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MEDICAL NEGLIGENCE: THREE PRINCIPLES.

IN his paper read at the Ninth Dominion Legal Conference in Napier in 1954, Dr P. P. Lynch said that, although the number of claims against hospitals and their professional officers had been increasing, he did not believe that that connoted a growing lack of care by medical officers who worked in them. One factor which operated to produce that effect was that there was a greater awareness on the part of the public of the possibilities of financial gain which might accrue to them, if by chance some harm or even some unexpected or disappointing result should follow medical or surgical treatment. The doctors, he said, were as careful today as ever they were. None of the reasons for the increase of cases based on alleged medical or surgical negligence had, therefore, anything to do with any slackening of individual standards of medical care.

Dr Lynch added that another reason for the increase —and he thought this might be the most important of all—was the extent to which operative procedures and therapeutic measures had become increasingly complex. . . . Not only did these aids to treatment increase the scope of the surgeon's work; they often resulted in procedures inherently dangerous in themselves and involving the use of methods which also had their own inherent dangers. Thus were multiplied many times the points at which error could creep into the work of the surgeon or the physician or the anaesthetist.

Dr Lynch's observations receive support from both the learned Judge, McNair J., and the jury in *Bolam* v. *Friern Hospital Management Committee* [1957] 2 All E.R. 118, which are concerned with injuries resulting from electro-convulsive therapy, which, as the learned Judge observed, is a progressive science, which gives a person who enters a mental hospital with a particular type of mental disorder a real chance of recovery. The change is due almost entirely to the introduction of physical methods of treatment of mental illness; and, of those physical methods, the electro-convulsive therapy is the most important. The particular injury of which the plaintiff complained—acetabular fracture—was one of extreme rarity: one medical witness said he had seen one such happening in fifty thousand cases, involving a quarter of a million treatments.

The plaintiff claimed damages against the defendant hospital in respect of fractures sustained when he was undergoing electro-convulsive therapy. He had been suffering from mental illness, and signed a form of consent to the treatment, but was not warned of the risk of fracture involved. There was evidence of a substantial difference of medical opinion in relation to various matters concerning the treatment.

Our purpose is to draw attention to three principles of general application which should be borne in mind when considering the facts where medical negligence is alleged.

In 1954, the plaintiff, who was suffering from mental illness, was advised by Dr de Bastarrecha, the consultant psychiatrist attached to the defendants' hospital to undergo electro-convulsive therapy. He signed a form of consent to the treatment but was not warned of the risk of fracture involved. There was evidence that the risk of fracture was very small, of the order of one in ten thousand. On the second occasion when the treatment was given to the plaintiff by Dr Allfrey in the defendants' hospital he sustained fractures. No relaxant drugs or manual control (save for support of the lower jaw) were used, but a male nurse stood on each side of the treatment couch throughout the treatment. The use of relaxant drugs would admittedly have excluded the risk of fracture. Among those skilled in the profession and experienced in this form of therapy, however, there were two bodies of opinion, one of which (since 1953) favoured the use of relaxant drugs or manual control as a general practice, and the other of which, thinking that the use of these drugs was attended by mortality risks, confined the use of relaxant drugs to cases where there were particular reasons for their use. The plaintiff's case was not such a case. Similarly, there were two bodies of competent opinion on the question whether, if relaxant drugs were not used, manual control should be used. So, too, different views were held among competent professional men on the question whether a patient should be expressly warned about risk of fracture before being treated, or should be left to inquire what the risk was; and there was evidence that in cases of mental illness explanation of risk might well not affect the patient's decision whether to undergo the treatment. The plaintiff having sued the defendants for negligence in the administration of the treatment—in not using relaxant drugs or some form of manual control, and in failing to warn him of the risk involved before the treatment was given—the jury returned a verdict for the defendants.

An enunciation of the principles relating to medical negligence is to be found in the careful and detailed direction of McNair J. to the jury.

Before applying the principles of the general law of negligence to medical practice, His Lordship explained

to the jury what in law is meant by "negligence". He said:

> In the ordinary case which does not involve any special skill, negligence in law means this: some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man.
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> But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent. Counsel for the plaintiff was also right, in my judgment, in saying that a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds. That again is unexceptionable.
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> The emphasis which is laid by counsel for the defendants is on this aspect of negligence: he submitted to you that the real question on which you have to make up your mind on each of the three major points to be considered is whether the defendants, in acting in the way in which they did, were acting in accordance with a practice of competent respected professional opinion. Counsel for the defendants submitted that if you are satisfied that they were acting in accordance with a practice of a competent body of professional opinion, then it would be wrong for you to hold that negligence was established.

The plaintiff's case primarily depended on three points: first, it was contended that the defendants were negligent in failing to give to the plaintiff a warning of the risks involved in electro-convulsive therapy, so that he might have had a chance to decide whether he was going to take those risks or not. Secondly, it was said that they were negligent for failing to use any relaxant drugs which admittedly, if used, would have excluded, to all intents and purposes, the risk of fracture altogether. Thirdly—and this was the point on which counsel for the plaintiff laid the most emphasis—it was said that if relaxant drugs were not used, then at least some form of manual control beyond shoulder control, support of the chin, and placing a pillow under the back, should have been used.

His Lordship then examined those three points. He told the jury to bear in mind that its task was to see whether, in failing to take the action which it was said Dr Allfrey should have taken, he had fallen below a standard of practice recognized as proper by a competent reasonable body of opinion.

Difference of Medical Opinion.

The first principle enunciated by the learned Judge is concerned with the relevance of a substantial body of conflicting medical opinion:

> A doctor is not negligent if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in the particular medical art, merely because there is a body of such opinion that takes a contrary view.

This principle is derived from a statement contained in a recent Scottish case, *Hunter* v. *Hanley* [1955] S.L.T. 213, 217, which McNair J. read to the jury. That case dealt with medical matters, and the learned Judge cited the following passage from the judgment of the Lord President, Lord Clyde:

> In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion, and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.

McNair J. went on to say:

> If that statement of the true test is qualified by the words "in all the circumstances", counsel for the plaintiff would not seek to say that that expression of opinion does not accord with English law. It is just a question of expression. I myself would prefer to put it this way: a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: "I don't believe in anaesthetics. I don't believe in antiseptics. I am going to continue to do my surgery in the way it was done in the eighteenth century". That clearly would be wrong.

His Lordship added that, before he dealt with the details of the case, it was right to say this, that it was not essential for the jury to decide which of two practices was the better practice, as long as it accepted that what Dr Allfrey did was in accordance with a practice accepted by responsible persons; but if the result of the evidence was that the jury was satisfied that his practice was better than the practice spoken of on the other side, then it was a stronger case. And he told the jury:

> Finally, bear this in mind, that you are now considering whether it was negligent for certain action to be taken in August, 1954, not in February, 1957; and in one of the well-known cases on this topic it has been said you must not look through 1957 spectacles at what happened in 1954.

It may be noted that the direction by the learned Judge that, where there were two different schools of medical practice, both having recognition among medical practitioners, it was not negligent for a practitioner to follow one in preference to the other, accords also with American law; see 70 *Corpus Juris Secundum* (1951) 952, 953, para. 44. Moreover, it seems that by American law a failure to warn the patient of dangers of treatment is not, of itself, negligence (*ibid.*, 971, para. 48m).

Duty to Warn Patient.

The second principle relates to the nature of the warning which a medical practitioner must give to his patient before treatment.

There were two questions for the jury to consider. First—did good medical practice require that a warning should be given to a patient before he was submitted

to electro-convulsive therapy? Secondly—if a warning had been given, what difference would it have made? Was the jury satisfied that the plaintiff would have said: "You tell me what the risks are. I won't take those risks. I prefer not to have the treatment?".

The question to which the members of the jury had to address their minds was this: Had it been proved to their satisfaction that, when the defendants adopted the practice of saying very little and waiting for questions from the patient, they were falling below a proper standard of competent professional opinion on the question of whether or not it was right to warn? This was a matter for the jury to decide, but its members might think that when a doctor who was dealing with a mentally sick man had a strong belief that his patient's only hope of cure was submission to electro-convulsive therapy, the doctor could not be criticized if he did not stress the dangers, which he believed to be minimal, that were involved in that treatment. If the jury came to the conclusion that the proper practice required some warning to be given, would it have made any difference if a warning had been given? Only the plaintiff in the present case could answer that question; and he was never asked it.

It may be interpolated here that the view that the duty of a medical practitioner does not necessarily extend, as a consequence of the confidential relationship between doctor and patient, to warning the patient of the dangers of proposed treatment, unless the patient makes inquiry concerning them, accords with Canadian authority: *Kenney* v. *Lockwood* [1932] 1 D.L.R. 507. Moreover, it seems that, by American law, a failure to warn the patient of dangers of treatment is not, of itself, negligence: *70 Corpus Juris Secundum* (1951) 971, para. 48m.

Misadventure.

The third principle, to which the learned Judge referred towards the end of his judgment, was that enunciated in *Roe* v. *Minister of Health* [1954] 2 Q.B. 13. 66; [1954] 2 All E.R. 131, a case where two men in the prime of life had been submitted to an anaesthetic for some trivial condition requiring operative treatment, and, as a result of a mishap in the anaesthetic, came off the operating table paralyzed. McNair J., who was the trial Judge in that case also, came to the conclusion that it had not been established, by the standard of care and knowledge operating at the time, that the anaesthetist was liable; and his decision was upheld by the Court of Appeal (Somervell, Denning, and Morris L.JJ.). In the *Bolam* case, he recalled to the jury what he termed "some very wise words used recently in the Court of Appeal" in the judgment of Denning L.J., as he then was, in *Roe* v. *Minister of Health* (*supra*), when His Lordship said:

> If the anaesthetists had foreseen that the ampoules might get cracked with cracks that could not be detected on inspection they would, no doubt, have dyed the phenol a deep blue; and this would have exposed the contamination. But I do not think their failure to foresee this was negligence. It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience: and experience often teaches in a hard way. Something goes wrong and shows up a weakness, and then it is put right. That is just what happened here.

Then again:

> One final word. These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure.

As we have already said, the jury found for the defendants.

* * *

The *Bolam* case will be read with interest and relief by members of the medical profession.

The most important feature of the judgment is that there is no change in the principles to be applied in deciding whether in a particular case there was negligence on the part of the doctor. But the judgment does indicate the proof required to establish medical negligence.

