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TESTAMENTARY PROMISES: PROMISE TO REMUNERATE BY DEVISE OF REALTY.

THE judgments in the Court of Appeal in *Pyne, Gould, Guinness, Ltd.* v. *Ramsay*, delivered on April 24, deal mainly with questions of fact; but they contain some interesting dicta which may be found useful in considering future possible claims under the Law Reform (Testamentary Promises) Act 1949.

An action under the Law Reform (Testamentary Promises) Act 1949 was heard before the learned Chief Justice at Christchurch on July 19, 1955, and his oral judgment was that there should be paid to the plaintiff out of the residue of the estate of the deceased the sum of £2,370. The executors appealed against that judgment, but the appeal was limited to the quantum of this award.

The facts, which were not seriously in dispute, were set out in the judgment of McGregor J., as follows:

In June, 1949, the deceased, who was then a poultry farmer, approached the respondent with the suggestion that she should come to him as a housekeeper. He said that he intended to sell the poultry farm and purchase a small home; and that he would leave the home to whomsoever was looking after him at his death. The situation was to be without remuneration, but the employee would be able to earn a small amount for necessaries from sewing or work of a like nature. The respondent accepted this promise and commenced work about June, 1949. In March, 1950, the poultry farm was sold, and a property at 7 O'Brien's Road was purchased for £2,250. After the purchase of this property, the deceased repeated his promise, and arranged to see his solicitor to give effect to the promise by will. He did actually see his solicitor, but certain difficulties were encountered. Shortly before the death of the deceased (which occurred as a result of an accident on March 29, 1954) the matter was again discussed, and the deceased promised to arrange the matter by the execution of a new will. The learned Chief Justice accepted the evidence on this aspect of the case, and with his findings the Court of Appeal agreed.

The result was that the respondent gave service to the deceased over a period of four years and nine months without remuneration, except to the extent of £125 paid by the deceased on the respondent's behalf for medical and hospital expenses and the value of furniture bequeathed to the respondent by the will of the deceased.

The deceased was survived by his wife, from whom he was separated and to whom he had been paying maintenance at the rate of £2 15s. a week. In the lifetime of the deceased, the wife had also the free occupation of a property at 41 Cashmere View Street. In addition, the deceased was survived by three daughters and a son: two of the daughters were married and there was nothing before the Court to indicate that any of the children was in necessitous circumstances.

The net value of the estate of the deceased, after providing for estate and succession duties, was £9,341. By terms of his will, the respondent received furniture valued at £225; the widow received the Cashmere View Street property valued at £2,215; and the residue was devised and bequeathed to the widow during her life and widowhood, with remainder to the children in equal shares. Apart from any award made in this action, it seemed that the residue would amount to approximately £6,800 less costs and administration expenses.

Since the death of the deceased, the O'Brien's Road property had, by arrangement, been sold and the net proceeds amounted to £2,720. The award in favour of the respondent was of that sum, less the benefits already received by the respondent—cash payment, £125, and furniture, £225—making a net sum of £2,370.

It was common ground that the respondent had rendered to the deceased services in his lifetime and had proved an express or implied promise by the deceased to reward her for her service or work by making some testamentary provision for her; and, further, that the deceased had failed to make that testamentary provision. It was further agreed between the parties that the promise made by the deceased related to real property: the property at O'Brien's Road.

The quantum of the award in the Court below was challenged on the ground that, although the statute secures enforcement of a moral claim, the basis must be a proper reward for services, so that a specific promise is enforceable only subject to its reasonableness. It was contended that, in exercising its discretion, the Court, in the absence of the promisor, the deceased, must take great care in assessing the nature of the promise and the value of the services; and, here, though the promisee performed her part up to the death of the deceased, she was deprived, by an unfortunate accident, of the opportunity to carry out her obligations for the period

contemplated by the parties. As her services covered a period from June, 1949, to the end of March, 1954, the award represented £10 a week and keep, which, it was submitted, was in excess of a proper reward for the services rendered.

Their Honours pointed out that every case under the Law Reform (Testamentary Promises) Act 1949 must be decided on its own facts and services.

Mr Justice McGregor expressed what was, in general, the view expressed by the other members of the Court in the present case when he said :

> . . . the respondent gave services over a period of four years and nine months. While the actual value of these services might not amount to more than £1,000, it must be remembered, and it seems to me that it is of prime importance, that by the nature of the arrangement the benefit to the respondent might or might not have been adequate reward for the services to be performed. It may well have been that, by reason of the deceased's longevity, the services to obtain any reward might have extended over a long period of years. The promise was to be performed only in the event of the respondent's continuing in service until the death of the deceased. After a period of years, it may well have been that ill-health might have prevented the respondent from continuing in the service of the deceased, or infirmity of the deceased may have made the services so arduous that the respondent could not continue. In the event of the employment ceasing for any reason before the death of the deceased, she would have been entitled to nothing. It does seem, therefore, that the benefit to the respondent might have been, as has in fact happened, more than commensurate with the services rendered, or, on the other hand, might have been to a very great extent illusory.

Mr Justice Shorland considered that to value the services rendered, on the basis of housekeeper's wages for the period covered, was to ignore the facts that the services included an obligation to continue them for the lifetime of the deceased, and were for seven days in the week with no " day off " for regular holidays. He added :

> The value of the services rendered was, I think, further enhanced by the fact that it was given on terms which gave the deceased the use in his lifetime of the money which otherwise he would have expended in housekeeper's wages. . . . A circumstance in the present case of importance is, I think, that the respondent, in return for the promise, undertook the obligation of caring for the deceased for life. . . . The real risk of the services being generous in relationship to the ultimate reward was accepted by the respondent; and I do not consider that the fact that fate has to some extent reversed this aspect of the matter should operate to effect a substantial reduction in what otherwise would be the reasonable sum to be awarded.

Their Honours, after carefully analyzing the findings of fact made in the Court below, were all agreed that the discretion conferred upon the Court had been properly exercised by the learned Chief Justice, and that the award made in the Court below should not be altered ; but Gresson and Shorland JJ. were of the opinion that it should be varied in respect of succession duty on the amount awarded, which should be borne by the respondent. On this topic, their Honours were agreed that this point seemed to have been overlooked. Under the provisions of s. 4 (2) of the Law Reform (Testamentary Promises) Act 1949, the amount allowed by order of the Court is to be treated as if the provisions of the order had been part of the will of the deceased. Under cl. 5 of the deceased's will, all estate and succession duties were payable out of the residue of estate. The effect of the order would be to increase such succession duties, owing to the respondent's benefit being assessable as one to a stranger in blood.

While all their Honours had agreed that the quantum of the award itself should not be disturbed, Gresson and Shorland JJ. considered it was not inequitable that the respondent should herself bear the succession duty on the amount awarded her by the Court. The award should accordingly be further diminished by the amount of the succession duty to be assessed on the award. McGregor J. did not think this was contemplated by the deceased, or that it was a term of the promise that the transfer of the property would be free of succession duty. He would, therefore, include in the order a provision that any additional succession duty assessable in respect of the benefit to the respondent under the order of the Court should be chargeable to the respondent.

The order of the Court below that the respondent was entitled to receive £2,370 out of the residuary estate of the deceased was accordingly varied to the extent that the executors should pay her that amount, less any succession duty which became payable upon or in respect of the Court's award to her.

So much for the findings of fact by the Court of Appeal.

By far the most interesting parts of the judgments are the observations (mostly *obiter*) of their Honours in relation to questions of law which arose in the course of the discussion.

The province of the Court of Appeal in respect of an appeal in action under the Law Reform (Testamentary Promises) Act 1949 is set out in the judgment of the Court of Appeal in *Gartery* v. *Smith*, [1951] N.Z.L.R. 105, 121 ; [1951] G.L.R. 58, 65 :

> We think that, on an appeal under this Act, in a case where no amount of money has been specified in the promise and all the circumstances of the case have to be considered, it would be proper to adopt the rule followed in cases under the Family Protection Act 1908, as set out in the judgment of this Court in *Rose* v. *Rose and Rose*, [1922] N.Z.L.R. 809 :
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> > " on an appeal the discretion of this Court is substituted for that of the Supreme Court, so that this Court is free to deal with the whole matter as the interests of justice demand. In exercising its discretion this Court would give, of course, due weight to the opinion of the Court below, but it is not fettered in any way by that opinion" (*ibid.*, 815).

Mr Justice Gresson made some observations on the Court of Appeal's view, as expressed in that passage that, on an appeal, such as the one now before the Court, the discretion of this Court is to be substituted for that of the Supreme Court. He said :

> For myself, I think it is a matter for regret that, on appeals under the Family Protection Act 1908, the discretion of the Court of Appeal is substituted for that of the Supreme Court ; still more do I regret that it has now been decided that, on appeals under the Law Reform (Testamentary Promises) Act 1949, the discretion of the Court of Appeal is to be substituted for that of the Supreme Court. Proceedings under the latter Act are (unlike those under the former Act where the proceedings are by way of originating summons and the evidence normally given by affidavit) by way of action, and in the Supreme Court the witnesses are seen and heard. I should myself have preferred the adoption of the principle enunciated by the House of Lords in *Evans* v. *Bartlam*, [1937] A.C. 473 ; [1937] 2 All E.R. 646, that

> "While the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the Judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it" (*ibid.*, 480; 650, per Lord Atkin).

It is a sound principle and has the support both of the case cited and of *Charles Osenton and Co.* v. *Johnston*, [1942] A.C. 130; [1941] 2 All E.R. 245, that the exercise of judicial discretion ought not to be interefered with by an appellate Court, except where it can be seen that no weight or not sufficient weight has been given to relevant and important considerations and that interference is warranted to prevent injustice.

His Honour, in obedience to the rule laid down in *Gartery* v. *Smith*, proposed to consider the case on that basis, but, at the same time, to give very considerable weight to the opinion of the Court below. He concluded that the discretion of that Court had been properly exercised and the award should stand, subject only to the deduction for succession duty to which reference has been made.

In examining the effect of s. 3 of the statute on a promise to devise realty, Gresson J. said that s. 3 (1) of the statute provides that when a claimant proves an express or implied promise by the deceased to reward "by making some testamentary provision for the claimant" the claim shall be enforceable to the extent to which the deceased has failed to make that testamentary promise or otherwise to remunerate the claimant

> as if the promise were a promise of payment by the deceased in his lifetime of the amount specified or, if no amount is specified or the promise relates to real property or to personal property other than money, of such amount as may be reasonable having regard to all the circumstances of the case . . .

and to the particular circumstances enumerated in the section. His Honour said that the testator did fail to make "that" provision, i.e., the particular provision promised; the promise related to real property: accordingly, it was enforceable as if it were a promise "of such amount as may be reasonable". His Honour continued:

> Though s. 3 (1) contemplates an unfulfilled promise sounding in real and personal property being made good by an award of the Court of "such amount as may be reasonable", that is, by an award in money, the subsection must, in my opinion, be read in conjunction with subs. (3), which enlarges the powers of the Court "where the promise relates to any real or personal property which forms part of the estate of the deceased at his death" by providing that the Court may in its discretion instead of awarding "a reasonable sum" make an order vesting the property in the claimant, or directing it to be transferred or assigned to him as to the whole or as to part of the particular property.
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> In this case, had the property been retained unsold and constituted part of the assets of the estate at the time the action was heard, I am of the opinion that the Court might properly have exercised its discretion by making an order vesting the property in the plaintiff, though in such case it would have been proper that such vesting should have been conditional upon the plaintiff vacating the bequest of the furniture and making payment of, or otherwise giving credit for, the amount she had received from the testator in his lifetime in money. The order made in the Supreme Court has notionally effected this.

In considering the construction and effect of s. 3 (1), Shorland J. discussed *Nealon* v. *Public Trustee*, [1949] N.Z.L.R. 148; [1949] G.L.R. 85. He said:

> The Law Reform (Testamentary Promises) Act 1949, under which the present claim falls, replaced s. 3 of the Law Reform Act 1944, which was considered by this Court in *Nealon* v. *Public Trustee*, [1949] N.Z.L.R. 148; [1949] G.L.R. 85. The judgment in that case was delivered in December, 1948. The 1949 statute adopted the whole of subs. (1) of s. 3 of the Law Reform Act 1944, with additional words specifically dealing with a testamentary promise which related to real property or to personal property and including such a promise in the category of promises to be dealt with
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> > in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime . . . of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular . . . .
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> The new section then repeats the enumeration of circumstances formerly contained in subs. (1) of s. 3 of the 1944 Act, with the addition of a further circumstance—namely, "the value of any real or personal property specified in the promise."

