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BANKRUPTCY: FRAUDULENT PREFERENCE: EXTINGUISHMENT OF BANK OVERDRAFT.

A JUDGMENT of more than passing interest to bankers and to the commercial community generally as well as to their advisers, *Re Aston (A Bankrupt), Ex parte Official Assignee* (to be reported), was recently given by Gresson J. The learned Judge held that it is not a fraudulent preference under s. 79 (1) of the Bankruptcy Act 1908 if a debtor, within three months before his adjudication as a bankrupt, makes a payment to a bank in the hope that, if his overdraft was cleared, the bank would extend to him further overdraft accommodation, or if the motive of the debtor in making the payment was that he thought it was necessary in order to retain the bank's goodwill so as not to imperil the continuation of his business. In every case, the real dominant or substantial motive of the debtor in making the payment in reduction of his overdraft must be sought from the evidence before the Court.

The judgment also indicates the position of a bank manager, who, under the authority of the debtor, himself makes lodgments to the debtor's account in reduction of the debtor's overdraft. Here, the manager's knowledge and intention are important: if there can be attributed to the manager a knowledge of the debtor's insolvency and an intention to protect the bank by preferring it, the lodgments by the manager would constitute a fraudulent preference, which would be void as against the Official Assignee.

Section 79 (1) of the Bankruptcy Act 1908 (as amended) is as follows:

> (1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor, with a view to giving that creditor or any surety or guarantor for the debt due to that creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the Official Assignee.

The burden of proving that a lodgment to a debtor's overdraft is a preference to the bank is, of course, on the Official Assignee.

In *Aston's* case the Official Assignee sought an order that certain payments to a bank between January 5, 1954, and February 18, 1954, be deemed fraudulent and void as against the Official Assignee. The date of the bankruptcy was April 2, 1954.

In support of the motion it was contended that certain lodgments, which were made to the credit of the bankrupt's account with the bank, and which had the effect of extinguishing an overdraft, were made with a view to giving the bank a preference over the other creditors; and that, since these payments were made within three months of the bankruptcy, they constituted a fraudulent preference under s. 79 (1) of the Bankruptcy Act 1908.

The evidence was wholly by affidavit. It showed that the bankrupt, in business as a cabinet-maker, sought on September 25, 1953, a temporary overdraft limit of £100, intimating, at that time, that he would have incomings of between £300 and £400 from work then nearing completion, and that he was approaching the Rehabilitation Department for a loan of £1,850. He was allowed a temporary overdraft limit of £100 until October 12, 1953. By November 16, his account with the bank was overdrawn to the extent of £310, and he was interviewed by the manager and pressed to clear the overdraft. He produced to the manager a list of expected incomings from work completed and nearing completion amounting to £901 8s. 6d.; he informed the manager, also, that he hoped to refinance through the Rehabilitation Department to overcome his shortage of working capital, and he undertook to have his bank account in credit by November 25.

On November 18, the debtor produced to the bank manager a trading account for the six months ended September 30, 1953, and a balance-sheet as at that date, prepared by a Public Accountant. The profit and loss account showed a gross profit of £1,467, and a net profit of £928 over the period; and the balance-sheet showed an excess of assets over liabilities amounting to £1,210.

On December 16, he was again pressed, and undertook to have the account in credit by December 24. At this stage, the manager arranged to honour his weekly wage cheques and cheques for purchases of material. Nevertheless, a cheque drawn in December 1953, post-dated to January 19, 1954, was not met by the bank. There was no evidence what the cheque was for, though it would appear to have been for materials; no reason was given for its not being met by the bank.

Between January 5, 1954, and February 18, 1954, lodgments were made to the credit of the overdrawn account at the bank as follows: January 5, 1954, £67; February 1, £62; February 2, £39 10s.; February 9, £84; February 11, £100; February 18, £40 4s. and February 18, £27, making a total of £419 14s.

On January 5, 1954, the account was in debit £217 18s. 5d.; during the period cheques were drawn amounting in all to £215 14s. 1d.; so that, after February 18, the account was in credit £6 1s. 6d.

Of the amount of £419 14s. lodged, £268 10s. was lodged by the debtor himself, but £151 4s. was lodged by the manager of the bank, who, with the authority of the debtor, personally collected an amount of £84, and an amount of £40 4s. which was owing to the debtor; and he lodged them, together with £27, which was owing by himself to the debtor for purchases made.

On April 2, 1954, the debtor was adjudicated bankrupt on his own petition.

During January and February, the debtor was indebted to about forty-five creditors in a total amount exceeding £2,000; his only assets—plant, stock-in-hand, and a motor car—were worth about £1,350, and were subject to a chattels security of £1,128. He was, therefore, undoubtedly "unable to pay his debts" within the meaning of the words as used in s. 79 (1).

Mr Justice Gresson said that it was very difficult to form an opinion as to what was the real dominant or substantial motive of the debtor in making the lodgments, when, as here, there may have been several reasons operating; and the difficulty was accentuated when, as here, the evidence available to the Court was from affidavits only.

The explanation given by the bankrupt to the Official Assignee was (*a*) that he understood that he was obliged to pay the bank before his other creditors, and (*b*) that, if he liquidated the overdraft, the bank would grant him fresh accommodation. In the affidavit which he had sworn, his reasons were somewhat differently stated as being: (*a*) because the bank manager had asked him to reduce his overdraft, as the latter said that he was going on leave, and wanted the overdraft repaid before he left, and that the overdraft might jeopardize his retirement; (*b*) that he thought he could operate the overdraft again (although the bank manager made no promise), and it was only after it had been reduced to approximately £27 that he was informed he could no longer draw on the account except for wages; (*c*) that the manager informed him that the bank officials above him were putting pressure on the manager to obtain a reduction of this overdraft amongst others; (*d*) that he felt the bank might close down his business, if he did not reduce his overdraft, although the manager made no threats in that direction; and (*e*) that he was concerned in paying the bank to safeguard the manager and his family.

The learned Judge said that there were, therefore, a variety of reasons deposed to, and they stood uncontradicted. It was not possible to extract any one of them as the substantial, effective, or dominant motive. His Honour continued:

> Pressure would negative an intention to prefer; also that the bankrupt thought, even if mistakenly, that he was under a legal obligation to make the payments: *Re Vautin Ex parte Saffery*, [1900] 2 Q.B. 325. A mere sense of moral obligation would, however, be insufficient.
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> "If a debtor makes a payment under the belief that he is under a legal obligation to make it, that will prevent the payment being a fraudulent preference; but doing so under a sense of honour, or moral obligation alone, will not, any more than a mere motive of kindness": per Vaughan Williams J. in *Re Vingoe and Davies, Ex parte Viney and Norton*, (1894) 1 Mans. 416.
>
> A hope, that the bank, if the overdraft was cleared, would the more readily extend further overdraft accommodation, would be primarily to benefit himself, and could not be regarded as a fraudulent preference, or if he thought it was necessary to do as he did, in order not to imperil the continuance of his business. It would constitute a fraudulent preference if there was "a view" of giving the bank a preference, and if that operated to bring about the payments. But I do not think I can collect from the variety of reasons advanced an intention to give the bank a preference.

The burden of proving that the lodgments to the overdrawn account were a fraudulent preference was upon the Official Assignee. His Honour did not think it had been so proved. He said:

> The governing motive, in so far as there was a governing motive, appears to have been to retain the goodwill of the bank, in order to permit of his business being carried on; a payment made for that reason is not a fraudulent preference: *Re G. Stanley & Co., Ltd.*, [1925] Ch. 148.

It was, however, contended that the three amounts collected by the manager, and, by him, placed to the credit of the account, must have been so paid by the manager with the intention of preferring the bank, and *In re Drabble Brothers*, [1930] 2 Ch. 211, was relied on in this connection. His Honour commented that that case establishes that an agent, who, acting within the scope of his employment, makes a payment with a knowledge of his principal's insolvency with a view to giving a preference, involves his principal in the payment so as to make it a fraudulent preference: the intention and knowledge of the agent is to be imputed to the principal. If, therefore, there could be attributed to the manager of the bank a knowledge of the insolvency of the debtor, and an intention to prefer the bank, the lodgments would constitute fraudulent preferences.

On this aspect of the case, Gresson J. said:

> Certainly the manager showed himself very anxious to get the overdraft cleared, but that was not necessarily because of any impending bankruptcy. He may well have incurred the disapproval of his superiors in permitting the account to have become overdrawn to the extent that it was; and it may have been important, in his own interests, to retrieve the position. Moreover, on the statements which had been submitted to him—a trading account and balance-sheet prepared by a Public Accountant—the debtor appeared to be quite solvent, even if somewhat short of cash. It has not been shown that the manager should have regarded the debtor as insolvent; without such knowledge, or knowledge sufficient to put him on inquiry, he was entitled to do all he did to secure the repayment of the overdraft.

His Honour concluded that, on the facts as deposed to in the affidavits, and especially the manager's statement (which had not been contradicted) that he believed the debtor "to be solvent with a substantial balance of assets over liabilities", the lodgments made by the manager had not been proved to have been fraudulent preferences.

For the foregoing reasons, the motion was dismissed.

In the result, the learned Judge, who decided the matter on the special facts before the Court, held that the governing motive of the debtor in lodging

amounts to pay off his overdraft, in so far as there was a governing motive, appeared to have been to retain the goodwill of the bank in order to permit of his business being carried on ; and that a payment made for that reason was not a fraudulent preference.

The other matter decided, again on the facts before the Court, was that without knowledge on the part of the bank manager that the debtor was insolvent, or without knowledge sufficient to put him on inquiry, the bank manager was entitled to do all that he did to secure the repayment of the overdraft ; and, accordingly, the lodgments made by the manager to the debtor's account had not been proved to have been made with the intention of preferring the bank, and were, accordingly, not a fraudulent preference.

OCCUPIERS' LIABILITY: DISTINCTION BETWEEN INVITEES AND LICENSEES.

THE New Zealand Law Revision Committee is sure to be interested in the progress through the British Parliament of the Occupiers' Liability Bill, which was given a second reading in the House of Lords on June 21.

This matter was considered by the Law Reform Committee (U.K.) in its Third Report (Cmd. 9305), wherein it recommended that the common-law distinction between the liability of an occupier towards invitees and licensees entering his premises should be abolished. This seemingly artificial distinction has been the subject of much critical attention in recent years. The probable reason for the differing standards is set out in a series of articles in the *Law Quarterly Review* (69 L.Q.B. 182, 359 ; 70 L.Q.R. 33). The learned Chief Justice in his judgment in *Napier* v. *Ryan*, [1954] N.Z.L.R. 1234, 1243, suggested that there is a case for amendment in this country in this branch of the law of tort.

The Law Reform Committee's recommendations for sweeping reforms were indicated last year in these pages, " Invitees, Licensees, and Trespassers " (31 N.Z.L.J. 161). These recommendations are embodied in the Occupiers' Liability Bill.

Following its usual practice, our Law Revision Committee will await the enactment of the current Bill in the House of Lords before recommending that the law in New Zealand be brought into line with the amendments there made. In the meantime, however, the proposals embodied in the Bill will be of general interest. For particulars of its contents, we are indebted to the *Law Journal* (London).

The Bill is concerned with lawful visitors only, and the duty of care owed to trespassers thus remains unaltered. The distinction between invitees and licensees is, however, abolished and their position is equated with that of contractual visitors; but the common-law rules will still determine who is an occupier and to whom the duty of care is owed. The " common duty of care " which an occupier owes to all visitors is to take such care "as is reasonable to see that the visitor will be reasonably safe in using the premises " ; the duty may, however, be modified or restricted by agreement or otherwise. Where an occupier is bound by contract to permit third parties to enter his premises, he cannot restrict or exclude the common duty of care so far as they are concerned, and he will be bound by any higher duty which the contract may impose upon him in relation to such third parties.

