948] N.Z.L.R. 42, I find myself unable to agree, after considering the matter carefully, that a useful analogy can be drawn between contracts of marriage or of separation on the one hand and contracts of apprenticeship or service on the other ; and I am, therefore, content to regard benefit to the infant as an irrelevant consideration in the present case, unless from all the circumstances it positively appears that the separation agreement taken as a whole is prejudicial to the infant's interests. I do not find prejudice shown in this case.

His Honour accordingly found the separation agreement proved, and not repudiated ; and that, ten months after attaining twenty-one years of age, the respondent had elected to rely upon it as the foundation of a prayer for divorce. He found that the agreement had been in full force for three years ; and, in those circumstances, that the respondent was entitled to a decree on the prayer contained in her answer. He had already decided that there could be no decree on the prayer in the petition.

It would appear that, as Mr. Justice Gresson observed in *Bell* v. *Bell*, each divorce suit of this kind must be decided by the application of general principles. The Court, however, will require proof that the infant party to the separation deed, if the divorce suit is brought against him or her, has repudiated the agreement—which is voidable—on attaining the age of twenty-one years or within a reasonable time thereafter. What is a reasonable time depends upon the particular circumstances of each case.

SUMMARY OF RECENT LAW.

CROWN PROCEEDINGS.

Tort—Act of Member of Armed Forces on Duty causing Death of Another Such Member—Exemption of Crown from Liability—Crown Proceedings Act, 1947 (10 & 11 Geo. 6 c. 44), s. 10 (1). (*Crown Proceedings Act, 1950, s. 9 (1)*). The plaintiff's son, while on duty as a member of the armed forces of the Crown, viz., a Class Z reserv ist attached to a territorial battalion, and while taking part in a military exercise, was killed by the bursting of a shell fired by other members of the armed forces who were also on duty. The plaintiff, as administrator of the son's estate, brought an action under the Fatal Accidents Acts, 1846 and 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the War Office claiming damages for negligence causing the death of his son. The Minister of Pensions issued a certificate certifying that the son's death would be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant. Subsequently the Minister decided that no award of pension or compensation should be made to the plaintiff. The defendants relied on the Crown Proceedings Act, 1947, s. 10 (1), which provided in effect that nothing done by a member of the armed forces on duty should subject the Crown to liability in tort for causing the death of another member of the armed forces, also on duty, if the Minister of Pensions certified that the injury suffered would be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant. *Held*, Although the issue of the certificate by the Minister had been followed by the refusal of any award under the Royal Warrant, the conditions of s. 10 (1) of the Crown Proceedings Act, 1947, were satisfied, and the defendants were exempt from liability in tort. *Adams* v. *War Office.* [1955] 3 All E.R. 245 (Q.B.D.).

DAMAGES.

Personal Injuries—Measure of Damages—Loss of Earnings—Deduction of Industrial-injury Benefits—Plaintiff away from Work for One Year—Benefits received on Basis that Incapacity throughout Whole Period attributable to Industrial Injury—Finding by Court that Period of Incapacity attributable to Injury less than that for which Benefits paid—Amount to be "taken into account"—Law Reform (Personal Injuries) Act, 1948 (11 & 12 Geo. 6, c. 41), s. 2 (1). On April 29, 1953, the plaintiff, who was employed by the defendants, was injured in an accident in the course of his employment. He was struck on the legs above and below the knee by the sling of a travelling crane. His injuries consisted of bruising of the legs and shock. His recovery was delayed by the development of tumours in his knees and by his mental state. He did not resume work until May 1, 1954. An insurance officer appointed under the National Insurance (Industrial Injuries) Act, 1946, assessed the benefits to which the plaintiff was entitled under the Act on the basis that the plaintiff's incapacity for work throughout the whole period was attributable to the accident, and the plaintiff was paid injury benefit at the rate of £4 7s. a week until August 30, 1953, and at the rate of £3 5s. 6d. a week until about the end of October, 1953. From then until February 20, 1954, he received sickness benefit at the rate of £2 3s. a week, and thereafter he received certain lump sums as disablement gratuities. In an action against the defendants for damages for personal injuries sustained by the plaintiff, the Court found that the defendants were guilty of negligence; that the period of incapacity attributable to the accident was only three or four weeks; and that the plaintiff's inability to work during the remainder of the period until May 1, 1954, was attributable to causes which were not the result of the accident. The plaintiff's loss of earnings for the period of four weeks amounted to £68. At the date of the judgment the total sums received by him as industrial injury benefit and disablement benefit were more than £136, and he was in receipt of a small disablement pension. The Court awarded him £25 as general damages. On the question whether any sum should be awarded as special damages for loss of earnings in view of the provisions of s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948, by which in assessing such damages one-half of the value of any rights which had accrued or probably would accrue to the plaintiff from the injuries in respect of industrial injury benefit, industrial disablement benefit or sickness benefit had to be taken into account against loss of earnings, *Held*, The value of the rights to be set under s. 2 (1) of the Act of 1948, against loss of earnings was the total of the sums paid or likely to be payable in fact in accordance with the National Insurance (Industrial Injuries) Act, 1946 (*i. e.*, in effect, in accordance with the decision of the insurance officer under that Act), for the blows which constituted the accident, and the words "taken into account" in s. 2 (1) of the Act of 1948 did not confer on the Court any discretion to evaluate the amount so to be set against loss of earnings; therefore, as one-half of the benefits which the plaintiff had already received as industrial injury or disablement benefit was more than his loss of earnings for the four weeks during which he was away from work as a result of the injuries, he was not entitled to any sum as special damages for loss of earnings. (*Stott* v. *Sir William Arrol & Co., Ltd.*, [1953] 2 All E.R. 416, considered.) *Per Curiam*: sickness benefit, being payable in respect of a day of incapacity for work forming part of a period of interruption of employment, may be payable when there has been no injury; and accordingly the question is left open whether the incapacity, which is the source of sickness benefit, is caused by the injury. This is a point which the Court must itself decide—for the purpose of its determination [of the damages]. *Flowers* v. *George Wimpey and Co., Ltd.* [1955] 3 All E.R. 165. [Q.B.D.]

DIVORCE AND MATRIMONIAL CAUSES.

Agreement between Spouses, in Settlement of Action brought by Wife against Husband for Moneys due to her, containing Agreement by Her to pay Husband Annuity for Life and Agreement for Separation—Parties subsequently Divorced—Application by Former Wife for Variation by Cancellation of Financial Provisions—Power to vary only where Continuance of Settlement rendered Unjust by Divorce or Conduct occasioning Divorce—Circumstances to be considered—Principles applicable—Variation not ordered—Divorce and Matrimonial Causes Act, 1928, s. 37—Practice—Appeals to Court of Appeal—Power to overrule Previous Decisions of that Court—Whether Desirability of maintaining Uniform State of Law throughout Commonwealth justifies Extension of Principles enunciated by the English Court of Appeal in Respect of Applications for Variation, after Divorce, of Settlements between Spouses. On December, 5, 1945, the wife began proceedings against her husband in which she claimed judgment for £809 8s. 4d. allegedly owing by him to her. The husband denied his indebtedness and counterclaimed for £1,010. The action was settled by agreement on February 7, 1946. On February 7, 1946, by the terms of the settlement, the husband agreed to transfer to his wife two properties and to abandon his counterclaim. In return, the wife undertook to pay to her husband £4 per week free of tax during his lifetime; and the parties further agreed from then on to live separate and apart. The marriage was later dissolved, on the wife's petition, on the ground that the separation had been in full force for not less than three years. The financial position of the wife was satisfactory and she enjoyed a substantial income. On the other hand, her former husband, who was several years older, was without any real means, was in ill-health, and by reason of his increasing age and infirmities, was unable to undertake regular or profitable work. On an application by the former wife, Gresson, J., made an order cancelling the settlement contained in the agreement dated February 7, 1946 ([1955] N.Z.L.R. 295). The former husband appealed. *Held*, by the Court of Appeal, 1. That (assuming in favour of the respondents, but without deciding, that the agreement of February 7, 1946, was a post-nuptial settlement), there were no circumstances, which, in accordance with the test laid down in *Coutts* v. *Coutts*, [1948] N.Z.L.R. 591; [1948] G.L.R. 147, could justify the conclusion that the continuance unvaried of the settlement had been rendered unjust by the divorce or the conduct which occasioned it. (*Coutts* v. *Coutts*, [1948] N.Z.L.R. 591; [1948] G.L.R. 147, followed.) 2. That, further, there were no grounds which would justify a variation of the terms of the settlement, even if it were permissible to disregard *Coutts* v. *Coutts* and deal with the matter in accordance with the principles laid down by the English Court of Appeal. (*Tomkins* v. *Tomkins*, [1948] P. 170; [1948] 1 All E.R. 237, *Johnson* v. *Johnson*, [1950] P. 23; [1949] 2 All E.R. 247, and *Jeffrey* v, *Jeffrey* (*No. 2*), [1952] P. 122; [1952] 1 All E.R. 790, referred to.) *Semble*, That it may be necessary on some future occasion for the Court of Appeal authoritatively to determine whether the Court of Appeal in New Zealand, in considering whether it is bound by its own previous decisions, should regard itself as governed exclusively by the principles laid down in *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] K.B. 718; [1944] 2 All E.R. 293: see *In re Rayner, Daniell* v. *Rayner*, [1948] N.Z.L.R. 455, or whether, on the other hand, the desirability of maintaining a uniform state of the law throughout the Commonwealth justifies some extension of the grounds open for consideration in New Zealand, so that applications for variations, after divorce, of statements, under the Divorce and Matrimonial Causes Act, 1928, may be dealt with on the same footing as similar applications are dealt

LEGAL ANNOUNCEMENTS.

Continued from page i.

