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AGREEMENTS AS TO COSTS.

Section 56 of the Law Practitioners Act 1955 provides as follows :

" Agreements as to costs—(1) A Solicitor may in writing agree with a client (not being a Maori) as to the amount and manner of payment of costs for the whole or any part of any past or future services, either by a gross sum or by commission, percentage, salary, or otherwise :

Provided that if the agreement appears to the Court to be unfair and unreasonable the Court may reduce the amount agreed to be payable under the agreement :

Provided also that the solicitor making the agreement shall not in relation to the same matters make any further charges than those provided for in the agreement.

(2) Costs payable under any such agreement shall not be subject to taxation, nor to any of the following provisions of this Part of this Act."

A consideration of this provision was necessary in a recent case which came before the Chief Justice, the Right Honourable Sir Harold Barrowclough, recently, and his Honour had some valuable comment to make both on the section itself and on the practice where an attack is made on such an agreement as being unfair and unreasonable. Since an attack on a solicitor's charges invariably tends to place him in an invidious position the names of the solicitor concerned and of the other parties are not being disclosed.

In 1958 two men, whom we shall call Y and Z were both injured in a motor accident, and instructed the solicitor, Mr X, to make a claim for damages against the driver of the other vehicle involved in the accident. Mr X proceeded with the usual investigation both as to the circumstances of the accident and as to the injuries suffered by his clients, and in due course issued separate writs claiming substantial sums for damages.

The actions did not go to trial but were settled with the approval of the clients, Y's for £6,228 10s., including general and special damages and an allowance for party and party costs, and Z's for £2,360 which included similar items. After settlement Mr X accounted to his clients for the moneys received after deduction of solicitor and client costs and disbursements, but did not render a detailed bill of costs in either case. In each case there was supplied a statement showing on the credit side the amount recovered, and on the debit side various payments made and the solicitor's own charges which in Y's case amounted to £761 19s. 8d. and Z's £370 11s. 8d., each figure including disbursements. In the case of Z only the statement was accompanied by a bill of costs which was not itemised but did show how much of the amount deducted comprised disbursements and how much profit costs.

Both clients accepted their cheques without demur but subsequently came to the conclusion that they had been overcharged and took steps to have the charges reviewed. Eventually they applied to the Court for orders for delivery of proper bills of costs and taxation of such bills when delivered, or alternatively, if there was an agreement in writing as to the costs, that the amount agreed to be paid be reduced on the ground that such amount was unfair and unreasonable.

In the first place these applications came before McCarthy J. who ordered that bills of costs be be delivered in each case within thirty days containing " sufficient particulars ", the other applications being adjourned. Bills of costs were delivered rather belatedly, and the Chief Justice considered that they did not supply all the particulars specified by McCarthy J. The applications were then again brought on before the Chief Justice and it is interesting to note, and was a matter later commented upon by the Chief Justice, that Mr X appeared in person.

In each case it was submitted by Mr X that there was an agreement as to costs. In the case of Z, who had received a brief bill of costs with his cheque, there was endorsed on the statement accompanying the cheque a note in the following terms :

" I hereby agree to the foregoing statement and authorise you to make the disbursements set out above ".

On the bill of costs itself was the note :

" I agree to the foregoing account and fee ".

Both of these notes were signed by Z. In the case of Y, who received no bill of costs whatever, there was endorsed on the statement and signed by Y the following note :

" I hereby agree to and authorise payment of the foregoing outgoings ".

In the case of Z, counsel for Y and Z conceded that there was an agreement as to costs within the provisions of s. 56 and that therefore he could not ask for an order for taxation. His Honour expressed the view that the concession was rightly made and it would unquestionably have been difficult if not impossible to argue to the contrary. In Y's case, however, counsel argued that the endorsement on the statement was not an agreement as to costs within the scope of s. 56. This was a much more hopeful argument and in our

respectful opinion might well have succeeded. In the amount deducted there were substantial disbursements which required to be paid by Mr X and the note could have been construed as being only an authority to Mr X to make those payments which could well have been described as "outgoings". The profit costs did not of course require to be paid out by Mr X, nor were they an "outgoing" in any sense of that term.

His Honour took the contrary view saying:

"I have considered the matter and in my opinion it is such an agreement. Y agrees to and authorises payment of the 'foregoing outgoings'. It is not a happy expression but its meaning is clear. It must refer to all the debit items in the statement of accounts, all of which are introduced by the customary 'To'. One of them is:

'To my disbursements and charges as per account herewith £761 19s. 8d.'