As a result of the decision of the House of Lords in *London Graving Dock Co., Ltd.* v. *Horton*, [1951] A.C. 37 ; [1951] 2 All E.R. 1, it is now the law that the duty of an invitor to an invitee is more extensive than a mere duty to warn : it is a duty to take reasonable care to prevent damage from any unusual danger. Where, however, the invitee has knowledge sufficient to enable him to avert the peril arising from the unusual danger, he cannot maintain an action against the invitor for any damage caused to him by the unusual danger. The Law Reform Committee felt, however, that knowledge and appreciation of the nature and extent of the risk operating as an absolute bar to any action by an injured invitee was liable to work injustice—as, indeed, it did in *Horton's* case—and they proposed, therefore, that the fact that a visitor has knowledge of some particular danger should not *in itself* discharge the occupier from liability to the visitor for any damage arising from that danger ; this recommendation was, however, made subject to a great many detailed modifications which, luckily, the Bill does not copy. All that is said in the relevant clause (cl. 2 (4) (*a*) is that a warning of danger " is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe ". Another change, made by cl. 2 (4) (*b*), concerns an occupier's liability for the faulty execution of any work of construction, maintenance, or repair by an independent contractor. In *Thompson* v. *Cremin*, [1953] 2 All E.R. 1185, the House of Lords held that an occupier cannot escape liability for injury resulting from the faulty work of an independent contractor ; under the Bill the occupier will not be liable in such circumstances if he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work was properly done.

It follows from the abolition of the distinction between invitee and licensee that a landlord would be liable to visitors of the tenant if they are injured on those parts of the premises which are retained under the landlord's control. In addition, the Law Reform Committee recommended that where a landlord is bound by contract with his tenant or by statute to keep demised premises or any part thereof in repair, he, as well as the occupier, should be liable to persons injured by reason of his breach of duty. At present, if the landlord fails to carry out his obligations, he may be liable to his tenant but not to any relative or friend of the tenant since the latter are not parties to the agreement : see *Cavalier* v. *Pope*, [1906] A.C. 428.

The present law was criticized not only by the Law Reform Committee, but also by the Leasehold Committee in England which reported in June, 1950 (Cmd. 7982). Clause 4 of the Bill accordingly imposes on a landlord who is responsible to his tenant for the maintenance or

repair of the premises the same duty of care towards his tenant's lawful visitors, in respect of dangers due to the landlord's failure to carry out his obligations under the tenancy agreement, as if he were himself the occupier. A corresponding obligation will be imposed on any superior landlord who has undertaken a similar repairing obligation to his own tenant, and so on up any chain of landlords until the chain is broken by the existence of a landlord who is not under an obligation to maintain or repair. " Tenancy " in this connection includes a statutory tenancy which does not in law amount to a tenancy, and includes also a contract conferring a right of occupation ; and it is immaterial whether the tenancies were created before or after the present Bill is passed. An exception is, however, made for the case where the premises comprised in the tenancy (whether occupied under that tenancy or under a sub-tenancy) are put to a use which is not permitted by the tenancy, and the visitor's presence is due solely to that use of the premises.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Practice—Uncertainty as to Date of Offence—No Proof of Actual Date of Commission of Offence—Two Informations disclosing Identical Offences on Successive Days—Proof of Commission of Offences within Period of Fortnight—Any Amendment leading to Two Convictions for Identical Offences, with No Identification of Convictions resulting—Amendment refused—Inferior Courts Procedure Act 1909, s. 8. Where a defendant is charged with two identical offences occurring on successive days, but the evidence does no more than establish that the offences must have occurred within the space of a certain fortnight, no conviction can be entered on either charge because the two convictions would be in identical terms and there would be nothing to identify either conviction with the offence in respect of which it was entered. Each conviction would, therefore, be bad for uncertainty. *Donald* v. *Langridge* ; *Donald* v. *New Zealand Shipping Co., Ltd.* (Wellington. September 10, 1955. Thomson S.M.)

DEATH DUTIES.

Estate Duty—Allowance for Debts—Son erecting Building on Father's Land on Promise by Father to transfer Same to Him—Such Land and Additional Land transferred—Transfer for Full Government Valuation of Land transferred (including Value of Building) with Mortgage back for Same Amount—Oral Agreement that Son had Right to Reimbursement by Father of Value of Building—Extrinsic Evidence admissible, notwithstanding Form of Documents, to prove Collateral Oral Agreement that Son should receive Credit for Value of Building—Such Agreement proved—Value of Building deductible as Debt owing to Son by Father's Estate—Estate and Gift Duties Act 1955, s. 9 (1). It was agreed between H. and his son that the son should be permitted to erect a workshop on Lot 3 of his property ; and H. promised to give the section to the son, and to transfer it to him. The son built on Lot 3 a workshop of the value of £804 14s. 7d. It was then found that Lot 3 had no legal frontage. The Government valuation of Lot 3, before the erection of the workshop, was £60 ; and the valuation of the adjoining Lot 2 was £2,000. It was arranged that the son should purchase Lots 2 and 3 for £2,060 ; but, on advice, a transfer to the son showing a consideration of £2,860 was registered, together with a mortgage back to H. over both Lots securing repayment of £2,860. Thenceforth, the son paid, and H. accepted, interest as on £2,060 only. On the death of the father, his executor included in his dutiable estate the mortgage from the son at its full value of £2,860 ; and he claimed an allowance of £800 as a debt of the deceased in respect of the son's claim in respect of the erection of the workshop. On Case Stated by the Commissioner of Inland Revenue for the opinion of the Court pursuant to s. 62 of the Death Duties Act 1921, *Held*, 1. That, immediately before the registration of the transfer and mortgage, the son had an enforceable claim against H. for reimbursement of the sum of £804 14s. 7d., and an equitable charge or lien on the land for the amount in respect of which he was entitled to reimbursement. (*In re Whitehead, Whitehead* v. *Whitehead*, [1948] N.Z.L.R. 1066; [1948] G.L.R. 365, followed.) 2. That it was the intention of the parties that, on registration of the transfer and the mortgage, the equitable charge or lien should merge in the transfer. 3. That the Court could consider *dehors* the transfer and mortgage any available evidence which would inform it either of the true nature of the transaction or of any collateral contemporaneous agreement not inconsistent with the documents, which formed part of the arrangement between the parties. (*Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30, and *Barton* v. *Bank of New South Wales*, (1890) 15 App. Cas. 379, followed.) 4. That it was proved that, notwithstanding the form of the documents, the parties had agreed in an oral agreement collateral with the mortgage that the son should receive credit for £800 thereunder in respect of the workshop which he had erected. 5. That, accordingly, the son was entitled against the father's estate to credit for £800 against the amount due under the mortgage. *Semble*, That, as the Commissioner had lost no revenue through the form in which the documents were presented, it might have been difficult for him to set up an estoppel, since no detriment could be shown. *Hammond* v. *Commissioner of Inland Revenue.* (S.C. Napier. May 10, 1956. Turner J.)

DESTITUTE PERSONS.

Maintenance Order—Effect of Registration of Agreement for Maintenance—Parol Agreement varying Maintenance Agreement before Registration—Registration a Nullity—Arrears under Such Separation Agreement—Destitute Persons Act 1910, s. 47B—Destitute Persons Amendment Act 1955, s. 4. A written agreement for maintenance, which, before registration, has been varied by parol agreement between the parties, cannot be registered under s. 47B of the Destitute Persons Act 1910 (as enacted by s. 4 of the Destitute Persons Amendment Act 1955), and, if registered, it should be cancelled. *Semble*, That arrears of maintenance accrued under such a separation agreement before registration cannot be dealt with as if they had accrued under a maintenance order. *Bunney* v. *Bunney.* (Wellington. April 16, 1956. Thomson S.M.)

FENCING.

Conversion—Fence erected on Unformed Road in County—Removal of Same by Adjoining Owner—Conversion of Chattels—Measure of Damages. The plaintiff claimed damages for the removal by the defendant of a fence erected upon an unformed road described as a " paper road " between his land and that of the defendant. The fence removed was in fact situated upon the paper road. It was erected by or on behalf of B., the person from whom the plaintiff bought the adjoining farm, and was removed by the defendant. The plaintiff claimed for trespass to, or conversion of, the fence itself, and damages including the cost of re-erecting the fence. *Held*, 1. That the plaintiff could recover damages for the wrongful act of removing the fence as a conversion of chattels. (*Pukeweka Sawmills, Ltd.* v. *Winger*, [1917] N.Z.L.R. 81 ; [1916] G.L.R. 728, followed.) 2. That, as the defendant could not plead the right of a third party to the fence itself, as the ownership of the fence, being a chattel, was capable of being passed by the sale-and-purchase agreement or even subsequent verbal agreement to the plaintiff, any question of the validity of any contract between the defendant and the County Council became irrelevant. 3. That the damages, which could be assessed without reference to actual title to the unformed road on which it was erected, should be limited to the value of the materials at the time of the conversion of the fence. *Tame* v. *Hansard.* (Whangarei. January 24, 1956. Herd S.M.)

GAMING.

Offences—Dog-races—Person appearing to make and accepting Bets from All-comers—Conviction of Carrying on Business as Bookmaker—Not Offence of Betting on a Sports-ground—Gaming Act 1908, ss. 2, 26—Gaming Amendment Act 1920, ss. 2, 4—Gaming Amendment Act 1949, s. 19—Gaming Amendment Act 1953, s. 3. Where a person on a sports-ground (which includes a ground where dog-races are being held) openly offers and accepts bets from all-comers, he can be convicted of carrying on the business of a bookmaker within the meaning of the Gaming Amendment Act 1953. *Semble*, That if a person has merely an occasional bet on a sports-ground with selected

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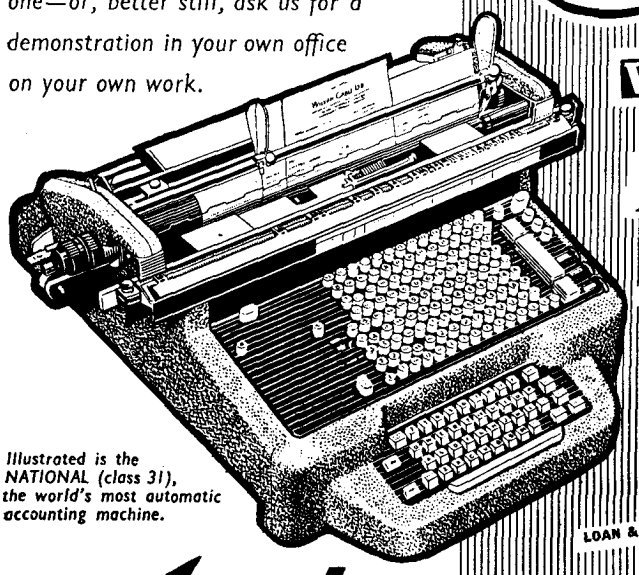

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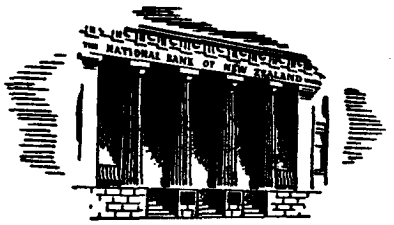

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people (sufficient to remove him from the protection afforded by s. 5 of the Gaming Amendment Act 1920) he can be convicted of betting on a sports-ground. *Police* v. *Beri*. (Christchurch. June 13, 1956. Lee S.M.)

LIMITATION OF ACTION.

Adverse Possession. *221 Law Times*, 93.

SHIPPING AND SEAMEN.