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with in England. (*Waghorn* v. *Waghorn*, (1942) 65 C.L.R. 289, *Nadarajan Chettiar* v. *Walauwa Mahatmee*, [1950] A.C. 481, and *Union Steam Ship Co. of New Zealand, Ltd.* v. *Ramstad*, [1950] N.Z.L.R. 716, referred to.) Appeal from the judgment of Gresson, J., [1955] N.Z.L.R. 295, allowed. *Preston and Another* v. *Preston*. (C.A. Wellington. September 6, 1955. Finlay, Cooke, North, Turner, JJ.)

Nullity for Duress. *105 Law Journal*, 520.

Seven Years' Separation—Desertion by Petitioner Proved—Such Desertion not Automatic Bar to Grant of Decree—One of Matters for Consideration in Relation to Exercise of Discretion—"Reconciled"—Divorce and Matrimonial Causes Act, 1928, ss. 10 (jj), *18.* A prerequisite of reconciliation for the purposes of s. 10 (*jj*) of the Divorce and Matrimonial Causes Act, 1928, (added by s. 7 (1) of the Divorce and Matrimonial Causes Act, 1953), must be that the parties mutually consent to live together again. (*McRostie* v. *McRostie*, [1955] N.Z.L.R. 631, followed.) The policy of the Legislature in enacting s. 10 (*jj*) was to provide that, where a husband and wife, in fact, have been living apart for a period of seven years and are unlikely to be reconciled, the marriage has in reality come to an end; it is not in the interests of public policy that a husband and wife in such circumstances should be required to retain the marriage status. (*Crewes* v. *Crewes*, [1954] N.Z.L.R. 1116, followed.) Desertion by the petitioner is not an automatic bar to the granting of a decree on the grounds set out in s. 10 (*jj*), such desertion by the petitioner being merely one of the matters to be considered in relation to the exercise by the Court of its discretion under s. 18. (*Crewes* v. *Crewes*, [1954] N.Z.L.R. 1116, applied.) *Adams* v. *Adams*. (S.C. Christchurch. May 16, 1955. McGregor, J.)

Termination of Desertion. *105 Law Journal*, 503.

EVIDENCE.

Standards of Proof, (G. H. L. Fridman). *33 Canadian Bar Review*, 665.

EXECUTORS AND ADMINISTRATORS.

Payment of Legacies on Partial Intestacy. *105 Law Journal*, 547.

FACTORIES.

Dangerous Machinery—Transmission Machinery—Machinery Nine Feet above Ground—Duty to Fence—Contributory Negligence—Employee performing Act in defiance of Established Practice—Apportionment of Liability—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 13 (1), (cf. Machinery Act, 1950, s. 16 (1)). The plaintiff was employed by the defendants in their factory to operate a machine driven by electric power known as a wheelabrator. On one side of the machine was a bucket which the plaintiff filled with metal castings; when he had switched on the power, the bucket was lifted and conveyed along wire ropes running over pulleys. These ropes and pulleys were nine feet above ground level and were not fenced. Occasionally the wire ropes came off the pulleys and the machine stopped. The established practice of the factory was that such a stoppage was reported to the foreman and the matter was remedied by the fitter-mechanics; it was no part of the plaintiff's duty to remedy the matter himself. The plaintiff knew the established practice. One day such a stoppage occurred and the plaintiff duly reported it, but in defiance of the practice himself endeavoured to remedy the matter in the brief interval before the fitter-mechanics arrived. He did not switch off the electric power but climbed to the machine and, while he was trying to replace the ropes on the pulleys, the machine began to move and his hand was caught and seriously injured. In an action for damages for breach of statutory duty under s. 13 (1) of the Factories Act, 1937, which provides that every part of transmission machinery shall be "securely fenced unless it is in such a position . . . as to be as safe to every person . . . working on the premises as it would be if securely fenced", *Held*, 1. The position of the transmission machinery nine feet above the ground did not make it as safe as it would have been if securely fenced; the defendants were, therefore, in breach of their duty under s. 13 (1) of the Factories Act, 1937, and since, if the machinery had been fenced, the accident would not have happened, the defendants were liable in damages for breach of statutory duty. 2. Although the defendants were in breach of their statutory duty yet, since the plaintiff had acted negligently and in defiance of the established practice of the factory, doing something which he knew it was not his business to do, he should bear ninety per cent. of the responsibility for the accident and the defendants should bear only ten per cent., and the damages recoverable by the plaintiff would be reduced accordingly. (*Williams* v. *Sykes and Harrison, Ltd.*, [1955] 3 All E.R. 225, considered.) Appeal allowed on the apportionment of responsibility for the accident; decision of Havers, J., on the question of liability for breach of statutory duty affirmed. *Hodkinson* v. *Henry Wallwork & Co., Ltd.*, [1955] 3 All E.R. 236 (C.A.)

Dangerous Machinery—Unfenced Nip between Conveyor Belt and Roller—Employee cleaning Machine in motion—Contributory Negligence—Causation—Apportionment of Liability—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 14 (1) (cf. Factories Act, 1946, s. 41 (4))—Law Reform (Contributory Negligence) Act, 1945 (8 & 9 Geo. 6, c. 28), s. 1 (1) (cf. Contributory Negligence Act, 1947, s. 3(1)). The plaintiff was employed by the defendants in their foundry to operate and clean a sand preparation plant. Part of the plant, which was driven by electric power, consisted of a conveyor belt which carried the sand up to and over a head-roller to a suction fan. This part of the plant, which was unfenced, was cleaned daily. The cleaning was done when the plant was stationary, and had never been done when the plant was in motion. One day, when work on the plant had ceased, the plaintiff switched on the power and started to clean the head-roller while it was revolving. His hand was caught in the nip between the roller and the belt and he suffered injuries. It was impossible on the evidence to tell what might have happened if the machinery had been securely fenced, whether, *e.g.*, the presence of a guard would have deterred the plaintiff from acting as he did or whether he would have removed a guard. In an action for damages for breach of statutory duty under s. 14 (1) of the Factories Act, 1937, *Held*, 1. The roller was a dangerous part of machinery because danger might reasonably be anticipated from use of the machinery while the roller was unfenced (dictum of Wills, J., in *Hindle* v. *Birtwistle*, [1897] 1 Q.B. 192, 195 applied), and the defendants were, therefore, in breach of their duty under s. 14 (1) of the Factories Act, 1937. 2. As it was not shown that, if the machinery had been securely fenced, the accident would not have happened, and as the plaintiff's injury was of a kind which s. 14 of the Factories Act, 1937, was designed to prevent, the defendants' breach of statutory duty was in part the cause of the accident, and accordingly they were liable to the plaintiff in damages; but, since the plaintiff's negligence was also a cause of the accident, the responsibility for the accident would be apportioned, the fair apportionment being in the circumstances one-fifth to the defendants and four-fifths to the plaintiff, and the damages recoverable by the plaintiff would be reduced accordingly. (Dictum of Lord Goddard, C.J., in *Roberts* v. *Dorman Long & Co., Ltd.*, [1953] 2 All E.R. 428, 432, applied); (*Stapley* v. *Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478, followed.) Appeal allowed on the apportionment of responsibility; decision of Oliver, J., affirmed on the question of liability for breach of statutory duty. *Williams* v. *Sykes and Harrison, Ltd.*, [1955] 3 All E.R. 225 (C.A.)

Safe Means of Access. *99 Solicitors' Journal*, 589.

Ventilation—Boiler Room with Furnace—Fumes—Employee suffocated—Whether Boiler Room a Workroom—Factories Act, 1937, (1 Edw. 8 & 1 Geo. 6, c. 67), s. 4 (1), s. 47 (1) (cf. Factories Act, 1946, s. 56). The deceased was employed as a lorry driver by the defendants in whose factory premises there was a boiler room containing a coke furnace and boiler which provided hot water for central heating. The furnace and boiler had been in the premises for twenty-five years without any accident occurring. On a Saturday in January, 1952, the man in charge of the boiler room stoked the furnace shortly before work ceased at 4 p.m. He left the furnace door closed and, in accordance with the usual practice, the door of the boiler room wide open. This open door together with a flue on the furnace provided the boiler room with some ventilation. Early the following morning the deceased was found dead in the boiler room the cause of death being suffocation from inhaling carbon monoxide fumes. The furnace-door was found to be open and the boiler room door half shut. It was no part of the deceased's duty to enter the boiler room or to attend to the furnace. In an action for damages under the Fatal Accidents Acts, the deceased's widow alleged that the defendants were in breach of their duty under s. 4 (1) and s. 47 (1) of the Factories Act, 1937, and were negligent at common law. *Held*, 1. The boiler room was not a workroom nor were the fumes generated in the course of any process carried on, within the meaning of s. 4 (1) and s. 47 (1) of the Act; therefore those sections were not applicable to the case and there was no breach of statutory duty on the part of the defendants.

2. Negligence on the part of the defendants had not been established, since the accident had been caused by the deceased's interfering with the furnace which was shown by the defendants to have operated without accident for twenty-five years and which he had no right to touch. Appeal dismissed. *Brophy* v. *J. C. Bradfield & Co., Ltd.* [1955] 3 All E.R. 286 (C.A.)

FAMILY PROTECTION.

Unmarried Daughter—Daughter living with Married Man—Physically incapable of maintaining Herself—Whether Father under Moral Obligation towards Her—Inheritance (Family Provision) Act, 1938 (1 & 2 Geo. 6, c. 45), s. 1 (1) (b). *(Family Protection Act, 1955, ss. 3* (a), *4 (1)).* The applicant, who was a daughter of the testator and was now sixty-nine years of age and by reason of physical disability was incapable of maintaining herself, had lived with him at his home until 1911 when she left to set up a permanent home with P. who was, at all material times, a married man. The applicant never married. After she left home she and the testator were estranged, but subsequently a reconciliation was effected and on occasions she went to stay with him and looked after him when he was ill. The testator, having made a will dated May 2, 1951, in which he made no provision for the applicant, died on August 24, 1953. The applicant applied to the Court for reasonable provision to be made for her maintenance under s. 1 (1) (*b*) of the Inheritance (Family Provision) Act, 1938. *Held,* From the time when the applicant left her father's home to set up a permanent home with P. the testator ceased to be under any moral obligation to maintain her or to provide for her by will notwithstanding that she and P. were never married; the Court therefore refused her application. *Re Andrews (deceased). Andrews* v. *Smorfitt and Another.* [1955] 3 All E.R. 247 (Chan. D.)