Bearing in mind what Denning L.J. said in *Roe* v. *Minister of Health* (*cit. supra*)—

> Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks,—

the question arises whether the patient should be warned of the risk; and, if the doctor does not warn the patient, whether he is negligent. It was a matter of complaint in *Bolam's* case that the patient was not warned of the risk of fracture in the course of electro-convulsive therapy. If this were held to be negligent, such a step would make the practice of medicine a nightmare. In the case of every child that has to have an anaesthetic administered for some trifling surgical procedure, this would involve the giving of a warning to the parents as to the risk of death during anaesthesia—a risk which some assess as being one in five to ten thousand administrations. Undoubtedly there are situations where the risk of an operation itself is considerable, particularly in relation to the expected benefit, and in which the matter of risk might properly be discussed with the patient or with relatives. In general, however, it must surely be left to the medical man who has the responsibility for the case to deal with each case on its merits. This may be inferred from what McNair J. said to the jury, and is in accord with Canadian and United States law on the point.

An important point emerging from *Bolam's* case relates to the choice of treatment: it is not necessary to show that the treatment or the technique is one which has been accepted generally by the medical profession; it is sufficient that it is a form of treatment approved by a reasonable and well-informed section of the profession. In a particular case, it may be a minority view. The practice of medicine allows of infinite variation of the problems that confront a doctor; and no more is required of him than that he be well-informed on recent advances and trends in medical science, and that, within wide limits, he uses his best efforts for the welfare of his patient.

SUMMARY OF RECENT LAW.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion—Husband deserting Wife in 1951—Brief coming together in 1953—Resumption of Marital Life in 1954—Conditional Reinstatement of Husband continuing for Two Months—Final Desertion by Husband—Wife's Right to Petition accrued in 1954—Period of Desertion running until Complete Reconciliation—Earlier Matrimonial Offence revived by Subsequent Desertion—Divorce and Matrimonial Causes Act 1928, s. 10 (b). Once a period of desertion has begun to run there must be a complete reconciliation in order to put an end to it. The period of desertion does not cease to run simply because the parties attempt a reconciliation, and, for that purpose, come together again for a time. The desertion continues until there is a bilateral or mutual intention on the part of both spouses again to set up a matrimonial home together. (*Bartram* v. *Bartram* [1950] P. 1; [1949] 2 All E.R. 270, followed.) In March, 1951, the husband wilfully deserted the petitioner wife. The parties came together about Christmas, 1953, for a short period; and, when they again came together in June, 1954, on the husband's return to the matrimonial home, they intended to resume marital life, but the acceptance of the husband by the wife was a conditional reinstatement—namely, that the wife was prepared to forgive all past matrimonial offences subject to the implied condition that, if a further matrimonial offence occurred in the future, the past offence would be revived. In August, 1954, the husband left without explanation, and had not returned to the matrimonial home. On the wife's petition for divorce on the ground that her husband on or about the month of March, 1951, wilfully deserted her without just cause, and for three years and upwards had continued to desert her without just cause, *Held*, 1. That the earlier coming together about Christmas, 1953, was in the nature of a casual visit by the husband, and there was nothing in the nature of a return to the routine of common life, and nothing resembling the re-establishment of the matrimonial relationship; this could not be regarded as a resumption of cohabitation, as the reconciliation was too tentative and conditional and too brief, if there was a reconciliation at all, to terminate the period of desertion. (*Stacey* v. *Stacey* [1955] N.Z.L.R. 355, applied.) 2. That the respondent's period of desertion continued to run at least until June, 1954, when the wife had an accrued right to petition for dissolution; and that, even if there was a resumption of married life in June, 1954, the husband's subsequent desertion in August, 1954, revived the earlier matrimonial offence. (*Batt* v. *Batt* [1953] N.Z.L.R. 260, followed.) Observations on the distinction between the right to apply for a divorce in England on the ground of desertion and the similar right established by s. 10 (*b*) of the Divorce and Matrimonial Causes Act 1928. (*Perry* v. *Perry* [1952] 1 All E.R. 1076, referred to.) *Trotter* v. *Trotter*. (S.C. Wellington. May 13, 1957. McGregor J.)

HUSBAND AND WIFE.

Married Women's Property—Husband's Moneys deposited in Wife's Name in Savings Bank Account, with Husband's Knowledge—Prima facie Presumption of Gift or Advancement—Evidence to rebut Presumption—Where moneys so deposited without Husband's Knowledge or Consent Onus on Husband to show Such Moneys his Property—Dwellinghouse purchased in Wife's Name and Improvements effected, and Mortgage Repayment Instalments paid with Husband's Money—Prima facie Gift or Successive Gifts to Wife—Insurance Policies, payable on Wife's Death, effected with Husband's Money and with His Concurrence—Policy Moneys on Wife's Death part of Her Dutiable Estate unless Evidence rebuts Presumption of Gift—Married Women's Property Act 1908, ss. 11, 12 (1) (Married Women's Property Act 1952, ss. 5 (1), 6 (1)). Section 12 (1) of the Married Women's Property Act 1908 (the statute in force when the deceased in this case died, and replaced by s. 6 (1) of the Married Women's Property Act 1952) provides that, where money is deposited in a bank account in the sole name of a married woman, it is deemed, unless and until the contrary is shown, to be her property. The contrary is shown by evidence which, on the preponderance of probability, satisfies the mind of the Court that the money is in truth owned by some person other than the person in whose name it stands. The words "unless and until the contrary is shown" do not purport to throw some special onus upon the husband as distinct from any other claimant. *Semble*, The presumption can, in appropriate circumstances, be displaced by proof of the fact that the moneys represented accumulated savings made by the wife from the allowance made by the husband for housekeeping expenses. (*Blackwell* v. *Blackwell* [1943] 2 All E.R. 579, applied.) To show that the husband's moneys were deposited in a bank account by a wife in her own name without his consent would be one way—but not the only way—of showing that the moneys were in truth the property of the husband and not that of the wife. (*Jack* v. *Smail* (1905) 2 C.L.R. 684, considered.) Where, however, the husband was aware of the fact that the wife was paying his moneys into bank accounts standing in her own name, it is the prima facie presumption of gift or advancement that he must rebut. He can rebut that presumption by proving that his wife handled all his moneys solely as his agent, for the sake of convenience, and that those moneys were, at all times, available to him and were not at any time given by him to his wife or regarded by her as her property. (*Public Trustee* v. *Steven* [1921] N.Z.L.R. 441; [1921] G.L.R. 194, and *Harrods Ltd.* v. *Tester* [1937] 2 All E.R. 236, followed.) Where a dwellinghouse was purchased with a deposit from the husband's money in the name of the wife and the husband executed a mortgage thereon as a covenanting party only, the fact that the moneys came from the husband would not displace the presumption of gift. If, subsequently to the original purchase, improvements were effected to the property with the husband's money, and the mortgage thereon to which he was a covenanting party was repaid in instalments by him, the successive payments are to be regarded either as repayments of moneys borrowed by the husband for the purpose of enabling him to effect improvements on his wife's property, which improvements were prima facie a gift, or each repayment was a successive gift to the wife. In such a case, the husband has no lien or right of deduction from his deceased wife's estate in respect of the mortgage moneys so repaid. If a wife, with the concurrence of the husband and with his moneys, effected insurance policies issued on proposals made by her (*a*) upon her husband's life and the policy moneys were payable to her or (*b*) as an endowment on a contract to pay moneys to the wife twenty years from the date of the policy, if the assured, a grandson, was then alive or in the event of his prior death to his executors, presumption of gift arose, and, where there was no evidence to rebut it, the policy moneys, at the date of the wife's death, were her property and formed part of her dutiable estate. *Fenton* v. *Commissioner of Inland Revenue.* (S.C. Auckland. April 8, 1957. Shorland J.)

LAND AGENT.

Commission—Claim for Commission on Alleged Inferential Appointment of Agent—Letter from Vendor denying Instrumentality of Plaintiff in completing Sale of Property—Rejection of His Claim for Commission not constituting Acknowledgment of His Appointment as Agent—Land Agents Act 1953, s. 25. G., a licensed land agent, who claimed commission from the company for work alleged to have been performed at its request in respect of the sale of a property, conceded that he had no prior written authority to act as agent, but contended that a letter from the company of March 7, 1956, to G.—which said, in part, "You refer to a transaction making a sale of this property, and suggest that we arrange to forward you commission on the sale of the house amounting to £82 10s. Although at times we have discussed the disposal of this property with you, we do not agree that you were instrumental in completing the recent transaction, and have to advise you we cannot accept your claim for commission"—constituted an acknowledgment of his appointment sufficient to satisfy the requirements of s. 25 of the Land Agents Act 1953. *Held*, 1. That, in order to be entitled to commission, G. had to establish appointment and instrumentality in bringing about the sale. 2. That the company's rejection of G.'s claim to commission on the ground that it considered he was not instrumental in effecting the sale, could not reasonably be construed as an admission of G.'s appointment as agent. (*Campbell* v. *Lindsay* [1933] N.Z.L.R. 588; [1933] G.L.R. 554, doubted. *Looney* v. *Pratt* [1919] G.L.R. 231, distinguished.) 3. That, accordingly, an inferential acknowledgment of appointment could not be spelt out of the letter of March 7, 1956; and that the absence of a written appointment was fatal to G.'s claim. *R. H. Rothbury Ltd.* v. *Norman Gibbs.* (S.C. Auckland. April 29, 1957. T. A. Gresson J.)

MASTER AND SERVANT.

Safe System.—The Responsible Workman. *101 Solicitors' Journal*, 330.

MORTGAGE.