Offences—Absence without Leave from Ship in New Zealand Port—Departure of Ship from New Zealand before Arrest of Deserter—Date of Departure of Ship to be proved—Certificate by Master under s. 159 inadmissible until Fact of Ship's Departure before Arrest proved—Shipping and Seamen Act 1952, ss. 157 (1) (b), 159. Where a person is charged under s. 157 (1) (*b*) of the Shipping and Seamen Act 1952 with the offence of absence without leave, a certificate by the master of the ship setting out the matters referred to in s. 159 is not admissible until the fact of the departure of the ship before the arrest has been proved. *Peddie* v. *Kitney*. (S.C. Wellington. July 2, 1956. Barrowclough C.J.)

SOIL CONSERVATION AND RIVERS CONTROL.

Rating—Classification of Lands in Catchment Board's District Liable for Rating—Magistrate's Power to confirm or amend Classification—Classification to be re-done only if a Nullity—Circumstances wherein Classification a Nullity—Soil Conservation and Rivers Control Act 1941, ss. 102 (1), (2), (2A), 103 (6). Section 103 (6) of the Soil Conservation and Rivers Control Act 1941 (as enacted by s. 3 (2) of the Soil Conservation and Rivers Control Amendment Act 1954) imposes on the Magistrate the duty of confirming or amending the classification; and it is no longer open to the Magistrate, except where the classification can be said to be a nullity, to send the classification back to be re-done. A classification is a nullity if it has not been made with the purpose and object of providing " a basis of rating that is equitable as between ratepayers and as between groups of ratepayers " as required by s. 102 (1) (as enacted by s. 2 (1) of the Amendment Act 1954). The mere fact that the required purpose and object was not achieved by a classifier does not nullify the classification so long as the required purpose and object were fairly and honestly striven for. (*Nelson Catchment Board* v. *Waimea County and Richmond Borough*, [1955] N.Z.L.R. 1126, followed.) Moreover, in striving to achieve that equitable basis of rating, the classifier must strive to classify " according to the degree of direct or indirect benefit received or likely to be received from the works " (in terms of s. 102 (2)) and must also strive to assess the degree of direct and indirect benefit in respect of works in accordance with the directions contained in s. 102 (2A) (both subsections being as enacted by s. 2 (1) of the Amendment Act 1954). If these additional purposes and objects are not honestly and fairly striven for, the classification would be a nullity; but if those additional purposes and objects are sought after honestly and fairly, the classification cannot be regarded as a nullity. *Semble*, That, in a particular case, there may be circumstances which, in spite of any assertion to the contrary by a classifier, would make it clear that he could not have made his classification with the purpose and object of complying with all the mandatory provisions of the statute or that they were not honestly and fairly in his mind throughout. *Manawatu Catchment Board* v. *Grant and Another*. (S.C. Palmerston North. May 22, 1956. Barrowclough C.J.)

TENANCY.

Statutory Tenant—Tenant holding over after receiving Notice to Quit—Acceptance of Rent after Expiry of Six-months' Period after Notice to Quit—Contractual Tenancy not created thereby—Statutory Tenant having No Term to assign—Rights of Statutory Tenant continuing only while He has Lawful Possession—Nature of Proof required to establish Contractual Tenancy—Tenancy Act 1948, s. 43 (2), (3)—Tenancy Act 1955, s. 47 (2), (3). After the expiry of the six months mentioned in s. 43 (3) of the Tenancy Act 1948, that subsection has no further application. After it has ceased to have effect, the former tenant is bound to pay the rent by virtue of the relationship created by s. 43 (2); and the former landlord is bound to receive it. Consequently, where the footing on which any payment of rent after expiry of the notice to quit has not changed from the relationship created by s. 43 (2), the payment and acceptance of rent are, prima facie, referable to the rights of the parties arising from that relationship which is deemed to continue while the statutory tenant remains in lawful possession; and acceptance of rent by the landlord after the expiry of the six months' period mentioned in s. 43 (3) (*a*) does not create a contractual tenancy, unless some other basis for such payment can be shown. *Semble*, That each case must be considered on its own surrounding facts, and to those facts are to be applied the common-law principles concerning the creation of new tenancies. Section 43 (2) is an additional element for consideration. In order to establish that a contractual tenancy has been created, it has to be proved that the footing on which payments provided for by the fictional statutory tenancy were made has been superseded by reason of lawful acts of the parties from which a new contractual tenancy should be inferred. (*Searle* v. *Purnell*, [1952] N.Z.L.R. 95; [1952] G.L.R. 94, considered. *Samson Trading Co., Ltd.* v. *Did-Dell*, [1955] N.Z.L.R. 970, referred to.) Since the rights of the protected person continue only so long as he has lawful possession, there is no term which he can assign, so that no assignee can acquire any interest; and, further, the relationship created by s. 43 (2) confers the tenancy on the tenant, and on the tenant only. *Howells Chemists, Ltd.* v. *Selby and Others*. (S.C. Christchurch. May 14, 1956. Henry J.)

TRADE MARK.

Registration—Similarity to Trade Mark already registered—" Goldfrute "—" Goldpack "—Application to register Two Trade Marks in Association with Three Previous Registrations of "Goldfrute "—Indefeasibility as to Registration after Seven Years—Words " likely to deceive or cause confusion "—Onus of Proof—Patents, Designs, and Trade-marks Amendment Act 1939, ss. 11, 13, 15—Trade Marks Act 1953, ss. 14, 16, 22. The appellant was the registered proprietor of the trade mark " Goldpack " used in connection with preserved and crystallized fruits and substances used as food or as ingredients in food, with certain exceptions; and it had used the name for ten years. The respondent, being the registered proprietor of the trade mark "Goldfrute " under three registrations (all dated December 18, 1946) in connection with food substances or ingredients within Classes 29, 30 and 32, of the Fourth Schedule to the Patents, Designs, and Trade-marks Act 1939, applied for two further registrations in association therewith within Classes 29 and 30 under the trade mark " Gold-frute ". The appellant appealed against the Commissioner's decision disallowing its opposition and objection to two applications for the registration of the respondent's original trade mark "Goldfrute" in respect of certain foodstuffs, on the ground that such application offended against the provisions of s. 13 of the Patents, Designs, and Trade-marks Amendment Act 1939. *Held*, 1. That, since there had been a lapse of more than seven years since registration, the trade mark " Goldfrute ", by virtue of s. 15 of the Patents, Designs, and Trade-marks Amendment Act 1939, had become indefeasible as to its registrability. 2. That, in a case of an application for registration of a trade mark the Court should act on a different principle from that on which it acts in the case of an action to restrain the use of a trade mark similar to one already on the Register; in the former case, not only is the onus of proof that the trade mark sought to be registered is not calculated to deceive shifted to the person seeking registration, but the onus is not discharged if there is any reasonable doubt or possibility that the new trade mark will be calculated to deceive. (*Lever Brothers* v. *Newton*, (1906) 26 N.Z.L.R. 856; 9 G.L.R. 157 and *I. & R. Morley* v. *Macky, Logan, Caldwell, Ltd.*, [1921] N.Z.L.R. 1001; [1921] G.L.R. 583, followed.) 3. That the question was one of fact, whether a person who sees "Goldfrute" in the absence of the word " Goldpack " would be likely to fall into the error of thinking it the same as " Goldpack "; and that, as so determined, no person of ordinary intelligence had any reasonable chance of being deceived, i.e., that there was no real tangible danger of confusion; and, accordingly, the application was within s. 13 of the Patents, Designs, and Trade-marks Amendment Act 1939. (*In re William Bailey (Birmingham), Ltd.'s Application*, (1935) 52 R.P.C. 136, followed.) *Goldpack Products, Ltd.* v. *Citrus Products, Ltd.* (S.C. Wellington. June 18, 1956. Gresson J.)

TRANSPORT.

Motor-vehicles Insurance (Third-party Risks)—Notice of Accident—Statutory Requirement that Notice of Claim be given to Insurer " in writing "—Waiver by Insurer—Insurer's Conduct inducing Insured to believe It did not require Him to put Notice in Writing—" Notice in writing "—Transport Act 1949, s. 73 (1) (2). The requirement by s. 73 (2) of the Transport Act 1949 of a notice in writing to be given to the insurance company by the owner of a motor-vehicle of every claim made or action brought on account of an accident resulting in the death of or bodily injury to any person, may be waived by the company. Consequently, the insurance company may, by its conduct, render performance of the statutory requirement unnecessary, or, by its conduct, may induce the insured to believe that it

did not require him to put into writing the required notice, and, in such a case, the insurance company is not entitled to recover the amount paid by it in respect of any claim relating to the matter. (*Stewart* v. *Bridgens*, [1935] N.Z.L.R. 948; [1935] G.L.R. 774, applied. *South British Insurance Co., Ltd.* v. *Irwin*, [1954] N.Z.L.R. 562, referred to.) *Norwich Union Fire Insurance Society, Ltd.* v. *Paitry*. (Auckland. February 9, 1956. Grant S.M.)

CROWN PRIVILEGE.

The Bar Council's Recommendations.

The question of Crown privilege in relation to the production of documents in the possession of State Departments has been a "live" one in this country for some years past: see, in particular, *Gisborne Fire Board* v. *Lunken*, [1936] N.Z.L.R. 894 (in which the Court of Appeal followed the judgment of the Privy Council in *Robinson* v. *State of South Australia* (*No. 2*), [1931] A.C. 559), *Carroll* v. *Osborne*, [1952] N.Z.L.R. 763, and *Hinton* v. *Campbell*, [1953] N.Z.L.R. 573, (in both of which the later judgment of the House of Lords in *Duncan* v. *Cammell Laird and Co., Ltd.*, [1942] A.C. 624; [1942] 1 All E.R. 587 was followed). The matter has also been discussed in articles in this JOURNAL, and, more recently, it was the subject of a comprehensive paper at the last Dominion Legal Conference, "Privilege for Crown Documents", by Messrs E. S. Bowie and R. A. Young (30 NEW ZEALAND LAW JOURNAL, 123).

We now learn that, in England, the Bar Council have recently been examining various aspects of this issue and have now expressed certain recommendations.

In *Duncan* v. *Cammell Laird and Co., Ltd.* (*supra*), Viscount Simon L.C. laid down the governing principles:

(*a*) Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test is satisfied either by having regard to the contents of the particular document or by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production, e.g., Departmental minutes;

(*b*) The decision to object should be taken by the Minister who is the political head of the Department;

(*c*) The mere fact that the Minister or Department does not wish the document to be produced is not an adequate justification for objecting to its production. Production should only be withheld when public interest would otherwise be damnified, e.g., where the disclosure is injurious to national defence or good diplomatic relations or the practice of keeping a class of documents secret is necessary for the proper functioning of the public service;

(*d*) An objection validly taken to production on the ground that it would be injurious to the public interest is conclusive. The Court should not require to see the documents for the purpose of itself judging whether the disclosure would in fact be injurious to the public interest;

(*e*) The above principles apply equally in suits between private citizens where in the course of those suits a Government Department is called upon to produce documents.

When considering principle (*c*), *supra*, it has been concluded that there are many matters of public interest which do not in any way affect the security of the State and noted that the Canadian Courts have refused to be bound by the principles laid down in the *Cammell Laird* case. The American Courts also tend to draw a distinction between a "secret of state" and "official information", the first only being privileged from disclosure.

The issue then arises as to whether when a Minister certifies that evidence should be withheld on some ground of public interest other than national security this should be conclusive. Lord Radcliffe in the case of *Glasgow Corporation* v. *Central Land Board* (*The Times*, December 13, 1955) has had some instructive comments to make on this matter:

> The interests of Government, for which the Minister should speak with full authority, do not exhaust the public interest. Another aspect of that interest is seen in the need that impartial justice should be done in the Courts of Law not least between citizen and Crown and that a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty public reason. It does not seem to me unreasonable to expect that the Court would be better qualified than the Minister to measure the importance of such principles in application to the particular case that is before it.