FOOD AND DRUGS.

Sale of unsound Food—Piece of Metal in Bun—Bun not unfit for Human Consumption—Whether Food not of the Nature, Substance or Quality demanded—Food and Drugs Act, 1938 (1 & 2 Geo. 6, c. 56), s. 3 (1), s. 9. The appellants sold from their shop in Battersea four chocolate cream buns one of which contained a small piece of metal. They were convicted under s. 9 of the Food and Drugs Act, 1938, of having sold food that was intended for, but was unfit for, human consumption. On appeal, *Held,* The presence of the small piece of metal did not render the food "unfit for human consumption" within s. 9 (1) of the Food and Drugs Act, 1938. Per Glyn-Jones, J.: the offence should have been dealt with under s. 3 of the Food and Drugs Act, 1938. Appeal allowed. *J. Miller, Ltd.* v. *Battersea Borough Council.* [1955] 3 All E.R. 279 (Q.B.D.)

HIRE-PURCHASE.

Hire-purchase Problems. *105 Law Journal,* 499.

HUSBAND AND WIFE.

The Rights of a Deserted Wife in the Matrimonial Home. *220 Law Times,* 118, 132.

INCORPORATED SOCIETY.

Domestic Tribunal—Court's Jurisdiction to examine Decision of Domestic Tribunal where Question of Law involved—Interpretation of Rules of Racing such a Question—Rules as to Disqualification of Horse to which Drug or Stimulant affecting Its Speed or Stamina administered—Rules Clear and Unambiguous, and Not Unreasonable—Domestic Tribunal's Correct Interpretation thereof. The Supreme Court has jurisdiction to examine a decision of a domestic tribunal (here, the Auckland District Committee constituted pursuant to the New Zealand Rules of Racing, or the Appeal Judges appointed by the President of the New Zealand Racing Conference pursuant to those Rules), which involves a question of law, including one of the proper construction of rules forming part of a contract between the litigants; and the Court can, and should, interfere and give relief if it is established that the domestic tribunal arrived at its decision only by misconstruing such rules. (*Lee* v. *Showmen's Guild of Great Britain,* [1952] 2 Q.B. 329; [1952] 1 All E.R. 1175, followed.) (*Baker* v. *Jones,* [1954] 1 W.L.R. 1005; [1954] 2 All E.R. 553, referred to.) Rules 103 (7) and 103 (8) of the New Zealand Rules of Racing provided as follows: "(7) Any horse which has been brought to any racecourse and which is found by the Committee of the Club or the Stewards to have had administered to it any drug, stimulant or depressant capable of affecting its speed, stamina, courage or conduct may be disqualified for any race in which it has started on that day." "(8) When a horse which has been brought to any racecourse for the purpose of engaging in any race is found by the Committee of the Club or the Stewards to have had administered to it any drug, stimulant or depressant capable of affecting its speed, stamina, courage, or conduct, the Trainer and any other person who in the opinion of the Committee of the Club or the Stewards was in charge of such horse at any relevant time may be disqualified, suspended or fined in a sum not exceeding £100 by the Committee of the Club or the Stewards as the case may be, unless he satisfy them that he had taken all proper precautions to prevent the administration of such drug, stimulant or depressant." The plaintiff was the lessee of the race-horse Bright Gem, and, for the purposes of the Rules of Racing, was deemed to be its owner. He was also the holder of a trainer's licence issued under the Rules. His entry for a race of the first defendant's race-meeting was accepted, and the horse was the first horse to pass the winning-post in that race. Tests made after the race by the appropriate officials revealed the presence of strychnine in a specimen of urine obtained from Bright Gem. The plaintiff was charged under Rule 103 (8) of the Rules of Racing, and also with having committed a corrupt practice under Rule 338 (1) (*o*) of those Rules. The charges were preferred before the Auckland District Committee, which, under the Rules, had initial jurisdiction to consider them. The plaintiff was found guilty under Rule 103 (8) only, and he was disqualified for twelve months. The horse was disqualified for the race under Rule 103 (7). The plaintiff appealed from that decision, and the Appeal Judges appointed by the President of the Racing Conference pursuant to the Rules, dismissed the appeal. The plaintiff claimed a declaration that the District Committee (the second defendants) had failed to construe correctly Rules 103 (7) and 103 (8), and that the Appeal Judges (the third defendants) had acted without jurisdiction in that their finding was based on a wrong interpretation of those Rules. (All parties were bound by the New Zealand Rules of Racing.) *Held,* 1. That the meaning of each of Rules 103 (7) and 103 (8) was plain and unambiguous, as, upon its grammatical construction, whereby the word "capable" qualified the words "drug or stimulant", it was the nature or quality of the drug or stimulant found to have been administered, and not the quantity of such drug or stimulant, which had, in fact, been administered, that was struck at by the Rule; and, consequently, each Rule plainly provided for certain consequences in certain circumstances, if it was found (by the person or persons designated by the Rules) that a horse had had administered to it (in any quantity, large or small) any drug or stimulant which was of such a nature that it possessed qualities which gave it the power of affecting the speed, stamina, or courage of the horse. (*R.* v. *Hennah,* (1877) 13 Cox C.C. 547, and *R.* v. *Cramp,* (1880) 5 Q.B.D. 307, distinguished.) 2. That the entry of a horse in a race was the result of a voluntary act on the part of its owner, and a Rule, which, in effect, forbade the bringing on to a racecourse of a horse which had in its body any trace of a drug or stimulant belonging to the class of drug or stimulant which is capable of affecting the horse's speed, stamina, or courage, was not unreasonable within the principle enunciated in *Kruse* v. *Johnson,* [1898] 2 Q.B. 91, and the line of cases which follow it. *Quaere,* Whether the principle that a rule which is unreasonable is void can have any application to the rules of a voluntary association (such as the New Zealand Racing Conference, even at the suit of a licensed trainer) in the same manner as it is applicable to the by-laws of local and public authorities (*Bonsor* v. *Musicians' Union,* [1954] 1 Ch. 479; [1954] 1 All E.R. 822, referred to.) *Tucker* v. *Auckland Racing Club and Others.* (S.C. Auckland. September 30, 1955. Shorland, J.)

INFANTS AND CHILDREN.

Accidents to Children. *99 Solicitors' Journal,* 569.

LANDLORD AND TENANT.

Unreasonable Withholding of Consent to Assignment. *105 Law Journal,* 518.

NEGLIGENCE.

Children—Negligence—Allurement—Nature of an Allurement—Hole in the Ground not of itself an Allurement—Child Trespasser injured by falling into Pit. Perry v. *Thomas Wrigley, Ltd. and Others,* [1955] 3 All E.R. 243 (Man. Assiz.) (*n*).

NUISANCE.

Encroaching Tree Roots: The Poplar Peril. *105 Law Journal,* 351.

ANNULMENT OF FOREIGN MARRIAGES AND RECOGNITION OF FOREIGN DIVORCES.

By B. D. Inglis, B.A., LL.M.

Sections 10B and 12A of the Divorce and Matrimonial Causes Act 1928[1] came into force on January 1, 1954, and it may have been hoped that the difficult questions surrounding the Supreme Court's jurisdiction to entertain petitions for nullity of foreign marriages[2] and the recognition by the Court of foreign decrees of divorce[3] would thereafter cease to trouble practitioners. Indeed, both sections go a long way towards achieving this result[4]; but certain difficulties still remain, especially in regard to section 10B, and it is the purpose of this article to point out these difficulties and to examine the effect both sections have on the previous law[5].

I. Section 10B.

Section 10B (1) would appear to contain an exhaustive definition of the Court's jurisdiction in nullity suits[6], and subss. (2) and (3) would appear to state the exclusive grounds on which a marriage shall be respectively void *ab initio* (whether or not a decree for nullity has been granted) and voidable[7].

The section presents no difficulty in cases where the marriage has been celebrated in New Zealand or overseas between parties domiciled in New Zealand at the time of the marriage[8]; but the position is otherwise, it would seem, in many cases where the parties were married in New Zealand but domiciled overseas at the time of the ceremony[9], or were married overseas and domiciled overseas at the time of the ceremony. Two examples will serve to illustrate the difficulties in these latter cases:—

1. A and B are Portuguese subjects, domiciled in Portugal. They are first cousins, and by the law of Portugal incapable of contracting marriage by reason of consanguinity. Any marriage between parties so related is by the law of Portugal held to be incestuous, and therefore null and void. Both A and B come to New Zealand, and marry here while they still retain their Portuguese domicil.

2. A and B, French subjects domiciled in France, are married in France, but according to French law the marriage is voidable at the suit of either party because B, being under the age of 22, has not obtained her parents' consent to the marriage; but no proceedings may be brought to annul the marriage after the expiration of three years from the date of the ceremony on this particular ground. Two years after the ceremony A deserts B, and acquires a New Zealand domicil. B goes to live in Australia. A forms an attachment with C, and desires to take proceedings in New Zealand to have his marriage with B annulled.

In Example 1, if A and B or either of them acquires a New Zealand domicil there is no doubt that subs. (1) is complied with. The main difficulty, however, arises in regard to subs. (2). Neither party was at the time of the marriage already married[10]; there was no absence of consent[11]; first cousins are not within the prohibited degrees within the meaning of s. 9 of the Marriage Amendment Act 1946[12]; and the marriage was solemnized in due form[13]. Yet the marriage is, by the law of the parties' domicil at the time of the ceremony, void for want of capacity; and it is quite clear that, if the common law applied, a decree for nullity would undoubtedly be granted[14].