The learned Judge went on to say that the 1949 Act, in s. 3 (3), contains a new and additional power conferred upon the Court by providing—

> (3) Where the promise relates to any real or personal property which forms part of the estate of the deceased on his death, the Court may, in its discretion, instead of awarding to the claimant a reasonable sum as aforesaid,—
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> (*a*) Make an order vesting the property in the claimant or directing any person to transfer or assign the property to him; or
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> (*b*) Make an order vesting any part of the property in the claimant or directing any person to transfer or assign any part of the property to him, and awarding to the claimant such amount (if any) as in its opinion is reasonable in the circumstances.

Nealon's case concerned a promise relating to real property; and the question before the Court was whether or not the Court had jurisdiction under the 1944 Act to make an order vesting the property covered by the promise in the claimant. The Court held that there was no jurisdiction to make such an order; and that the only power was to make an award upon the fictional basis of a promise by the deceased for payment by him in his lifetime of such amount as may be reasonable having regard to all the circumstances of the case, including in particular the circumstances enumerated in the section. The circumstances enumerated in that section did not include "the value of any real or personal property specified in the promise"; and, in his judgment in *Nealon's* case, Finlay J. said:

> It may or may not be that the value of the property promised should be taken into consideration in determining what is reasonable; but that question was not argued, and I therefore express no opinion upon it (*ibid.*, 162; 91).]

Mr Justice Shorland continued:

> The value of the property promised would be one circumstance in "all the circumstances of the case" under the 1944 Act; but it was not one of the circumstances in the enumeration of circumstances to be included "in particular" in all the circumstances of the case.
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> It is, I think, clear that the 1949 Act was passed to meet some of the points raised by the decision in *Nealon's case*; and, from the inclusion of the value of the property in the enumeration of circumstances to be included in particular in the consideration of all the circumstances of the case, it follows that that circumstance is, under the 1949 Act, an important circumstance to be considered with all the other circumstances in arriving at the reasonable sum to be awarded.

His Honour concluded by saying that the inclusion of the discretionary power to make an order vesting the property in the claimant, instead of awarding a reasonable sum in the case of a promise relating to real or personal property, suggested that in certain circumstances the assessment of the reasonable sum upon the basis provided for in s. 3 (1) may be equivalent to the value of the property.

SUMMARY OF RECENT LAW.

AGED AND INFIRM PERSONS PROTECTION.

Authority of Supreme Court asked by Manager of Estate for Sale of Protected Person's Land—Protected Person a Mental Defective at Time of Application—Such Sale adeeming Specific Devise in Such Person's Will—Proceeds of Sale passing under Will to Person other than Devisee—Sale in Interests of Protected Person's Estate—Order made preserving Proceeds of Sale to Beneficiaries under Will in Same Interests as if Land not sold—Aged and Infirm Persons Protection Act 1912, ss. 11, 22, 27 (2). In September, 1954, a protection order under the Aged and Infirm Persons Protection Act 1912, was made in respect of F., and M. was appointed manager of her estate. Later, F. became an inmate of an institution under the Mental Health Act 1911. In November 1955 an order was made giving M. leave to mortgage certain property but not to sell. On the present application by M. to sell the property, M. stated that she had been informed by F. that the latter had made her will in the Public Trust office and had left this particular property to M. At the hearing of the application, the learned Judge directed the Public Trustee to produce F.'s will for perusal. *Held*, That a perusal of F.'s will showed that the conversion of the property into money would adeem a specific devise depriving a legatee of the support of a charge on that property, and the money representing the sale or some portion of it, would, under the dispositions of the will, pass to a person other than the specific devisee; nevertheless, the evidence showed that a sale of the property was proper in the interests of F.'s estate. An order was made empowering M. to sell the property; and a further order was made (for what it might be worth) that the proceeds of the sale of the land, or so much as should remain, should be deemed to represent F.'s interest in the land, to the intent that the beneficiaries under her will should take the same interests in such proceeds, or such portion of them as remained, as they would have taken in the land if it had not been sold. (*In re W.*, [1954] N.Z.L.R. 183, and *In re P.*, [1956] N.Z.L.R. 283, referred to.) Observations on the need for the enactment of a statutory provision similar to s. 123 of the Lunacy Act 1890 (U.K.), by virtue of which it can be ordered that a devisee shall have the same interest in any moneys arising from the sale as that devisee would have had if there had been no sale; and to give authority to the Court to require disclosure to the necessary extent of the will of a mental patient or of a protected person. *In re F. (A Protected Person).* (S.C. Wellington. May 29, 1956. Gresson J.)

ANIMALS.

Dogs—Injury done by Dog—Liability of Owner—Defences open to Him—Dogs Registration Act 1908, s. 27. In an action against the owner of a dog, brought under s. 27 of the Dogs Registration Act 1908, three defences are available: (i) trespass (ii) contributory negligence subject to the provisions of the Contributory Negligence Act 1947; and (iii) no escape of the dog from control. An insufficient securing is equivalent to an escape from control, and it is a question of fact in each case whether, in all the circumstances, there was a sufficient degree of securing. In the circumstances of this case, having regard to the dog's disposition when on the chain, the length of the chain, and the situation in which he was kept, the dog was not sufficiently secured, and the defendant was liable for the injuries caused by his dog to the plaintiff. (*Chittenden* v. *Hale*, [1933] N.Z.L.R. 836; [1933] G.L.R. 742; *Wilkins* v. *Manning*, (1897) 13 N.S.W. W.N. 220; *Simpson* v. *Bannerman*, (1932) 47 C.L.R. 378; *Read* v. *J. Lyons & Co., Ltd.*, [1947] A.C. 156; [1946] 2 All E.R. 471, and *Rands* v. *McNeil*, [1955] 1 Q.B. 253; [1954] 3 All E.R. 593, referred to.) *Christian* v. *Johannesson.* (S.C. Wellington. May 31, 1956. Cooke J.)

BUILDING CONTRACT.

Time for Completion. *100 Solicitors' Journal*, 275.

COMPANY LAW.

Company in Financial Difficulties. *100 Solicitors' Journal*, 289.

Unpaid Creditor of a Company. *100 Solicitors' Journal*, 272.

CONTRACT.

Construction—Contractor doing Work for Board—Pile-driving Frame made available to Contractor—Statement that Minor Repairs Required before Frame usable—Costs of Repairs to be borne by Contractor—General Provision in Contract dealing with All Plant—Special Provision in Specifications relating to Frame—Both Documents to be read together to ascertain Intention of Parties—Board's Duty to make Frame available to Contractor without Responsibility for Its Condition. A dispute arose between the parties as to the responsibility for the cost and delay arising in the erection of the work being done under contract for the Board from the condition of a pile-driving frame referred to in the specification accompanying the contract. This frame suffered a breakdown. Two paragraphs were relevant to the matter in dispute: (a) para. 2 in the printed general conditions of contract which were annexed to the deed, and formed part of the contract between the parties, and (b) para. 6 in the cyclostyled specification referring to this contract alone, which was similarly annexed to the deed, and formed part of the contract between the parties. These paragraphs are set out in the judgment. The dispute was referred to an arbitrator who, in a Case Stated for the opinion of the Court, "Whether upon the construction of the contract documents the Board's duty to the contractor in respect of the pile frame was: (*a*) To make such frame available for use by the contractor but without any responsibility for its condition; or (*b*) To make available to the contractor a frame suitable for use in the contract works or capable of being put in such condition with only minor repairs", *Held*, 1. That, upon the true construction of the general conditions of the contract and para. 6 of the specifications, read together, the Board undertook merely to provide a certain specified frame, presently available, the state of which was described, and, at that point, the contractor became obliged by virtue of para. 2 of the general conditions, to inspect it and form his own opinion as to any statement of fact made about it; and that thereafter the contractor must be held to have made such an inspection, and to have satisfied itself of the accuracy of the statement before tendering. 2. That, accordingly, the Board's duty to the contractor was to make the frame available to the contractor but without any responsibility for its condition. (*S. Pearson & Sons, Ltd.* v. *Dublin Corporation*, [1907] A.C. 351, applied.) *In re An Arbitration, Poverty Bay Catchment Board and E.D. Kalaugher and Co., Ltd.* (S.C. Gisborne. June 18, 1956. Turner J.)

EQUITY.

The Doctrine of Election. *100 Solicitors' Journal*, 334.

FAMILY PROTECTION.

Time for making Application—Application for Extension—Transmission and Transfer of Only Remaining Asset, executed by Executor in favour of Sole Beneficiary and held Unregistered with Certificate of Title by Beneficiary's Solicitors—Application for Extension made One Month later—Application made after Final Distribution of Estate—Family Protection Act 1955, s. 9 (1)—Land Transfer Act 1952 s. 123 (1). The testatrix died on August 23, 1953, leaving a will specifically devising a freehold property (the main asset of the estate) to her only surviving child, who was appointed executrix. She was survived also by A., her second husband. The named executrix having died, probate of her will was granted to W., her executor and sole beneficiary. On December 20, 1955, W. signed an application for transmission to him of the freehold property, and, on the same date, he signed a transfer as registered proprietor by virtue of such transmission to himself as transferee as sole beneficiary; and these documents in registrable form, together with the certificate of title, were forwarded to the Wellington agents of the transferee's solicitors for registration, which, however, was not effected, when A. commenced proceedings for further provision out of the estate of the testatrix. Upon an application by A., under s. 9 of the Family Protection Act 1955, two years one month after grant of probate, for an order extending the time for making application for further provision, *Held*, refusing the application, That the application was made after the final distribution of the only asset in the estate, as the transmission, transfer, and title were in the hands of the devisee's solicitor for registration, and the trustee had done all in his power to complete the transfer to the devisee and to complete the distribution of the estate; and that anything remaining to be done could be done by the devisee. (*Commissioner of Stamps* v. *Todd*, [1924] N.Z.L.R. 345; [1923] G.L.R. 505; *Scoones* v. *Galvin and Public Trustee*, [1934] N.Z.L.R. 1004; [1934] G.L.R. 777, and *Kennedy* v. *Tickner*, [1950] N.Z.L.R. 62, applied.) *Anderson* v. *Williams.* (S.C. Wellington. June 15, 1956. McGregor J.)

FOREIGN LAW.

The Non-Enforceability of Foreign Laws. *221 Law Times*, 172, 186.

HIRE-PURCHASE AGREEMENT.

Undertaking by Owner of Vehicle that if Conditional Purchaser paid Insurance Premium in respect thereof to Owner, Owner would effect Insurance or Renewal thereof—Consideration for Such Undertaking in All Consideration given by Conditional Purchaser under Agreement—Failure of Owner to pay to Insurance Company Premium received from Conditional Purchaser—Vehicle destroyed during Consequent Lapse of Policy—Owner liable in Damages to Conditional Purchaser. Where, in a contract of hire-purchase, the owner has undertaken that if the conditional purchaser, by direction of the owner, pays the insurance premium in respect of the hired vehicle to the owner instead of to the insurer, the owner will effect the insurance or the renewal thereof, the consideration for the undertaking to effect the insurance is to be found in all the consideration given by the conditional purchaser by virtue of the hire-purchase agreement. (*McNeill* v. *Millen & Co., Ltd.*, [1907] 2 I.R. 328, and *Heron* v. *Person*, (1887) N.Z.L.R. 5 S.C. 416, followed.) Consequently, when the conditional purchaser paid the authorized agent of the owner of the vehicle the amount of the insurance premium payable by him under the hire-purchase agreement, he was performing a promise contained in the contract—to keep the vehicle insured; and that, by the terms of the hire-purchase agreement, the owner had bound itself in the event of its accepting from the conditional purchaser the amount of any premium, to renew the policy and pay the premium; and, on its failure to renew the policy and pay that premium, it was liable to the conditional purchaser in damages when the vehicle, in its uninsured state, was destroyed in an accident and the insurance company disclaimed liability on the ground that the policy had lapsed. (*Pilcher* v. *Leyland Motors, Ltd.*, [1932] N.Z.L.R. 449; [1932] G.L.R. 95, referred to.) *W. A. Bennett, Ltd.* v. *Puna*. (S.C. Napier. May 23, 1956. Turner J.)