The Bar Council have been impressed by Lord Radcliffe's words and their recommendations have been shaped accordingly:

(1) A Departmental head seeking the exclusion of any evidence should be required to state in his affidavit whether the adduction of such evidence would be prejudicial to the national security, including diplomatic relations or some other head of public interest which he should specify.

(2) In either case the Departmental head should be required to state whether the evidence would be so prejudicial when adduced in open or closed Court.

(3) Where his claim to privilege is based on grounds of national security, it should be conclusive.

(4) When his claim is based on grounds of public interest other than national security, it *should* be examinable by the Court.

(5) The Court should be given power to order a hearing, a partial hearing in closed Court, on the ground that publication of any evidence to be given in the course of the proceedings would be prejudicial to the national safety or the national interest.

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THE PREROGATIVE WRITS.

By the Rt. Hon. Lord Goddard, the Lord Chief Justice of England.*

There are nowadays really only four prerogative writs: certiorari, prohibition, mandamus, and habeas corpus.

Certiorari.

I propose to start with certiorari because I think at the present day certiorari is probably the commonest writ which is moved for, and certainly it is one of the most important. Nowadays there are so many tribunals—whether they are electricity tribunals, furnished-houses tribunals or anything else, so many quasi-judicial bodies set up by modern legislation—and the word "quasi" is a very blessed word; we use it on every possible and impossible occasion—that the writ of certiorari is of very great importance.

It is a writ which has a great many uses. You can look in *Halsbury* and see in how many cases certiorari can be used. It can be used mainly for two purposes. One is to remove from an inferior tribunal a cause to be tried in a superior tribunal; but the main object (and the one which I am going to deal with to-night) is to remove orders into the High Court for the purpose of quashing. Other matters for which on occasions certiorari can be used are not of very great importance nowadays, because modern legislation has facilitated, for instance, the sending of an indictment from one jurisdiction to another.

There was an Act called Palmer's Act, named after the person in whose interest it was passed, to enable an indictment found in a county to be moved to the Central Criminal Court for trial because of prejudice, but those things now are dealt with by the Administration of Justice Act.

The only use of certiorari about which I am going to talk to-night is the use of the writ for removing into Queen's Bench Division the order of some inferior tribunal, whether it is justices sitting in petty session or quarter session, or one of these numerous tribunals which are set up by various Acts of Parliament, for the purpose of examination and quashing. A writ of certiorari, which is a very ancient writ—certainly it was in force by the time of Edward I—is a writ by which the Sovereign orders the record to be sent up to the High Court, to the Court of King's Bench in the old days before the Judicature Act, in order that it may be certified whether justice has been done.

The first thing to remember about the writ is that it can only issue to a Court or to a body that is exercising some judicial function. Perhaps I might read a short extract from the judgment of Lord Justice Atkin, as he then was, in *The King* v. *Electricity Commissioners*, [1924] 1 K.B. 171, 205, in which he said this:

> Wherever a body, having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs [of certiorari or prohibition].

The two writs are very closely allied; I shall deal with that in a moment.

As I say, it will only lie to a Court or body exercising judicial as distinct from administrative functions, except in a few cases (which I do not propose to deal with in any detail to-night) where a statute has expressly given the remedy with regard to such matters as orders by municipal corporations or county councils, regarding payments out of county funds and in respect of some departmental matters where, although certiorari has been designed by the Act to be the remedy, it is really an appeal.

The common cases are orders either of Justices sitting in petty session or in quarter session. But one thing which you have to bear in mind (and I believe I myself once fell into error about this) is that certiorari will lie to quarter session only where quarter session is exercising either its appellant jurisdiction or what I may call its civil jurisdiction. Quarter Session is a very wonderful Court, one of the greatest Courts in the country, having to deal with a great variety of things. It deals with a great many of what are really civil matters. As regards appeals in matters of orders of bastardy, or appeals in settlement cases (not so common now as they used to be) in the removal or adjudging the settlement of paupers, in all those matters certiorari would lie to it, but it will not lie to review a conviction on indictment. And the reason is this, that quarter session is a Court of record. In a Court of record the only remedy the law gave was a writ of error. You may say that certiorari lies where a writ of error would not lie. A writ of error would only lie to a Court of record. If you had a Court like Justices sitting in petty session, that is to say Justices sitting, to use the technical expression, out of session, which means not in quarter sessions, certiorari would lie. It will not lie to quarter session after trial of an indictment because error would lie.

I daresay you know how very unsatisfactory the writ of error was as the only method of appeal which existed for hundreds of years in criminal cases. It brought up the record to be examined, and the record consisted of everything except that which mattered! It started with the commission of assize; it went on, after reciting the commission, to recite the precepts which the judge sent to the sheriff; it then set out that the sheriff summoned the grand jury, with all the names of the grand jury; it then set out that the grand jury returned a true bill; it set out the indictment; then it set out the names of the petty jurors, and the joinder of issue by the clerk of assize; and then it stated that "all things being seen and understood", the jury returned a verdict of so and so. It then set out the judgment of the Court. The one thing which it did not tell you was the directions the Judge had given the jury (which might be quite as wrong as any directions I occasionally give!) or anything about the evidence which had been admitted.

Certiorari lies to a Magistrates' Court or a court of inferior jurisdiction where a writ of error did not lie because there was no record.

Of course the most common case in which certiorari is used is in a case where it is alleged that the Court has

* An Address given in Gray's Inn Hall, reproduced by courtesy of *Graya*, the magazine of the Honourable Society of Gray's Inn, in which it first appeared.

exceeded its jurisdiction. It used to be extremely common in cases which had been before Magistrates and where there had been convictions. You very seldom find that now. The reason is this. Until Jervis's Acts—in 1848 Sir John Jervis was the Attorney-General, and in that year those two great statutes, the Summary Jurisdiction Act and the Indictable Offences Act, were passed; there was also in the previous year the Quarter Sessions Act, Baine's Act—a conviction before Magistrates for any offence (and they could not try an indictable offence) had to set out the information, the evidence and the conviction; in fact they had to set out the whole thing.

Consequently there was, as you can see, ample opportunity for attacking the decision of a few Tory squires or someone of that sort who probably had been wrongly advised by a country attorney, good men like Mr Jinks who advised Mr Nupkins, the Mayor at Ipswich. Accordingly, a good many mistakes could be made, and therefore certiorari to Justices was very, very common. You could so often find some mistake apparent on the face of the proceedings.

All that got altered in 1848, because the thing had become almost a scandal; and so the statute provided that a conviction before Justices need only set out the charge and the adjudication of the Magistrates. Therefore, if that was brought up to the High Court, they could only see that the charge was one in which the Justices had jurisdiction and whether they had passed a sentence which it was within their jurisdiction to pass. That was the result of Jervis's Acts. To put it in the words of Lord Sumner in *The King* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128, 159:

> By so doing the statute did not alter the actual law of certiorari; it disarmed its exercise. The face of the record "spoke" no longer; it was the inscrutable face of a sphinx.

That is an observation very characteristic of Lord Sumner.

I think I may say without presumption that if you read my judgment in the case of *The King* v. *Northumberland Compensation Appeal Tribunal*, [1951] 1 K.B. 711, and the judgment of Lord Justice Denning in the Court of Appeal ([1952] 1 K.B. 338, 346), you will understand a great deal about the law of certiorari.

The question in these cases is whether or not there is what is called a "speaking order". If an inferior Court or a tribunal makes an order in which they set out the reasons, the High Court can then examine them and see whether there has been an error of law which is apparent upon the face of the order. If the Court can only look at the conviction which says that A B was charged with obstructing a road with a motor-car or something of that sort, and he was sentenced to pay a fine of ten shillings, nothing can be seen except that there was a charge which would be within the jurisdiction of the Magistrates to try and a sentence which they could pass. You cannot go into the question whether or not the decision was right, because that is a matter of appeal.

The distinction between the Court exercising jurisdiction under certiorari and the Court exercising jurisdiction in an appeal is this. If a Court is sitting as a Court of Appeal, they can substitute their view of what the result of the case should be for that of the case below. If you have a civil case in the Court below and the Court of Appeal differed from the Judge below (which of course they ought never to do, but constantly do), they substitute their judgment for the judgment of the Court of first instance. Certiorari cannot do that. In certiorari we have to look at the record, whatever it may be, of the proceedings; and, if we find that it is within the jurisdiction of that Court and that the order of the Court appears on the face of it to be regular, there is no more to be said. But if, like in the compensation case to which I referred (*The King* v. *Northumberland Compensation Appeal Tribunal* (*supra*)), or in the case of an arbitrator or anyone else—and this explains why the Courts always have been able to set aside the award of an arbitrator—we are told the reasons why they have come to their conclusion, and we can see that the reasons why they came to their conclusion are wrong, then we can set aside the award, judgment, order, or whatever it may be, on the ground that there is an error of law on its face, but the Court cannot substitute its own order for it; it can only quash.

In a case against the War Compensation Tribunal which Master Comyns Carr † argued before us (and I was a member of the Court which decided against him) it was thought that we could not really go into the matter, although that order turned out to be a "speaking" order. We put that right in the *Northumberland* case. I say that with all due respect to the Court of Appeal, although I do not know why I need say it because I was a member of the Court which went wrong. The *Northumberland* case was of no little importance because we there decided that, in cases where we can examine the reasons which are given, the Court can grant certiorari, although we cannot grant it on that ground in the case of an ordinary conviction before Justices because they do not have to state their reasons.

There was an old case before Chief Justice Holt, *Parish of Ricelip* v. *Parish of Hendon*, (1698) Mod. 416, 417. That was a case about the removal of a pauper. You know that parishes used to spend hundreds of pounds in the old days, far more than it would ever cost to keep a pauper unless he lived to be at least 120 years of age, and fight like tom cats about which parish should support him. That was a case in which Chief Justice Holt of the Court of King's Bench did intervene and quash because the reasons were set out on the face of the order, and therefore it could be quashed.

One thing about which I should remind you is that certiorari and prohibition are very closely allied. Prohibition can be used before the Court which you desire to prohibit has given a final order; certiorari is the appropriate remedy if the Court has given the final order. Lord Atkin pointed out in the case of *The King* v. *Electricity Commissioners*, [1924] 1 K.B. 171, that as a general rule you may say that wherever prohibition would lie, certiorari would lie, and vice versa. If it is an order which you could bring up on certiorari, then you could have moved for prohibition.

I think I am right in saying that there is only one exception to that. It is not an exception of any very great importance nowadays, but if you should go into the history or are interested in the history of these two things you will find that the Court of King's Bench in the old days was constantly granting prohibition to

† Sir Arthur Comyns Carr Q.C., a Master of the Bench of Gray's Inn.

the Ecclesiastical Courts and the Court of Admiralty. The Court of King's Bench was very jealous in the reign of George III, and earlier, indeed since about the reign of William III, about the encroachment of the Court of Admiralty which was trying to draw to itself all Admiralty cases and all commercial cases; and the Court of King's Bench was determined that the common lawyers and not those interlopers from Doctors' Commons should have the conduct of those cases. The Court of King's Bench constantly sent prohibition to the Ecclesiastical Courts to prevent encroachment on their jurisdiction.