Mortgagee in Possession—Debenture creating Floating Charge over Company's Assets including First Mortgage—Debenture-holder, on Mortgagor's Default, collecting Rents and Managing Property—Demise of Company and Bankruptcy of Mortgagor—Mortgage Charge remaining—Debenture-holder becoming Sub-mortgagee and later, mortgagee, and continuing Management of Property—No Right of Election to appropriate Moneys collected against Personal Indebtedness to Him of Registered Owner of Property—Mortgagee accountable to Second Mortgagee for Whole Period of His Management of Property since His First Entry into Possession. Practice—Evidence—After Trial and Judgment, but before Judgment perfected, Application to admit Additional Evidence as Ground for Reopening Case—Apposite Party without Opportunity to test Additional Evidence by Cross-examination—Admission of New Evidence in Such Circumstances not in Interests of Justice. W., as second mortgagee, claimed the right to an account of the rents and profits of a residential property in respect of which it was alleged R. had been in possession as mortgagee. An oral decision was given at the conclusion of the trial in favour of W.; but, before the judgment was perfected, an application was made on behalf of R. for leave to call further evidence. This application was refused. R. appealed against both decisions. R. was the holder of a bearer debenture which created a floating charge over the undertaking and assets of P. Ltd. One of the assets of the company was a first mortgage securing £600 and interest charged on a residential property, owned by one P. who, as registered proprietor, before trial, was added as a defendant. The property was subject to a second mortgage to U. Both the first and second mortgages were given in 1932. The first mortgage was submortgaged to a Bank, and this submortgage was guaranteed by R. The property was tenanted by W.'s husband, and, in or about 1933, R. announced to the tenant that he was mortgagee in possession and commenced to collect the rents, pay the outgoings, and attend to the management of the property generally including, later, the making of an application to fix a fair rent. He continued to manage the property until these proceedings were commenced. No interest was ever paid by the mortgagor himself on the first mortgage, with the result that the mortgagor was at all material times in default. In October, 1937, the company was struck off the register. P. was adjudicated bankrupt in 1939 and was discharged in 1941. The Official Assignee took no steps in respect of the property. In a statutory declaration made by R. on July 29, 1953, in support of his application to the Registrar to sell the head mortgage, R. set out, inter alia: "4. That in order to protect my security by virtue of such debenture I entered into possession of the property comprised in the head mortage in or about the month of July 1935 and thereafter attended to the collection of the rents thereof and to payment of the outgoings thereon including the payments to the bank under the submortgage". R. paid off the bank some time before July, 1951, when he took a transfer of the submortgage to himself. At the date of the declaration, July, 1953, R. was still in possession of the property, but he said that the rents had been insufficient to pay the amount of the submortgage and to do necessary repairs. He claimed there was still the sum of £388 16s. 1d. owing to him under the submortgage as at May 31, 1953. This reduction resulted from the application of the rents collected. R., by virtue of default in payment of that sum, exercised his power of sale and put the first mortgage up for auction through the Registrar. He bought it in; and, by a transfer dated October 12, 1953, R. became first mortgagee. W. bought the second mortgage a few days later (on November 5, 1953) and by virtue of her status as second mortgagee, she claimed an account from R. in respect of the administration of the property by R. as mortgagee in possession in order that she might redeem the charge standing in priority to her second mortgage. The learned trial Judge held that R. was to be treated as mortgagee in possession from the time he entered into the receipt of the rent, which, according to a rent-book produced, was November, 1933. On appeal from that judgment, *Held*, by the Court of Appeal, 1. That, on the facts, R. acted as a mortgagee when he entered upon the collection of rents from the property and took over its complete management and continued as mortgagee in possession at all material times; and that, in consequence of that action, he was bound to account for the rents and profits he received. (*Gaskell* v. *Gosling* [1896] 1 Q.B. 669, referred to.) 2. That, though R. was nothing more than a secured creditor of the company, which had a floating charge over the first mortgage, he administered the property in the same way as a first mortgagee in possession would administer it, with the result that the first mortgage had been reduced to an extent not exactly known and the position of the second mortgagee had been improved. 3. That R. could not elect to appropriate the moneys he had collected against a personal indebtedness between himself and the registered proprietor of the property, as R. had collected the moneys in his capacity as secured creditor of the company, and, since the date of P.'s bankruptcy, there was no debt owing by P. to R. 4. That, notwithstanding the demise of the company as first mortgagee, the mortgage charge remained, and R. continued in possession and, in fact, received the proceeds from the mortgaged property and applied them in discharge of the obligations of the owner as mortgagor; and that, even if R. had originally acted in excess of his strict legal rights in entering into possession of the property, he was a mortgagee, and, as such, took possession of the property charged with his debt, and was accordingly accountable. (*Woods* v. *Robertson* (1901) 21 N.Z.L.R. 137; 4 G.L.R. 157, applied.) *Held, further*, by the Court of Appeal, That the learned Judge had rightly rejected the additional evidence on which R. sought to have the case reopened, as the party against whom it was to be produced could not be given an opportunity of testing by cross-examination not only the particular piece of evidence itself, but also the subsequent history of matters between P. and the parties to these proceedings: this was due to R.'s physical and mental condition, and to take the evidence, without giving W. the opportunity of cross-examination would not be in the interests of justice. Appeal from both judgments of Hutchison J. dismissed. *Richards* v. *Weggery*. (S.C. Wellington. November 17, 1955. Hutchison J. C.A. Wellington. April 16, 1957. Turner J. Henry J. McCarthy J.)

PATENTS.

Threat of Proceedings for Infringement—Oral Threat Actionable—Threat made by One Manufacturer to Another—Latter a Person "aggrieved thereby"—Measure of Damages—Nature of Relief—Patents Act 1953, s. 74. The words "by circulars, advertisements, or otherwise threatens any other person", as used in s. 74 of the Patents Act 1953, include an oral threat of proceedings for infringement. *Skinner & Co.* v. *Perry* (1892) 10 R.P.C. 1, and *Luna Advertising Co. Ltd.* v. *Burnham & Co.* (1928) 45 R.P.C. 258, followed.) Where a threat is made directly by one manufacturer to another, the latter may be a person "aggrieved thereby" within the meaning of those words as used in s. 74. (*Willis & Bates Ltd.* v. *Tilley Lamp Co.* (1943) 61 R.P.C. 8, followed.) The measure of damages for such a threat is that ordinarily applicable in cases of tort and the damages must be due to the threats alone. *Ungar* v. *Sugg* (1892) 9 R.P.C. 113, followed.) In an action under s. 74 of the Patents Act 1953, the defendant company was the applicant for the grant of letters patent. Before the publication of the complete specification, a director of the defendant company orally threatened the plaintiff company with proceedings for infringement; and these threats were repeated in writing. It is provided in s. 30 of the Patents Act 1953 that no proceedings shall be taken for infringement committed before the date of publication; but the threat was made, in fact, later than the date of acceptance of the application by the Commissioner of Patents. The plaintiff company claimed a declaration that the threats were unjustifiable, an injunction against continuance of the threats, and damages related to cessation of manufacturing activities. (It was open to the plaintiff company in support of its case to attack the validity of the patent; but s. 76 (2) requires that notice of intention to do so shall be given to the Solicitor-General, and no such notice had been given.) *Held*, 1. That the plaintiff company had established that threats were made to it by and on behalf of the defendant company within the meaning of s. 74. 2. That, in the circumstances, the plaintiff company could claim relief only in respect of threats of proceedings for infringement made before the publication of the defendant company's complete specification, for the onus of proving that the claims made in the defendant company's complete specification were invalid rested on the plaintiff company and had not been discharged. 3. That the only relief to which the plaintiff company was entitled was a declaration that the oral threats made by or on behalf of the defendant company and repeated in writing before the date when the defendant company's complete specification was published were unjustifiable. An injunction to restrain further threats was refused. No damages were awarded. *H. L. Tapley & Co. Ltd.* v. *White Star Products Ltd.* (S.C. Auckland. June 4, 1957. North J.)

DIVORCE, THE ROYAL COMMISSION, AND THE CONFLICT OF LAWS.

By J. W. DAVIES* and B. D. INGLIS**

The New Zealand Legislature has always shown a considerable interest in the problems surrounding the law of divorce and matrimonial causes. Since the turn of the century hardly a decade has gone by without legislative activity in this field, usually of some significance,[1] and in view of the recent important recommendations of the Royal Commission of Marriage and Divorce[2] further activity can possibly be anticipated.

One of the most significant sections of the Report is that dealing with jurisdiction in divorce cases and recognition of foreign divorce and nullity decrees,[3] and the Draft Code on Jurisdiction and Recognition annexed to the Report as an Appendix.[4]

This is one field in the conflict of laws in which the questions raised are of some difficulty, and it is one of the purposes of this paper to examine the Draft Code in the light of the existing New Zealand law. This is not only because the Draft Code suggests some valuable amendments, although failing to remove some of the difficulties in the existing law and creating some new ones, but especially because some of the more recent legislation in the field of divorce and the conflict of laws has not been outstandingly successful in making the law any less complex.[5]

The first Part of the Draft Code makes provision for the jurisdiction of the Court, and some of the provisions in s. 1 of the Code as to the bases of jurisdiction are sufficiently novel to call for comment.[6]

The first question raised before the Commission was that of domicil as the sole basis of jurisdiction in divorce. In dealing with this question, the Commission was assisted by the recent Report of the Standing Committee on Private International Law,[7] which fully investigated the problems raised by this topic. It was contended before the Commission, and accepted by them, that undue hardship resulted from a rigid adherence to domicil as the basis of jurisdiction,[8] not only because of the peculiarities of the English law of domicil,[9] but also because of the dependency of the wife's domicil on that of her husband.[10] The Commission therefore stated that, while it considered that domicil should continue to be the main basis of jurisdiction, there should be some relaxation of the strict requirements of the law in order to bring it into line with that of other countries. There should, the Commission recommended, be jurisdiction to grant a decree based on a simple residence qualification which "would in our view greatly assist those persons who have to live in England or Scotland for some time but have no intention of becoming domiciled therein."[11]

Residence alone has never been a sufficient basis of jurisdiction in either England or New Zealand,[12] but statutory relaxations of the strict requirements of domicil have been made in both countries in cases

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[1] The Divorce and Matrimonial Causes Act 1867, the first New Zealand legislation in this area, was substantially copied from the English Divorce and Matrimonial Causes Act, 1857. The Divorce Act 1898 contained the important statutory provision of domicil as the basis of divorce jurisdiction. The Divorce and Matrimonial Acts Compilation Act was passed in 1904, followed by an amending Act in 1907. In the following year the law was consolidated in the Divorce and Matrimonial Causes Act 1908, followed by further short Acts in 1912 and 1913, amendment Acts in 1919 and 1920, and the short 1921-22 Act. In 1928 the principal statute now in force was passed, and was not only a consolidating measure, but embodied certain significant changes in the law. Further amendments, or other Acts affecting the operation of the principal Act, were passed in 1930, 1932 (the National Expenditure Adjustment Act), 1936 (the Statutes Amendment Act and the Law Reform Act), 1947 (the Matrimonial Causes (War Marriages) Act), and 1953.

[2] Report of the Royal Commission on Marriage and Divorce (1951-1955), Cmd. 9678, presented to the United Kingdom Parliament in March 1956.

[3] *Ibid.*, paras. 772-919.

[4] *Ibid.*, Appendix IV, pp. 394-396.

[5] In particular ss. 3 and 10 of the Divorce and Matrimonial Causes Amendment Act 1953. For detailed comment on these sections, see notes by Braybrooke, (1955) *4 International and Comparative Law Quarterly*, 209, and Inglis, (1955) 31 N.Z.L.J. 343.

[6] Section 1 reads:

The Court shall have jurisdiction to entertain proceedings for divorce if:

(a) the petitioner is domiciled in England at the commencement of the proceedings, or

(b) the petitioner is in England at the commencement of the proceedings and the place where the parties to the marriage last resided together was England, or

(c) the parties to the marriage are both resident in England at the commencement of the proceedings:

Provided that the Court shall not grant a decree of divorce in the exercise of jurisdiction under subparagraphs (*b*) or (*c*) unless (i) the personal law or laws of both the parties recognize as sufficient ground for a divorce or nullity of marriage a ground substantially similar to that on which a divorce is sought in England, or (ii) the personal law or laws of both the parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground.