INTERNATIONAL LAW.

Diplomatic Protection and Recourse to International Tribunals. *106 Law Journal*, 276.

MUNICIPAL CORPORATION.

Meeting—Committee Chairman—No Power to remove Such Chairman without discharging him from Committee—Point of Order—Fact of Proposed Resolution Ultra Vires constituting Point of Order—Assumption of Chair by Deputy-Mayor at Council Meeting while Mayor still present invalid—Municipal Corporations Act 1933, ss. 49, 50, 55. A Borough Council had no power under the Municipal Corporations Act 1933 to remove a chairman of one of its committees without discharging him from the committee. *Semble*, That if the Council had power to remove the chairman of a committee as such, only the Council would have had power to make a fresh appointment. The fact that a proposed resolution would be ultra vires constitutes a point of order, and a ruling on it is a decision on a point of order. (*R.* v. *Foley, Ex parte Miller*, [1928] V.L.R. 1, and *R.* v. *Neeson, Ex parte Koch*, [1937] V.L.R. 211, referred to.) Where a Standing Order provides that the Mayor, when called upon to decide on points of order or practice, "shall state the provision, rule, or practice which he deems applicable to the case", those words are directory only, and the non-observance of them does not affect the validity of the ruling thereon. While the Mayor is still present at a meeting of the Council, the assumption of the chair by the Deputy Mayor contrary to s. 55 of the Municipal Corporations Act 1933, is invalid; but, from the time of the Mayor's retirement from the meeting, the Deputy Mayor's tenure of the chairmanship becomes valid under s. 55, and, accordingly, resolutions passed during the chairmanship of the Deputy Mayor, but after the Mayor's retirement from the meeting, are valid. (*Herring* v. *Allen and Others*. (S.C. Feilding. December 6, 1955. Cooke J.)

NEGLIGENCE.

Fire—Escape to Adjoining Premises—Principle in Rylands *v.* Fletcher*—Liability of Occupier for Acts of Independent Contractor.* Premises which formed part of a large mansion house had been converted into four houses. The plaintiff owned one of these and the defendants, who were husband and wife, occupied the adjoining converted premises. A pipe in the loft of the defendants' premises became frozen and B. and R., two workmen in the employment of the third parties, came on the defendants' premises at the request of the defendants, made to the third parties as independent contractors, to unfreeze the pipe. B. and R. proceeded to thaw the pipe by applying to it the flame of a blow-lamp. Most of the pipes in the loft were lagged with felt, and some of the lagging caught alight and in turn ignited other inflammable material in the defendants' loft causing an extensive fire which spread to the plaintiff's premises. The fire so arising was not an accidental fire within s. 86 of the Fires Prevention (Metropolis) Act 1774, but was caused by the negligence of the workmen in using a blow-lamp for the purpose of unfreezing the pipe in the place at which the blow-lamp was used. The plaintiff claimed against the defendants in respect of the damages to his premises caused by the fire. *Held*, The defendants were liable to the plaintiff on two grounds—namely, (*i*) because the fire had begun on the defendants' premises through negligence and the defendants failed to establish that the persons by whose negligence the fire was caused, viz., B. and R., were strangers to the defendants for this purpose. (Principle stated by Bankes L.J. in *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43, 46, and dictum of Holt C.J. in *Turberville* v. *Stampe*, (1697) 1 Ld. Raym. 264, applied.) (ii) because the use of the blow-lamp to thaw the pipe was in the circumstances dangerous and a non-natural use of the premises and accordingly the rule in *Rylands* v. *Fletcher*, (1868) L.R. 3 H.L. 330, applied to the creation of the fire, as also to its spreading to the plaintiff's premises, and against liability under this principle neither the Fires Prevention (Metropolis) Act 1774, s. 86, nor the fact, if it were the fact, that the defendants had no reason to know that the blow-lamp would be used to thaw the pipe in the loft afforded a defence. (*Musgrove* v. *Pandelis*, [1919] 2 K.B. 43, and dictum of Lord Porter in *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 All E.R. 471, 478, and *West* v. *Bristol Tramways Co.*, [1908] 2 K.B. 14, applied.) *Semble*, In the case of acts which from their nature involve in the eyes of the law special danger to others an obligation is imposed on the ultimate employers [of contractors] to take special precautions which they cannot delegate by having the work carried out by the independent contractors. (Dictum of Langton J. in *Pass of Ballater S.S. Owners* v. *Cardiff Channel Dry Docks & Pontoon Co., Ltd.*, [1942] 2 All E.R. 79, 84, considered.) *Balfour* v. *Barty-King and another* (*Hyder and Sons (Builders), Ltd. Third Parties*). [1956] 2 All E.R. 555. (Q.B.D.)

Res Ipsa Loquitur. *100 Solicitors' Journal*, 330.

PRACTICE.

Judgment—Judgment by Default—Failure to file Defence due to Slip—Such Judgment to be set aside only where Substantial Ground of Defence established by Affidavit—Code of Civil Procedure, R. 236. A regular judgment obtained by default should be set aside, under R. 236 of the Code of Civil Procedure, only where a substantial ground of defence is established by affidavit. (*Maclaurin* v. *Little*, (1906) 9 G.L.R. 348, followed. *Howell* v. *Ngakapa*, (1895) 13 N.Z.L.R. 298, applied.) In this case, applying the above-stated principle, a judgment by default was set aside on terms. *Trengrove and Others* v. *Inangahua Hospital Board*. (S.C. Christchurch. May 17, 1956. Henry J.)

Trial by Jury—Either Party having Absolute Right of Trial by Jury where "only relief claimed is payment of a debt or pecuniary damages or the recovery of chattels"—Real Nature of Relief claimed examinable by Court—Power to remove Action from Jury List if Relief claimed not Claim for Debt or Pecuniary Damages—Claim based on Indemnity an Action in Damages—Judicature Amendment Act (No. 2) 1955, s. 2. Section 2 of the Judicature Amendment Act (No. 2) 1955 gives to either party an absolute right of trial by jury in cases "in which the only relief claimed is payment of a debt or pecuniary damages or the recovery of chattels"; and the Court cannot take into account the disadvantages and inconveniences which any such trial will entail. (*Richardson and Co., Ltd.* v. *The King*, [1942] N.Z.L.R. 211; [1942] G.L.R. 149, referred to.) The Court may examine the real nature of the relief claimed by the plaintiff; and, if it comes to the conclusion that it is not really a claim for debt or pecuniary damages, though so denominated in the statement of claim, it may remove the action from the jury list and order its trial by a Judge alone. In the present case, the claim depended on an indemnity (the nature of which was not in dispute) admittedly given by the defendant to the plaintiff. *Held*, That such a claim, though not couched in terms alleging

specially a breach of contract, was an action in damages. (*Jabbour* v. *Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145, and *Solomon* v. *The King*, [1934] N.Z.L.R. 1; [1934] G.L.R. 23, referred to.) An application to have the action taken out of the jury list and heard before a Judge alone was accordingly dismissed. Observations on the effect of s. 2 of the Judicature Amendment Act (No. 2) 1955. *Whitcher* v. *State Fire Insurance General Manager*. (S.C. Wellington. May 10, 1956. Turner J.)

Trial by Jury—Verdict—Jury's Verdict for Defendant set aside and Judgment for Plaintiff entered—Verdict One which Jury could properly find—Judgment for Defendant restored—Code of Civil Procedure, R. 286—Negligence—Res Ipsa Loquitur—Affirmative Proof by Defendant of Exercise of Reasonable Care and that Cause of Accident not due to His Negligence—Burden of Disproof continuing throughout Proceedings. A motor-truck belonging to the defendant company, carrying a heavy load, while being driven from Lyttelton to Christchurch, got out of control near the top of a long hill, and, at the foot of the hill, crashed into a building owned by the Crown. The driver was killed and the building was damaged. In an action by the Crown claiming damages, the jury found for the defendant company. On a motion that the judgment entered for the defendant be set aside and judgment entered for the plaintiff, the trial Judge set aside the verdict and gave judgment for the plaintiff for what was agreed to be an appropriate award of damages if the plaintiff was entitled to recover (see [1955] N.Z.L.R. 1182). On appeal by the defendant company against the judgment setting aside the jury's verdict and entering judgment for the plaintiff, *Held*, per totam curiam, That the jury's verdict was one which the jury, viewing the whole of the evidence reasonably, could properly find, as the evidence warranted a finding by the jury that the defendant had not been proved to have been negligent; and, consequently, the trial Judge should not have set aside the verdict and given judgment for the plaintiff. Per Gresson J., That R. 286 of the Code of Civil Procedure is wide enough in its terms to permit a Judge, in such a case as the present one, to give judgment in favour of a plaintiff notwithstanding the verdict of a jury in favour of the defendant; but the exercise of that jurisdiction must be governed by the principles laid down as to disturbing the verdict of a jury. (*Benson* v. *Kwong Chong*, (1932) N.Z.P.C.C. 456, followed. *Millar* v. *Toulmin*, (1886) 17 Q.B.D. 603, and *Winterbotham, Gurney, and Co.* v. *Sibthorp and Cox*, [1918] 1 K.B. 625, and *Steele* v. *Gilliland*, [1928] N.I. 19, referred to.) *Semble*, per Gresson J., That, in a case to which the maxim, *Res ipsa loquitur*, applies, the defendant is required to prove affirmatively that he exercised all reasonable care, and that the cause of the accident was not due to his negligence; and this burden of disproof lies on him throughout the proceedings. (*Southport Corporation* v. *Esso Petroleum Co., Ltd*, [1954] 2 K.B. 182; [1954] 2 All E.R. 561, and *Moore* v. *R. Fox and Sons*, [1956] 1 All E.R. 182, considered. *Attorney-General*, v. *J. M. Heywood and Co., Ltd.* [1955] N.Z.L.R. 1055, disagreed with. *Voice* v. *Union Steam Ship Co. of New Zealand, Ltd.*, [1953] N.Z.L.R. 176, referred to.) Appeal from the judgment of F. B. Adams J., sub nom. *Attorney-General* v. *J. M. Heywood and Co., Ltd.* (*No. 2*), [1955] N.Z.L.R. 1182, allowed. *J. M. Heywood and Co., Ltd.* v. *Attorney-General*. (Court of Appeal, Wellington. April 27, 1956. Barrowclough C.J. Gresson J. Shorland J.)

PRINCIPAL AND AGENT.

Husband and Wife—Wife permitting Third Party to drive Her Husband's Motor-car—By so acting on Her Own Responsibility, Third Party not constituted Husband's Agent except in Special Circumstances—Husband promising to drive Guests Home after Party—Husband Incapable of doing so and Asleep—Alleged Social Obligation to Guests not Special Circumstances constituting Driver Agent of Husband. If a wife permits a third party to drive her husband's motor-vehicle, she does so on her own responsibility; and, by so doing, she does not clothe the driver with the agency of her husband unless there are special circumstances which would enable her to do so in the particular case. (*Ormrod* v. *Crosville Motor Services, Ltd.*, [1953] 1 All E.R. 711, applied. *Hewitt* v. *Bonvin*, [1940] 1 K.B. 188, and *Manawatu County* v. *Rowe*, [1956] N.Z.L.R. 78, distinguished.) M., the owner of a truck, was incapable of driving it owing to the liquor he had consumed, and he was asleep. M.'s wife, who was sober, authorized T., who was in M.'s employ, and living in his house, to carry out M.'s promise, given earlier in the evening, to drive his visitors to their homes. *Held*, That the evidence did not permit the inference that Mrs M. had any authority to permit T. to drive her husband's truck; and the alleged social obligation of M. to take guests home, supported as it was by his promise given to them before he became drunk and incapable of driving his truck, could not alter the matter. *Mako* v. *Land and Another*. (S.C. Napier. May 17, 1956. Turner J.)

PROBATE AND ADMINISTRATION.