Until the middle of the last century the Ecclesiastical Courts exercised tremendous power over laymen for the health of their souls, and I should always advise people who are reading the law to read in the first volume of *Sketches by Boz*, the chapter entitled "Doctors' Commons", which records the case of *Bumple* v. *Sludberry*. You will find that is a case in which Mr Sludberry, who was a gingerbeer seller, said to Mr Bumple and other persons at a vestry meeting, "You be blowed"; and also asked him to step outside if he wanted anything for himself. Sludberry was being prosecuted for brawling. The ecclesiastical judge was against him, and excommunicated Sludberry for a fortnight. He also ordered him to pay costs; and Mr Sludberry asked whether he could be let off costs if he was excommunicated for life, as he never went to church anyway.

Dickens, you know, reported both in the Ecclesiastical Courts and in the Common Law Courts, and he had a very keen eye for these things.

In those days, and really until about 1850, the Ecclesiastical Courts used to have very great jurisdiction not only in matters of adultery, fornication, and brawling, but also in cases of slander. The Courts were constantly issuing prohibitions against them. Those were the cases in which the Court of King's Bench could issue prohibition; they could stop the Ecclesiastical Courts from continuing to try these cases, which they said were their own proper prerogative to try. But, if once a decision had been given, the Court could not issue a writ of certiorari.

You will see, if you think about it, why they could not issue certiorari. They could not issue certiorari because that would mean the record, the order and so forth, would have to be brought up, but the Judges of Common Law were not supposed to know any ecclesiastical law. These were two entirely separate systems of law. There was the King's ecclesiastical law on the one hand and the King's common law on the other. The King's common law was administered by the Judges of the three superior Courts at Westminster with assistance from barristers; and the King's ecclesiastical law was administered by the Dean of the Arches, the chancellors of the dioceses and the Court of Delegates, assisted by the doctors of civil law from Doctors' Commons. Therefore, it was quite impossible for the Judges of common law to examine proceedings, once they had taken place and finished, because they could not say whether the Judges in the Ecclesiastical Courts were right since they had no knowledge, or were supposed to have no knowledge of the system which the Civilians were administering. Therefore, I believe that is the only instance where prohibition will lie, and certiorari will not lie. As a general rule, wherever prohibition would lie certiorari would lie after the proceedings are brought to an end; wherever certiorari would lie after the proceedings are brought to an end, prohibition would have lain before.

There are certain other matters which are very often today dealt with by certiorari, for instance cases in which bias of a particular Justice is alleged. It is said that a Justice is interested in the case in some way or another and has not declared his interest or retired from the proceedings. Why is that examined by certiorari? It is for this reason. The theory is that no man can be a judge in his own cause; and, therefore, a man who is interested in a particular cause cannot act as judge thereon, so there is a defect of jurisdiction. That is the theory why certiorari will lie in a case where there is bias on the part of a Justice.

There is one thing which is most unfortunate with regard to certiorari, and which I am hoping will some day be put right.

I said to you a few minutes ago that the reason why a Court, when it is dealing with a matter of certiorari, is not a Court of Appeal is that a Court of Appeal can substitute its own judgment for the one which has been given. In certiorari it cannot. It can only quash the conviction or order, or uphold it.

Accordingly, I think we have got a most unsatisfactory state of affairs. Occasionally a Court, acting in all good faith, makes a mistake and passes a sentence which is not justified by law. For instance, the other day we had in the Divisional Court a case in which Justices had a very bad motoring case. Quite properly, if they had had the power, they disqualified the defendant from driving for, I think, six months. Unfortunately, they only had power to disqualify him for three months. (I think that if they could have disqualified for life it would have been a very good thing.) But they did pass this six months' sentence of disqualification, which could not be justified. It is a most unfortunate thing when that happens because, if people are cute enough or well advised to bring the matter up by certiorari, the Court cannot do anything except quash. There we had got an order, which sets out the charge on which the man was tried and shows a sentence which is not strictly justified in law. The only thing we could do was to quash.

I am hoping that some day an alteration will be made in the law, when summary jurisdiction is enquired into, as it will be some day, to give the Court on certiorari powers to impose a proper sentence or to send it back to the Justices to impose a proper sentence, because it is quite absurd if the Justices make a mistake of that sort, and they may easily make it by overlooking some provision in an Act, that the man should get off altogether. Still, that is just one of those things which happen; and a person may be well advised to come and ask for a writ of certiorari instead of going to Quarter Sessions on appeal who are able to put it right.

Prohibition.

I do not think it is necessary to say very much about prohibition, because prohibition and certiorari are so very much allied to each other.

(To be concluded: Next Issue: Habeas Corpus and Mandamus.

POWERS OF ATTORNEY.

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

Rules of Construction.

There are two elementary (but most important) rules as to the construction and effect of powers of attorney.

(1) A power of attorney, if intended to affect land, must be in the form of a deed. It cannot be in the form of a deed unless executed and attested in manner prescribed by s. 4 or s. 5 of the Property Law Act 1952.

An exception to this rule is a power executed in the form O in the Second Schedule to the Land Transfer Act 1952, pursuant to s. 150 thereof; powers in such a form, however, are very rare: usually deposited powers of attorney are in "usual form", to employ the words of s. 150 itself. It is also to be remembered that the provisions of the Property Law Act 1952 as to powers of attorney also apply to powers of attorney for use under the Land Transfer Act: s. 3 (2) of and First Schedule to the Property Law Act 1952.

It is expressly provided by s. 153 of the Land Transfer Act 1952 that no power of attorney made or used under that Act or any former Land Transfer Act shall be invalidated by reason of the power not having been created under seal.

(2) Powers of attorney are strictly construed, and general words following particular words are construed subject to the wording of those particular words: *Baird's Real Property*, 87, *Garrow's Real Property in New Zealand*, 4th Ed., 472.

To get over this rule, a special provision is often inserted, especially in the so-called universal form of attorney, e.g.,

> I hereby expressly declare that the foregoing powers are to be construed not strictly but in the widest sense including authority to borrow money and property of any kind whatsoever in any manner with or without security therefor of any kind and that I do not by these presents specify any particular power or powers which I hereby intend to confer upon my attorney for fear that by so doing I should in any way be deemed or construed to limit abridge or restrict the absolute and unconditional powers and authorities hereby conferred upon my attorney.

A power to do an act includes power to do everything merely incidental to that act. Thus, power to raise money on mortgage will include the power to execute the necessary instrument of mortgage: *Ballantyne* v. *Coleman*, (1890) 9 N.Z.L.R. 131.

A power to mortgage, however, is never implied. "There is a strong inherent improbability that a principal intends to give his attorney power to borrow money, if he does not expressly state it", *Baird's Real Property*, 90. But, if an attorney has an express power to mortgage, this will include power to extend the term of the mortgage: *Cornford* v. *Gower*, [1936] N.Z.L.R. 1176; [1936] G.L.R. 17.

An attorney specifically appointed to sell real estate and receive the purchase money is not, unless otherwise specifically empowered, authorized to exercise the power of sale under mortgages: *In re Dowson and Jenkins's Contract*, [1904] 2 Ch. 219.

An attorney who has power to discharge mortgages *on repayment*, cannot discharge unless there is repayment. (In this respect powers of attorney given by banks and other great financial institutions must be carefully scrutinized.) Such an attorney, for example, could not partially discharge a mortgage unless there was repayment.

A power to sell does not include power to exchange. "Neither may the attorney who has power to sell, mortgage, charge, lease, or encumber the donor's estate make a *voluntary* deed." *Baird's Real Property*, 90.

Examples in Practice.

1. *Power to Mortgage.*—"To manage, conduct, and superintend the management of a farm (named) and any other real estate and property" does not embrace a mortgage, and consequently a further clause giving power to sell such property would not apply to a mortgage.

However, a clause giving power "to call in and receive any moneys due secured by a mortgage of real estate and to execute reconveyance" does presumably refer to mortgages and, if the consideration in the transfer is the same as the sum owing under the mortgage, the transfer of the mortgage could be accepted, as it would amount to a receipt for the money owing under the mortgage.

2. *Sales by Receivers Under Debentures.*—A receiver for a company acting under a debenture in the normal form may transfer by way of sale, as attorney for the company, for usually the debenture contains an adequate power of attorney clause. The debenture should be deposited as a power of attorney.

3. The attorney should not have an interest adverse to his principal: in other words, unless specially authorized by the instrument, he should not exercise the power so as to benefit himself: a dealing in favour of his or her spouse would also be frowned on by the Courts. Thus, unless specially authorized, the attorney cannot sell to, lease to, nor buy from his principal: *Andrews* v. *Ramsay and Co.*, [1903] 2 K.B. 635, 637. It also follows that unless specially authorized an attorney cannot make a gift to himself.

4. Powers of attorney usually contain a *ratification* clause at the end or near the end thereof. For example:

> I hereby ratify and confirm and agree to ratify and confirm whatsoever my attorney or his substitute or substitutes shall lawfully do or cause to be done in or about the premises by virtue of these presents.

But it must be observed that a ratification clause does not extend actual authority so as to protect a person dealing with an attorney who acts in excess of his powers. The effect of the clause is rendered almost nugatory by the customary words, "in or about the premises by virtue of these presents": these words refer back to the preceding powers; unless the act is in accordance with the preceding powers it is not ratified by such a clause. As Lord Atkin said in *Midland Bank* v. *Reckitt*, [1953] A.C. 1, 18, the clause is common, but its value is doubtful.

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CHURCH HOUSE, 173 CASHEL STREET CHRISTCHURCH

Warden: The Right Rev. A. K. WARREN
Bishop of Christchurch

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Secretary: Alan Thomson, J.P., B.Com.,
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A character building movement.

FORM OF BEQUEST:

"I GIVE AND BEQUEATH unto the Boys' Brigade, New Zealand Dominion Council Incorporated, National Chambers, 22 Customhouse Quay, Wellington, for the general purpose of the Brigade, (*here insert details of legacy or bequest*) and I direct that the receipt of the Secretary for the time being or the receipt of any other proper officer of the Brigade shall be a good and sufficient discharge for the same."

For information, write to
THE SECRETARY,
P.O. Box 1403, WELLINGTON.

Capacity of Parties to Act as Attorneys.

A person cannot authorize another to do what he may not legally do himself. Thus the following cannot appoint an attorney :

(*a*) An infant or minor, but as to a married woman minor see s. 13 of the Married Women's Property Act 1952.

(*b*) A bankrupt, subject, however to s. 60 (*d*) of the Bankruptcy Act 1908, which provides that a bankrupt shall execute such powers of attorney as the Official Assignee shall require.

(*c*) A person of unsound mind.

(*d*) A Maori, as to an alienation of Maori land, unless he is outside the Dominion : s. 223 of the Maori Affairs Act 1953, and the attorney, be it noted, must be a European.

(*e*) Trustees may execute by an attorney *only whilst outside New Zealand* : ss. 103-106 of the Trustee Act 1908, and see *Goodall's Conveyancing*, 2nd Ed., 545, note (*b*). If a solicitor acting for the party claiming under the instrument has notice that a registered proprietor executing by his attorney holds the land as executor, administrator, or trustee, or in some other fiduciary capacity, he should insist on a clause being added to the usual non-revocation declaration to the effect that the principal was outside New Zealand at the date of execution of the instrument by the attorney or delegate. Instruments under these sections of the Trustee Act are really not powers of attorney but instruments of delegation.

As *Baird* in his book on *Real Property*, at p. 78, points out, there seems to be no rule that the donee, i.e., the attorney, of the power must not be under a legal disability. Thus it has been decided that an infant may be the donee of a power of attorney. A person able to read and write may appoint one who cannot write to sign a document : *Foreman* v. *Great Western Railway Co.*, (1878) 38 L.T. 851. It is difficult to conceive, however, how a person of unsound mind could validly act as an attorney, except perhaps during lucid intervals, and it is difficult to conceive how an infant of tender years could act as an attorney.

Universal Powers.