[7] Cmd. 9068.

[8] Report, paras. 791. ff. "The major criticism [of the basis on which divorce jurisdiction is at present exercised] was that the jurisdiction is too restricted, because of the excessive emphasis placed by English . . . law on the factor of domicil. It was said that hardship also results from the strict view taken of the concept of domicil": *ibid.*, para. 791. It will, of course, be remembered that at English and New Zealand law a person acquires and retains a domicil of choice only when he is actually resident in a country, with intention to remain there permanently: *Winans* v. *Attorney-General* [1904] A.C. 287 and *Ramsay* v. *Liverpool Royal Infirmary* [1930] A.C. 588 are not only two of the leading cases, but are also examples of the extremes to which the law on this point has been taken.

[9] See Report, particularly para. 793.

[10] *Ibid.*, para. 796. The English legislation (Matrimonial Causes Act, 1950, s. 18 (1) (*b*) is much less far-reaching in this respect than the corresponding New Zealand legislation: cp. Divorce and Matrimonial Causes Act 1928, s. 12 (as amended by s. 9 (2) of the Divorce and Matrimonial Causes Amendment Act 1953).

[11] Report, para. 811.

[12] Although in England mere residence of both parties is sufficient to found jurisdiction in nullity suits: *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115, (C.A.); and presumably this would be the position in New Zealand without s. 10 B of the Divorce and Matrimonial Causes Act 1928 (as enacted by s. 3 of the Divorce and Matrimonial Causes Amendment Act 1953). In the light of this amendment, mere residence will apparently suffice if the marriage had been celebrated in New Zealand: s. 10 B (1) (*b*).

where the wife is the petitioner.[13] The main criticism usually advanced against the relaxation of the domicil basis of jurisdiction is that it encourages what is colourfully known in the United States as forum-shopping, and tends to limit foreign recognition of the resulting decree.[14]

It may be said that these objections have been met by the Commission by their proviso to s. 1 of the Draft Code, in which it is recommended that a decree of divorce should not be pronounced under subparagraphs (*b*) and (*c*) of the section unless the personal law or laws of both parties recognize as sufficient ground for divorce a ground substantially similar to that on which a decree is granted in England, or the personal laws of both parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground. This provision was also intended to assist in what the Commission regarded as one of the main difficulties in this branch of the law, namely the lack of reciprocity in the recognition of decrees.[15]

The recommendation, however, is especially interesting because it is the first attempt in either English or New Zealand law to consider the question of choice of law in domestic divorce jurisdiction. English Courts have always applied English bases of jurisdiction in divorce causes heard by them, even when jurisdiction is claimed under the statutory three-year residence period.[16]

Prior to the adoption of residence, or, in the case of New Zealand, " deemed " domicil as a basic of jurisdiction in the enactments now contained in s. 18 of the English Matrimonial Causes Act, 1950 and s. 12 of the New Zealand Divorce and Matrimonial Causes Act 1928 respectively, the problem of choice of law in divorce jurisdiction could not, except in a purely academic sense, be said to arise. The law of the forum was certainly applied, but since the parties to the suit were of necessity domiciled in the forum, it was arguable whether it was applied *qua lex fori* or *qua lex domicilii*. With the passing of these Acts it was clear that English and New Zealand law were to be applied quite irrespective of the domicil of the parties. It is hardly necessary to point out that this position is inconsistent with the generally accepted principle that questions of status are governed by the personal laws of the parties, and it is gratifying to see it urged that this branch of the law be brought more nearly into line in this regard. It is possibly desirable that English and New Zealand Courts should apply their own law, but it is also desirable that due consideration be given to the principles of the appropriate foreign law.[17]

However, references to the personal laws of the parties raise problems as to the scope and extent of those laws. This uncertainty is, of course, always present in any conflict of laws case, but it is particularly serious here; firstly because of the problem of *renvoi*, and secondly because of the nature of the Commission's recommendations, particularly the second part of the proviso to s. 1 of the Draft Code, in which the Courts are required to consider not only whether the foreign law has a ground substantially similar to the law of the forum, but also whether the personal law of the parties would permit the petitioner to obtain a divorce in the circumstances of the particular case on some other ground. In the sense that the Court would be required to consider not only the foreign law, but also the interpretation which would be put on all the facts and circumstances of the case by the foreign Court, according to its own law, this would require an English or a New Zealand Court to sit literally as a foreign Court on the case. It is one thing to apply the principle in *Travers* v. *Holley* [18] to provide that a foreign divorce on a wife's petition will be recognized if an English or New Zealand Court would grant a decree on a wife's petition in substantially similar circumstances though not necessarily on the same grounds, but another thing to attempt to apply the principle as it were in reverse by granting decrees on jurisdictional facts substantially similar to those adopted in the country of the proper law, though not necessarily on the same grounds.

A further difficulty, and one always encountered in conflict of laws cases, is in obtaining expert evidence of foreign law. While it is usually comparatively simple to obtain a reliable statement of what may best be described as the foreign statutory or case-law background, it is extremely difficult to obtain reliable expert

[13] In New Zealand the relevant provision is s. 12 (4) of the Divorce and Matrimonial Causes Amendment Act 1928 (as enacted by s. 9 (2) of the Divorce and Matrimonial Causes Act 1953), which provides that a period of three years' residence, together with the intention to reside permanently in New Zealand, shall be a sufficient basis of jurisdiction where the petitioner, being the wife, is living apart from her husband.

[14] Compare the statement of Hitz A.J., in *Holt* v. *Holt*, 77 F. (2d) 538, 541, (1935) (U.S. Court of Appeals for the District of Columbia), on the subject of Nevada Divorces: " Since control of the matrimonial status lies in the law of the domicile of the parties to the marriage, the decrees so casually granted by a few of our states to sojourners, tourists, and birds of passage have no extra-territorial validity or effect in the District of Columbia under the Constitution. And while it is probably true that a law of divorce like our own, which is based on adultery only, is now neither adequate nor appropriate to the life of the community and tends to produce a train of perjury, bigamy, and bastardy, yet the constitutional rule is not to be relaxed by the Courts, though the evil may be recognized and corrected by the Legislature whenever it sees fit to do so."

[15] See Reports, para. 828.

[16] See s. 18 (3) of the Matrimonial Causes Act, 1950 (U.K.).

[17] Indeed, it was on this type of reasoning that the view that domicil was the proper basis of jurisdiction was founded. It was said by Lord Penzance in *Wilson* v. *Wilson*, (1872), L.R. 2 P. and D. 435, 442, that " the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to the principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another." Six years later, in *Niboyet* v. *Niboyet*, (1878), 4 P.D. 1, 13, Brett L.J. expressed a similar view: " It seems that the only Court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married or the status of either of such parties arising from their being married on account of some act which by law is treated as a matrimonial offence, is a Court of the country in which they are domiciled at the time of the institution of the suit." The views expressed by Lord Penzance in *Wilson* v. *Wilson* (*supra*) were concurred in " without reservation " by the Privy Council in *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517, 540. It is as difficult to deny the force of the above reasoning, as it is to deny that the English test of domicil lacks nothing in certainty. The question appears to be whether it is more desirable to have certainty, or to sacrifice a certain degree of certainty for the rather doubttul value of providing a forum for persons who are, for some reason or other, unable to take advantage of their own. For further comment on this point, see text, *post*, p. 10,

[18] [1953] P. 246 (C.A.)

testimony on what the appropriate foreign Courts would actually do were a particular case to come up before them.[19] It is this more, particularized evidence which the provisio to s. 1 of the Draft Code appears to be aimed at obtaining: the production of a certificate as to the appropriate foreign law by an official of the appropriate foreign embassy, which is advocated by the Commission as admissible evidence of foreign law [20] and which would in practice possibly be the only evidence adduced, appears entirely inadequate to meet the situation.

A whole section of the Commission's Report is devoted to the question of how the personal law of the parties is to be determined,[21] and the Commission's recommendations may be summarized as follows: The English Court is first directed to the law of the domicil, and if the Courts of that country recognize that questions of personal status are governed by the law of the domicil, then the Court should regard the domestic law of that country as the personal law of the spouse.

But if, as is frequently the case, the law of the domicil as determined by English law refers questions of personal status to the law of the nationality, then the English Court is bound to refer to the law of the nationality. If that law would also apply the law of the nationality to a question of this kind, then the English Court stops there; if, on the other hand, the law of the nationality refers the question to the law of the domicil, we are in the *circulus inextricabilis* of the text-book writers. The Commission cuts the Gordian knot by providing that in this last case a specific choice of law rule should be adopted and the law of the domicil applied.[22]

This at first sight seems to be a simple solution to a difficult problem, but it should be noted that the Commission is in effect advocating the adoption of a statutory theory of partial *renvoi*, and not what is usually referred to as the foreign Court theory,[23] which has so far been applied in England in every case in which a question of *renvoi* has arisen. Accordingly, what the Court is asked to do is to apply the foreign law, not as the foreign Court would actually apply it in the very circumstances of the case, but on the purely artificial basis of what the foreign Court would do assuming that it agreed with the Commission's view of *renvoi*. The result may be that, inasfar as the Court is referred to foreign law without in the ultimate result finding out what the foreign Court would do in the particular case, the certainty of applying English or New Zealand law may be sacrificed without the achievement of the uniformity to which the foreign Court theory ultimately leads.[24]

Further, in its references to domicil under this provision, the Commission has not made any reference to the possibility that domicil may be differently defined in the forum and what the forum regards as the country of the personal law.[25] This question was adverted to by the Standing Committee on Private International Law, and it is submitted that it is capable of raising conflicts just as serious as those between the laws of domicil and nationality.[26]

In short, s. 1 of the Draft Code appears to be a well-meaning attempt both to relax some of the rigidities existing in the present law, and to clarify it. The major defect is that it abandons the certainty of the present bases of jurisdiction in favour of a complex mass of choice of law rules without achieving the uniformity which theoretically would result from the adoption of the foreign Court theory. It occupies the middle line between an adherence to the law of the forum in favour of the rules the appropriate foreign Court would apply were it seized of the particular case. If certainty is desired, the former is to be preferred. If complete reciprocity is desired, despite the considerable difficulties encountered in the field of expert evidence on what the foreign Court would in fact do, probably the latter is the one to be adopted. The middle position chosen by the Commission appears to substitute one set of fairly rigid rules with another, without

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[19] The classic example of this difficulty is *In re Duke of Wellington* [1947] Ch. 506, in which Wynn-Parry J. was moved to say (*ibid.*, 515):

> As regards Mr Valls and Dr Colas, they were most satisfactory as [expert witnesses on Spanish law]; each made plain his conclusions; each made plain the reasons for his conclusions; the difficulty arises from the circumstances, first, that, as they both agreed, there is no express provision in the Spanish Civil Code, nor any express decision of the Supreme Court, on the question of the applicability of the doctrine of *renvoi* in Spanish law, and, secondly, that on this matter they arrived at diametrically opposed conclusions. The task of an English Judge, who is faced with the duty of finding as a fact what is the relevant foreign law, in a case involving the application of foreign law, as it would be expounded in the foreign Court, for that purpose notionally sitting in that Court, is frequently a hard one; but it would be difficult to imagine a harder task than that which faces me—namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of Courts of inferior jurisdiction.