Letters of Administration—Practice—Will revoked in Proper Form—Letters of Administration granted to Widow of Deceased without Annexation of the Revocation of the Will—Wills Act 1837, s. 20. On June 29, 1950, the testator executed a will in proper form, but, on December 15, 1953, he endorsed on the will a revocation thereof which was executed in the manner in which a will is required to be executed. On March 6, 1956, the deceased died intestate, leaving him surviving his widow but no children or other issue. On a motion by the widow for letters of administration, *Held*, That there should be a grant of letters of administration to the applicant as on an intestacy. It was directed that, although the paper writing operating as a revocation should not be annexed, there would be a note that the grant was made in consequence of the execution of the document of December 15, 1953, revoking the will. (*In the Goods of Durance*, (1872) L.R. 2 P. & D. 406; *Toomer* v. *Sobinska*, [1907] P. 106, and *Re Sprackman's Estate*, [1938] 2 All E.R. 345, followed.) *In re Bradley (deceased)*. (S.C. (In Chambers). Palmerston North. May 18, 1956. McGregor J.)

Probate—Will containing Mistake by Draftsman—Words introduced in Error—Proof that Will not read over by Testator in Proper Way and Contents of Incorrect Clause not brought to His Notice—Words inserted per incuriam struck out—Probate granted of Will with Such Words omitted. There is a burden on every person propounding a will to prove that the testator knew and approved of its contents. If there is execution with full testamentary intention and knowledge, the proper inference, in the absence of fraud, is that the testator knew and approved of its contents. This inference is not inflexible and may be rebutted in certain cases. Where the mistake alleged is one on the part of the draftsman of the will, a distinction is drawn between cases where the words are unintentionally and inadvertently introduced and cases where they are introduced by the draftsman with the intention of carrying out the instructions of the testator, but from ignorance or error inappropriate language is used. In a draft will prepared according to the testator's instructions the testator, in cl. 5, directed his trustees to hold a farm property "together with all live-stock implements plant and other chattels" in trust for his nephew subject to payment to his wife of the income therefrom. In his final instructions, the testator left the farm only to his nephew subject to a life interest to his wife. In the final draft prepared by the testator's solicitor, following those instructions, cl. 3 was as follows: "3. I GIVE DEVISE AND BEQUEATH unto my Trustees the farm property at Oreti aforesaid at present owned by me upon the trusts hereinafter declared concerning the same." Clause 5 reproduced the clause in the earlier draft will without alteration, as the solicitor overlooked striking out the words which were struck out of cl. 3. The draft was sent to the testator. When the testator next called at his solicitor's office, he was given a copy of the draft will to read; but he did not read it and it was not read to him. Later, the draft was duly executed as a will on May 14, 1954. In an action seeking proof in solemn form of the will but omitting therefrom in cl. 5 the words "and the said live-stock implements plant and other chattels", *Held*, 1. That, on the evidence, those words were inserted into the will per incuriam without advertence to their significance and effect by a mere clerical error of the draftsman or engrosser; and that the testator was not bound by the mistake unless the introduction of such words was directly brought to his notice. 2. That it had been proved as a fact that the testator had not read over the draft will in a proper way, and the provisions of cl. 5 were not really brought to his notice. (*Gregson* v. *Taylor*, [1917] P. 256, and *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P. 335, applied. *Lethaby* v. *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd.*, [1932] N.Z.L.R. 1674; [1932] G.L.R. 339, distinguished.) 3. That the plaintiffs were entitled to a grant of probate of the will of the testator dated May 14, 1954, in solemn form of law, with the words "and bequeath" in cl. 3 and the words "and the said live-stock implements plant and other chattels" in cl. 5 omitted therefrom. (*Guardian Trust and Executors Company of New Zealand, Ltd.* v. *Inwood*, [1946] N.Z.L.R. 614; [1946] G.L.R. 242; *In re Gosset*, [1954] N.Z.L.R. 1146; and *Tartakover*

v. *Pipe*, [1922] N.Z.L.R. 853; [1922] G.L.R. 247, referred to.) *In re Smith (deceased), Marshall and Another* v. *Day and Others.* (S.C. Invercargill. April 10, 1956. Henry J.)

PUBLIC REVENUE—INCOME TAX.

Deductions—"Loss exclusively incurred in the production of the assessable income for any income year"—"Loss" differentiated from "Expenditure"—Purpose of Loss irrelevant—Degree of Connection between Business carried on and Cause of Loss—Loss to be incurred as Part of Operations reasonably incidental to Earning of Income in Income-year—Loss incurred through Actionable Negligence of Taxpayer in Transactions from which Taxpayer earned His Income not "loss of capital"—Land and Income Tax Act 1923, ss. 80 (1) (b), 80 (2)—(Land and Income Tax Act 1954, ss. 111, 112 (a)). Where, under s. 80 (2) of the Land and Income Tax Act 1923 (now s. 111 of the Land and Income Tax Act 1954), a claim is made for the deduction from the taxpayer's total income in respect of a "loss", as distinct from an "expenditure", the inquiry must be simply whether the loss was incurred in the course of producing the taxpayer's assessable income, the purpose of the loss being irrelevant. Such inquiry must be made into the degree of connection between the business carried on and the cause of the loss, which must have been incurred as part of the operations reasonably incidental to the earning of the income for the year in which the loss was incurred. (*Herald and Weekly Times, Ltd.* v. *Federal Commissioner of Taxation*, (1932) 48 C.L.R. 113, *Allen* v. *Farquharson Bros. and Co.*, (1932) 17 T.C. 59, and dictum of Lord Loreburn L.C. in *Strong and Co., Ltd.* v. *Woodifield*, [1906] A.C. 448, 452, applied. *Ward and Co., Ltd.* v. *Commissioner of Taxes*, (1922) N.Z.P.C.C. 625, and *Aspro Ltd.* v. *Commissioner of Taxes*, [1930] N.Z.L.R. 935; [1930] G.L.R. 476, aff. on app. (1932) N.Z.P.C.C. 630, distinguished.) Where the loss is incurred through the actionable negligence of the taxpayer in transactions from which he earned his income, the loss does not partake of the characteristics of a "loss of capital", within s. 80 (1) (*b*) of the Land and Income Tax Act 1923 (now s. 112 (*a*) of the Land and Income Tax Act 1954), but is one incurred in and arising out of the production of the current income. (*Herald and Weekly Times, Ltd.* v. *Federal Commissioner of Taxation*, (1932) 48 C.L.R. 113, *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation*, (1935) 54 C.L.R. 295, and *In re The Income Tax Acts 1924 to 1930 (No. 6)*, [1933] Q.S.R. 350, referred to.) *Commissioner of Taxes* v. *Webber.* (S.C. Wellington. May 8, 1956. Turner, J.)

RATES AND RATING.

Rating on Annual Value—Transport Board's Tram Barns and Workshops—Borough Valuation made Triennially—Roll compiled on Annual-value Basis—Diminishing Value of Property owing to Gradual Replacement of Trams by Buses—Method of Ascertaining Annual Value of Board's Property for Rating Proposals—Rating Act 1925, ss. 7, 8 (4), 19, 20. The Board's property consisted of a substantial area of land on which the tram barns with requisite workshops, offices, and amenities had been erected for many years. These barns housed at least 100 trams, the rails being set in heavy concrete on pile foundations with servicing pits running the full length of the several tramways. The Board was rapidly converting its services to diesel fuel and trolly buses. On January 15, 1956, the material date, some fifty trams only were housed in the barns. It was anticipated that within fifteen months no trams would remain in service; and as the trams were withdrawn from service they were handed over to the wreckers. Within two years, no trams at all would be housed on these premises. As the site and buildings could not be adapted for the bus services, the premises would then be of no further use to the Board. At the time of the hearing of the Board's objection, approximately only two-thirds of the premises were in actual use. The valuer for the Borough valued the premises as a going concern at £80,000. A valuer for the Board, on the same basis, valued at £70,000. The Government Valuation was later reduced from £60,000 to £40,000. It was admitted by both of the valuers that, when the Board ceased to use the premises for its trams, the value would fall to £20,000, on account of the fact that the land was zoned as residential land and the site and the buildings could not be converted for any other commercial use. The demolition value of the buildings was not likely to pay for the very substantial cost of demolition, removal of the concrete yards and tracks, withdrawal of the piles, filling in the large area of pits, and re-earthing the area for residential purposes. The Borough had adopted, under s. 7 of the Rating Act 1925, the triennial system for the preparation of the annual-value rating roll, and, although these premises would be unusable by the Board and have only demolition value for at least the last year of this triennial period, by reason of the zoning scheme of the local authority, such variation in circumstances did not permit an amendment of the roll under s. 36 of the statute. The Board sought that either a varied valuation be included in the valuation roll spread over the three years of, say, £3,000 for the first year, £3,000 or less for the second year, and £1,000 (being 5 per cent. on £20,000 value as for demolition) for the third year; or, alternatively, that the annual value over the three years be averaged as for each year, i.e., on the above figures, a constant annual value over the triennial period of £2,333. *Held*, 1. That only one value may be inserted in the valuation roll as determined as at January 15 of the year in which the roll is prepared, and not, as contended for, a decreasing value for each year of the period. 2. That the hypothetical rent, for the ascertainment of the annual value, is to be assessed as on a tenancy from year to year where the tenant is presumed to be capable of enjoying the property independently, the hypothetical net annual return being assessed against the owner-occupier as on a return from an investment. (*R.* v. *South Staffordshire Waterworks Co.*, (1885) 16 Q.B.D. 359, and *Dunedin City Corporation* v. *Young*, [1941] N.Z.L.R. 959; [1941] G.L.R. 407, applied.) 3. That the Board, as a hypothetical tenant or as the owner of the property seeking investment, had the knowledge that it was the only permissible tenant of the property under the town-planning zoning, and that its occupancy required for the purposes of its undertaking over the three-year period of the valuation roll would be approximately two-thirds of the premises for the first year, decreasing to nothing by the end of the second year, and thereafter, as an occupier, pending demolition and reconstruction into residential sites. 4. That the hypothetical rent should be averaged over the period of the valuation roll in force, and the annual value of the premises, so ascertained, for the three-year period should be assessed at £2,500. *In re Auckland Transport Board's Objection.* (Asst.Ct. Auckland. April 9, 1956. Wily S.M.)

TRANSPORT.

Appeal—Right of Appeal from Fixing, Alteration, or Review of Road Charges given to Incorporated Body "whose members by reasons of the class of persons to which they belong have a special interest in the type of transport to which the service belongs"—"Class"—"Interest"—"Special Interest"—Transport Act 1947, s. 125 (1) (b)—Transport Amendment Act 1950, s. 6. To constitute a "class" within the meaning of s. 125 (1) (*b*) of the Transport Act 1947 (as enacted by s. 6 of the Transport Amendment Act 1950) the persons who comprise it must be shown to have some common attribute or characteristic: there must be something in common which distinguishes its members as a complete and definable group as distinct from other individuals or groups. In order to ascertain such a class, it is necessary to ascertain the purpose of the classification, or the respect in which it is to be made, and the nature of the interest of those persons in the relevant type of transport. The words "special interest in the type of transport to which the service belongs", as used in s. 125 (1) (*b*) mean an interest special to the class as opposed to any other class or individual who may be affected. (*Glasgow Corporation* v. *Neilson*, [1948] A.C. 79; [1947] 2 All E.R. 346, and *Gordon* v. *Barnsley Police Authority*, [1948] W.N. 229; [1948] 2 All E.R. 79, applied.) *N.Z. Road Transport Alliance* v. *South Otago Freezing Co., Ltd. and Another.* (S.C. Dunedin. May 31, 1956. Henry J.)

Offences—Failure to pay Prescribed Fare for Hire of Taxi-cab—Regulation creating Such Offences intra vires the Statute—Mens rea not Necessary Ingredient of Offence—Transport Act 1949, s. 160 (r)—Transport Licensing Regulations 1950 (S.R. 1950-28) Reg. 34 (1) (f). Regulation 34 (1) (*f*) of the Transport Licensing Regulations 1950—which is as follows: "34 (1) Every person commits an offence against these regulations who . . . (*f*) Hires a taxi-cab and fails to pay the prescribed fare on demand by the driver after completion of the hiring"—is intra vires s. 160 (*r*) of the Transport Act 1949, read together with s. 167 of that statute. Mens rea is not a necessary ingredient of the offence created by Reg. 34 (1) (*f*) of the Transport Licensing Regulations 1950. *Russell* v. *Shand.* (S.C. Napier. May 30, 1956. Barrowclough C.J.)

WILL.