To avoid the inconvenience of the rule that powers of attorney are strictly construed, and that general rules following particular words are construed subject to the wording of those particular words, the practice has grown up in New Zealand during the last thirty years or so of executing what are called *universal* powers. For example :

> To act for me in my name on my behalf and in my interests in New Zealand aforesaid and elsewhere in all matters connected with or pertaining to my affairs and in all matters of what kind and nature soever with or in which I shall be in any way connected interested or concerned or which shall or will in any way pertain to me (whether pertaining to me solely or jointly with any other person or persons corporation or corporations whomsoever) as fully effectually unconditionally and absolutely as I myself could do if present it being the true intent and meaning of these presents that my attorney shall have absolute and unrestricted power hereunder at the sole and absolute discretion of my attorney and without reference to me to do or cause to be done for me and on my behalf any act deed matter or thing of what kind and nature soever pertaining to my affairs and moneys properties real and personal rights privileges deeds securities goods chattels effects and things choses in action or choses in possession.

Even a clause of such apparently wide magnitude has its limitations. It would not, for example, enable the attorney to :

(1) Act as trustee. If delegation of powers as trustee is desired, there should be a special clause to that effect, e.g., clause 1 of *Goodall's Conveyancing*, 2nd Ed., 545 ; see also *In re Donoughmore and Hackett's Contract*, [1918] 1 I.R. 359.

(2) Enter into a guarantee unless required for the principal's affairs : *Dalgety and Co., Ltd.* v. *Tulloch*, [1924] G.L.R. 572.

(3) Make a gift.

(4) Exercise the power in favour of himself.

If the above special powers are desired, they must be expressly conferred in clear and unequivocal language.

Powers of Attorney in Favour of More Than One Attorney.

The giver of the power of attorney, i.e., the principal, is known as the donor, constituent, mandant, or grantor, and the person to whom the power is given, i.e., the attorney, is sometimes called the donee, procurator, mandatory, or grantee.

The general rule is that a power of attorney to two or more persons *simpliciter*, or to two or more persons jointly, must be exercised by them all. On the death of one or more, the survivors could probably exercise the power effectually. A power of attorney authorizing A *or* B to do an act may be used by either and is not void for uncertainty : *Baird's Real Property*, 79. A power of attorney to A, whom failing B, is also good and quite common, but, unless skillfully drafted may lead to practical difficulties if B acts ; one dealing with the attorney may require proof that the facts giving rise to B's. acting have arisen unless it is expressed in the power of attorney that if B acts that shall be sufficient evidence that B has the necessary authority to act. As to this topic, see article and precedents in (1951) 27 New Zealand Law Journal 194.

The following extract from (1924) *58 Law Journal* (London), 485, appears worthy of notice :

> A power given to several persons cannot be exercised by one or some only of them unless each and every two or more of them are appointed severally as well as jointly : Co. Lit. 181b, and see *Key and Elphinstone*, 11th Ed., Vol. 1, 215. It appears to be very doubtful whether the words " attorneys and attorney " would or could be construed to make the appointment joint and several.

Fortunately the general practice in New Zealand is to make the appointment joint and several, in which case execution by any one of the attorneys is sufficient.

Delegation of Powers by Attorney.

The rule is that, unless expressly authorized by his principal, an attorney cannot delegate to another the powers conferred on him by the power of attorney. This rule is concisely expressed in the maxim, *Delegatus non potest delegare*.

Therefore, if a delegate of the attorney, for example, purports to execute an instrument dealing with land on behalf of the principal (the donor of the power of attorney) the solicitor should insist on a copy of the instrument of delegation (which also should be in the form of a deed) being deposited in the Land Registry Office, and check both the original power of attorney and the instrument of delegation, and make sure that

the delegate has power to execute the instrument to be proferred for registration. First, there must be the express authority by the principal to delegate, and if any conditions are imposed as to the delegation those conditions should be complied with. The statutory declaration as to non-revocation by the delegate should refer both to the original power of attorney and the instrument of delegation: see also article in (1950) 26 NEW ZEALAND LAW JOURNAL 60.

It must also be remembered that unless there is a provision to the contrary in the original power of attorney, the delegate's authority ceases with that of the attorney. If the attorney should die, go insane, or go bankrupt, the delegate's authority, as a general rule, ceases also. A deed of delegation in the normal form will be found in *Goodall's Conveyancing*, 2nd Ed., 553.

REVOCATION OF A POWER OF ATTORNEY.

Section 152 of the Land Transfer Act 1952 provides that the grantor of any revocable power of attorney may, by notice to the Registrar in form P in the Second Schedule to the Land Transfer Act 1952, revoke either wholly or as to the land specified in the notice. It is rare, however, for a power of attorney to be revoked in this manner. Usually the revocation is by separate deed, e.g., *Goodall's Conveyancing in New Zealand*, 2nd Ed., 554. Often the revocation is contained in a subsequent power of attorney appointing another attorney. But note particularly the following passage from *1 Halsbury's Laws of England*, 3rd Ed., p. 241, para. 539:

> The revocation need not necessarily be by formal instrument. A deed may be revoked by word of mouth, or the principal may intervene in the course of negotiations, but until some such action of the principal is taken the agent [and *semble* those dealing with him] is justified in assuming the continuance of the agency.

It may be pointed out that certain powers of attorney may not be revoked by the principal. Under the general law a power of attorney cannot be revoked. If given for valuable consideration it is to effect a security or to secure the interest of the attorney. Such an authority is irrevocable on the ground that it is coupled with an interest: *1 Halsbury's Laws of England*, 3rd Ed., p. 238, para. 531. There are also two statutory provisions restricting the right of the principal to revoke: they are ss. 136 and 137 of the Property Law Act 1952, hereinafter set out.

STATUTE LAW AFFECTING POWERS OF ATTORNEY.

General Power.

Section 134 of the Property Law Act 1952 provides for the execution by the attorney in his own name. It is as follows:

> 134. (1) The donee of a power of attorney may execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal (where sealing is required) by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law to all intents as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.
>
> (2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

Notwithstanding this provision it is still the general practice in New Zealand for an attorney to execute an instrument in the name of his principal, e.g., "A, by his attorney B".

Continuance of Power of Attorney.

Section 135 of the Property Law Act 1952 provides that powers of attorney (whether executed in New Zealand or elsewhere) continue in force until notice of death or revocation. The section is as follows:

> 135. (1) Subject to any stipulation to the contrary contained in the instrument creating a power of attorney, the power shall, so far as concerns any act or thing done or suffered thereunder in good faith, operate and continue in force until notice of the death of the donor of the power or until notice of other revocation thereof has been received by the donee of the power.
>
> (2) Every act or thing within the scope of the power done or suffered in good faith by the donee of the power after such death or other revocation as aforesaid, and before notice thereof has been received by him, shall be as effectual in all respects as if that death or other revocation had not happened or been made.
>
> (3) A statutory declaration by any such attorney to the effect that he has not received any notice or information of the revocation of the power of attorney by death or otherwise shall, if made immediately before or if made after any such act as aforesaid, be taken to be conclusive proof of the non-revocation at the time when the act was done or suffered in favour of all persons dealing with the donee of the power in good faith and for valuable consideration without notice of the said death or other revocation.
>
> (4) Where the donee of the power is a corporation aggregate the statutory declaration shall be sufficient if made by any director, manager, or secretary of the corporation or by any officer thereof discharging the functions usually appertaining to any of those offices or by any officer of the corporation appointed for that purpose either generally or in the particular instance by the board of directors, council, or other governing body by resolution or otherwise, and if it is to the effect that to the best of the declarant's knowledge and belief neither the attorney nor any servant or agent of the attorney has received any such notice or information as is mentioned in subsection three of this section; and where the declaration contains a statement that the declarant is a director, manager, or secretary of the corporation or is an officer of the corporation discharging the functions usually appertaining to any of those offices or is an officer of the corporation appointed for the purpose of making the declaration, that statement shall be conclusive evidence in favour of the persons mentioned in that subsection.
>
> (5) This section applies to powers of attorney executed in or out of New Zealand.

Subsection (4) constitutes new law, permitting a corporation aggregate to act as attorney. In the case of Trust Companies there is usually a special statutory provision for declarations to be made on behalf of the company whilst acting as an attorney, e.g., New Zealand Insurance Company, Ltd., Guardian Trust, Perpetual Trustee Company, Ltd.

Irrevocable Power for Value.

Section 136, which deals with an irrevocable power of attorney for value, is as follows:

> 136. (1) Where a power of attorney given for valuable consideration (whether executed in or out of New Zealand) is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—
>
> (*a*) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, mental deficiency, or bankruptcy of the donor; and
>
> (*b*) Any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, mental deficiency, or bankruptcy of the donor, had not been done or had not happened; and
>
> (*c*) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, mental deficiency, or bankruptcy of the donor.

The New Zealand CRIPPLED CHILDREN SOCIETY (Inc.)

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19 BRANCHES

THROUGHOUT THE DOMINION

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ITS POLICY

(*a*) To provide the same opportunity to every crippled boy or gir as that offered to physically normal children; (*b*) To foster vocational training and placement whereby the handicapped may be made self-supporting instead of being a charge upon the community; (*c*) Prevention in advance of crippling conditions as a major objective; (*d*) To wage war on infantile paralysis, one of the principal causes of crippling; (*e*) To maintain the closest co-operation with State Departments, Hospital Boards, kindred Societies, and assist where possible.

It is considered that there are approximately 6,000 crippled children in New Zealand, and each year adds a number of new cases to the thousands already being helped by the Society.

Members of the Law Society are invited to bring the work of the N.Z. Crippled Children Society before clients when drawing up wills and advising regarding bequests. Any further information will gladly be given on application.

MR. C. MEACHEN, Secretary, Executive Council

EXECUTIVE COUNCIL

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(*Each Branch administers its own Funds*)

AUCKLAND	P.O. Box 5097, Auckland
CANTERBURY AND WESTLAND	P.O. Box 2035, Christchurch
SOUTH CANTERBURY	P.O. Box 125, Timaru
DUNEDIN	P.O. Box 483, Dunedin
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WELLINGTON	P.O. Box 7821, Wellington E.4
TAURANGA	42 Seventh Avenue, Tauranga
COOK ISLANDS	C/o Mr. H. Bateson, A. B. Donald Ltd., Rarotonga

Active Help in the fight against TUBERCULOSIS

OBJECTS: The principal objects of the N.Z. Federation of Tuberculosis Associations (Inc.) are as follows:

1. To establish and maintain in New Zealand a Federation of Associations and persons interested in the furtherance of a campaign against Tuberculosis.

2. To provide supplementary assistance for the benefit, comfort and welfare of persons who are suffering or who have suffered from Tuberculosis and the dependants of such persons.

3. To provide and raise funds for the purposes of the Federation by subscriptions or by other means.

4. To make a survey and acquire accurate information and knowledge of all matters affecting or concerning the existence and treatment of Tuberculosis.

5. To secure co-ordination between the public and the medical profession in the investigation and treatment of Tuberculosis, and the after-care and welfare of persons who have suffered from the said disease.

A WORTHY WORK TO FURTHER BY BEQUEST

Members of the Law Society are invited to bring the work of the Federation before clients when drawing up wills and giving advice on bequests. Any further information will be gladly given on application to:—

HON. SECRETARY,

THE NEW ZEALAND FEDERATION OF TUBERCULOSIS ASSNS. (INC.)

218 D.I.C. BUILDING, BRANDON STREET, WELLINGTON C.1.

Telephone 40-959.

OFFICERS AND EXECUTIVE COUNCIL

President: Dr. Gordon Rich, Christchurch.
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Dr. F. H. Morrell, Wellington.
Hon. Treasurer: H. H. Miller, Wellington.
Hon. Secretary: Miss F. Morton Low, Wellington.
Hon. Solicitor: H. E. Anderson, Wellington.