"True there was no 'account herewith' but I am satisfied that Y agreed as to the amount of Mr X's costs and agreed as to the manner of payment of them. They were to be paid by deduction from the amount Mr X was holding on his account."

It followed then that the costs charged to Y were also not subject to taxation.

This question having been settled against the applicants, they were compelled to fall back upon s. 56 (1) and submit that the agreements were unfair and unreasonable and that the Court should reduce the amounts agreed to be paid. The amounts claimed as profit costs were as follows:

	£	s.	d
Y's case ..	682	10	0
Z's case ..	315	0	0
	£997	10	0

The Chief Justice was very critical of the amount charged and, taking into account that the claims arose out of a simple running-down accident and did not go to trial, he found that the amounts were unfair and unreasonable. He then went on to consider by how much the costs should be reduced, but at this point he found himself with insufficient evidence. This led his Honour into a discussion of the correct procedure to be followed from that point on, and he dealt with it as follows:

"All I have is the two bills of costs, which fall far short of the requirements so clearly indicated by McCarthy J. in his judgment, and certain affidavits in which a direct conflict arises. It is a conflict which cannot be resolved in proceedings such as these on affidavit evidence alone. I was told that all the parties were in Court and that they could be cross-examined on their affidavits. But the affidavits touch only on the fringes of the matter and cross-examination on their contents would not produce the evidence that is required. Though it is Y and Z who are the applicants in these proceedings, I cannot blame them for the insufficiency of the evidence. Until they know upon what grounds so large a fee has been taken they can scarcely oppose it. Unless this case presents some circumstances which make it very different in a material way from the ordinary running down case the fee is clearly much in excess of what is fair and reasonable. If it did present such circumstances it was for Mr X to state them. I should make it clear that it is a concession to him and in an endeavour to do him full justice that I propose to give him another opportunity of setting out evidence to justify his charges.

"I do that because both sides seemed to be under the impression that without any reference to the Court and without having taken steps to ascertain what conditions the Court might see fit to impose in the interests of a just and proper inquiry, this notice of motion could be suddenly turned into an ordinary witness action. There may be occasions on which that could be done: but this is not one of them. The Court is not prepared to embark on what would virtually be a witness action unless an itemised account and indeed something in the nature of pleadings have first been delivered so that those disputing the fee can state specifically what items are admitted and what are disputed. The time of the Court should not be wasted in hearing a mass of evidence on points that are not really in dispute. I was satisfied that, because of the absence of clarification in advance of the points really in dispute, none of the parties was yet ready to proceed with what would really be a formal trial. In these circumstances I informed the parties that I thought justice might more inexpensively and more speedily be done if I referred to the Registrar the making of an inquiry, the taking of evidence and the furnishing of a report thereon. All parties consented to this course."

Accordingly an order was made referring the case to the Registrar for inquiry, the Registrar to hear and record the evidence and furnish a report to the Court along with a copy of the evidence so taken. The Registrar was also required to report the submissions of the parties and his opinion as to what was a reasonable fee for Mr X to charge each party for his services.

After making the order his Honour expressed the hope that the case might be settled amicably without even the need for the hearing before the Registrar, and offered the following observations in the desire to be helpful to the parties:

"Running-down cases are very common and do not usually present any excessive difficulties. There must be a fairly well recognised fee for such cases. A solicitor whose fee is questioned is an interested party and interested not only from a monetary point of view. He will generally be well advised not to appear in person but to engage the services of some other practitioner—especially a practitioner with an extensive experience in that class of actions. Finally it should be remembered that in negotiating an agreement as to costs the solicitor is a party who stands in a fiduciary relation to his client and the Court must be astute to see that the client, who is in an unfavourable position *vis a vis* the solicitor, is not unfairly prevailed upon; especially if the agreement is made when the action is over and the proceeds are being paid out."

There the matter rests for the moment, and it may well be that nothing further will be heard of the case. The Chief Justice was clearly on sound ground when he stressed the fiduciary relationship existing between solicitor and client when an agreement as to the amount of costs is under negotiation. Such an agreement will

obviously be subject to close scrutiny by the Court on an application for review under s. 56, and any practitioner negotiating such an agreement would be well advised to ensure that his charges are beyond criticism.