Similarly, in Example 2, there is no doubt that subs. (1) applies: but there is no question of non-consummation[15]; neither party was at the time of the marriage a "mentally defective person" within the meaning of the Mental Defectives Act 1911[16]; the respondent was not at the time of the marriage suffering from venereal disease in a communicable form[17]; and the respondent was not at the time of the marriage pregnant by some person other than the petitioner[18].

In circumstances such as those shown in the above illustrations, is it then the position that the Court cannot entertain a petition for nullity? Such a position would appear to be anomalous in the extreme.

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1. As enacted by the Divorce and Matrimonial Causes Amendment Act 1953, ss. 3 and 10 respectively.

2. See *Dicey's Conflict of Laws*, 6th Ed. (1949), 245 ff. *Sim's Divorce Law and Practice in New Zealand*, 5th Ed., 85.

3. At common law marriages purporting to have been dissolved overseas could be recognized in New Zealand as having been effectively dissolved only if they had been dissolved by the Courts of the husband's domicil: *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517: or, if dissolved by the Courts of some other country, that the decree would be recognized as effective by the Courts of the husband's domicil: *Armitage* v. *The Attorney-General*, [1906] P. 135.

4. Although s. 12A, as will be pointed out later (*post*, p. 345), goes further than was probably intended.

5. For a more detailed discussion on the previous law, see the note by E.K. Braybrooke in (*1955*) *4 International and Comparative Law Quarterly*, 209.

6. Cf. Braybrooke, *ibid.*, 210.

7. Subsection (2) commences:
> A marriage shall be void *ab initio*, whether or not a decree for nullity has been granted, where any of the following grounds exist, and in no other case . . .

Subsection (3) commences:
> A marriage shall be voidable on any of the following grounds and on no other ground . . .

8. As Braybrooke rightly points out (*4 International and Comparative Law Quarterly*, 212-213), the section in this respect codifies the existing law: see, *e.g.*, *Brook* v. *Brook*, (1861) 9 H.L.Cas. 193 (marriage in Denmark between parties within the prohibited degrees according to English law, both parties being domiciled in England at the time of the ceremony); *Mehta* v. *Mehta*, [1945] 2 All E.R. 690 (marriage in British India between a domiciled Indian and a domiciled Englishwoman, entered into by the latter under the mistaken impression that the ceremony was for the purposes of her conversion to the Hindu faith only).

9. Except, other things being equal, as far as subs. (2) (*d*) is concerned: this is declaratory of the common law: see *Dicey*, 6th Ed., 748 ff.

10. Subsection (2) (*a*).

11. Subsection (2) (*b*).

12. Subsection (2) (*c*).

13. Subsection (2) (*d*).

14. *Sottomayor* v. *de Barros* (1) (1877) L.R. 3 P.D. 1, from which the facts of this example have been taken. In *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1955] 2 All E.R. 709, Willmer, J., held, on the authority of *Easterbrook* v. *Easterbrook* [1944] P. 10 and *Hutter* v. *Hutter* [1944] P. 95, that the Court had jurisdiction to entertain a petition for nullity on the basis that both parties were resident in England at the time of filing the petition.

15. Subsection (3) (*a*).

16. Subsection (3) (*b*).

17. Subsection (3) (*c*).

18. Subsection (3) (*d*).

If the Court is faced with a marriage, *e.g.*, which is plainly void by its proper law for want of capacity, it is extraordinary that it should not be able to say that it is void. In the light of subss. (2) and (3), is the inference to be drawn that a foreign marriage, though void or voidable according to its proper law, must be regarded as a valid marriage in New Zealand, because the circumstances surrounding it do not bring it within the precise terms of the subsections ? The situation is rendered even more odd by the fact that the distinction between a void and a voidable marriage is that, in the case of a marriage void *ab initio*, the Court considering the matter proceeds on the footing that the parties were never husband and wife. Although by the law of their domicil at the time of the ceremony, the ceremony may have been wholly ineffective to render the parties husband and wife, does s. 10B (2), in effect, " marry " them in the eyes of New Zealand law ?

There appear to be two ways in which this situation may be avoided. One is to regard section 10B as referring only to marriages celebrated in New Zealand[19], or celebrated overseas between domiciled New Zealanders. If this is the case, subss. (2) and (3) are read as having only " territorial "[20] effect. This view is supported to a certain extent by the terms of subss. (2) (*c*) and (3) (*b*), which refer to New Zealand statutes : the Marriage Amendment Act 1946 and the Mental Defectives Act 1911 respectively. It is well settled at common law that the question whether two foreign parties are within " the prohibited degrees " is governed by their *lex domicilii* and not by the *lex fori*[21] ; and similarly it is somewhat difficult to see how a respondent could be classified with any degree of certainty as a " mentally defective person " if his sole connection with New Zealand lies in the fact of his being the respondent in a petition for nullity brought in a New Zealand Court.

A further major factor is that the law of the domicil of the petitioner and the respondent may regard the marriage as void or voidable on numerous grounds not specified in subss. (2) and (3). It is difficult to regard a provision (more especially subs. (2)) as having extra-territorial effect when it appears to imply that parties are to be regarded in New Zealand as lawfully married, although by the law of their domicil at the time of the ceremony they could not be married, and, as far as that law is concerned, never have been married.

A second way of avoiding the difficulties created by s. 10B is, it is suggested, to regard it as laying down certain grounds in certain circumstances on which the Court can exercise its jurisdiction in regard to foreign marriages ; but that the Court is free to exercise its common-law jurisdiction on grounds and in circumstances not specified in the section. Reading subss. (2) and (3) together with subs. (1), it is possible to construe the section as a whole as meaning that a petition for nullity *on the grounds stated in subss. (2) and (3)* can be presented to the Court *only when the provisions of subs. (1) are complied with* ; or, alternatively, that the provisions of subs. (1) relate *only to the special grounds stated in subss. (2) and (3)*. Thus, for example, the Court would have no jurisdiction to entertain a petition for nullity on the ground that at the time of the ceremony one of the parties was already married unless either the petitioner or the respondent was domiciled in New Zealand at the time the petition was filed, or the marriage had been celebrated in New Zealand, because

> a petition for nullity of marriage *on any of the grounds specified in subsections two and three of this section* may be presented to the Court in either of the following cases, and in no other case . . .[22]

On this construction, s. 10B is exhaustive only in respect of marriages which are declared void or voidable by subss. (2) and (3), and subss. (2) and (3) are exhaustive only to the extent that they state the available grounds for petitions in which the Court assumes jurisdiction on the bases contained in subs. (1). The result is that if the ground for a proposed petition is not one of those stated in either subs. (2) or subs. (3), then the Court cannot assume jurisdiction under subs. (1), but must rely on its common-law jurisdiction. Therefore, if the above reasoning is correct, before petitions could be entertained by the Court in the hypothetical cases set out above[23], in the first example the petitioner would have to be domiciled in New Zealand[24], and in the second example *both* parties would have to be (at least) resident in New Zealand[25]. The provisions of subs. (1) would in these cases be irrelevant.

It is evident that if s. 10B is construed narrowly difficulty and absurdity may result in many cases which would otherwise be covered by the common law. It is suggested, however, that the section does not, on a liberal interpretation, provide an exhaustive code, and it is submitted that if questions such as those illustrated above arose for consideration, the Court would be likely to hold the section not to be exhaustive, if only to escape from the strange position of not being able to declare a void marriage void.

II. Section 12A.

At common law, a foreign divorce could not be recognized by a New Zealand Court as having effectively dissolved the marriage in question unless the marriage had been dissolved by the Courts of the husband's domicil[26], or, if dissolved by the Courts of some other country, the Courts of the husband's domicil would recognize the marriage as having been effectively dissolved[27]. In 1953 the English Court of Appeal,

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[19]. In the case of a New Zealand marriage between domiciled foreigners, the question of recognition overseas of a decree based on any of the grounds specified in subs. (2) or subs. (3) (with the exception of that stated in subs. (2) (*d*)) may cause difficulty. It seems that any doubt expressed in the past on the recognition of decrees of divorce based on section 12 may now have been substantially removed (at any rate as far as recognition in England is concerned) by the decision in *Travers* v. *Holley* [1953] P. 246 : and this decision may have some application to decrees for nullity granted in New Zealand. On this question, however, the decision of Davies, J., in *Dunne* v. *Saban* [1955] P. 178 must not be disregarded.

[20]. The term " territorial " is perhaps inexact when applied to foreign marriages between domiciled New Zealanders, but it is used here in the sense that a domiciled New Zealander carries his " territorial " capacities and incapacities in regard to marriage with him wherever he goes : see, *e.g.*, *Brook* v. *Brook* (1861) 9 H.L.Cas. 193 ; *Pugh* v. *Pugh* [1951] P. 482.

[21]. See *Dicey*, 6th Ed., 760-763.

[22]. Subsection (1).

[23]. *ante*, p. 343

[24]. See *Dicey*, 6th Ed., 244, rule 35 (2) ; *White* v. *White* [1937] P. 111 ; *De Reneville* v. *De Reneville* [1948] P. 100.

[25]. See *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1955] 2 All E.R. 709, and authorities there cited.

[26]. See, *e.g.*, *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517.

[27]. *Armitage* v. *The Attorney-General* [1906] P. 135.

in *Travers* v. *Holley*[28], by recognizing a divorce based on a wife's "deemed" domicil on the ground that English Courts assumed jurisdiction on substantially the same basis[29], relaxed the above rule somewhat. However, in *Dunne* v. *Saban*[30] it was held that a foreign Court had not assumed jurisdiction on substantially the same basis as English Courts when it had purported to dissolve a marriage on the basis of a wife's "deemed" domicil arising out of ninety days' continuous residence, and that therefore the decree of such Court could not be recognized as effective in England.