Charities and Charitable Institutions

HOSPITALS - HOMES - ETC.

The attention of Solicitors, as Executors and Advisors, is directed to the claims of the institutions in this issue:

BOY SCOUTS

There are 22,000 Boy Scouts in New Zealand. The training inculcates truthfulness, habits of observation, obedience, self-reliance, resourcefulness, loyalty to Queen and Country, thoughtfulness for others.

It teaches them services useful to the public, handicrafts useful to themselves, and promotes their physical, mental and spiritual development, and builds up strong, good character.

Solicitors are invited to COMMEND THIS UNDENOMINATIONAL ASSOCIATION to clients. A recent decision confirms the Association as a Legal Charity.

Official Designation:

The Boy Scouts Association (New Zealand Branch) Incorporated,
P.O. Box 1642.
Wellington, C1.

500 CHILDREN ARE CATERED FOR

IN THE HOMES OF THE

PRESBYTERIAN SOCIAL SERVICE ASSOCIATIONS

There is no better way for people to perpetuate their memory than by helping Orphaned Children.

£500 endows a Cot in perpetuity.

Official Designation:

THE PRESBYTERIAN SOCIAL SERVICE TRUST BOARD

AUCKLAND, WELLINGTON, CHRISTCHURCH, TIMARU, DUNEDIN, INVERCARGILL.

Each Association administers its own Funds.

CHILDREN'S HEALTH CAMPS

A Recognized Social Service

A chain of Health Camps maintained by voluntary subscriptions has been established throughout the Dominion to open the doorway of health and happiness to delicate and understandard children. Many thousands of young New Zealanders have already benefited by a stay in these Camps which are under medical and nursing supervision. The need is always present for continued support for this service. We solicit the goodwill of the legal profession in advising clients to assist by means of Legacies and Donations this Dominion-wide movement for the betterment of the Nation.

KING GEORGE THE FIFTH MEMORIAL CHILDREN'S HEALTH CAMPS FEDERATION,
P.O. Box 5013, WELLINGTON.

THE NEW ZEALAND Red Cross Society (Inc.)

Dominion Headquarters
61 DIXON STREET, WELLINGTON,
New Zealand.

"I GIVE AND BEQUEATH to the **NEW ZEALAND RED CROSS SOCIETY (Incorporated)** for:—

The General Purposes of the Society,

the sum of £..... (or description of property given) for which the receipt of the Secretary-General, Dominion Treasurer or other Dominion Officer shall be a good discharge therefor to my trustee."

In Peace, War or National Emergency the Red Cross serves humanity irrespective of class, colour or creed.

MAKING A WILL

CLIENT "Then. I wish to include in my Will a legacy for The British and Foreign Bible Society."
SOLICITOR: "That's an excellent idea. The Bible Society has at least four characteristics of an ideal bequest."
CLIENT: "Well, what are they?"
SOLICITOR: "It's purpose is definite and unchanging—to circulate the Scriptures without either note or comment. Its record is amazing—since its inception in 1804 it has distributed over 600 million volumes. Its scope is far-reaching—it broadcasts the Word of God in 820 languages. Its activities can never be superfluous—man will always need the Bible."
CLIENT "You express my views exactly. The Society deserves a substantial legacy, in addition to one's regular contribution."

BRITISH AND FOREIGN BIBLE SOCIETY, N.Z.
P.O. Box 930, Wellington, C.1.

(2) This section applies only to powers of attorney created by instruments executed on or after the first day of January, nineteen hundred and six.

THE PROPERTY LAW ACT 1952, S. 136.

1. If a power of attorney is given for valuable consideration and is made irrevocable so that s. 136 applies, the donee can execute a transfer notwithstanding the death of the donor and notwithstanding the fact that the sale was made after the donor's death.

2. Section 136 of the Property Law Act 1952 requires the power of attorney to express itself as irrevocable, but it does not appear to be necessary that the power should expressly state that it is given for valuable consideration. The fact that it has been given for valuable consideration could be proved by extraneous evidence. It is not essential that the valuable consideration should move from the attorney to the donor.

Such a power may be acted upon if a declaration of non-revocation is given in terms of s. 135 (3) of the Property Law Act 1952.

Power of Attorney Irrevocable for Fixed Time.

Section 137, which treats of a power of attorney made irrevocable for a fixed time, is as follows:

137. (1) Where a power of attorney (whether executed in or out of New Zealand, and whether given for valuable consideration or not) is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(*a*) The power shall not be revoked for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, mental deficiency, or bankruptcy of the donor; and

(*b*) Any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, mental deficiency, or bankruptcy of the donor had not been done or had not happened; and

(*c*) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice, either during or after that fixed time, of anything done by the donor during that fixed time without the concurrence of the donee, or of the death, mental deficiency, or bankruptcy of the donor within that fixed time.

(2) This section applies only to powers of attorney created by instruments executed on or after the first day of January, nineteen hundred and six.

Companies and Other Corporations.

Section 139: the above provisions apply, with the necessary modifications to corporations, as if the corporation were a person and the dissolution of the corporation (however occurring) were the death of the individual. They apply alike to companies registered in New Zealand under the Companies Act 1933 and to companies incorporated outside New Zealand.

Section 139 of the Property Law Act 1952 provides as follows:

139. (1) The provisions of this Part of this Act apply with the necessary modifications with respect to any power of attorney executed by any corporation to the same extent as if the corporation were a person and the dissolution of the corporation (however occurring) were the death of a person within the meaning of this Part of this Act.

(2) The provisions of subsection one of this section are in addition to and not in derogation of the provisions of sections forty-two and three hundred and thirty-three of the Companies Act 1933.

(3) The provisions of subsection one of this section do not apply to a corporation which is dissolved before the commencement of this Act, but do apply to powers of attorney whether executed before or after its commencement.

NOTE.—Section 42 of the Companies Act 1933 is as follows:

42. (1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute instruments on its behalf in any place in or beyond New Zealand.

(2) An instrument executed by such an attorney on behalf of the company shall bind the company, and if executed as a deed shall have the same effect as if it were under the common seal of the company.

(3) The provisions of Part XI of the Property Law Act 1908 [now ss. 134-139, comprising Part XII of the Property Law Act 1952] shall, with the necessary modifications, apply with respect to any power of attorney executed by a company to the same extent as if the company were a person and as if the commencement of the winding up of the company were the death of a person within the meaning of the said Part XI.

Section 333 of the Companies Act 1933, after declaring that a company incorporated outside New Zealand and after delivering certain documents to the Registrar, has the same power to hold lands as if it were a company incorporated in New Zealand, goes on to provide as follows:

333. (2) The provisions of Part XI of the Property Law Act 1908 [now ss. 134-139, comprising Part XII of the Property Law Act 1952] shall, with the necessary modifications, apply with respect to any power of attorney executed by a company to which this Part of this Act applies to the same extent as if the company were a person and as if the commencement of the winding up of the company were the death of a person within the meaning of the said Part XI.

NOTE.—Section 333 is contained within Part XII of the Companies Act 1933, which applies to companies incorporated outside New Zealand carrying on business within New Zealand.

Executors and Administrators.

An executor or administrator *residing out of New Zealand* may appoint an attorney in New Zealand to whom letters of administration may be granted: *Code of Civil Procedure*, R. 531E, which is as follows:

531E. In the case of a person residing out of New Zealand administration or administration with the will annexed may be granted to his attorney acting under a power of attorney.

As to this, see *In re Norris*, [1955] N.Z.L.R. 7.

Married Women.

Section 13 of the Married Women's Property Act 1952 provides as follows:

13. A married woman, whether married before or after the commencement of the Married Women's Property Act 1884, and whether a minor or not, may, as if she were unmarried and of full age, by deed appoint an attorney on her behalf for the purpose of executing any deed, or making any appointment otherwise than by will, or doing any other act she might herself execute or do.

Trustees.

As to the delegation of powers by trustees not resident in New Zealand, s. 103 of the Trustee Act 1908 (N.Z.) provides:

103. Any trustee of real or personal property in New Zealand who for the time being is residing out of New Zealand, whether appointed by order of any Court, or by deed will, letters of administration, or otherwise howsoever, and whether the order or instrument creating the trust or appointing the trustee is made or executed out of New Zealand or not, may, if not expressly prohibited by the instrument creating the trust, delegate by deed to any person residing in New Zealand all or any of the powers, authorities, and discretions vested in such trustee, so far as such powers, authorities, and discretions affect or are capable of being exercised over the trust estate in New Zealand.

The validity of deeds and acts under powers delegated by trustees is assured by s. 105 of the same Act, which is as follows :

> 105. Every deed, act, matter, or thing done or executed by any person under such delegated powers, authorities, and discretions shall be as valid and effectual as if the same had been done or executed by the person who executed the deed by which such powers, authorities, and discretions were delegated.

As to *administrators*, there was recently reported an interesting ruling by Sir Harold Barrowclough C.J. Although there is no authority for the making of a grant of letters of administration to the attorney of the next-of-kin residing in New Zealand (who is solely entitled to the grant, for his own use and benefit), there is, however, no objection to the next-of-kin's taking the grant of administration, and then appointing an attorney to carry on and conclude the administration : *In re Norris*, [1955] N.Z.L.R. 7.

Public Trustee.

The Public Trustee may act as agent for the purpose of resealing in New Zealand any grant of probate or letters of administration granted outside New Zealand : Public Trust Office Amendment Act 1921-22, s. 105.

The Public Trustee may also act as attorney for any person resident outside New Zealand desiring to appoint an agent in New Zealand : Public Trust Office Act 1908, s. 12.

Maoris Outside New Zealand.

A Maori, within the definition given in s. 2 of the Maori Affairs Act 1953, who is outside New Zealand at the time of the execution of an instrument of alienation of land by Maoris, may execute such instrument by a European attorney in the ordinary manner, the power of attorney being executed and verified in the same manner as if it had been executed by a European : Maori Affairs Act 1953, s. 223.

Provisions of Land Transfer Act.

Sealing is unnecessary (s. 153). Section 150 enacts as follows :

> 150. The registered proprietor of land under this Act, or any person claiming any estate or interest under this Act, may by power of attorney in form O in the Second Schedule to this Act or in any usual form, and either in general terms or specially, authorize and appoint any person on his behal to execute transfers or other dealings therewith, or to make any application to the Registrar or to any Court or Judge in relation thereto.

A power of attorney in *the usual form* under the general law will suffice, as provision is made in s. 150 for such a power of attorney, or a copy verified to the Land Registrar's satisfaction, to be deposited in the Land Registry Office, because registration of the power of attorney is not necessary. This is the customary procedure.

If, however, a special power of attorney is given to effect a particular dealing in land, form O in the Second Schedule to the Land Transfer Act 1952 may be used, though its use is infrequent.

The provisions of the Land Transfer Act 1952 relating to the *revocation* of a power of attorney are contained in s. 152 :

> 152. (1) The grantor of any revocable power of attorney may, by notice to the Registrar in form P in the Second Schedule to this Act, revoke the power of attorney either wholly or as to the land specified in the notice.
>
> (2) No power of attorney shall be deemed to have been revoked by reason only of a subsequent power of attorney being deposited without express notice as aforesaid, nor shall any such revocation take effect as to instruments executed prior to the reception of the notice by the Registrar.
>
> (3) No power of attorney shall be deemed to have been or to be revoked by the bankruptcy of the grantee or by the marriage of a female grantee.

Subject to the foregoing provisions, the sections of the Property Law Act 1952, as above set out, apply to powers of attorney for use under the Land Transfer Act 1952.