A further matter referred to by the Chief Justice in his consideration of the reasonableness of the charge was the fact that two separate writs were issued although both claims arose out of the same accident and were against the same defendant. He suggested that one writ would have been sufficient, and that the applicants might have been able to suggest that the Court fees on the second writ were incurred unnecessarily and charged to them. We are not sufficiently informed as to the circumstances of the accident on which the actions were based to express any opinion on this point. If the issues between the plaintiff and the defendant in each case, apart from damages were identical, then the need for two writs does not seem to arise, but on the other hand if there were some variation in such issues as between plaintiffs, as for example where a plea of contributory negligence might lie against one and not the other, separate actions would be desirable. The doubts expressed by the Chief Justice should however be kept in mind by any practitioner faced with a similar case.

SUMMARY OF RECENT LAW.

BANKRUPTCY.

Acts of Bankruptcy—Fraudulent conveyance—Proof of fraud necessary unless conveyance of substantially whole of bankrupt's property—Considerations applicable—Bankruptcy Act 1908, s. 26 (b). Where the effect of a transaction under which a debtor transfers the whole or substantially the whole of his assets is necessarily to deprive creditors of their right to a distribution of them within the bankruptcy law it will be fraudulent within the meaning of s. 26 (b) of the Bankruptcy Act 1908; but when there is a substantial exception out of the debtor's property the transaction cannot necessarily and by force of law become fraudulent without reference to extrinsic circumstances showing fraud. Observations as to what comprises "substantially the whole" of a debtor's property. The sale of certain chattels which would have been liable to distress for rent and the application of the purchase money in extinguishment of a debt owing for rent which would have been a preferential debt under s. 120 (d) of the Bankruptcy Act cannot have the effect of defeating or delaying creditors as to the purchase money. *So held*, by the Court of Appeal (Gresson P., Cleary and Turner JJ.). *Further held*, Per Gresson P., *Semble*, A conveyance of the whole or substantially the whole of a debtor's property to a creditor who has an equitable charge over it which he has taken no steps to enforce operates necessarily to defeat other creditors and would be an act of bankruptcy. Per Cleary and Turner JJ., 1. Where an allegation is made that a conveyance, as distinct from a preference, is fraudulent, the debtor's motive in entering into it is immaterial, as is the question whether he did or did not know that the purchaser intended to set the purchase money off against a debt owing to him by the bankrupt. 2. The fact that a conveyance of assets is made by the debtor pursuant to a pre-existing contractual obligation will not negative its constituting an act of bankruptcy if it would otherwise have been a fraudulent conveyance provided that the obligation was not undertaken in consideration of an advance of money. (*Re Hooper* [1951] N.Z.L.R. 704; [1951] G.L.R. 361, distinguished. Judgment of Hutchison J. (*infra*), disapproved on this point.) Appeal from the judgment of Hutchison J. [1960] N.Z.L.R. 577, dismissed. *In re Proudfoot.* (C.A. Wellington. 1960. 11, 12, 13 July; 20 October. Gresson P. Cleary J. Turner J.)

COMPANY LAW.

Directors—Governing director—Right to become also employee of company. Company separate legal entity from shareholders and governing director. A person who holds practically all the shares in a company and is also appointed governing director with full power of government and control of the company's affairs may still in his personal capacity enter into a valid contract of service with the company and then become a worker in the employment of the company for the purposes of the Workers' Compensation Act 1922 (now the Workers' Compensation Act 1956). The capacity of the company to make such a contract cannot be impugned because the governing director himself was the agent of the company in its negotiation. The company and such person are separate legal entities and although the governing director exercised the right of control over himself as an employee of the company he did so as agent for the company. (*Salomon* v. *Salomon and Co. Ltd.* [1897] A.C. 22; *Inland Revenue Commissioners* v. *Sansom* [1921] 2 K.B. 492; *Fowler* v. *Commercial Timber Co. Ltd.* [1930] 2 K.B. 1; [1930] All E.R. Rep. 224, followed.) *So held*, by the Judicial Committee of Her Majesty's Privy Council reversing the judgment of the Court of Appeal (Gresson P. and North and Cleary JJ.) [1959] N.Z.L.R. 393. *Lee* v. *Lee's Air Farming Ltd.* (J.C. 1960. 6, 7 July; 11 October. Viscount Simonds. Lord Reid. Lord Tucker. Lord Denning. Lord Morris of Borth-y-Gest.)

CRIMINAL LAW.