Residuary Gifts and the Doctrine of Cy-Près. *100 Solicitors' Journal*, 292.

BLOOD TESTS IN MOTOR-VEHICLE PROSECUTIONS.

By P. P. Lynch, C.B.E., LL.D., M.D., F.R.A.C.P.

For a number of years practising pathologists have been aware of the importance of the estimation of the alcohol content of the blood in victims of motor-vehicle accidents whether the victims have been drivers, passengers or pedestrians. Frequently an accident which appears inexplicable is all too readily explained by evidence of intoxication of the victim founded on analysis of the blood. There can be no doubt that the amount of alcohol in the blood at the relevant time gives the most accurate and satisfactory index of the degree of intoxication.

There is a growing mass of professional opinion especially in the field of alcohol physiology which has correlated with reasonable precision the relationship between the percentage of alcohol in the blood and the degree of intoxication. The zone which appears to be critical is that between 0.1 and 0.15 per cent. It has been described as a liberal wide zone in which alcoholic influence of some measure is present but consideration of behaviour of the individual and other attendant circumstances is also of importance. That zone over 0.15 per cent. indicates definite physiological evidence of intoxication of a degree which would satisfy any Court that the individual would be unsafe in the handling of a motor-vehicle. I think these figures and these standards are liberal and perhaps over-generous.

In Sweden, legal intoxication is present when the alcohol concentration of the blood exceeds 0.08 per cent., and a very serious view is taken of those cases in which the blood alcohol is over 0.15 per cent.

There are very considerable variations in behaviour as among individuals who have consumed the same amount of alcohol. The pharmacological effect, however, is more constant; and it can be said that an alcohol concentration of, say, 0.15 per cent. would lead to substantially the same effect on the judgment of individuals and on their ability to carry out movements of precision. These are the qualities which profoundly affect the capacity to drive with safety.

Because it is the most accurate measure of the degree to which a person has been affected by alcohol, it has sometimes been suggested that the examination of the blood of persons suspected of being drunk in charge of motor-vehicles should be made compulsory. I understand that this is the view of some Magistrates. The matter has from time to time been considered by special committees of the medical profession, both here and overseas, and views have been expressed by Courts in this country and in Canada and in the United States as to the propriety of such legislation.

The view generally held by the profession, and this is my own personal view, is that under all circumstances such an investigation would require the prior consent of the accused or suspected person. The taking of blood from a vein is nowadays a procedure commonly carried out, but it is a medical procedure and should be entrusted only to trained personnel. The difficulty that I can foresee is that, even if legislation were introduced making it compulsory for a suspected person to submit himself to the withdrawal of blood, it is extremely doubtful whether any medical man would act on such legislative compulsion without the consent of the individual.

The principle which seems to lie behind the reluctance of Judges in this matter is the well-known dictum that no person should be compelled to testify against himself.

In an interesting article by Dr Charles U. Letourneau (1950) *28 Canadian Bar Review*, 858, the question is dealt with at considerable length. He quotes an opinion by Chief Justice Belt of the Supreme Court of Oregon as follows:

> To extract blood by hypodermic from a person accused of crime without his consent or while he is unconscious, for the purpose of obtaining evidence to be used against him, shocks my sense of justice and decency.

Such a situation can lead to very great embarrassment for a medical practitioner to find himself confronted by a reluctant, and indeed resistent and struggling, patient from whom he has been directed to take a sample of blood. Legislative enactment would not by any means overcome the ethical objections which the doctor may find.

There may occasionally arise a situation in which the person suspected may be unconscious at the time and yet the circumstances may be not precisely those so vividly expressed by Chief Justice Belt. Such an example is afforded by a fairly recent Californian case (*155 Journal of the American Medical Association* (1954), 668). The defendant, a woman, was convicted of manslaughter arising out of the operation of a motor-vehicle while under the influence of intoxicating liquor. After the accident, the defendant, the driver of one of the cars, and some other injured persons were taken to hospital. At the hospital, and while the defendant was still unconscious, 5c.c. of blood were taken from her arm. Part of this blood sample was used to determine her blood group for the purpose of a blood transfusion, but a portion was submitted for analysis and was found to contain a high concentration of alcohol—0.18 per cent. It was mainly on the basis of this estimation and the professional opinion that such a concentration would indicate intoxication that the defendant was convicted. The Appellate Court, which I imagine would have the same standing as our Supreme Court, reversed the conviction and the matter was referred by the prosecution to the Supreme Court of California. The appeal was upheld: *People* v. *Haeussler*, (1953) 260 P. (2d) 8 (California). The basis of the defendant's claim was that in the taking of evidence by force from the person of a defendant without her consent there was what Americans term "a violation of due process of law". It was claimed on behalf of the defendant that this force consisted of puncturing her skin with a needle to withdraw blood. The view of the Court was that evidence obtained by means of a blood test under the conditions in which it was obtained in this case was not obtained by "testamentary compulsion". The defence relied on a United States case in which there were elements of unlawfulness in the acquisition of evidence. In that case (*Rochin* v. *California*, (1952) 342 U.S. 165) narcotics-enforcement officers invaded the defendant's room without a warrant, seized his person when he put two capsules into his mouth, hand-

cuffed him, took him to a hospital where by means of a tube an emetic was injected into his stomach causing him to vomit the capsules. Upon analysis the capsules were found to contain morphine, and this evidence formed the basis of a successful prosecution.

It is a relief to know that the United States Supreme Court, in a judgment which quashed the conviction, held the view that the proceedings by which the conviction was obtained did more than "offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically". They thought it was conduct that shocked the conscience, and that the methods used were too close to those of the rack and screw. Mr Justice Douglas observed that the circumstances disclosed in the case were "part of the process of erosion of civil rights of the "citizen in recent years".

The Supreme Court of California thought that the methods employed in this case were not at all comparable with those of the *Rochin* case. The taking of a blood test when done in a medically approved manner does not smack of brutality. Thousands of young men and young women submit to it as a pre-requisite to induction into military service, and in applications for marriage licences; the procedure is one which is well known and frequently used and is free from danger. Moreover, in the case under review, the defendant was unconscious and the removal of some of the blood was necessary to provide medical treatment. The only unauthorized action of the medical attendant was to remove a small quantity of blood additional to what was the minimum required for the tests preparatory to blood transfusion.

The Court concluded that this conduct cannot be called "shocking to the conscience", and did not support the defendant's claim of a violation of due process of law.

Nevertheless, the case does draw attention to the importance of gaining an accused person's consent to any such procedure. If indeed the consent is not obtained, I understand that the evidence so obtained may be admissible; but the fact that such evidence was obtained without the suspected person's consent does outrage public susceptibility.

I think it would be regrettable if the well-known principles which have formed the background of our law were to be lost sight of in the face of a national problem of grave importance. If such legislation as has been suggested were to be introduced it would place medical officers, who are consulted in these cases, in an embarrassing position with the possibility of finding themselves involved in allegations of technical assaults against those they have been asked as doctors to examine. It seems to me that such a provision in our law would be contrary to public policy.

ENFORCEMENT OF FOREIGN MAINTENANCE.

By B. D. Inglis.

In 1921, when the Maintenance Orders (Facilities for Enforcement) Act [1] was passed, some satisfaction was expressed in the House of Representatives that decisive steps towards ensuring financial protection for deserted wives and children as against their defaulting husbands and fathers were at last being taken, [2] and it is, of course, one of the principal objects of the Destitute Persons legislation as a whole to ensure that wives and children receive adequate financial support from the persons properly responsible for it. But another object of the legislation is to supply some measure of protection to persons responsible for paying maintenance from being too heavily burdened with payments, which, due perhaps to a change in their circumstances, they cannot now fully meet without undue hardship, or which, due to the changed circumstances of the recipient, ought fairly to be reduced.

The legislation as a whole is designed to strike a reasonable balance between the support a wife or a child needs from time to time, and what the husband or father can from time to time pay. [3] It is this latter object of the Destitute Persons legislation which seems to have been overlooked by those responsible for drafting the provisions of the Maintenance Orders (Facilities for Enforcement) Act 1921 enabling the enforcement in New Zealand of foreign maintenance orders. [4]

The provisions of the 1921 Act to be discussed in this article are s. 3, which provides for the registration and enforcement in New Zealand of maintenance orders made by Courts in the British Commonwealth, and s. 5, which provides for the confirmation in New Zealand of provisional orders made overseas.

I. Overseas Maintenance Orders Registered In New Zealand.

Section 3 of the 1921 Act provides that a maintenance order made against any person by any Court in "the United Kingdom or elsewhere in Her Majesty's domin-

[1] Introduced as a measure reciprocal to the English Maintenance Orders (Facilities for Enforcement) Act 1920. (*11 Halsbury's Statutes of England*, 856.)

[2] See *191 N.Z. Parliamentary Debates* (October 7, 1921), 377 ff.

[3] See, e.g., s. 8 (3); s. 19 (3), (4), (6); s. 26 (5), (6); s. 39 of the Destitute Persons Act 1910.

[4] The writer is informed that in fact little drafting was done in New Zealand, and that the provisions of the New Zealand Act were copied, with only minor alterations, from those of the English Act.

ions ", on registration in New Zealand, [5] " shall from the date of such registration be of the same force and effect, and all proceedings may be taken thereon in the same manner as if it had been a maintenance order originally made by a Magistrate " acting under the authority of the Destitute Persons Act 1910. [6]

On a first reading of the section, it might be thought that an order to which the section applies would in all respects be in exactly the same position as an order made in New Zealand under the Destitute Persons Act. The wide powers conferred on Magistrates by that Act to cancel, vary, suspend and enforce New Zealand orders would, one would suppose, apply equally to the cancellation, variation, suspension and enforcement of registered orders. But this is not the view the Courts have adopted. In *Cook (Bolton-Moss)* v. *Bolton-Moss*, [7] Mr J. H. Luxford S.M. took the view that the preamble to the 1921 Act showed that its purpose was " to facilitate the enforcement of local and foreign maintenance orders ", and that when a foreign maintenance order was registered, a new maintenance order did not come into existence with incidents different from those attaching to the order made by the Court of origin. The legal control of the order, stated the learned Magistrate, remained in the Court of origin : [8]

> An overseas maintenance order, on registration, is deemed to be a maintenance order made under the Destitute Persons Act, so as to enable proceedings to be taken for its enforcement, and for no other purpose. [9]

In *Tucker* v. *Tucker* [10] Mr J. B. Thomson S.M. reached a similar conclusion on the grounds that, as a matter of construction, the words "all proceedings may be taken thereon " meant proceedings " on " the order and not against it ; [11] and in any event there was no machinery provided by the Act for the taking of evidence for the purpose of variation of orders registered under s. 3. [12] Similar grounds appear in the decision of Mr L. G. H. Sinclair S.M. in *Fewson* v. *Fewson*, [13] who, in addition, compared the wording of the English section with that of the New Zealand section, and concluded that

> . . . although the wording of the New Zealand section in its widest interpretation could include proceedings for variation, I find it difficult to believe that, in legislation intended to be reciprocal, registered orders should be variable in New Zealand and not variable in England. [14]

These decisions [15] have now been reinforced by the judgment of Lord Merriman P. and Davies J. in *Pilcher* v. *Pilcher*, [16] in which the Court, after comparing the provisions of ss. 1 (1) [17] and 4 [18] of the English Act, came to the conlusion that

> . . . the marked contrast between the wording, the scope, and the machinery of the two sections, except only with regard to enforcement, almost necessarily suggests that some limit must be put on the apparent generality of the words " all proceedings may be taken on such an order ". . . . Recognizing, as we do, that neither registered nor confirmed orders are free from certain anomalies and difficulties, the essential differences between the scope of the two sections by which they are governed remain. These seem to us to be such that the true conclusion is that section 1 (1) is limited to enforcement and does not permit of complaints for alteration, variation or discharge of orders registered by virtue of that section. [19]

It therefore appears quite plain that New Zealand Courts can do no more than enforce orders registered under s. 3 : and from this fact arise difficulties of the gravest nature, not the least of which is that, apart from leaving New Zealand, there is absolutely nothing a defendant under an order registered here can do to relieve himself from the full burden of the order, however deserving may be his circumstances. It is true that he can always take proceedings for variation in the Court of origin : but apart from the obvious disadvantages of such a procedure—the inevitable delay, and the expense involved—it is very doubtful indeed whether a variation by the Court of origin of an order which has been registered can have any effect whatever on the order as registered. An order of the Court of origin varying the original order cannot be registered under s. 3, as it is not a " maintenance order " within the terms of the section. [20] Furthermore, there is no provision in the Act to enable the registration of an

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[5] No procedure is laid down by the Act or by the Regulations under the Act (Gazetted September 13, 1923) as to the registration of an overseas maintenance order. It is believed that the practice adopted by the Justice Department is to forward and receive maintenance orders through the channels provided for by s. 4 (3) of the Act. However, in the absence of any express procedure, there seems to be no reason why an overseas order, properly authenticated, together with a certificate as to the arrears of maintenance due, should not merely be handed in over the counter of the office of the appropriate Court. See, however, the provisions of s. 1 (1) of the English Act. The corresponding legislation in certain of the Australian States also makes provision for the transmission of orders for registration through " diplomatic " channels : see, e.g., s. 3 (1) of the Queensland Maintenance Orders (Facilities for Enforcement) Act 1921 : " Where a maintenance order has, whether before or after the passing of this Act, been made against any person by any Court in England or Ireland or in any reciprocating State, and a certified copy of the order has been transmitted by the Secretary of State for the Colonies or by the Governor of the reciprocating State, as the case may be, to the Governor, the Governor shall send a copy of the order to the prescribed officer of a Court in Queensland for registration ; and on receipt thereof the order shall be registered in the prescribed manner . . ."