[20] Draft Code, section 10.

[21] Report, paras. 836-839.

[22] Draft Code, section 9, which reads:

> (1) For the purposes of this part of the Code, the personal law of a party shall be:
>
> (*a*) the domestic law of the country in which that party is domiciled, if, under the rules of private international law of that country, questions of personal status are governed by the law of the country in which a person is domiciled; failing which
>
> (*b*) the domestic law of the country of which that party is a national, if, under the rules of private international law of that country, questions of personal status are governed by the law of the country of which a person is a national; failing which
>
> (*c*) the domestic law of the country in which that party is domiciled.
>
> (2) Where the Court is required under subsection (1) (*b*) above to look to the law of a party's nationality and he has more than one nationality, he shall be taken to be a national of that country in which he is also domiciled, or, failing that, a national of that country of which he last became a national.

[23] For an explanation of these terms, see *Dicey, Conflict of Laws*, 6th Ed., 49ff.

[24] This is particularly unfortunate since the only justification for any form of *renvoi* is uniformity of result, both in the forum and the appropriate foreign country.

[25] The Commission did, however, make one oblique reference to this difficulty: Report, para. 850; when dealing with the question of somicil as the basis of recognition of foreign decrees, recommending "that the Court should not require that the concept of domicil in the country in question should exactly correspond to the English and Scottish concept, bearing in mind that in many countries domicil is equivalent to habitual residence." The Commission does not make it clear how close a correspondence is required, and as it stands the recommendation would compel recognition of a decree granted on the basis of mere habitual residence without the Commission's proviso that the personal law of the parties be applied. This is hardly reciprocity.

[26] As in fact it did in *In re Annesley* [1926] Ch. 692.

achieving either the certainty or the uniformity which it appeared to desire to embody in its Draft Code. Whether it is more desirable to sacrifice certainty for the rather doubtful value of providing a forum for persons who are, for some reason or other, unable to take advantage of their own, appears to be a question which, in New Zealand at least, can have only one clear answer. It is submitted that there is no sufficient reason why the existing rule of domicil should be abandoned.

Section 2 of the Draft Code provides that in addition to the jurisdiction conferred on the Court under s. 1, the Court is to have jurisdiction to entertain proceedings for divorce "if the petitioner is a citizen of the United Kingdom and Colonies and is domiciled in a country, the law of which requires questions of personal status to be determined by the law of the country of which the petitioner is a national and does not permit divorce to be granted on the basis of the petitioner's domicil or residence."

The difficulty the Commission sought to remove was that arising where an Englishman or Scotsman, who has grounds for divorce under the law of England or Scotland, is domiciled in a country whose law does not permit him to take divorce proceedings. Uniformity is obtained not by the invention of a choice of law rule at the jurisdictional stage, but by reference to the choice of law rule of the country of the petitioner's domicil, where the law of such country refers to the petitioner's national law. Accordingly, if an English Court were in such circumstances to assume jurisdiction and grant a decree, the law of the country in which the petitioner is domiciled, by referring to the law of the petitioner's nationality, would be obliged to recognize the validity of the divorce.

It is conceivable, however, that in considering the above provision the Commission overlooked the difficulty raised by the decision in *In re O'Keefe*,[27] and, further, there appears little reason why the privilege conferred by s. 2 should be conferred only on petitioners fortunate enough to be domiciled in a country where the choice of law rule as to status indicates national law as the law to be applied. Article 185 of the Civil Code of Lower Canada prevents a petitioner domiciled in Quebec from obtaining a divorce *a vinculo*: there appears no substantial reason for drawing a distinction between an English or Scottish citizen domiciled in Quebec, and one domiciled in, e.g., Italy. The further question may be asked, whether the provision is really necessary. It is true that to a few British nationals domiciled overseas there may be some hardship in not being able to obtain a divorce in the country of their domicil; this might, however, be regarded as a matter such persons should have considered before acquiring their foreign domicil. Nor is it clear why the Courts should be asked to concern themselves in this manner with nationals of England or Scotland who have, presumably voluntarily, acquired a foreign domicil.

[27] [1940] Ch. 124.

(*To be concluded.*)

THE NEW COMPANIES ACT 1955.

Winding Up of Companies.

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

Restrictions of Rights of Creditor as to Execution or Attachment.

Section 314 (1) of the Companies Act 1955 provides that where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment *before* the commencement of the winding up: Proviso (*c*) is a new provision: it enables the Court to set aside or modify the statutory rights of the liquidator against the creditor in the case of an uncompleted execution or attachment, or to put it another way, the Court may set aside, in favour of an execution creditor, rights conferred on the liquidator by the section. This proviso has been judicially considered in *In re Grosvenor Metal Company Ltd., Ex parte Bebb Industries Ltd.* [1949] 2 All E.R. 948; 65 T.L.R. 755: the proviso is new law, giving to the Court a much wider discretion than formerly to allow an execution, begun before a winding up, to be completed on such terms and conditions as it might choose to impose. The facts were that *Bebb Industries Ltd.* had obtained judgment for £458 against *Grosvenor Metal Co. Ltd.* before the beginning of the winding up of the company, and were proposing to issue execution for that sum. They were requested to stay their hands by Grosvenor Metal Company Ltd. But for that request the execution would have been carried out before the winding up of Grosvenor Metal Company Ltd. became effective. Vaisey J., as reported in the *Times Law Reports*, concluded his judgment thus:

> "The section seems to give the Court quite a free hand to do what is right and just according to the circumstances of each case. It is just because the discretion is so wide and so uncontrolled and so lacking in any sort of guidance that the exercise of it is made so difficult. All I can say is that I have come to the conclusion that in this case the applicants, in all the circumstances, should succeed."

It appears clear that in New Zealand, before the coming into operation of the Companies Act 1955, nothing short of a trick, or some actual dishonesty would justify interference by the Court. This point is also brought out in *In re Suidair International Airways Ltd.* [1951] Ch. 165; [1950] 2 All E.R. 920, 66 (Pt. 2), T.L.R. 909, an interesting case which also deals with conflict of laws. The applicants, who were creditors in England of a company which was South African and had an office in England, began an action in England to recover moneys which the company admitted owing to them, after the company had admitted also giving the applicants nothing but promises and evasions and had defaulted on the instal-

ments in which the applicants had consented to accept repayment. Unknown to the applicants and to the company's London office, a winding-up petition was presented in South Africa by a creditor there. The applicants having signed judgment in their action in default of defence, the company sought by summons to set it aside and, again, without the knowledge of the applicants or the company's London office, the company was provisionally wound up in South Africa. On learning of that, the applicants issued writs of *fieri facias* to two sheriffs, who seized goods belonging to the company. The company failed to get the applicants' judgment set aside, the winding up in South Africa was made final and the liquidator in South Africa claimed the goods in the hands of the sheriffs, who thereupon took out interpleader summonses. In England, a further creditor presented a petition to wind up. The claim of the liquidator in South Africa was barred after the interpleader summonses had been heard, and on hearing the petition to wind up, the company was wound up, the official Receiver being appointed provisional liquidator. The applicants then took out a summons under s. 325 (1) (*c*) of the Companies Act 1948 (U.K.) (corresponding to s. 314 (1) (*c*) of the Companies Act 1955) asking for an order that they should be entitled to retain the benefit of the two writs of *fieri facias* against the liquidator (the Official Receiver). The English Court granted the application, because, in its opinion, it was a proper case for the intervention of the Court. The English Court administered only English law for the purpose of administering the assets of the South African company, which were in England, although the English liquidation was only ancillary to the South African liquidation. It is to be noted that according to South African law the execution in England was void because it took place after the South African winding-up petition was presented. Rule 193 in *Dicey's Conflict of Laws*, 6th ed., p. 859 was applied by Wynn Parry J. This rule reads as follows:

> "All matters of procedure are governed wholly by the local or domestic law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs (*lex fori*). In this Digest, the term 'procedure' is to be taken in its widest sense and includes, *inter alia*, (1) remedies and process; (2) evidence; (3) limitation of an action or other proceeding; (4) set-off or counterclaim."

Duties of Sheriff as to Goods Taken in Execution.

Section 326 (2) of the United Kingdom Act (corresponding to s. 315 (2) of the Companies Act 1955) provides:

> "Where under an execution in respect of a judgment the goods of a company are sold . . . the sheriff shall deduct the costs of the execution from the proceeds of the sale . . . and retain the balance for fourteen days, and, if within that time notice is served on him of a petition for the winding up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding up of the company, and an order is made or a resolution is passed, *as the case may be* for the winding up of the company, the sheriff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor."

In *Bluston & Bramley Ltd.* v. *Leigh* [1950] 2 K.B. 548; [1950] 2 All E.R. 29; 66 (Pt. 2) T.L.R. 103, the facts were that on July 16, 1948, a sheriff seized goods in execution to satisfy a judgment in favour of judgment creditors against a debtor company. On July 28 another company presented a petition for the winding up of the debtor company on the ground of insolvency. On August 7 the sheriff sold by auction goods seized by him on July 16. On August 19 a notice was served on the sheriff of a meeting of the creditors of the debtor company under s. 293 of the United Kingdom Act (s. 284 of our Act) on September 17, the notice being sent with a letter stating it to be enclosed "in reference to s. 326 (2)," (s. 315 (2) of our Act). On September 17 the debtor company, at a meeting of members, passed a special resolution for its compulsory winding up. On October 18 an order for its compulsory winding up was made by the Court on the petition of July 28. On January 4, 1949, the sheriff paid proceeds of the sale of August 7 to the liquidator of the debtor company. The judgment creditors claimed that money from the sheriff. It was held (1) that the notice of August 19 was a sufficient notice of a meeting to pass a resolution for the voluntary winding up of the debtor company to satisfy s. 326 (2) of the Act, (s. 315 (2) of our Act), but that the resolution which that subsection required to be passed, were it to apply, was a resolution for the voluntary winding up of the company, and the resolution of September 17 was not such a resolution; and that the effect of the words "as the case may be" was that the subsection applied only if notice of a petition was followed by an order, or notice of a meeting was followed by a resolution, for the voluntary winding up; and that the sheriff was therefore not authorized by s. 326 (2), (s. 315 (2) of our Act), to pay the liquidator, notwithstanding that the notice of August 19 was followed by an order for the winding up of the company; but (2) that the sheriff was nevertheless entitled by s. 325 (1), (s. 314 (1) of our Act), to pay him since the effect of that subsection was to divest the title of the judgment creditors to the money on October 18, the date of the winding-up order.