The decision in *Travers* v. *Holley*[31] has now, in a sense, been given statutory effect in s. 12A (*a*), paras. (i) and (ii), which provide for the recognition by New Zealand Courts of foreign decrees based on the domicil of one or both of the parties to the marriage, or the wife's continuous residence for not less than two years, in the country where the decree was granted. Section 12A (*b*) states that a decree may be recognized in New Zealand if it is recognized as valid in the Courts of a country in which at least one of the parties to the marriage is domiciled or is deemed to be domiciled by the law of that country, thus, in a sense, giving statutory effect to the decision in *Armitage* v. *The Attorney-General*[32].

The words "in a sense" are used because, while the section does in fact embody the above two decisions, it appears to go far beyond the principles laid down in those cases. The following example illustrates the point here raised:—

> A and B, two New Zealand citizens domiciled in New Zealand, marry in New Zealand. After their marriage, A takes up employment in Hollywood, Florida, where B joins him. A returns to New Zealand, but B remains in Hollywood where she obtains a divorce from A on the ground of "extreme cruelty", the Court assuming jurisdiction on the basis that B has acquired a domicil in Florida as she has been a *bona fide* resident there for ninety days. B marries C in Hollywood, and A, in New Zealand. wishes to marry D[33].

At common law, this Hollywood divorce would not (*semble*) be recognized by a New Zealand Court[34]. However, in the light of s. 12A the position appears to be otherwise. The Hollywood Court has exercised jurisdiction on the basis of B's domicil in Florida, and thus, apparently, s. 12A (*a*) (i) has been complied with:

> The validity of any decree . . . for divorce . . . by a Court . . . of any country outside New Zealand shall, by virtue of this section, be recognized in all New Zealand Courts if—
>
> (*a*) That Court . . . has exercised jurisdiction—
> (i) In any case, on the basis of the domicile of one or both of the parties to the marriage in that country . . .

It might possibly be argued that, in para. (i), the common-law rule that a wife retains her husband's domicil is preserved[35], and that, therefore, the divorce does not come within the terms of the paragraph; but one is then faced with s. 12A (*b*), which states that the decree shall be recognized if

> the decree . . . is recognized as valid in the Courts of a country in which at least one of the parties to the marriage is domiciled or is deemed by the law of that country to be domiciled.

There can be no doubt that, at the time of the divorce B was deemed by the law of Florida to be domiciled in Florida; and, similarly, there can be no doubt that a Florida Court would regard the decree as valid. The decree would therefore be regarded as valid in New Zealand.

If this is the correct interpretation of s. 12A, then the implications of the section can be plainly seen. If the law of Florida were to the effect that B would be deemed to be domiciled in Florida on the basis of two days' *bona fide* residence, the result would still be the same; and the question arises whether the Legislature really intended to make such sweeping and far-reaching changes in the law[35A]. It is a long way from *Travers* v. *Holley*[36] to the recognition of "two-day domicil" divorces.

As has been suggested, it might be possible to argue around s. 12A (*a*) (i), but the effect of section 12A (*b*) would appear to be inescapable. It is reasonably obvious that para. (*b*) is based on a mistaken view of the principle in *Armitage* v. *The Attorney-General*[37], which goes only so far as to lay down that the decree in question must be regarded as valid by the Courts of the *husband's* domicil *at the time of the divorce*, and not, as the wording of the paragraph appears to suggest, the domicil or deemed domicil of either party at the time of filing the petition[38].

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[28]. [1953] P. 246. This important decision of the Court of Appeal is, unaccountably, not referred to in the 6th Edition (1954) of *Sim's Divorce Law and Practice in New Zealand* although, as Braybrooke rightly points out in his note on s. 12A in (1955) *4 International and Comparative Law Quarterly*, 218, it may still be necessary to invoke its assistance in cases not falling within the scope of the section (which does not, like section 10B, purport to be exhaustive). Braybrooke gives the following example: "A husband and wife domiciled in England have been resident elsewhere for some years. If, while they are so resident elsewhere, the husband desert his wife and acquire a new domicil of choice, there is no doubt that the wife may present a petition for divorce under s. 18 (1) (*a*) of the Matrimonial Causes Act 1950 [U.K.]; as the new section 12A stands at present such decree will not be recognized in New Zealand by virtue of its provisions."

[29]. [1953] P. 246, 250, 251, per Somervell, L.J.; 257, per Hodson, L.J.

[30]. [1955] P. 246.

[31]. [1953] P. 246.

[32]. [1906] P. 135.

[33]. These are the (abridged and slightly altered) facts in *Dunne* v. *Saban* [1955] P. 178.

[34]. *Dunne* v. *Saban* (*supra*).

[35]. Although, if this is the case, it is difficult to see the relevance of the words "of one or both of the parties". The paragraph may, of course, in this sense apply only to foreign marriages where the wife does not necessarily take her husband's domicil, *e.g.*, in certain parts of the United States—but without some words of limitation it seems that the effect of the paragraph cannot be so restricted.

[35A]. The Legislature may, of course, have intended to make such a sweeping change in the law; although if it did it is perhaps strange that there was apparently no discussion on the question when the measure was before the House of Representatives: no mention at all was made of the section during the second reading of the Bill, which was the only stage at which any debate took place: see *299 Parliamentary Debates* (28th August 1953), pp. 812-824.

[36]. [1953] P. 246.

[37]. [1906] P. 135.

[38]. See *ibid.*, 141, *per* Sir Gorrell Barnes, P.: "The only question that remains for consideration is this question of English law: Are we to recognize in this country the binding effect of a decree obtained in a State in which the husband is not domiciled if the Courts of the State in which he is domiciled recognize the validity of that decree? . . . Are we in this country to recognize the validity of a divorce which is recognized as valid by the law of the domicil? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognized in the State of New York—the State of the domicil—as having affected and determined it."

No one with a knowledge of private international law could take exception to the recognition of the decree of, *e.g.*, a Reno Court dissolving a Reno marriage, or, indeed, a New Zealand marriage, provided (in the latter case) both parties were domiciled (in the New Zealand sense) in Reno at the time of the decree. But if the effect of s. 12A is—and it seems likely—that the Court must recognize the jurisdiction of a Reno Court to dissolve a New Zealand marriage on the basis of the wife's deemed domicil there, founded on residence for whatever time is necessary, no matter how short, then every consideration would appear to indicate the necessity for drastic revision of the section.

. . . . .

There can be no doubt that legislation on the question of nullity and recognition of foreign decrees of divorce and nullity is desirable. It is unfortunate, however, that the legislation now in force is not without difficulties, and may give rise to questions which should have properly been considered when the provisions were being drafted. If s. 10B as it stands is not in fact exhaustive, then one of its main purposes—presumably the clarification of the law by replacement of the common law—has not been achieved. Again, if in enacting s. 12A, the aim of the legislature was to give effect to the general principles of reciprocity stated in *Travers* v. *Holley*[39], then the legislature has, with respect, well overshot its target. Both sections appear to the present writer to call for amendment; and it is hoped in the interests of clarity and certainty that amendment will not be too long delayed.

[39]. [1953] P. 246.

PROFESSIONAL ETHICS.

I. The Barrister.

As already mentioned in these pages (*ante*, p. 296), papers on Professional Ethics were contributed by Mr. W. W. Boulton, Secretary of the General Council of the Bar, and Mr. Thomas G. Lund, Secretary of the Law Society, at the recent Commonwealth and Empire Law Conference.

No subject is, perhaps, of greater interest to both branches of the legal profession in England and Wales, and *Law Times* (London) is giving a full summary of each of these papers, beginning with that of Mr. Boulton, which deals with professional ethics in relation to the Bar of England and Wales, much of which is of interest here.

Mr. Boulton's paper is largely based on his book *Conduct and Etiquette at the Bar*, which was published in 1953, and it touches upon several topics of outstanding importance.

As Mr. Boulton points out, the conduct of members of the Bar is governed not by any comprehensive code but by a number of different authorities, the most important of which are the Consolidated Regulations of the four Inns of Court, rulings of the General Council of the Bar, decisions of the Courts and unwritten rules, which are nevertheless observed as practices of long standing.

At the outset Mr. Boulton emphasizes the individual nature of practice at the Bar, and in this connection he summarizes as follows the rules governing "devilling":

> A member of the Bar may not hand over his brief to another to represent him in Court and to conduct a case as if he (the devil) had himself been briefed, unless the instructing solicitor consents to this course. Although the practice of devilling briefs is not uncommon in the Queen's Bench and Probate, Divorce and Admiralty Divisions, it is very seldom that a Q.C. "devils" a brief for another, and the practice is not found in the Chancery Division, nor at the Parliamentary Bar. Under no circumstances may a brief for the defence in a criminal case where conviction would involve the death penalty be devilled.

The Acceptance of Instructions.

Mr. Boulton goes on to deal with the rules governing the acceptance of instructions. "A barrister," he writes, "is bound to accept any brief in the Courts in which he professes to practise at a proper professional fee dependent on the length and difficulty of the case. He cannot pick and choose his cases. Indeed, he has been compared for this reason with a taxi-driver on the rank, who is bound to take the first passenger who wishes to hire his cab. This fundamental rule of the profession finally became established in 1792 when Tom Paine was prosecuted for publishing the second part of his *Rights of Man*. Paine was defended by the great advocate Erskine, who because of this was deprived of his office of Attorney-General to the Prince of Wales. In a famous speech Erskine said: 'From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end.'"

Mr. Boulton contrasts the obligation placed upon a member of the English Bar and the principle which governs advocacy in the Courts of some continental countries (and, he might have added, of other countries as well) that a lawyer should not act in any case in the righteousness of which he does not honestly believe.

"Such a thesis," he writes, "is quite incompatible with the contribution which the Bar makes to the English legal system, for two reasons. First, it could (in the eyes of the profession at least) provide a wholly undesirable avenue of escape for a member of the Bar asked to undertake some unpopular cause; and secondly, it would result in counsel departing from his role of advocacy and usurping the functions of the Court itself." He says that it is impossible to explain this point more clearly or concisely than in the words of Dr. Samuel Johnson, who said:

> A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir, what is the purpose of Courts of justice? It is that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge and determine what shall be the effect of evidence—what shall be the result of legal argument . . . If

lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.