[6] The corresponding section of the English Act is s. 1 (1), which is to substantially the same effect (apart from the method of registration).

[7] (1938) 33 M.C.R. 79, 80, 81.

[8] As to this point, see p. 187, *post*.

[9] 33 M.C.R. 79, 80.

[10] Unreported. Decided at Auckland, April 28, 1953.

[11] The learned Magistrate here followed *Wilson* v. *Morris*, [1929] N.Z.L.R. 901, but pointed out that as the application before him was an application to increase, not to reduce, an order, and although a proceeding to reduce an order might well be regarded as a proceeding against the order, the same difficulty of expression did not arise where the application was to increase the order, the case fell short of being decisive on the issue before him. See also *Fewson* v. *Fewson*, (1955) 9 M.C.D. 26, 27, 28.

[12] The learned Magistrate stated : " If registered orders can be varied, what machinery is to be used ? The procedure by way of provisional variation transmitted to England for confirmation is only available if a variation is regarded as a " maintenance order " within the definition in the Maintenance Orders (Facilities for Enforcement) Act. It may be possible without undue forcing of language to regard an order increasing a maintenance order as being itself a maintenance order (though I do not think this view is correct). But I am quite unable to see how an order decreasing an order and in particular an order cancelling an order (which are asked for here) can be regarded as orders under which maintenance is payable as required by the definition."

[13] (1955) 9 M.C.D. 26.

[14] *Ibid.*, 27.

[15] And see also *In re McGrath* (unreported ; see p. 188, note (38), *post* ; *Peart* v. *Peart*, (1956) 9 M.C.D. 28, in which Mr L. G. H. Sinclair S.M. followed *Pilcher* v. *Pilcher*, [1955] P. 318 ; [1955] 2 All E.R. 644.

[16] [1955] P. 318 ; [1955] 2 All E.R. 644.

[17] This section is to substantially similar effect as s. 3 of the New Zealand Act.

[18] This section is to substantially similar effect as s. 5 of the New Zealand Act.

[19] [1955] P. 318, 331, 332 ; [1955] 2 All E.R. 644, 652, 653.

[20] See the definition of " maintenance order " in s. 2, and see also *In re McGrath* (unreported), discussed, p. 188, *post*.

order to be cancelled, [21] and there is no procedure laid down by which a complainant can apply to have a registered order withdrawn. The conclusion must be, therefore, that although procedure may be available in the Court of origin for variation of the original order, as far as the Court of registration is concerned the amount payable under the order is permanently fixed. It follows that the only relief a defendant may obtain may be a remission, partial or total, of arrears of maintenance due under the registered order, whenever the complainant sees fit to enforce it. [22]

It should be emphasized that it is not only the defendant who may suffer from the inadequacy of s. 3 in this respect. The complainant may have good grounds for applying to the Court of origin to have amounts payable under the order increased—but an order increasing an existing order is no more a "maintenance order" than an order reducing an existing order; and it seems quite clear that such an order could not be registered under s. 3, [23] nor could advantage be taken of the provisions of s. 5. [24]

It is submitted, in the light of what has been said, that s. 3, while providing a comparatively simple and inexpensive means of enforcing an overseas maintenance order, is quite inadequate in other respects. There seems no reason why some procedure analogous to that available under s. 4 of the Act [25] could not be adopted to enable the Court of registration to make provisional orders varying, cancelling, or suspending registered orders, such provisional orders being subject to confirmation by the Court of origin.

Apart from questions of the desirability of enabling registered orders to be varied in the manner described above, it should be noted that s. 3, as it stands, provides no procedure for setting aside the registered order, nor for enabling a defendant to show cause why the order should not be registered. As has been pointed out, once an order has been registered under s. 3, the registration appears to be permanent. There are no safeguards available to prevent or to set aside registration of an order in cases, e.g., where the order has been obtained by fraud, or in excess of jurisdiction of the Court of origin, or in the absence of the defendant, he not having had sufficient notice of the proceedings to enable him to defend them. There does not seem to be any reason why maintenance orders should in this respect receive less attention than any other judgment of a foreign Court, and it may be that the incorporation in any amendment of s. 3 of provisions similar to those contained in s. 6 of the Reciprocal Enforcement of Judgments Act 1934 may be desirable. [26]

A further feature of s. 3 which may be thought to call for attention is the silence of the section on the question whether the incidents to be attached to a registered order by the Court of registration are those incidents attaching to the order in the Court of origin, or those attaching to an order under the Destitute Persons Act. If, for example, by the law of the Court of origin, liability under an order for maintenance of a child ceases when the child attains the age of fourteen, does the liability of the defendant in New Zealand continue until the child has attained the age of sixteen, [27] [28] Or, supposing liability according to the law of the Court of origin to continue until the child attains the age of twenty-one, is liability in New Zealand extinguished when the child reaches the age of sixteen? What is the position if, by the law of the Court of origin, a father is bound to maintain his child until the death of the child? [29]

It is submitted that the incidents of a registered order as to its scope and duration are those attached to the order by the law of the Court of origin. [30] It is true that s. 3 provides that a registered order shall be "of the same force and effect" as an order originally made under the Destitute Persons Act; but if, as appears above, these words mean no more than that a registered order is "of the same force and effect" only as far as enforcement is concerned, it appears that a New Zealand Court cannot go behind the registration to ascertain whether in a similar type of case a similar type of order would have been made in New Zealand, or whether the defendant would, under New Zealand law, have been liable for greater or less payments for a shorter or longer period had the complaint been heard in New Zealand. If s. 3 relates only to enforcement, it follows that the provisions of the Destitute Persons Act as to the scope and duration of New Zealand orders, and, it may be added, the classes of persons who may be liable for maintenance at New Zealand law, [31] are immaterial, and it is submitted that the Court is bound to enforce a registered order to the full extent to which it could be enforced by the Court of origin. [32]

If this is the present position, it cannot be said that as a result persons liable under registered orders are likely to suffer any injustice: there is no reason why any such person should be able to restrict his liability in this respect by moving to some Commonwealth country where the Destitute Persons law is more indulgent to him than the law of the country where the order was made; it is, however, desirable that the matter be put beyond doubt by a clear statement of the exact scope and incidents of a registered order.

Finally, the limitations of s. 3 are brought into sharp relief by the type of situation which might arise when both parties to a registered order are in New Zealand.

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[21] Compare the provisions of the Reciprocal Enforcement of Judgments Act 1934; in particular s. 6.

[22] Remission of arrears would appear to be part of the procedure of enforcement: see *Pilcher* v. *Pilcher*, [1955] P. 318, 332; [1955] 2 All E.R. 644, 652.

[23] See *In re McGrath* (unreported), discussed, p. 188, *post*.

[24] See discussion, pp. 188, 189, *post*.

[25] This course has been suggested in *Pilcher* v. *Pilcher*, [1955] P. 318, 333; [1955] 2 All E.R. 644, 652.

[26] And see also s. 4 (5) of the Maintenance Orders (Facilities for Enforcement) Act 1921.

[27] See Destitute Persons Act 1910 s. 26 (5); but note the provisions of s. 3 of the Destitute Persons Amendment Act 1953.

[28] It should be noted that ss. 4 and 5 of the Maintenance Orders (Facilities for Enforcement) Act are also silent on this point, although it is true that it is only as regards s. 3 that the point necessarily becomes relevant.

[29] It is questionable whether public policy cannot become an issue in cases under s. 3; and it may be that a New Zealand Court would refuse recognition of an order registered under the section on this ground. See, e.g., *In re Macartney*, [1921] 1 Ch. 522, where it was held that an affiliation order made in Malta, granting maintenance to the mother of an illegitimate child without any provision for termination when the child reached the age of 16 years, must be refused recognition in England on the ground, *inter alia*, that it was contrary to public policy in England to give an illegitimate child perpetual maintenance.

[30] See *Cook* (*Bolton-Moss*) v. *Bolton-Moss*, (1938) 33 M.C.R. 79, 81.

[31] This is clear from the definition of "maintenance order" in s. 2 of the 1921 Act.

[32] The *manner* in which the order is enforced is, of course, that provided by the Destitute Persons Act.

It is obvious that in such a case, where both parties can come before the Court of registration and full evidence on both sides can be taken before the Court of registration, the provisions of s. 3 as they stand can result in considerable injustice and inconvenience. It is equally obvious that any provision enabling a provisional variation order to be made, to be confirmed by the Court of origin, is quite inappropriate in this class of case. It would seem highly desirable that some provision be made, possibly to the effect that when both parties to a registered order reside and are domiciled in New Zealand, the order is for all purposes, both as to its incidents and its enforcement, to be regarded as an order made under the Destitute Persons Act. [33]

In view of the serious limitations of s. 3, it is submitted that amendment is called for in the following respects:

1. To provide procedure to enable the Court (provisionally or otherwise) to vary, cancel, or suspend registered orders;
2. To incorporate provisions similar to those contained in the Reciprocal Enforcement of Judgments Act 1934 to enable a defendant to show cause why an order should not be registered, and to enable him to apply on certain grounds to have the registration of an order set aside;
3. To define the incidents and scope of registered orders;
4. To provide some simple procedure for variation, cancellation, or suspension of registered orders in cases where both parties are in New Zealand.[33A]

[33] The proposition here stated is not without difficulty. Mere residence would seem to be too uncertain a requirement, whereas one of the parties might well be domiciled in New Zealand but resident somewhere else, and although a New Zealand domicil in most cases involves permanent residence here, this need not necessarily be the position in regard to a married woman resident elsewhere, whose husband is domiciled in New Zealand.

[33A] Since the above was in type, the writer has had made available to him the Report of the Royal Commission on Marriage and Divorce (1951-1955) (Cmd. 9678) in which the question of variation of registered orders by the Court of registration is briefly discussed. After referring to the position as now established by *Pilcher* v. *Pilcher*, [1955] P. 318, the Report continues: "Where the order has been registered under Section 1 [of the English Act] a husband may suffer real hardship; the wife is able to enforce the order against him without coming to England but if he wishes to apply for variation or discharge he must take proceedings in the country in which the order was made. We accordingly recommend that the Magistrates' Court in England in which the maintenance order has been registered under the provision of Section 1 of the Act of 1920 should be given the same power to vary or discharge the order as it already has in respect of an order confirmed by it under Section 4 of the Act of 1920. It will be necessary to provide for service of the summons for variation or discharge to be effected by sending it by registered post to the last known address of the wife" (p. 287, para. 1113). It is unfortunate that the Royal Commission did not consider the question at greater length, as it is doubtful whether any such variation or discharge by the Court of origin can have any relevance if the wife insists on enforcing the registered order as such: see p. 186, *ante*. It is true that the difficulties of service would have to be overcome in any proposed new legislation. However, in New Zealand it has always been possible under s. 73 of the Destitute Persons Act 1910 (before its amendment by the Destitute Persons Amendment Act 1955) and now under the new s. 73 as inserted by s. 3 of the latter Act, for the Court to dispense with service of a summons on a defendant if it is proved to the satisfaction of a Magistrate that the defendant is absent from New Zealand or cannot be found; and the complaint may be heard and determined in the same manner as if the defendant had been served with a summons: s. 73 (1) (as amended). A Magistrate may, however, order any steps to be taken to bring the proceedings to the notice of the defendant: s. 73 (3) (as amended).