Liability Where Proper Accounts Not Kept.

Section 319 of the Companies Act 1955, which replaces s. 267 of the Companies Act 1933, provides that, if where a company is wound up it is shown that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the winding up or the period between the incorporation of the company and the commencement of the winding up, whichever is the shorter, every officer of the company who is in default, shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried out the default was excusable, be liable on conviction on indictment to imprisonment for a term not exceeding one year, or on summary conviction to imprisonment for a term not exceeding six months. Under s. 267 of the Companies Act 1933, some doubt existed whether officers of a company being wound up within two years of its incorporation could be prosecuted for failure to keep proper books. It will be seen from the foregoing that such officers are now under the new Act liable to be prosecuted.

Responsibility for Fraudulent Trading of Persons Concerned.

This is dealt with by s. 320 of the Companies Act 1955, which replaces s. 263 of the Companies Act 1933. The liability imposed by s. 268 of the Companies Act 1933 extended only to past or present directors (including any person in accordance with whose directions or instructions the directors had been accustomed to act). By s. 320 of the present Act, however (following s. 332

of the Companies Act 1948 (U.K.)), the liability is extended to *any other persons* who were knowingly parties to carrying on a business with intent to defraud creditors and the maximum penalty for contravention of the section is now increased to a period of imprisonment not exceeding two years (formerly one year); moreover, a fine may now be imposed as an alternative or additional penalty.

PROSECUTIONS OF DELINQUENT OFFICERS AND MEMBERS OF COMPANY.

These prosecutions are covered by s. 322 of the Companies Act 1955. The function of making inquiries and investigations is given to the Official Assignee, instead of, as heretofore, to the Registrar of Companies under the 1933 Act. In the United Kingdom it is the function of the Board of Trade.

CORRUPT INDUCEMENT AFFECTING APPOINTMENT OF LIQUIDATOR.

An entirely new provision is s. 324 of the Companies Act 1955, which provides that any person who gives or agrees or offers to give to any member or creditor of a company any valuable consideration with a view to securing his own appointment or nomination, or to securing or preventing the appointment or nomination, of some person other than himself, as the company's liquidator shall be liable to a fine not exceeding £100. In short, the section is designed to prevent *touting* for liquidatorships.

PAYMENT OF UNCLAIMED MONEYS IN A LIQUIDATION ACCOUNT.

Section 330 of the Companies Act 1955 is new. From a practical point of view it improves the convenience of the Unclaimed Moneys Act 1908 in its application to the liquidation of companies. It provides that moneys in the liquidator's hands which appear from the statements of receipts and payments to have been unclaimed or undistributed for not less than *six months* may, at the option of the liquidator, be paid into the Public Account at any time before the expiration of six years, when such payment becomes compulsory. All moneys so paid become unclaimed moneys under the Unclaimed Moneys Act 1908. Under the previous law a period of *six years* had to elapse before the Unclaimed Moneys Act could be taken advantage of by the liquidator of a company. It may be pointed out that under that Act unclaimed moneys are in proper cases paid to subsequent claimants out of the Public Account by order of the Minister of Finance. Under s. 343 of the Companies Act 1948 (U.K.) such unclaimed moneys are paid by the liquidator to the Companies Liquidation Account, and claims thereon are decided by the Board of Trade subject to a right of appeal to the High Court.

TRANSPORT LICENSING: RAILWAYS PROTECTION.

By R. T. DIXON.

In s. 96 of the Transport Act 1949 (as amended by s. 14 of the Transport Amendment Act 1955) and in Reg. 29 (2)-(3) of the Transport Licensing Regulations 1950 (as amended by Reg. 2 of Amendment No. 10, (S.R. 1955/188) are provisions for limiting the carriage of goods where rail transport is available.

The amendment effected by the above s. 14 was not in force when the relevant case to be considered in this article was decided, and, therefore, the wording before the amendment will be the wording under our main attention; but some thought will be given in conclusion to any possible change caused by the fresh wording.

Also Reg. 29 (2) was amended after the other relevant case was decided, but the wording of the new cl. (2) remains identical so far as it affects that case.

The legislation, before amendment, provided that a transport licence is required for the carriage of even one's own goods "from one place to another" by truck exceeding (now) 2½ tons "if there is between those places an available route for the carriage of goods that includes not less than thirty miles of open Government railway."

The Regulation provides for a similar restriction to apply as a condition of all goods service licences unless expressly provided otherwise by the licence, but the wording of the Regulation is: "if there is an available route for the carriage of goods which includes at least thirty miles of open Government railway" (increased to fifty miles for some commodities).

There have been cases in the Magistrates' Court on the meaning of the words "available route" in these contexts and now there are two decisions of the Supreme Court on this point, one under s. 96 and one under Reg. 29. It is suggested by this writer that the meaning of the word "available" in its association with "route" would not be affected by the slightly different former wording of the Act as compared with the regulation, and this is assumed for the purposes of this article.

The stretch of highway from Kopu (near Thames) across the Hauraki Plains to the Auckland-Hamilton highway one mile north of Pokeno has been declared to be a "notional" railway for the purposes of the above Reg. 29; see cl. (3) thereof. This affects the position in the later of the cases to be reviewed.

The first case to consider is that under s. 96—namely, *Hanna* v. *Garland* [1954] N.Z.L.R. 945. The facts in this case are that the defendant carried by his own truck a load of his own goods from Auckland to Tauranga via the highway above described. (The fact of the highway's declaration as a "notional" railway has no bearing in this case as the defendant was carrying his own goods.) Two alternative routes were possible for the cartage, both including a length of railway of over thirty miles. Section 96 (2) (*a*) provided that s. 96 shall not apply "where the route that includes the railway is longer by more than one-third than the shortest road route available between the two places"; and this ruled out of legal consideration one route (via Hamilton). The other route considered was from Auckland to Pokeno by rail thence by road to Paeroa thence by rail again to Tauranga. The Court held that this was an "available route"; and, as the rail distance from Paeroa to Tauranga exceeds thirty miles, the de-

fendant was convicted. In arriving at his decision Finlay J. held that " available " as used in s. 96 means " capable of use in fact " or " open and usable " or " susceptible of use " and that in arriving at a decision economic factors such as those involved in loading and discharging the goods to use intervening stretches of railway need not be considered. In support of this contention, he specially referred to the use of the word " includes " in the words " includes at least thirty miles of open Government railway ". A second point raised by the defendant and dismissed by the Court need not be considered for the purposes of this article.

The other more recent case is that of *Gordon* v. *Coldicutt* [1956] N.Z.L.R. 837. In that case, the defendant was a licensed operator whose alleged offence consisted of carting stock from Kaihere (on the Hauraki Plains highway) to Westfield near Auckland. The prosecution's first contention was that this cartage constituted a breach of Reg. 29 (2) in that an " available route " for the cartage was from Kaihere to Pokeno by road and thence from Pokeno to Westfield by thirty-two miles of rail. Alternatively, it was argued that another " available route " was over twenty miles of the " notional railway " as actually used in the trip, plus fourteen miles of real railway between Drury and Westfield. The latter argument was ruled out by Shorland J. who held that the regulation " envisages a continuous stretch of railway ". In arriving at this decision, the learned Judge referred to the " economic factor involved in the successive unloadings and loadings " and in this respect does not appear to agree with Finlay J. who ruled out economic factors in his interpretation of s. 96.

In regard to the first contention, the learned Judge ruled that a fatal consideration to it was that to travel from Kaihere via Pokeno, it is necessary, when the Auckland-Hamilton highway is reached, to turn south and travel about one mile to Pokeno whereas the " customary road route " to Westfield from Kaihere does not require this deviation. The learned Judge held that the words " goods shall be carried by road only so far as it is necessary to permit of their carriage by railway " cannot

> fairly or properly be construed as words of obligation requiring a road carrier to deviate from his customary road route

and went on to state that

> the context in which the word " available " is used, in my opinion, limits its meaning to " capable of being used " from the customary road route along which the carriage of the goods by road is permitted.

The charge was therefore dismissed on the grounds that the route via Pokeno required a diversion of one mile from the customary road route.

It will be noted that the learned Judge appears to construe the governing words of Reg. 29 as the words " goods shall be carried by road only so far as it is necessary to permit of their carriage by railway ". In regard to these words and the application to them of economic considerations, it must be borne in mind that the regulation allows a licence to be amended so that the regulation does not apply or is modified, and in this connection the Licensing Authority is enabled to take economic considerations into account.

It is submitted that, if there is an " available route ", etc., then the requirement " goods shall be carried by road " etc. must apply unless the licence otherwise expressly provides.

A further finding of the learned Judge is set out in his consideration of the second argument concerning interrupted stretches of rail which added together, but not otherwise, exceed thirty miles distance. He states:

> The purpose of Reg. 29 is to give the Government Railways the monopoly of carriage of goods by rail for so much of their journey as the railway extends, either from the point of departure or from any point along the customary road route, to their destination or to a point on the customary road route, provided two conditions are fulfilled, namely—
>
> (*a*) The goods can be so carried by rail for a distance of not less than thirty miles; and
>
> (*b*) The road cum railway journey does not exceed the shortest road route journey by more than one-third of the total distance of the latter.
>
> These conditions point to consideration of economic factors in fixing the limits of the monopoly.

This is apparently his construction of the regulation generally and not only in relation to the above second argument. If this be the case, then it seems that the regulation, in the opinion of the learned Judge, applies only when for the carriage of the goods the rail is wholly available either from the point of departure of the goods to their destination or from any point along the " customary road route " to another point on the " customary road route ".

With every respect, this writer finds it difficult to reconcile the two Supreme Court cases. Admittedly, they are decided under two different enactments, but the general purpose of the enactments is similar and their wording (at the date when the *Coldicutt* judgment was given) was almost identical. The only variation in wording of consequence was the use in s. 96 of the words " between those places " in reference to the cartage of goods " from one place to another " and it is suggested respectfully that the failure to use these words in the Reg. 29 (2) would make one more likely to expect the reasoning used in the *Garland* case to be applicable in the *Coldicutt* case. Then one would have anticipated that the words " available route " would have been construed to mean that a route is " capable of use in fact " or " susceptible of use " even although the route involves a diversion of one mile from the customary road route. In the *Garland* case, a diversion from the " customary road route " to an entirely different route involving a much longer journey and the extra loading and unloading of goods to use an intervening stretch of railway was held to be an " available route ". In the *Coldicutt* case, a route also involving such loading and unloading but similar in the main to the route actually used, very little longer and involving a diversion of only a mile from the " customary road route " was held not to be an " available route ".