American and Indian Views.

By way of contrast, reference may be made to two publications—one on *Legal Ethics* by Mr. Henry S. Drinker, chairman of the Standing Committee on Professional Ethics and Grievances, American Bar Association, and the other—an Indian book—by Mr. R. K. Soonavala, Bombay Judicial Service, on *Advocacy: Its Principles and Practice.*

"Although a lawyer may refuse to undertake a case which appears to him unsound or incapable of being successfully presented or defended," writes Mr. Drinker, "or to defend a criminal whom he believes to be guilty, he is not bound to do so. Our legal system does not constitute the lawyer the judge as to the justice or soundness of the causes committed to him." And in a footnote Mr. Drinker, like Mr. Boulton, quotes the view of Dr. Johnson.

The advice which Mr. Soonavala gives on this matter to budding advocates in India is directly at variance with the practice of the English Bar. "I think it is most unethical," he says, "for a lawyer to conduct the defence of a client when he considers him to be guilty. The reason is that a lawyer who does not consider him to be guilty may be able to conduct and arrange the defence in a better manner. I say it is your privilege, nay, your duty, to reject a brief which you feel should not be handled by you."

Conflict of Interests.

Mr. Boulton observes that the rule in England that a barrister must accept any brief in the Courts in which he professes to practise has its exceptions:

> The first applies where counsel is faced with a conflict of interests in the shape of special circumstances which would render it difficult for him to maintain his professional independence, or would otherwise make the acceptance of instructions incompatible with the highest interests of the administration of justice. Such a conflict may arise in many different ways. A common example is where a barrister is a member of, or closely associated with, some body or association in a non-professional capacity. In such a case the general rule is that he may not appear professionally for or against that body or association. For example, a barrister who is a member of a local authority may not accept a brief for or against the authority and a barrister who is a director of a company may not appear on behalf of that company. Similarly where he is a member of a society; and a barrister who is a member of a group of underwriters at Lloyds may not act professionally in any case relating to a policy on which his name appears.
>
> The same principle applies where a barrister holds an appointment connected with the administration of justice. Thus a Recorder may not appear either for the prosecution or the defence at a Magistrates' Court of the borough of which he is Recorder, and a barrister who is a county Magistrate ought not to practise either at county quarter sessions or at any Magistrates' Court composed of justices of the county of which he is a Magistrate; but he is not prohibited from appearing as an advocate before a Recorder of a borough in the same county, or in the Crown Court at the assizes for the county (though there are cases where it is undesirable that he should do so, *e.g.*, where the prisoner has been committed for trial from the Magistrates' Court where he sits). A barrister who sits regularly as chairman or as a member of a rent tribunal should not practise as counsel before other rent tribunals. A member of the Bar who sits on a certifying committee charged with the responsibility for issuing legal aid certificates under the Legal Aid and Advice Act, 1949, may not appear against an assisted person to whom a legal aid certificate has been issued by the committee on which he sits; but he may appear for such an assisted person.
>
> A barrister may be faced with a conflict of interests of a similar character in circumstances which do not fall within either of the two categories referred to above. He might, for example, be asked to act both as advocate and witness in the same case. This is a situation he must take pains to avoid, and if it becomes apparent at any stage of a case that he is to be a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardizing his client's interests. Similarly, counsel should not accept a brief before an appellate tribunal when he has been a witness in the Court below. It has also been ruled that a barrister who is an expert in foreign law and who has made an affidavit in the character of a witness in a proceeding in the British Courts should not accept a brief for any of the parties of such proceedings. The position is the same where counsel knows or has reason to believe that his own professional conduct in matters out of which an action has arisen is likely to be impugned in the course of the case. He must in these circumstances decline to accept a retainer in such action; and if during the course of a case he finds that his own conduct is being impugned (having no reason to suppose that it would be so impugned when he accepted the retainer), he ought not to continue to appear as counsel unless in his opinion he cannot retire from the case at that stage without jeopardizing his client's interests.

Personal Embarrassment.

Mr. Boulton goes on to point out that the second exception to the general rule as to the acceptance of briefs applies where counsel finds that he would be personally embarrassed. "Embarrassment may arise in two different ways. The first is where counsel finds himself in possession of confidential information from a source other than his instructions. His duty in such circumstances has been laid down as follows:

> No counsel can be required to accept a retainer or brief or advise or draw pleadings if he has previously advised another person on or in connection with the same matter, and he ought not to do so if he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by such other person, or if his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him; and if he has received any such retainer, brief or instructions inadvertently he should return the same.
>
> Secondly, embarrassment may arise out of some personal relationship between counsel and a party to the proceedings. Although no written rule is to be found, it is well established that, if because of such a relationship counsel would find it difficult or impossible to maintain the independence and objectivity which is expected of him in the performance of his duty to his client, he is justified in declining to act and, indeed, ought not to do so. He could not, for example, reasonably be expected to prosecute, or in civil proceedings to appear against, a close relative or personal friend. It was ruled in one particular case that a barrister who was frequently instructed by a solicitor whom he had also known socially for many years would be justified in refusing a brief to appear against that solicitor in an action for negligence. Embarrassment of this kind might of course constitute an equally good reason for counsel declining to appear for as well as against a person with whom a special or intimate relationship existed.

Mr. Boulton comments on the fact that the employment of counsel places him in a confidential position and imposes upon him the duty not to communicate to any third person information which has been confided to him in his capacity of counsel.

Where counsel has been briefed to appear in two cases on the same day and finds that he cannot attend to one of them, he must return the brief to his instructing solicitor at the earliest moment; but he may not return a brief for the defence of an accused person to be tried on a capital charge, apart from the most extreme and exceptional circumstances, and then only if sufficient time remains for another counsel to master the case and no question arises of the prisoner being even remotely

prejudiced through publicity being given to the fact that counsel originally retained is to give up the case.

Conduct of Proceedings.

Regarding the conduct of proceedings, Mr. Boulton says that, according to the best traditions of the Bar of England, a barrister should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client without regard to any possible unpleasant consequences either to himself or to any other person. But in defending a prisoner he is not entitled to attribute, wantonly or recklessly, to another person the crime with which his client is charged unless the facts or circumstances given in evidence, or rational inferences drawn from them, raise at the least a not unreasonable suspicion that the crime may have been committed by the person to whom the guilt is so imputed.

In dealing with the problem of what course counsel should take if his client makes a confession of guilt, Mr. Boulton quotes on this point the opinion of the Bar Council:

> Different considerations apply to cases in which the confession has been made before counsel has undertaken the defence and to those in which the confession is made subsequently during the course of the proceedings. If the confession has been made before the proceedings have been commenced, it is most undesirable that a counsel to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another counsel. Other considerations apply in cases in which the confession has been made during the proceedings, or in such circumstances that the counsel retained for the defence cannot retire from the case without seriously compromising the position of the accused.
>
> In considering the duty of a counsel retained to defend a person charged with an offence who, in the circumstances mentioned in the last preceding paragraph, confesses to counsel himself that he did commit the offence charged, it is essential to bear the following points clearly in mind: (1) that every punishable crime is a breach of the common or statute law committed by a person of sound mind and understanding; (2) that the issue in a criminal trial is always whether the accused is guilty of the offence charged, never whether he is innocent; (3) that the burden of proof rests on the prosecution. Upon the clear appreciation of these points depends broadly the true conception of the duty of the counsel for the accused. His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged . . .
>
> But such a confession imposes very strict limitations on the conduct of the defence. A counsel "may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud." While, therefore, it would be right to take any objection to the competency of the Court, to the form of the indictment, to the admissibility of any evidence, or to the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other person had committed the offence charged, or to call any evidence which he must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or in fact had not done the act; that is to say, a counsel must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him.

It has of course often been said that prosecuting counsel is "a Minister of Justice". His business is "fairly and impartially to exhibit all the facts to the jury."

Mr. Boulton of course brings out clearly in his paper the fact that counsel has a duty not only to his client: he has a duty to the Court as well. "He must on no account deceive or mislead the Court, and this rule extends to the point of making it obligatory for counsel to draw the attention of the Court to any relevant statutory provision or binding decision which is immediately in point whether it be for or against his contention."

Counsel and Witnesses.

The position of counsel in relation to witnesses is of course a matter which has arisen from time to time. "It is a recognized practice," says Mr. Boulton, "that witnesses (other than the parties and experts or professional witnesses who are instructing counsel) should not be present at consultations or conferences with counsel and that counsel should not interview such witnesses before or during a trial. It is recognized, however, that there must necessarily be exceptions to this practice, and it is a matter which has to be left to the judgment and discretion of counsel in each case, as to whether a departure from the practice is justified."

In so far as the cross-examination of witnesses is concerned, the following rules (amongst others) have been laid down by the Bar Council:

> In all cases it is the duty of the barrister to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person, and to exercise his own judgment both as to the substance and the form of the questions put.
>
> In a cross-examination which goes to a matter in issue, it is not improper for counsel to put questions suggesting fraud, misconduct or the commission of any criminal offence (even though he is not able or does not intend to exercise the right of calling affirmative evidence to support or justify the imputation they convey), if he is satisfied that *the matters suggested are part of his client's case* and has no reason to believe that they are only put forward for the purpose of impugning the witness's character.
>
> Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual inquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true.

On advertising, Mr. Boulton recalls that in 1951 the Bar Council published a set of rules covering the principal fields in which the greatest danger of this exists. He refers to several matters which are dealt with in these rules.

Advertising: Broadcasts and Films.