II. Variation of Provisional Orders Confirmed In New Zealand.

Section 4 of the Act makes provision to enable maintenance orders to be made in New Zealand against a defendant elsewhere in the British Commonwealth, such orders being subject to confirmation "by a competent Court in the place where the defendant is . . . proved to be resident"; [34] and such orders may be varied or rescinded by the New Zealand Court. [35] Section 5 makes provision for the converse situation: a provisional order made by a Court in the British Commonwealth may be confirmed by the New Zealand Court, [36] and such an order may be varied or rescinded in New Zealand "in like manner as if it had originally been made by the Magistrate confirming the same", the Magistrate being empowered, if he considers it necessary, to remit the case to the Court which made the order for the purpose of taking further evidence. [37]

It will immediately strike the reader that although s. 5 deals in some detail with the procedure on an application before a New Zealand Court to vary a provisional order, it is silent on the procedure to be adopted when a provisional order of the Court of origin varying the original order comes before the New Zealand Court for confirmation, and the question arises whether the New Zealand Court has jurisdiction to confirm such a provisional variation order.

In *In re McGrath*, [38] a maintenance order was made in England and registered [39] in New Zealand. Subsequently a provisional order was made in the Court of Summary Jurisdiction at Wealdstone varying the original order. The provisional order was duly transmitted to the Magistrates' Court at Wellington for confirmation in terms of s. 5 (1), and a summons was issued to the defendant to show cause why the order should not be confirmed. It should be noted that the provisional order provided for an increase in the amount of maintenance payable under the original order, and the question arose whether the provisional variation order was a "maintenance order" within the meaning of the definition of "maintenance order" in s. 2. In refusing to confirm the provisional variation order, the learned Magistrate said:

> I do not think that an Order varying a Maintenance Order is within the definition of "Maintenance Order" in the Maintenance Orders (Facilities for Enforcement) Act 1921. It is not an order for the periodical payment of a sum of money. It is in fact what it purports to be, an order varying such an order. The ultimate obligation to pay is found in the original order. The distinction between a Maintenance Order and an Order varying a Maintenance Order is quite clear throughout the legislation. For example, in s. 39 of the Destitute Persons Act 1910, of which the 1921 Act was deemed to be part, power is given to a Magistrate to make an order varying a Maintenance Order, but there is no provision which gives an order for variation any substantive effect. The obligation is still under the original order, though the amount is varied.
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> Moreover, if a variation can itself be regarded as a maintenance order it is a little difficult to see why express provision

[34] Subs. (1).

[35] Subs. (5). But the order varying the original order is subject to confirmation in the same way as the original order.

[36] Subss. (1) and (3).

[37] Subs. (5).

[38] Unreported. Decided at Wellington by Mr J. B. Thomson, S.M., February 23, 1953.

[39] There is apparently no reported case in which the question here discussed arose in regard to the provisional variation of a confirmed order: and see note (41), *post*.

was made in the 1921 Act for the variation of provisional orders later confirmed. If an order for variation could itself be regarded as a maintenance order the special provisions which are made for provisional variations would have been unnecessary. [40]

If this is the position, [41] there would appear to be an extraordinary gap in the law: not only as far as the New Zealand statute is concerned, but the English statute also. Section 4 of the New Zealand Act is complementary to s. 4 of the English Act, [42] and s. 3 of the English Act [43] is complementary to s. 5 of the New Zealand Act. Thus, an English Court can make a provisional order varying an order of its own confirmed in New Zealand, [44] but there is nothing in s. 5 of the New Zealand Act giving the New Zealand Court jurisdiction to confirm such a provisional order, although the New Zealand Court can itself vary or rescind the confirmed order: [45] similarly a New Zealand Court can make a provisional order varying an order of its own confirmed in England, [46] but there is nothing in s. 4 of the English Act giving the English Court jurisdiction to confirm such a provisional order, although the English Court can itself vary or rescind the confirmed order. [47] This is reciprocity gone mad. [48] There is no doubt that what was intended in the legislation was that the Courts of both countries should have jurisdiction to vary orders made under s. 3 of the English Act and s. 4 of the New Zealand Act, and it may be the case that the term "maintenance order" in s. 3 (1) and s. 4 (1) respectively was intended to include an order varying a maintenance order, [49] but it is difficult to deny the force of the reasoning of the learned Magistrate in *In re McGrath*. [50]

[40] See also the dictum of the same learned Magistrate in *Tucker* v. *Tucker* (unreported): see p. 186, note (12), *ante*. Reference may also be made to *Peart* v. *Peart*, (1956) 9 M.C.D. 28, in which Mr L. G. H. Sinclair S.M. refused to confirm or vary a provisional variation order on the ground that the original order (which had been registered under s. 3) could not be varied in the light of the decision in *Pilcher* v. *Pilcher*, [1955] P. 318; [1955] 2 All E.R. 644. In view of the fact that the provisional variation order *increased* the amounts payable under the original order, it is submitted with respect that the decision in *Peart* v. *Peart* proceeded on a wrong basis. Had the provisional variation order been confirmed, the defendant would, it is submitted, have been liable for the increased amounts under *that* order, and not under the registered order. The question was not, with respect, whether the provisional variation order purported to vary the registered order (it in fact varied the original order), but whether it could be confirmed, thus taking effect quite apart from the registered order. In the result, of course, the decision was, it is submitted, right; but, with respect to the learned Magistrate, the approach adopted in *In re McGrath* (*supra*) is to be preferred.

[41] Although the *ratio decidendi* in *In re McGrath* was that a provisional variation order could not be confirmed as it was not a "maintenance order" within the meaning of the definition of that term in s. 2, the decision is, of course, strictly speaking authority only for the proposition that the procedure under s. 5 is not available where variation of a *registered order* is sought. Had the provisional variation order in that case been confirmed, it would have existed in New Zealand as a variation order, as it were, *in vacuo*, unrelated to any confirmed original order. The position would not have been as strange had the original order been a confirmed, and not a registered order, and the learned Magistrate obviously did not need to consider the latter type of case. It is, however, submitted, that the *ratio* in *In re McGrath* is clearly applicable to any case in which a provisional order is sought to be confirmed.

[42] Section 4 of the English Act is to substantially the same effect as s. 5 of the New Zealand Act.

[43] Section 3 of the English Act is to substantially the same effect as s. 4 of the New Zealand Act.

[44] Section 3 (5) of the English Act.

[45] Section 5 (5) of the New Zealand Act.

[46] Section 4 (6) of the New Zealand Act.

[47] Section 4 (6) of the English Act.

[48] *Pace* Lord Goddard L.C.J. in the case of one Jean Callender, a case which he called "bureaucracy gone mad": *Evening Post*, June 23, 1956.

[49] See note in (1952) *141 Justices of the Peace and Local Government Review*, 14.

[50] See p. 186, *ante*.

LEASE TO A PRIVATE COMPANY.

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

Explanatory Note.

To the student of real property law, who desires to ascertain and understand the legal concept of a lease of land, I would advise a careful reading of the House of Lords case, *Cricklewood Property and Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.*, [1945] A.C. 221; [1945] 1 All E.R. 252.

A lease is of a two-fold nature: it constitutes an estate in the land, and it is also a contract. The contractual provisions remain operative during the subsistence of the lease. Except in the cases where a memorandum of lease contains purchasing or renewal clauses, the District Land Registrar is not very much concerned with the contractual provisions of a lease: he is concerned more with the *title* aspect, with the *legal* estate in the land which is created on the registration of the lease.

The conveyancer, however, is very much concerned with the contractual provisions, for they affect his client: they may be advantageous to his client and on the other hand they may be most burdensome.

This leads us to the important doctrine of *privity* of estate and *privity* of contract. As between the lessor and the lessee, there is *privity* of estate and *privity* of contract. When the lessee transfers his lease, he vests his estate in the land in the transferee, who expressly or impliedly covenants with the transferor to pay the rent, etc., and perform the covenants in the lease; but he (the original lessee) does not thereby relieve himself of the burden of the covenants he has made with the lessor, except with the concurrence of the lessor by *novation*, and such a novation is not usual in practice. The original lessee still remains liable to the lessor or to the lessor's assigns on the covenants in the lease: a statutory exception to this rule is s. 89 of the Land Act 1948 (which applies only to leases and licences of Crown land issued under the Land Act 1948 or former Land Acts) and reads as follows:

> Every person to whom any lease or licence has been lawfully transferred shall have all the rights and privileges and be subject to the same obligations as the original lessee or licensee and the former lessee or licensee shall thereupon cease to be liable for any subsequent breach of any covenant, condition, or obligation (expressed or implied) in the lease or licence.

The personal covenant of the lessee is, therefore, an additional advantage to the lessor or his assigns—its value depends on the worth of that personal covenant.

If the original lessee is " a man of straw ", it is worthless. The value of the personal covenant of a company-lessee may also be worthless : that will depend mainly on the state of solvency of the company. The company may become defunct by going through the procedure of winding-up or by being struck off the Register by the Registrar of Companies. Upon the dissolution of a company, its personal covenants ipso facto become extinguished, subject, however, to s. 283 of the Companies Act 1933 providing for the assets of a dissolved company vesting in the Crown as bona vacantia, which topic, however, is beyond the scope of this Explanatory Note.

Therefore, it is the practice of some conveyancers in drawing leases to small private companies or other companies to insert special provisions in the leases binding personally the principal shareholders in the company. That these special provisions are often advisable appears clear from the fairly recent English case, *In re House Property and Investment Co., Ltd.*, [1954] Ch. 576 ; [1953] 2 All E.R. 1525. In this case, a lessor unsuccessfully sought, on the liquidation of a company lessee, to have a fund set aside to secure payment of future rent and performance of other covenants.

The judgment like so many modern ones in the Chancery Division is indeed a very long one, but the headnote in the *All England Law Reports* correctly summarizes the principle laid down :

> Where a solvent company, having resolved to be wound-up voluntarily, has assigned for value a lease which is beneficial to the assignee, the assignment being a permitted one, there is no absolute right [in the landlord] to have a fund set aside out of the assets of the company to answer its liabilities under its covenants in the lease. The landlord's remedy in such a case is to prove in the winding-up.

It was agreed by counsel in that case that the sum for which a proof could be lodged is the difference, at the date of valuation, between the market value of the particular lease with the benefit of the original lessee's covenants, and the value of the same lease without the benefit of the original lessee's covenants. If that is all a lessor can do with respect to a *solvent* company in liquidation, it does not appear that he will get much protection from a practical point of view in the liquidation or dissolution of an *insolvent* company.

The following two precedents are examples of how a solicitor, acting for the lessor, endeavours to solve the problem in New Zealand.

Precedent No. 1.

Special Provisions and Covenants in a Lease to a Private Company.

And the Said A. B. and the Said C. D. in consideration of the Lessor granting the foregoing lease to the Lessee at their request Do Hereby Jointly and Severally Agree and Undertake with the Lessor :

1. That they will duly and punctually keep observe and perform all and singular the agreements stipulations and provisions of these presents.

2. That should they or either of them at any time agree to sell or transfer their respective shareholding in the Lessee Company they shall obtain the approval of the Lessor to the proposed transferee or transferees thereof and shall procure a Deed of Covenant (prepared by the Lessor's solicitor at the expense of the Lessee) from the proposed transferee or transferees to keep and observe all and singular the agreements stipulations and provisions hereof both on the part of the Lessee and the said A. B. and the said C. D.

And Lastly it is expressly agreed and declared :

(1) That although as between the Lessee and the said A. B. and the said C. D. their respective executors administrators and permitted assigns the two last named may be sureties only nevertheless as between the Lessor and the said A. B. and the said C. D. their respective executors administrators and permitted assigns the two last named shall be principal debtors and shall not be released by any act or omission of the Lessor which would otherwise release a surety only.