It may be argued that if the construing of the words " available route " allowed of diversions from the customary road route, then an absurd position might arise in that one can generally find thirty miles or more of rail between any two places by departing sufficiently from the customary route between them. But to avoid this absurdity is obviously the purpose of the exception from both s. 96 and Reg. 29 which is to be found in both and which provides that if the total available rail and road route exceeds by more than one-third the shortest road route available, then the section (or regulation) shall not apply.

Finally, there remains for consideration the question whether the change in s. 96, as effected by s. 14 of the Transport Amendment Act 1955, might affect the application of either case to the present law. The

material wording of the fresh s. 96 is as follows: " the carriage of any goods . . . . by any goods service vehicle . . . . shall be deemed . . . . to be a goods service . . . . if there is available for that carriage a route that includes not less than . . . . thirty miles of open Government railway ". It will be noted that the main variation from the former wording is the omission of the reference to the carriage of goods " from one place to another " and the consequent subsequent words " between those places ". As these words are not used in either the present Reg. 29 or the former Reg. 29 (under which the *Coldicutt* case was decided) it is suggested that the findings in the latter case will not be affected. Also those words did not, it is suggested, have bearing on the findings in the *Garland* case.

In other words, it is still necessary for any person who requires to construe the present s. 96 or Reg. 29 to do so in the light of both the decisions above discussed; and those who have read this article may agree that this is not an easy task.

THE LATE MR H. R. BISS.

Tributes by Bench and Bar.

Tributes to " a stalwart in upholding those principles which . . . the profession have always striven to maintain," and to one who " leaves behind him a record of service to his country and his profession which is in accordance with the best traditions," were paid by Bench and Bar in the Wellington Supreme Court on July 10, when reference was made to the death of Mr Hugh Roland Biss by His Honour Mr Justice K. M. Gresson on behalf of the Wellington Judges, and Mr R. L. A. Cresswell, speaking in his capacity as President of the Wellington District Law Society.

Associated with Mr Justice Gresson on the Bench were Mr Justice Hutchison, Mr Justice McGregor, and Mr Justice McCarthy, and included in the representation of the Bar were the Attorney-General (Mr J. R. Marshall), the Solicitor-General (Mr H. R. C. Wild) and Mr T. P. Cleary (President of the New Zealand Law Society).

Members of the Wellington Bar, said Mr Cresswell, had assembled before the Bench that morning to pay tribute to the memory of their late friend and colleague, Hugh Roland Biss. Hugh Biss, as he was widely known in the profession, was born at Lower Hutt in 1892, and was educated at Wellington College and Victoria University College, where he graduated LL.B. He was admitted to the Bar in 1914, shortly after the outbreak of the First World War. He was soon on active service, and during most of that war, he served with the Wellington Regiment, of which many lawyers were members, and in which some gave their lives. As an officer of the Second Battalion, commanded by Sir William Cunningham, who was present that morning, Hugh Biss took part in practically every engagement in which that unit was involved during the years 1917 and 1918, and before the end of the war, he had attained the rank of captain.

" Upon his return from active service," said Mr Cresswell, " Mr Biss commenced practice at Martinborough as the resident partner of the firm of Gawith, Biss, and Griffiths, moving in 1930 to Masterton. During this time in the Wairarapa, despite limited opportunities, he became known as an advocate of great ability, and in 1932, shortly after those opportunities had become further limited by the abolition of the Supreme Court sittings at Masterton, he came to Wellington and opened offices here on behalf of his firm.

" Until some time after the end of the Second World War, in which he again played his part, he had no Wellington partner. Notwithstanding the fact that he bore alone the pressure of a busy practice, he found time to take a prominent part in the activities of the Returned Services Association and in the councils of both the Wellington and New Zealand Law Societies. In the former sphere, he held a number of important executive positions, and even in the last months of his life his counsel was being sought by the N.Z.R.S.A. on a matter of the greatest moment to that body."

In the sphere of the Law Society, he served five years on the Wellington District Council, said Mr Cresswell. He became its president, and a most able president, in 1945, a particularly difficult year so far as the society was concerned. Following that, in 1949, he succeeded the late Mr Justice Hay as a member of the Disciplinary Committee of the New Zealand Law Society, and served continuously on that committee until his death.

" The record which I have summarized," said Mr Cresswell, " shows him to have been an unselfish man, ever ready to help his former comrades in arms, and his professional brethren.

" As an advocate, owing to the calls of the all-round practice which he conducted single-handed for the greater part of his professional life in Wellington," Mr Cresswell continued, " Hugh Biss did not figure so prominently in the public eye as some others of his Wellington contemporaries. Few, however, were held in higher esteem by the Judiciary and by those of the profession who had the opportunity of judging his ability in the Courts. He was a great, but always a fair, fighter for his clients, to whom he gave his services to the full, and he was an able lawyer. His legal arguments always commanded the respect and attention of his opponents and of the Court, but his outstanding characteristic was the quickness of his mind which not only enabled him to pick up the facts of even a complicated case with great rapidity, but also made him a most formidable and successful cross-examiner. One who held him in very high esteem as an advocate was that most exacting of critics, the late Chief Justice, Sir Michael Myers."

Apart from his ability as an advocate, said Mr Cresswell, Hugh Biss was widely known in business circles as a most capable commercial lawyer and, as a result, in his later years he served as a director of a number of large public companies which would greatly miss his sound advice. As a member of the profession he was widely popular, ever approachable, cheerful, and helpful if need be.

" During the last two years," Mr. Cresswell concluded, " we had seen little of him owing to the illness which ultimately resulted in his death, and which he bore

with the fortitude we would have expected of him. It is sad to think that we shall not see him again, but he leaves behind him a record of service to his country and his profession which is in accordance with our best traditions, and which will live in our memories. To his widow, his son, and his relatives, we tender our respectful sympathy in their loss."

His Honour Mr Justice K. M. Gresson, addressing the gathering on behalf of the Wellington Judiciary, said that the fact that the profession was present that morning in such numbers was more of a tribute than any spoken words could be.

"The Judges in Wellington," he said, "desire to join with you in this public reference to the passing of Hugh Biss. In his lifetime he was a stalwart in upholding those principles which we of this profession have always striven to maintain, and which we expect the generation which will follow us to maintain. He did it quietly but firmly, unostentatiously but faithfully. My own acquaintance with him was not considerable enough to enable me to speak of his intellectual capacity, his professional ability, or of his services in other directions. That has been done—and well done—by your President. But I can, of my own observation, testify to his work as a barrister as being characterized by a correctness of bearing, a thoroughness of preparation, a directness of delivery, and a forcefulness of presentation to the advantage of his client and to the great assistance of the Bench in its task of decision.

"The elder practitioners amongst you have lost a friend, the younger an example. Those who in professional life are ever careful to do and to be all that is best set the standard for the younger members, and enable them to learn what no book will teach them. This Hugh Biss did. When one passes on—as he has passed on—it is a great loss to all. We ourselves have had losses in our own ranks, and have learnt how sorely one misses one with whom one was in almost daily contact. We can understand how greatly you will miss your fellow practitioner of many years.

"To Mrs. Biss and to his family we offer our sincere sympathy. We hope that in their grief they may be able to take some comfort from, and feel pride in, the high regard Hugh Biss won from those amongst whom his life was chiefly spent."

The gathering stood in silence as a tribute to the memory of the deceased and the Court took the customary adjournment.

A NINE-HUNDRED-AND-FORTY-YEAR OLD COURT.

A felicitous association linking a distinguished Governor-General of New Zealand, himself a barrister of the Inner Temple, with the history of the Law is illustrated by the appearance of Viscount Bledisloe in the role of host to Her Majesty the Queen and His Royal Highness, Prince Philip, Duke of Edinburgh, in what is considered to be the oldest Court of Justice in the United Kingdom. The venue of the welcome to the Royal visitors was the beautiful and ancient Speech House in Gloucestershire which, for generations, has been the home of the nine-hundred-and-forty year old Court of Verderers of the Royal Forest of Dean. Lord Bledisloe, as the Senior Verderer of the Court, outlined the unique history of the institution in his address of welcome, the text of which is reproduced as follows from the *Lydney Observer* of April 27 of this year:

> We tender to you, Madam, and to His Royal Highness, Prince Philip, Duke of Edinburgh, a very warm and loyal welcome to Your Majesty's Forest of Dean and to this ancient Court, the oldest public institution in this county, and said to be the oldest still existing Court of Justice in the Kingdom. It was founded by King Canute the Dane in 1016—940 years ago. . . . Ever since the days of Canute the Court has had an uninterrupted existence, being convened or adjourned every 40 days. Its original function was to guard the "Vert and Venison" of the King in his Royal hunting grounds, "venison" including in those days wild boars and hares as well as deer. Its functions are now much more extended and include protection against encroachment on Crown land, the approval of fresh areas of afforestation when timber plantations come to be felled, and the maintenance of the amenities of the Forest. Incidentally, that acts as a liaison between the Crown and the local inhabitants. I am happy to say the relations between the Crown Officers and the Verderers have always been of the most cordial description.

Lord Bledisloe, when he relinquished his Vice-Regal appointment in New Zealand in March, 1935, after a term of office in which he left an indelible impression of a great publicist, an expert agriculturist, and a personality of wide sympathies and infinite understanding, retired to his family seat, Lydney Park, in the Forest of Dean, in Gloucestershire. There he resumed the practice of those modern principles of husbandry, with particular reference to cattle-breeding and pig-raising, which he commended with unfailing enthusiasm, in season and out of season, to the farmers of New Zealand during the five years he spent in this country as the representative of King George V.