He summarizes the position with regard to broadcasts and films as follows:

> A member of the Bar who intends to give a wireless broadcast may not in connection therewith cause or allow to be disclosed his qualification as "barrister-at-law" in conjunction with his name. If the broadcast is on any aspect of law or legal administration, he may not cause or allow his name to be disclosed unless he has first obtained authority from the Bar Council, who must be satisfied when giving consent that the broadcast is in the interests of the Bar. In other words, unless specific authority is obtained, such a broadcast must be anonymous.
>
> In the case of a television broadcast or film in which he is to appear, a barrister may not allow himself to be described as such—he may be announced only by name, and he may not make reference to any aspect of law or legal administration, unless he has previously obtained the consent of the Bar Council. And a barrister is not permitted in a television broadcast or film to wear a barrister's robes or otherwise to act the part of counsel. Finally, he may not grant facilities for the filming or televising of himself in circumstances connected with any case in which he is or has been engaged or with his practice at the Bar.

Mr. Boulton says that, although the rules of 1951 have in general served their purpose well, there has been some criticism of those dealing with broadcasts. "It

has been suggested, for example, that the prohibition (without the authority of the Bar Council) against the disclosure by a barrister of his name when giving a sound broadcast on a legal subject and the prohibition against the disclosure of his qualification in the case of a television broadcast are anomalous; and again, that the definition 'any aspect of law or legal administration' is too wide and the procedure for obtaining the necessary consents for broadcasts on legal subjects too slow and cumbersome. These matters are receiving the attention of the council at the present time."

COMMERCIAL TELEVISION.

"A point of interest for the future is the attitude which will be adopted in regard to broadcasts by members of the Bar on commercial television," Mr. Boulton says. "The Bar Council will presumably have to consider whether it is proper for a barrister to take part in a programme sponsored by a commercial firm or whether, although the risk of unfair competition would appear to be no greater than in a broadcast given by the B.B.C., such an activity would amount to engagement in business or otherwise be derogatory."

LIEN UNDER THE WAGES AND CONTRACTORS' LIENS ACT, 1939.

As affecting a Land Transfer Mortgage.

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

In (1955) 31 NEW ZEALAND LAW JOURNAL, 60, in an article on The Discharge of a Lien under the Wages and Contractors' Liens Act, 1939, I said:

> However, the purpose of this article is not so much to stress the urgency of these matters (*i. e.*, the necessity to register a lien promptly) but to point out to conveyancers that when the matter has been completed, the lien, which has been registered against the appropriate land title, should be discharged therefrom, especially, as in most cases, the registered proprietor is an innocent party; the trouble is usually caused by the contractor or one of the subcontractors getting into financial straits. Yet, it is surprising how often in practice it seems to be no person's business to see to the discharge of the registered lien. Then, as the writer has often observed, if there is no dealing sought to be registered against the title for many years afterwards, when the lien is ultimately discovered by a search of the title, the plaintiff in the action may be untraceable, and an application to the Court to remove the lien will have to be made. It may then be difficult to prove to the Court that the amount of the lien has been duly paid.

Perhaps, in that article, I should also have pointed out that the failure to register promptly a discharge of the lien after the moneys claimed thereunder have been duly paid, may also detrimentally affect a mortgagee who may be an innocent party and in no way responsible for the unfortunate contretemps.

It is true that s. 41 provides that no land shall be affected by a lien unless that lien is registered against the title to the land as provided in that section. Subsection 2 provides that where the land is subject to the Land Transfer Act, a copy of the statement of claim in the action to enforce the lien certified by the proper officer of the Court, may be lodged with the District Land Registrar, who shall thereupon register it in the manner in which caveats are to be registered. Notice of the registration shall be given by the Registrar, *by registered letter*, to the registered proprietor of the land *and to every person entitled to a mortgage or encumbrance over the land.*

Therefore, the mortgagee gets, by registered post, notice of the registration of the lien; and, if he hands the notice to his solicitor, it is good practice for his solicitor to make a note of it, and in due course make inquiries as to whether or not the lien has been discharged.

The provision in s. 41 (1) that no land shall be affected by a lien unless the lien is registered against the title, is in accordance with general Land Transfer principles. However, there is a special section (s. 25) dealing with mortgages which has to be considered, and subss. (2) and (3) can put a mortgagee into a very awkward position. Subsection 1 of that section is in aid of the mortgagee, and provides that *subject to the provisions of that section and the last preceding section*, where any land to which a lien attaches is subject to a mortgage registered *before* the registration of the lien against that land, the mortgage shall have priority over the lien. Mr. Nigel Wilson in his invaluable book, *Contractors' Liens and Charges*, succinctly sums up the position of a mortgagee thus, at p. 23:

> The section is intended to protect a mortgagee who has got on the Register before registration of the lien, even if the mortgage was executed after the lien had attached—*i.e.*, after the "work" had been commenced. *Subject to the provisions of subss. (2) and (3)*, if the mortgage is registered (or even if an equitable mortgage is protected by registration of a caveat) before the "work" begins, it is not affected by liens subsequently registered, because, apart from the provisions of subs. (1), the lien attaches only to the estate or interest of the "employer" at the time the "work" was begun, and at that time such estate or interest was subject to the mortgage.

It is subss. (2) and (3) of that section which can put a mortgagee into a very awkward position, if a discharge of a lien is not promptly registered. Subsection 2 provides that, if the mortgagee is a party to the contract in respect of which the lien arises, the lien shall have priority over the mortgage. Subsection 3 provides that, in so far as the mortgage secures any money that is advanced (after written notice of the lien or of registration of the lien against the title to the land) has been given to the mortgagee or to any solicitor for the time being acting for the mortgagee in respect of the mortgage, the lien shall have priority over the mortgage.

Take the following example: A mortgage is duly registered on February 1, 1940. On February 15,

1940, a lien is registered against the title. The mortgagor makes default; and, in 1955, the mortgagee exercises power of sale. Naturally the purchaser desires a clean title: he is not going to accept one clogged with a registered lien.

Section 105 of the Land Transfer Act, 1952, enacts that upon the registration of any transfer executed by a mortgagee for the purposes of any such sale, the estate or interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest *except an estate or interest created by any instrument which has priority over the mortgage*, or which by reason of the consent of the mortgagee is binding on him. Section 101 (6) of the Property Law Act, 1952, (dealing with sales by mortgagees through the Registrar of the Supreme Court) is to the same effect.

Therefore, when the transfer, in exercise of the power of sale under the mortgage, is presented for registration, unless a discharge of the lien has been previously registered, the District Land Registrar is sure to require to be satisfied that the provisions of subss. (2) or (3) of s. 25 are not applicable. Such a requisition may prove very difficult to answer: after the lapse of such a time it may be difficult to ascertain the facts. It may be necessary to make application to the Court to cancel the lien: that, presumably, the Court would not do, unless it could be satisfied that the lien has been duly repaid.

Again, subs. (2) of s. 25 is often difficult to apply. When can it be said that a mortgagee is a party to the contract in respect of which the lien arose, and when can it be said that he is not a party to that contract? Many difficult border-line cases may arise in practice.

The mortgagee may also experience trouble if he attempts to transfer the mortgage: the transferee is not likely to accept a transfer, if there is any possibility of the lien's taking priority over the mortgage.

MATHS. FOR THE MILLION.

By Advocatus Ruralis.

"I haven't time to sign my will
I'm running just a trifle late."
At least he saved his lawyer's bill
It was paid by his estate.

Advocatus was one of a panel, which panel was asked what improvements could be made in the methods of teaching the young. Curiously enough, this followed shortly after an article by Advocatus on a related subject had appeared in this esteemed publication.

Mathematically, Advocatus was brought up in the plumbing age, when it was necessary (or was it) to find out how long it would take to fill the bath if all the taps were turned on at once. We were never allowed to take into consideration the fact that the turning on of the third tap would take the pressure from the other two; but these are the facts of life which mean so much in this mechanical age, and which Advocatus suggested should be taught.

With the growth of motoring and the T.A.B., it is high time that our simpler mathematical questions be brought up to date. For instance, in order to get from Eastbourne to the Western Hutt Road, a friend of Advocatus travelled South over the Petone ramp and then turned Westwards and stopped to see if he could enter the North-bound traffic. This friend (all motorists in trouble are friends of Advocatus) had wondered how long it took from a standing start for a motorist to complete a full ninety degrees turn in normal circumstances. Remembering the words of Charles II, he had "made trial" and found that it took on the average 7½ seconds on an ordinary town corner where the traffic was visible for about three chains.

On the Hutt Road, however, he found that, sitting at right angles to the road, he had a visibility of slightly less than 200 yards. The time was 4.30 p.m. The traffic was averaging 50 miles per hour, or 75 feet per second. A modern exam. paper should therefore ask:—

Given these figures, and allowing one second for reaction time, what odds should be given against the motorist making the turn (*a*) alive, (*b*) unscathed, (*c*) without being stopped by a traffic cop?

If the motorist should endeavour to move from the West Lane to the East Lane at the same point, he would find that his view of oncoming traffic was restricted to 7 chains. What difference would this make in the odds?

Or take another instance! A certain justly-celebrated area has recently been connected with a som what more populated area by means of a tunnel. The area of the first part has been famous for many years for its farm lands—many of the farms being bisected or intersected by the railways. The aforesaid tunnel has raised the number of separate rail units going one way or the other to something like one every forty minutes. In the course of farming it is necessary to move sheep and cattle across the line at different times at the farmers' private crossings. The noise of either sheep or cattle can be expected to mask almost any train whistle. Even a small mob of cattle or sheep can be depended on to take an unconscionable time to cross the line.

Assuming it takes half a mile to stop a train at average speed, and assuming a visibility of three hundred yards one way and 360 yards the other, what odds should be given against the farmer with land on both sides of the railway completing his shearing without loss?

As an addendum to the last question, Advocatus was this week asked who would be responsible if a railcar hit his mob of sheep and damaged twenty sheep and five passengers to the extent of £10,000.