Execution of Powers of Attorney.

Sealing is not essential to the proper execution of a power of attorney for use in New Zealand unless the donor is a corporation. But attention must be drawn to Reg. 3 of the Land Transfer Regulations 1948, Amendment No. 2 (S.R. 1951/112), which reads :

> The principal regulations are hereby amended by inserting, after regulation 35, the following new heading and regulation :
>
> *Powers of Attorney.*
>
> 35A. (1) The Registrar may decline to deposit any power of attorney or a duplicate or attested copy thereof, unless the original has been duly signed (or, if executed by a corporation, sealed), duly attested, and, if required by him, duly proved in accordance with sections 169 to 171 of the Act [now ss. 158-160 of the 1952 Act], or duly verified in accordance with section 176 of the Act [now s. 166 of the 1952 Act], section 21 of the Statutes Amendment Act 1939, or section 9 of the Evidence Amendment Act 1945, as the case may be.
>
> (2) Regulation 10 (which provides paper of the approved size and quality) of these regulations shall, with the necessary modifications, apply to the deposit with the Registrar pursuant to section 160 of the Act (now s. 151 of the 1952 Act) of any power of attorney or duplicate or attested copy thereof.

The practical effect of this regulation is that a witness to a power of attorney executed in New Zealand should be one who would be accepted as a competent witness to a Land Transfer instrument.

It appears that a registered proprietor claiming under an instrument executed by the attorney of a registered proprietor obtains an indefeasible title, even if the attorney has acted in excess of the powers conferred upon him by the power of attorney : *Rotorua and Bay of Plenty Hunt Club (Inc.)* v. *Baker*, [1941] N.Z.L.R. 669; [1941] G.L.R. 422.

In General.

The requirements of New Zealand law as to execution of documents generally (including powers of attorney) are set out in s. 4 of the Property Law Act 1952.

Evidenciary.

If a power of attorney is executed out of New Zealand for use in New Zealand, the signature of the witness or witnesses must be verified in accordance with New Zealand law if it is to be used for purposes of the registration of dealings in relation to land. That is to say, it must be verified in accordance with either :

(*a*) Section 6 of the Evidence Amendment Act 1952, which for practical purposes is the same as s. 166 of the Land Transfer Act 1952 ; or

(*b*) Section 166 of the Land Transfer Act 1952 ; or

(*c*) Section 21 of the Statutes Amendment Act 1939 ; or

(*d*) Section 9 of the Evidence Amendment Act 1945.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Briefs.—Scriblex notices in the Press that the owner of El Khobar, recent winner of the Doomben Ten Thousand, has "briefed" his Australian trainer to take El Khobar first to Sydney and then to Melbourne. Whether, in the preparation of the brief, the owner has assumed the role of instructing solicitor and the trainer that of counsel for the horse is not disclosed; but Scriblex feels impelled to utter a minor note of protest against the possible absorption into the realms of racing of a term that is essentially legal. Although we must, of course, give due recognition to Shakespeare's "proud man, drest in a little brief authority" and his "out, out, brief candle" of *Macbeth*, it is still a far cry to the much-advertised "briefs" in which "Little Mo" Connelly was apt to appear at Wimbledon—usually on the Centre Court. The position is one that requires to be watched: otherwise we shall shortly find in our newspapers some item reading: "The Minister of Justice has briefed A. N. Other Esq., the hanging specialist, to attend to the final arrangements for Mr Geradus Ziebiecki, whose appeal from his conviction for murder was recently dismissed by the Court of Appeal."

Buried Treasure.—*Thomson* v. *Cremin* is an interesting case on the duty of stevedores to inspect a ship before they commence to unload it. But not upon that ground alone. As Professor A. G. Davis of Auckland University College points out in the last number of *Modern Law Review*, the current edition of *Salmond on Torts* states that the case is "reported only in the official papers of the House of Lords" (where it was decided in 1941), and the learned editor indicates that it was only by good fortune that he discovered that such an important decision had been arrived at by that House. Doubtless, Professor Davis suggests, as a result of this note in *Salmond*, the case was reported in [1953] 2 All E.R. 1185; but on its further report as a note in [1956] 1 W.L.R. 103, Professor Davis has drawn attention to his even more important discovery,—viz., that the case was originally reported in *71 Lloyd's List Reports* 1—a report which gives counsel's arguments in full, and this neither *All England* nor the *Weekly Law Reports* do. Citation from *Lloyd's List Reports* has been made from time to time in the Court of Appeal, and then by the courtesy of the solicitors for the Union Steam Ship Company, who, so far as Scriblex is aware, are the only persons in Wellington who have them.

Verse or Worse?—Scriblex is indebted to a learned contributor in one of our Government Departments who has gone to the trouble of copying and translating from the *Volkskraut* (28/4/56) an interesting and unusual legal item. It appears, he says, that the Judiciary in Western Germany are courageously exploring new avenues into originality. Last December, a Magistrate in Baden Baden was hearing an action for slander between two women. He must have been a man with great versatility of mind, because, after all the evidence had been brought, he gave his judgment in verse. One of the women appealed against this. She had no objection to the standard and poetic quality of the verse; but she was of opinion that the Magistrate, by his having used verse, had shown such a degree of levity as was inconsistent with the case or with his position. Accordingly, the Court of Appeal in Karlsruhe was required to consider the matter, and came to the conclusion that a judgment loses none of its legal effect even though it is drawn up in the form of a poem. The question now is, however, whether the Court of Appeal also takes a sufficiently serious attitude to its work: the Court felt itself in such strong agreement with the Magistrate that it also gave its judgment in the form of a verse. The only objection that Scriblex can see is the temptation on the part of the Court to adopt, from time to time, some of the obscurity of the modern poet. Let us take, for instance, the late Dylan Thomas, one of the foremost of the moderns, and the last verse of his celebrated "Light Breaks Where No Sun Shines":

Light breaks on secret lots,
On tips of thought where thoughts smell in the rain;
When logics die,
The secret of the soil grows through the life,
And blood jumps in the sun;
Above the waste allotments the dawn halts.

This may be abundantly clear to counsel in the particular case—town-planning, breach of municipal regulations, or what-have-you—but the client is entitled to know, in firm prose, precisely what has happened to him.

Consortium Note.—One of the valued tribe of will-makers has come up with something new. It seems that an elderly lady gave instructions for a will under which her entire estate was left to her husband. His employer regarded the matter as one upon which a junior member of his staff might well cut his teeth, and, in due course, the junior read the proposed will to the client. "It seems very cold to me," she observed, "could there not be some reference to the love he has shown me and the comfort he has been?" "Well," said the law clerk, feeling that Messrs Willis and Carrad had both slipped a bit, "It isn't too hot, but come back this afternoon and it will be better." The elderly lady returned in the afternoon, and was given the polished article to read. Then shock chased surprise across her face. This is what she read:

> "I give devise and bequeath my estate both real and personal of which I am now seised or possessed or to which I may become entitled to my dear husband who has been the best and most loving of husbands to me for his own benefit absolutely."

From My Notebook (Understatement Division).—"Counsel for the defendant cited, as I think the best he could do, the case of bigamy, which is not a very convincing one, since bigamy is hardly a crime which is likely to be committed in the course of an air flight."—Devlin J. in *R.* v. *Martin*, [1956] 2 All E.R. 86, 90 (a decision that the Civil Aviation Act 1949 (U.K.) does not confer substantive criminal jurisdiction in relation to acts in British aircraft wherever the aircraft may be when the act was done).

"A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract."—Lord Sands in *Scott and Sons* v. *Del Sel*, [1922] S.C. (Ct. Sess.) 592, 597 (implied terms in frustration of contract).

MAGISTRATES' COURTS RULES AND IMPRISONMENT FOR DEBT LIMITATION (MAGISTRATES' COURTS) RULES.

Effect of Amendments.

The recent amendments to the Magistrates' Courts Rules (S.R. 1956/81) and the Imprisonment for Debt Limitation (Magistrates' Courts) Rules (S.R. 1956/82) are the second amendments since the principal rules were made in the years 1948 and 1949 respectively. The amending rules are of varying interest. Some are referred to in these notes.

Revised Scale of Fees.

Perhaps the principal matter dealt with is the substitution of a completely-revised scale of fees, that combines in one Schedule the scales under both sets of Rules.

The new scale will not affect the cost of litigation. The fees were fixed after tests had been made, which showed that the total amount collected will be the same as under the former provisions.

The new scale will effect a great simplification. The Third Schedule to the Magistrates Courts' Rules contained forty-five different fees, and the Third Schedule to the Imprisonment for Debt Rules eight fees. In place of those fifty-three fees, there are now thirteen.

In general, there are two points at which fees are payable: when any proceeding is commenced, and when any process is issued to enforce a judgment or order. No fees are payable on most incidental proceedings, for example, on filing ancillary documents, on adjournments, hearing, or entry of judgment. In the result, the work of Court offices in collecting and accounting for fees is greatly reduced, and similarly the work of practitioners and their staffs in paying and accounting.

Another amendment applies the Witnesses and Interpreters Fees Regulations 1954 (S.R. 1954/236) to civil proceedings in the Magistrates' Court. This completes a reform, in this respect, of Court rules generally. Formerly there were different scales of payment for the Supreme and Magistrates' Courts and in respect of civil and criminal proceedings. The scales did not usually vary much and there was never much reason for any variation. Now, there is one set of rules only to be referred to and applied. The Witnesses and Interpreters Fees Regulations have previously been applied to proceedings under the Coroners Act.

Recovery of Moneys Payable under Hire-purchase Agreements.

Rule 5 of the Magistrates' Courts Rules 1948, Amendment No. 2 (S.R. 1956/81) alters the position that no default action may be brought to recover interest on moneys payable under a hire-purchase agreement within the meaning of the Hire-purchase Agreements Act 1939. The rules as amended enable those claims to be brought by default action if the rate of interest does not exceed 10 per cent.

In the case of a hire-purchase agreement, if the total amount payable under the agreement exceeds the cash price of whatever is being purchased, the difference is deemed to be interest. Where a default action is brought in accordance with the new provision, the statement of claim must contain a certificate that the true rate of interest does not exceed 10 per cent. This certificate must be signed by the plaintiff or his solicitor.

Default Action: Statement of Claim.

An amendment of much interest to practitioners is contained in r. 6 of the Magistrates' Courts Amendment Rules. This provides that in a default action the statement of claim may be included in the summons form instead of in a separate document. The summons form will be reprinted, and will then leave a space for typing the claim. That space will be sufficient for any ordinary short claim, and, in the result, probably for 80 or 90 per cent. of claims that are brought by default action. The new procedure will no doubt be widely used. It will save a lot of paper, and a lot of work involved in typing the heading and conclusion of the claim and in handling and affixing of separate sheets. This will be a beneficial amendment for the Courts and practitioners.

Imprisonment for Debt Limitation Procedure.

An interesting amendment is that in r. 2 of the Imprisonment for Debt Limitation (Magistrates' Courts) Rules 1949, Amendment No. 2 (S.R. 1956/82), which relaxes the requirement that a judgment summons must be delivered personally on the debtor.

Through all previous changes, the rule about service of a judgment summons has remained unaltered, no doubt because service is so important since an order of committal to prison can be made on the ground that the debtor has not appeared at Court. Under the amended rule, if there are special circumstances, a Magistrate may authorize service by registered post. This provision will probably not be used often. But there are the odd cases where, for example, the expense of personal service justifies use of the post.

Another amendment that practitioners should be pleased with is that in r. 3 (2) of the Imprisonment for Debt Limitation amending Rules. This provides that conduct money need not be tendered with a judgment summons unless the amount would exceed 5s.

This will, particularly in the main centres, save a lot of dealings with small amounts of money.