The Good Craftsman.—We are left with a picture of the good craftsman which embodies the highest traditions of the legal profession and should be a spur to the noblest professional ambition. Good craftsmanship presupposes sound scholarship, and a scholarship of a range and grasp commensurate with the order of magnitude and urgency of the problems involved in the creation of an effectively organized world community. A truly universal outlook, an acute sense of the interdependence of different branches of thought, and a profound intellectual humility are essential elements in such scholarship. To this foundation of sound scholarship the good craftsman must add a reasonable proficiency in handling the tools of his craft. An international law has now developed, this implies that he must have acquired by necessarily long experience practical skill in interpreting, applying and developing a complex and growing body of precedent and experience. In so doing the good craftsman, whether he be serving as legal adviser, advocate, or judge, will be confronted in an acute form with the problem of the relationship of law and policy at a time when the law is passing through a decisive phase of evolution. . . . The responsibility is one which only "the tranquil and steady dedication of a lifetime" can fulfil. To that responsibility the international lawyers of the twentieth century must be collectively and individually dedicated. (C. Wilfred Jenks, "Craftsmanship in International Law" (1956), 50 Am. J. Int. L. 32, 60).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Puisne Judges.—The Law is not above making game of the sad wits of the layman with its engaging, if sometimes disconcerting, practice of flirting with the common meaning of words. With one eye on the *Oxford English Dictionary*, the man in the street can surely be excused for thinking that the Puisne Judge, who looks and sounds so imposing is, in fact, only a puny one. According to the lexicographers "puisne" is "puis-ne", born later, younger, junior, raw, inexperienced, of inferior size, force, and importance. Actually a puny boy ought to mean a youngster, but fashion has twisted him into a weakling, and "puisne" remains legal English or Anglicized French. More than 300 years ago it was used for a junior of the Bar in a holiday poem by the rollicking Thomas Randolph which commences,

> "*Come, spur away*
> *I have no patience for a longer stay,*"

and concludes with the solemn determination,

> "*More of my days*
> *I will not spend to gain an idiot's praise,*
> *Or to make sport*
> *For some slight puisne of the Inns of Court.*"

Poor Randolph, poet and dramatist friend of Ben Jonson, had none too many days to spend on anything A wild life in London as a scholar and a wit came to an end in 1635 when he was barely thirty. Puisne, it would seem, was applied to inferior or junior Judges in the superior Courts of common law about 1688, and emerged as "puny", small, insignificant, petty and alling, in 1782. Puisne Judges appear to have come into being in England in 1810.

Obscene Fiction.—The statement of the Victorian Premier (Mr. H. E. Bolte) that the State Government proposes to review the Obscene Publications Act calls attention to the unsatisfactory position in Great Britain as to modern fiction which, it must be admitted, requires at times a strong stomach for easy absorption. Commenting upon *R.* v. *Hutchinson and Company (Publishers) Limited* (The *Times*, 18:9:54) in which the Recorder of London, following the test laid down in *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, that the Court has to determine whether the tendency of the matter charged was to deprave and corrupt those whose minds were open to such immoral influences, the *Law Times* observes: "The definition was designed to protect the weak rather than the strong. A book which might not affect the mind of an archbishop might well affect the mind of a callow youth or a girl just budding into womanhood. Sex had been referred to as one of the vital things of life, but the jury might think sex was something to be protected, and indeed even sanctified, as it was by the marriage ceremony." This would appear to apply to the standard of the adolescent rather than the adult reader. In *R.* v. *Martin Secker Warburg Ltd.* [1954] 2 All E.R. 683, Stable J. deals, in his summing-up to a jury, with the case of a novel, aptly called *The Philanderers*. "Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence . . . Then you say: 'Well, corrupt and deprave whom?' to which the answer is: 'Those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.' What, exactly, does that mean? Are we to take our literary standards as being the level of something that is suitable for the decently brought-up young female aged 14? Or do we go even further back than that, and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making those works available to the general public." It is interesting to note, in passing, that on the jury being empanelled the Judge sent them home for three days to read the book as a whole: "Do not pick out the highlights. Read it as a book and we will come back on Friday and proceed with the case." In February last, the Supreme Court of the United States unanimously quashed the conviction of a Detroit book-dealer under a section of the Michigan Penal Code. The effect of the ruling was that the general public could not be deprived of "a rugged literary diet" solely because it might be harmful to youth. "It is clear on the record," said Felix Frankfurter J., giving the opinion of the Court, "that appellant was convicted because Michigan made it an offence for him to make available to the general reading public a book that the trial judge found to have a potentially deleterious influence upon youth. The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig." The incidence of the enactment, said the learned Judge, was to reduce the adult population of Michigan to reading only what was fit for children. "It thereby curtails," he added, "one of those liberties of the individual . . . that history has attested as the indispensable condition for the maintenance and progress of a free society."

From My Notebook.—It is true that, over the last few years, there has been a tendency to take a benevolent view, shall we say, of the provisions of the Family Protection Act; and, on occasion it might be said that there was a tendency to make new wills. That is not my view of the way the Act should be administered, and I do not think it is the view of many of the Judges today.—North J. in *In re Blakey, Blakey* v. *Public Trustee* (Auckland, July 15, 1957.)

"The trial of Dr. Smethurst took place in 1859 for the murder by poison of a woman whom he had bigamously married, and who had made a will only a few days before she died under which he was the sole beneficiary. Ten doctors gave it as their opinion that the lady had been poisoned while seven swore that the death was due to natural causes, probably dysentry. He was found guilty. A tremendous outcry was raised against the verdict and Smethurst was ultimately granted a free pardon. He was then charged with bigamy and sentenced to a year's imprisonment, after which he took proceedings in the Probate Court to establish the will made in his favour by the deceased woman, and succeeded."—*Law Journal* (London), 10:5:1957.

TOWN AND COUNTRY PLANNING APPEALS.

Blakely *v.* Manakau County.

Town and Country Planning Appeal Board. Auckland. 1956. September 19; October 20.

Subdivision—Residential Sites—Area zoned as "rural"—Adequately serviced with Amenities of Residential Area—Subdivision and Close Settlement of Land not in Public Interest—Provision for Urban Development Adequate—Proximity to proposed International Airport—Areas around Airports in Continual Use not approved for Residential Purposes—Town and Country Planning Act 1953, s. 38 (1) (c).

Appeal under s. 38 (10) of the Town and Country Planning Act 1953 against the decision of the Manukau County Council refusing approval to the subdivision into 37 residential lots of approximately 10 acres of the appellant's land fronting on Greenwood Road, Kirkbride Road, and Ascot Road, Mangere.

The grounds for the appeal were that the land was suitable for residential purposes; that it was adequately serviced with the usual amenities of a residential area; that it was uneconomic for use as a farm or market garden and had in fact been declined for use as a market garden by Turners and Growers Ltd.; that the subsoil was suitable for septic tank drainage and that other subdivisions had been allowed in nearby areas.

The Council replied that there were only limited public transport and shopping facilities available in the area; that the subdivision and close settlement of the land in question would not be in the public interest; and that the proposed subdivision was a "detrimental work" in that it was not in conformity with the town-and-country-planning principles closed district scheme.

The appellant purchased this land in April, 1954, for £12,000 and paid a further £1,500 to the then lessees for a surrender of their lease. The Government valuation of the property as at March 31, 1953, was £6,540. He bought the land as a subdivisional project, but he apparently made no inquiries of the Council as to whether a subdivision was likely to be approved before he bought, and he did not seek legal advice.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board has some knowledge of this locality from previous appeals, and in its decision in *Prangley* v. *Manukau County Council* (*supra*), it expressed the view that the respondent Council's undisclosed district scheme makes provision for urban areas in Mangere Bridge, Mangere Central, and Mangere East, and that the provision so made is adequate for the immediately forseeable needs for the urban development of this part of the Council's district. Nothing advanced at the hearing of this appeal leads the Board to change or qualify that view.

In fact the information given to the Board relative to the proposed Government housing project in what is known as the Otara block indicates the correctness of that view.

The Board found as follows:

(1) To approve the appellant's proposed subivision would lead to the creation of a pocket of urban development in an area which is at present appropriately zoned as "rural" and would be contrary to the town-and-country-planning principles likely to be embodied in the respondent Council's undisclosed district scheme.

(2) It is a well-recognized principle of town-and-country-planning that the encroachment of urban development upon land of high actual or potential value for production of food should be controlled for as long as possible. The land in question here is in an area predominantly rural in character and zoned as such. The only evidence as to its productivity was directed to the point that it would not be an economic unit as a dairy-farm, but it is surrounded by dairy-farms and market-gardens. There was a hearsay statement by the appellant to the effect that he had been told it had been offered as a market-garden to Turners and Growers Ltd. during World War II and had been refused by that company: the Board cannot take cognizance of that.

In its reply, the respondent Council advanced several other grounds upon which it contended that the appeal should fail. The Board does not propose to deal with these in detail but it deems it apposite to make reference to one of them, viz. that the proposed subdivision would be within approximately two miles of the runways of the proposed international airport at Mangere and the flight-way of the subsidiary runway would pass over or near to the property. It was not suggested by the Director of the Auckland Regional Planning Authority who gave evidence on this point that any final conclusions had been reached on this matter; but experience overseas and investigations being carried out indicate that areas around airports should not be used for residential purposes, particularly so if the airport is to be used continuously.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Wellington Regional Planning Authority and Upper Hutt Borough Council *v.* Hutt County Council.

Town and Country Planning Appeal Board. Wellington. 1956. December 20.

Road—County's Refusal to show in District Scheme Road-connection from Proposed Motorway—Circumstances for Consideration—Appeal disallowed—Town and Country Planning Act 1953, s. 26 (1).

Appeals by the Wellington Regional Planning Authority and the Upper Hutt Borough Council made under s. 26 (1) of the Town and Country Planning Act 1953 against the decision of the Hutt County Council's refusal to show in its District Scheme a road connection from the proposed motorway through the Upper Hutt Valley to the main Hutt road at Sutherland Avenue. The appeals were heard together by consent.

Grounds for the appeal were that the proposed road connection would serve the development of the Upper Hutt Valley better than any other possible road connection, and it would effectively handle the increasing volume of traffic with greater safety and less confusion.

Grounds for refusal were that the Hutt County Council saw no reason why the connection from Sutherland Avenue to the motorway was better than any other possible road or why it should be built. It was not in the best interests of the region to construct the suggested road.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board finds:

1. That the onus of establishing the necessity for provision for the extension of Sutherland Avenue as suggested lies on the appellants. That burden has not been discharged.
2. The weight of evidence suggests that if a link road serving the Upper Hutt Borough is necessary between the proposed motorway and the Main North Road then that link road should be established not further south than Cottle Street. This would involve the provision of a station at the Moonshine Bridge point or a point north.
3. It was indicated that the Ministry of Works and the National Roads Board, whose concern the motorway is, now incline to the view that there should be no link road between the commencement of the motorway at Hull's Bridge up to the Brown Owl, in other words that motorway traffic should completely by-pass the Upper Hutt. The Board is not required to express any opinion on that question at this stage. It is a policy matter for the authorities concerned to determine.
4. Considerable stress was laid by both the appellants on the potential future of what is known as the Camp area, both for industrial and residential uses. If and when this development occurs, the Board considers that its traffic needs could be best met by the construction and development of the proposed regional road on the eastern side of the railway.
5. The Board also agrees with the submission of Mr. Blundell that the Memorial Park and the Golf Club property provide valuable open recreational areas, and it would not be in the interests of the amenities of the neighbourhood to intersect that area with a link road from the motorway.
6. The Board also considers that it would not be advisable to establish a station for a link road so close to the commencing point of the proposed motorway at Hull's Bridge as would be the case if Sutherland Avenue were extended.

Both appeals are disallowed. No order as to costs.

Appeals dismissed.