The hazards of farming have grown since the ploughman first homeward plodded his weary way.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Houses and Maxims.—In *Mc Key* v. *Rorison*, [1953] N.Z.L.R. 498, the Court of Appeal decided that the vendor of a completed house does not, in the absence of some express representation or warranty, undertake any obligation as to the condition of the house or its fitness for occupation as a dwelling; and the maxim, *Caveat emptor*, applies whether or not the sale is of a new house sold by a builder to a purchaser for a home. On the other hand, the Court held that the maxim has no application where the sale is of a house in the course of erection, the vendor a builder, and the purchaser, to the knowledge of the vendor, requires the house for occupation as a residence. In that case, the vendor impliedly warrants that the work remaining to be performed will be carried out in a proper and workmanlike manner and that the dwellinghouse, when completed, will, as a whole, be fit for human habitation. This view was taken by Jones, J., in *Jennings* v. *Taverner*, [1955] 2 All E.R. 769, in which cracks appearing in the walls of a recently-constructed bungalow were proved to be due to the withdrawal of moisture by the roots of rapidly-growing trees in the vicinity—a situation that rendered the vendor who had sold the house when in the course of construction liable for breach of the warranty implied in the circumstances. Nor was the warranty confined to the parts of the bungalow that were above the ground. It extended to the provision of proper foundations, and the building of such foundations in a place where they would not collapse.

Radio Trials.—Listeners to the Light Programme of the B.B.C. in September would have had their interest held by a series of four documentary items entitled "The Course of Law". The series tells the story of a trial and its progress from the Magistrates' Court, through the Old Bailey and the Court of Criminal Appeal to the House of Lords—a trip from the public point of view both educative and entertaining. The writer of the series is Henry Cecil, whose last novel, *Brothers in Law*, is having a well-deserved success in England, and can be strongly recommended to the young practitioner for its many delightful touches, not the least amusing of which relates to the examination of a petitioner in a divorce case. She is represented by very inexperienced counsel, who, effectively prevented from asking leading questions, lacks the skill or finesse required to induce her to describe the cruelties which her husband had inflicted on her.

Ghostly Note.—Writing of ghosts in the *Solicitors' Journal* (13.8.55), Richard Roe relates an odd case from Jugoslavia just before World War II. It seems that, in the village of Lyubiski, Ivan Hajduk emboldened by a merry evening at the inn bet his friends that he would visit the cemetery at midnight, and return with a wreath to prove it. He arrived there; and, when wandering about in the dark, he was confronted by a white-clad apparition rising from behind a grave. He drew his revolver and fired. Unfortunately, the ghost was a practical joker and one of his friends. Mortally wounded, he died that night. Upon this set of facts, the Jugoslav Court found Hajduk guilty neither of murder nor manslaughter. The offence it found was one of violating the peace of the cemetery, and upon conviction Hadjuk was sentenced to fourteen days' imprisonment.

Judicial Pets.—A recent paragraph in this column on the subject of pigs leads Scriblex to add a postscript. As Baron Hawkins had, on the Bench and off, a devotion to dogs, so Lord Gardenstone, a Scottish Judge of an earlier generation, had a predilection for pigs. In its formative years, one of these animals took a particular liking to His Lordship and followed him about with a canine persistency, even to the length of reposing in the same bed. This course presented difficulties when the animal grew to the stature of adult swinehood; but Lord Gardenstone, unwilling to be separated from his friend, when on circuit, continued to allow it to sleep in the same room, and when he undressed laid his clothes on the floor for it. Criticized for such apparent eccentricity, he maintained with a show of reason that it kept his clothes warm until the morning.

Murder in Fiji.—As a matter of interest to all New Zealand practitioners, Scriblex refers to a letter appearing in the *Solicitors' Journal* (27.8.55) from C. C. Chalmers, an Auckland member of our profession and also a member of the bar of Fiji of forty-five years' standing. He draws attention to what he considers the unsatisfactory position in regard to murder trials in Fiji, of which he can doubtless speak with authority as he has appeared for the defence in three of them during the past few years. Where the person charged with murder is white, he has the right to trial by jury; but, where the accused is a Native, or of Native descent, the trial is taken before a Judge who has the aid of assessors, of whom, in capital cases, there are not less than four. It would seem that these assessors are appointed by the Court, and not kept together during the trial, and they may, and do, mix with all and sundry. In a recent case, where there were five assessors, he points out, the Chief Justice acted upon the minority opinion of two, in favour of guilty, as against the majority of three, who considered the verdict should be one of not guilty. The accused Fijian was sentenced to death, although sentence was later commuted to life imprisonment. Since 1949, there has been a Court of Appeal in Fiji, but in only one capital case has any appeal been allowed. Mr. Chalmers contends that in these enlightened days there is no excuse for a system where the life of a subject depends on a single Judge's decision. He trusts "that every member of the legal profession in England who is a member of the House of Commons and who has this letter brought to his notice, will press hard for reform not only in Fiji, but throughout other Colonies".

From My Notebook.—Behind every English exercise of liberty was the underlying conception of law. It was because the law was there, guaranteeing the freedom of every man against every other, that the English were able to allow and take so much licence. The law did not coerce a man from acting as he pleased: it only afforded redress to others if in doing so he outraged their rightful liberty or the peace of the community. Every man could appeal to the law: no man could legally evade it. Not even the King: perhaps it would be truest to say in the eighteenth century, least of all the King. The squire who rebuked George III—a very popular monarch—for trespassing on his land became a national legend. (Arthur Bryant, *The Years of Endurance, 1793-1802.*)

THEIR LORDSHIPS CONSIDER.

By Colonus.

Income Tax: Rating contrasted with.— "In a familiar passage in *London County Council* v. *Attorney-General*, [1901] A.C. 26, 35, Lord Macnaghten has described the character of income tax as follows:—

> Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Schedule D, and those assessed under Schedule A. or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all.

The purpose of the Income Tax Acts is to tax a person's total income from all sources; the method of assessing income derived by ownership or occupation of hereditaments is somewhat arbitrarily based on annual value and not on actual income, but that does not alter the essential characteristic of income tax that it is a tax on income generally.

"On the other hand, the poor rate is levied in respect of the occupation of hereditaments, irrespective of a person's income generally, and irrespective of whether the ratepayer is in fact deriving profits or gains from such occupation. A dwellinghouse is a burden, not a source of profit, for the occupier who pays rent for it. He is rated on the value of the burden, while he remains unrated in respect of his whole profits, be they from business or from investments. In their Lordships' opinion this marks the essential difference in character between income tax and rates, and it is unnecessary to consider other and less important differences between them." Lord Thankerton, in *Re A Reference Under Government of Ireland Act*, 1920, *s.* 51, [1936] A.C. 352, 359; [1936] 2 All E.R. 111, 115.

Procedure.—"I cannot help observing that this is one of that description of cases which ought to induce us to consider whether some alteration might not be made in law procedure, so as to prevent parties having rights from being deprived of their remedies through the blunders in point of form of attornies and counsel. It is a dreadful thing to be obliged for a defect in form to give judgment contrary to the real merits of the case. There is no doubt but that the defendants in error in this case had a right to distrain, and that they lost the advantage of it solely by the erroneous mode of putting their case on the record." Lord Wynford in *Pluck* v. *Digges*, (1831) 2 Dow & Cl., 180, 186; 6 E.R. 695, 698.

Appeals.—On an appeal to the House of Lords from a decision of the Court of Session in Scotland, the respondents petitioned the House that the appeal was incompetent on the ground that the decision of the Court of Session was final and not appealable. The House agreed that the appeal was incompetent. During argument by counsel for appellant in the appeal during the hearing of the petition, the Earl of Halsbury, L.C., said:

> The principle that I have referred to is that where you have a Court selected for a particular purpose you must show a right of appeal, either because it comes within some general category which is appealable, like orders in the Court of Appeal; or else you must have express words giving an appeal. It does not follow as a matter of course there is an appeal in every case; for where you have jurisdiction created and particular persons charged with that jurisdiction, you must show a right of appeal. I should agree with you that if you brought it within the category of ordinary interlocutors of the Court of Session then your general principle applies, and you have brought it within a category that was appealable; but it does not at all follow that this particular jurisdiction [under the Workmen's Compensation Act, 1897] created for a particular purpose is appealable.

The case is *Osborne* v. *Barclay, Curle and Co.*, [1901] A.C. 269, 278.

Date of Will.—A neat point arose in *Airey* v. *Bower*, (1887) 12 App. Cas., 263. Testatrix had a general power of appointment. In 1854 she executed her last will, in terms that would exercise this power, but in 1855 she executed a deed poll appointing the relevant property upon such trusts as she by deed or by her last will might *thereafter* direct or appoint. She died in 1857, and the problem before their Lordships was briefly, whether the will of 1854 was an appointment under the deed of 1855. Lord Herschell, L.C., said at p. 267:

> "The question of the making of wills at one time, and the operation of them afterwards upon the death of the testator (because of course a will only operated upon the death of the testator), had been a subject of considerable discussion, and had raised questions of difficulty and sometimes of great hardship; and the Legislature, with the express view of getting rid of such questions, created the perhaps somewhat artificial system that a general power of appointment should be treated as the property of the testator—and that the will should not only operate but speak from the death of the testator.
>
> "Taking together these two sections, the 24th and the 27th [of the Wills Act, 1837], it seems to me impossible to contest that this lady's will does that which the Legislature enacted that it should do, and speaks from the date of her death and exercises the power, which was created, no doubt, after the will, but which, under the combined operation of those sections, undoubtedly seems to me to effect that for which the respondents have contended".

The House held, on these grounds, that the power was validly exercised by the will.

The Limitations of the Courts.—A Court of law provides at the best but an imperfect instrument for the determination of the rights and wrongs of the most personal and intimate of all human relationships, that of husband and wife. No outsider, however impartial, can enter fully into its subtle intricacies of feeling and conduct, but when a case involving such questions arises the Court must do its best to judge dispassionately between the parties, though it may sometimes be left with a doubt whether, with the imperfect means at its disposal, it has achieved perfect justice, especially where the evidence is widely conflicting. Lord Macmillan in *Watt* v. *Thomas*, [1947] 1 All E.R. 582, 590.