(2) That default by the said A. B. and the said C. D. their respective executors administrators or permitted assigns under any of the agreements stipulations and provisions on their part herein contained and implied shall be deemed default by the Lessee hereunder.

Precedent No. 2.

Special Provisions in an Agreement to Lease to a Private Company.

And It Is Expressly Declared that the foregoing agreement to lease has been granted to the Lessee at the request of A. B. of Wanganui Manager and C. D. his wife two of the directors of the Lessee Company and in consideration of the granting of the said agreement to lease to the Lessee the said A. B. and C. D. (hereinafter called " the covenantors ") Do Hereby Jointly and Severally Covenant with the Lessor as follows :

1. That the covenantors shall not sell transfer or otherwise dispose of such parcel or parcels of their shares in the Lessee Company without first obtaining the written consent of the Lessor.

2. That the covenantors shall not part with the physical occupation of the said demised premises to any other person or persons without the prior written consent of the Lessor Provided That the bona fide employment of a person not being a member of the company as manager of the company's business conducted in the demised premises shall not constitute a breach hereof.

3. That the covenantors shall not conduct or allow the Lessee Company to conduct or carry on any type of business in the demised premises other than that of a [*state here nature of business.*]

4. That the covenantors shall observe and perform each and all of the foregoing agreements and provisions on the part of the company to be performed and observed and shall pay or cause to be paid the rental and all other moneys including rates payable by the Lessee at the times and in the manner hereinbefore specified.

5. That although as between the Lessee and the covenantors the latter may be only sureties yet as between the covenantors and the Lessor the covenantors shall be deemed principal debtors and shall not be released by any transaction between the said Lessee and the Lessor which might or would otherwise have that effect.

6. That it shall be a condition precedent to the granting of any renewal of the said term of these presents that these present covenants by the covenantors shall be confirmed by the covenantors and remain in full force and effect during any renewed term.

And For The Consideration hereinbefore appearing the Lessee both hereby for itself and its successors covenant with the Lessor that any breach of the provisions and covenants of the covenantors in these presents contained shall constitute default by the Lessee and immediately entitle the Lessor to exercise his remedies as Lessor but without prejudice to the Lessor's rights powers and remedies against the covenantors for breach of covenant hereunder

And the Lessor records that his consent would not be given should a proposed transferee of shares be other than a respectable and solvent transferee.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Biro Pen.—One of the grievances that Scriblex has against life in general is that the ball-pointed pen, that enemy of over-cautious bank managers, never joined the upsurge of the cost-of-living spiral. He was one of a noble band of those who encouraged invention at a cost of £5 5s. per pen—only, some years later, to be confronted by the chain-stores and the imitative Japs with what appeared an excellent facsimile at 5s. It is therefore with a certain satisfaction that he notices that the House of Lords in *H. Millwood, Limited* v. *Martin* has now held that the patent granted to Laszlo Josef Biro in 1943, relating to "a writing instrument of the type comprising a reservoir, which reservoir has an air intake and is adapted to contain a charge of dense ink and a writing tip constituted by a ball retained in a housing between an inturned lip and a seat", is a valid one entitled to protection against infringement. To the defence by the infringers that the invention lacked inventive merit and was obvious, the Court replied that although the idea of a ball-pointed fountain pen had been known for many years prior to 1943, at that date no such pen had been put on the market. An examination of the individual features of the Biro pen showed at least one feature that was not obvious—namely, the manner in which the grooves or channels between the bearing surfaces were designed. That led to and supported the view that the combination, in which the invention was said to consist, was not obvious.

Women Litigants.—There can be no doubt that some women litigants sometimes adopt lines of action well calculated to embarrass their legal advisers, and in so doing are moved by impulses or reasons which never enter into the heart of a mere man. Not long ago a widow was plaintiff in an action for damages against a firm of caterers; she alleged that she had been poisoned by certain of their foodstuffs. She had no case, for the evidence of the medical people, including her own, was dead against her. In those circumstances the defendants offered to settle, and offered a substantial sum before the case came on for hearing. This offer was increased, but the lady firmly refused, against the advice of her legal and medical advisers. The trial proceeded and she lost her case. "I know," she had said, "that I shall win. I have it on the highest authority that I shall get judgment for a very large sum, and that I must not settle the case." It transpired eventually that she had attended a seance, whereat a spirit, purporting to be that of a deceased Lord Chancellor, had delivered himself of that strong and favourable opinion. And the curious thing is that the lady still believes he was substantially correct. It is fair to add that there is one recorded case where a lady whose "bad" case had been settled without her consent by counsel, appealed, and won. And, apropos of women in law generally, Scriblex recommends "The Second Man" by Edward Grierson (Chatto & Windus, 1956) as a particularly well-written study of a woman barrister handling a difficult brief in a murder trial, the Court scenes being excellent and presented against a background of life in barrister's chambers and robing rooms. The author gives a just and illuminating picture of the difficulties that confront a woman advocate in this class of case.

Waking the Judge.—The compulsory retirement of our Judges on attaining the age of 72 years ("resignation" is the more correct term, as the late Sir Frederick Chapman always maintained) removes, to a great extent, the habit of the older Judges in other countries of closing their eyes during the hearing of a case. This has prompted a reader to draw the attention of Scriblex to a story told of Coleridge L.C.J. During the hearing of an action for damages for running down a dog, alleged to be a pedigree animal and a winner of many prizes, the Lord Chief is said to have fallen into a profound slumber. Now in sporting circles a dog during exhibition is said to be a dog "on the bench". Counsel for the defendant was doing his praiseworthy best in cross-examination to get an admission that this dog's day of glory and value had long since passed; but it was expedient that the Judge should hear. Counsel therefore put the following question to witness: "Is it not your experience as an exhibitor that when an old dog has taken his place regularly on the bench for many years he gets sleepy and past his work?" And it is reported that during the loud laughter which followed His Lordship resumed consciousness, and so continued until he had delivered a judgment which satisfied the defendant. Baron Brampton (Sir Henry Hawkins) had a small terrier that frequently appeared on the Bench, but the cynics used to declare that he appeared there, not so much in any advisory capacity, as a courier from His Lordship's local "commission agent" of the latest results on the turf.

Obsolete Statutes.—In a Wellington Court recently, a landlord claimed under s. 1 of the Landlord and Tenant Act 1730 (Eng.) double the yearly rent from a tenant who was holding over without benefit of tenancy legislation. At the time of writing, judgment has not been given. There was a time when rapacious Judges made dexterous use of obsolete but unrepealed Acts, "preying," according to Lord Bacon, "like tame hawks for the King their master, and like wild hawks for themselves." Empson and Dudley, in the reign of Henry VII, raked up many old statutes, "long considered obsolete and in practice disregarded, and enforced them without regard to the object for which they had been framed, or the time they had been allowed to slumber in obscurity." By acting as the agents of the King in the purchase of Royal pardons, they made "the blessed prerogative of mercy" a profitable source of revenue to the Sovereign as to themselves. By and by, emboldened by success, they dropped the old statutes and the mask of legality, and would attach anyone they considered worth the powder, have the victim brought before them in a private house, and, calling themselves a "Court of Commission", would proceed to trial and condemnation.

Tailpiece.

What delightful omniscience
In a Q.C.'s reminiscience
Of delinquents and taxes
And corpses down hatches,
All made so deuced
Lucid!

IT'S FUN TO BE A TRUSTEE.

By Advocatus Ruralis.

Recently, a trustee of an estate which included a small dairy farm and stock called for advice. According to the will, the trustees could lease the farm or else—adopting the local idiom—share-milk it. The client had arranged a share-milking agreement; but, as the estate did not own a motor-vehicle, it was agreed between the parties that the share-milker would find and maintain the necessary motor-vehicles and he should be paid 50 per cent. instead of 39 per cent.—and would we please prepare the agreement. Advocatus pointed out that the trustee was, *in vulgar parlance*, "poking his neck out". We explained that the regulations under the Share-milking Agreements Act 1937 set out certain terms and conditions of share-milkers' contracts, and these conditions must be adhered to or improved on so far as the share-milker was concerned. Under cl. 14, the owner must provide the motor-vehicles. According to the decision in *Handley* v. *Wishnowsky*, [1941] N.Z.L.R. 390; [1941] G.L.R. 185, it is impossible for the owner to contract out of the liability to provide the motor-vehicle, but he would still be bound to pay his 50 per cent. if he entered into an agreement to do so. Our client dissented from this judgment, and asked: "So what?"

Advocatus explained that this was some of the advanced Social Legislation which was produced in a hurry in the late 1930's. We explained that, when the Act was first passed, a share-milker working under a Share-milking Agreement had put water in the milk which was supplied to the local hospital. The owner who lived fifteen miles away was in due course sued for having supplied watered milk. Being ably defended (we bow) the charge was dismissed; the owner then wanted to know how he could sack the milker. We explained to him that the man was not an employee but a contracting party. The owner could write him a letter telling him not to do it again, or he could refer the matter to arbitration. The owner had lived with our Army in Flanders and said—forcefully—that he wanted the cow (the share-milker—not the Jersey) out, and how could he do it?

The next Advocatus remembers of the matter was that a neighbouring solicitor was writing his client demanding damages for wrongful dismissal. Advocatus thereupon rang the other solicitor pointing out that, so far as the owner was concerned, the share-milker was not an employee but a high contracting party, and should any body corporate or institution provide money to take action against the owner then such body would be guilty of champerty or barratry or whatever it was the people are guilty of, and that it would look nice if we took action against any body corporate for providing maintenance for a milk-watering defaulter.

It seemed poor law but good blackmail, and the correspondence thereupon ceased.

Returning to 1956: we explained to our client that his first mistake was made allowing himself to be appointed a trustee. Advocatus remembered in his younger days that he had been a trustee in a large estate, and his only reward was to have his name spelt wrongly in the Law Reports.

We remember after the Napier Earthquake a commercial property had been badly shaken in a small village. There was a mortgage for £400 to trustees on the property—the owner died without other estate. The trustee-mortgagees found that it would cost £370 to clear the section which would then be worth £200. They did nothing until the Borough Council decided to sue them for rates. Then they sought legal advice. Advocatus explained that their best action would be to register a release of mortgage, and the signing correct of that release is still on our conscience.

Warming up to the subject of trustees, Advocatus remembered that during the slump Mr B, of the well-known legal firm A, B, and C, was a trustee with X and Y in a farming estate. At that time, no farm was paying its way and in due course the Springbok County Council instructed its solicitors, A, B, and C, to sue B, X, and Y, and enter judgment so as to protect their rates.

A, B, and C temporized by drawing the summons against X and Y only, but X and Y had other views and expressed them.

Advocatus then wrote to his Law Society suggesting that an Act should be prepared whereby a trust estate having a continuing trust could be incorporated, so that the incorporated body could sue and be sued and otherwise act. Apparently in those days Advocatus could make himself understood, for, after a decent interval, his Law Society wrote back approving the idea in principle and asking Advocatus's assistance in drawing an Act.

That correspondence thereupon ceased, but it does seem a subject on which some orator could spend time at the next Legal Conference.

NEW ZEALAND LAW SOCIETY.

(*Concluded from p. 160.*)

Standing Committee and Wellington Members of Committees: Mr Currie expressed the appreciation of the Wanganui Society for the valuable work carried out by the Wellington members on the Standing Committee and the Committees. Other members conveyed similar expressions from their Societies.

Contracts Enforcement Bill.—The following letter was received from the Hon. the Attorney-General:

"20th December, 1955.

"During the last Session of Parliament the above Bill was introduced and referred to the Statutes Revision Committee. The President of the Society appeared before the Committee and gave evidence on the Bill, and, as a result of what he said, the Committee decided that the views of the Law Society should be sought on the basis of the actual Bill that was now drafted, and in the light of the legislation which is now in operation in the United Kingdom.

"I would be greatly obliged if you would arrange for the views of the Society to be obtained."

The President said that some years ago the Society had the proposals contained in the present bill under consideration. In 1954, an Act was passed in England, and last year a Bill was drafted and brought before the Statutes Revision Committee. The Committee had been informed that, in the limited time available, the Society had not been prepared to approve of the Bill. It had then been decided by the Hon. the Attorney-General that the Bill be held over until this Session. It was resolved that the Council approve of the Bill in principle, but that it disapprove of cl. 2 (6) which makes the legislation retrospective.