Evidence—Person called merely to produce document need not be sworn—No right in accused to compel prosecution to call a witness. The accused in a criminal trial cannot compel the prosecution to call a witness. Where a person attends the trial under a subpoena *duces tecum* merely to produce documents he need not be sworn, but may lay the documents on the table where they can be later identified and made evidence by other witnesses. (*Perry* v. *Gibson* (1834) 1 Ad. & E. 48; 110 E.R. 1125, followed.) *R.* v. *Gilmore.* (S.C. Wellington. 1960. 7 November. Hutchison J.)

DIVORCE AND MATRIMONIAL CAUSES.

Practice—Appeal in Court of Appeal—Time runs from pronouncement of decree and not from date of sealing—Divorce and Matrimonial Causes Act 1928, s. 58. The wording of R. 34 (2) of the Court of Appeal Rules 1955 is intractable and if security for costs is not given within 14 days of the appeal being brought the notice of motion on appeal is deemed to be abandoned. This being the case, on the notice being deemed to be abandoned, there is nothing before the Court which can be "amended or otherwise dealt with" under R. 69. (*M.* v. *M.* [1958] N.Z.L.R. 453, distinguished.) The time for appealing prescribed by s. 58 of the Divorce and Matrimonial Causes Act 1928 runs from the day a decree or other order is pronounced or a petition is dismissed as the case may be and not from the sealing of the order or judgment appealed from. (*Nash* v. *Nash* [1924] G.L.R. 665, explained.) *Hermans* v. *Hermans.* (C.A. Wellington. 1960. 5, 9 December. Gresson P. North J. Cleary J.)

MAORIS AND MAORI LAND.

Maori Land Board acting under Maori Housing Act—Entitled to limitation period of one year on actions against it—Limitations Act 1950, s. 23.—See CHATTELS TRANSFER (*ante*, 4).

MASTER AND SERVANT.

Employer's Liability—Same person governing director and principal shareholder of company—May still be a worker employed by company under contract of service negotiable by himself as governing director—Workers' Compensation Act 1922, s. 3 (Workers' Compensation Act 1956, s. 3)—See COMPANY LAW (*supra*).

NEGLIGENCE.

Spread of fire deliberately lit—Volunteers called in to prevent further spread and property damage—Liability to volunteers suffering personal injuries. Where a fire which has been deliberately lit in the course of farming operations has spread and an appeal has been made for volunteers to fight it in order to save other property from damage, the liability of the person who lit the fire to a volunteer who has suffered personal njuries in fighting the fire does not come for consideration under what are termed the "rescue cases". In those cases the distinguishing feature is the suddenness of the emergency

and the natural reaction of a human being to lend his or her aid even though the voluntarily accepted risk be great or even foolhardy. It is natural to anticipate that if a fire so lit goes out of control persons will be called on to help in taking steps to put it out, and would thereby be exposed to some danger of personal injuries, although not a high degree of danger. If then, the lighting of the fire was in fact negligent, the person lighting it will be liable in damages to the person so injured, even though he did not invite that person to help. *McCabe* v. *Russell and Others.* (S.C. Dunedin. 1960. 29, 30, 31 August; 1 September; 17 November. Henry J.)

PRACTICE.

Appeals to Court of Appeal—Security not given in time—Omission not excusable—Court of Appeal Rules 1955, RR. 34, 69—See DIVORCE AND MATRIMONIAL CAUSES (*supra*).

PUBLIC REVENUE.

Death duties (gift duty)—Disclaimer of specific devise with directions as to disposal of subject-matter—Not a true disclaimer—Acceptance and assignment—Dutiable as disposition of property—Estate and Gift Duties Act 1955, s. 42 (1) (a), (b). The disclaimer of a gift by will exhibits a negative attitude—a refusal to accept the gift. Directions as to how the subject-matter of the gift is to be disposed of are incompatible with a mere disclaimer which becomes, in effect, an acceptance and an assignment. Such a purported disclaimer falls within s. 42 (1) (a) of the Estate and Gift Duties Act 1955 and possibly also within s. 42 (1) (b) as well. *So held*, by the Court of Appeal (Gresson P., Cleary and Henry JJ.), reversing the judgment of Turner J. [1959] N.Z.L.R. 1364. *Further held* (per Cleary and Henry JJ., Gresson P., *dubitante*), A specific legatee or devisee under a will is entitled *in specie* to what has been bequeathed or devised to him and has an equitable interest therein. Where such an interest is an interest in land s. 12 of the Property Law Act 1952 prevents its oral disclaimer. *Commissioner of Inland Revenue* v. *McLaren.* (C.A. Wellington. 1960. 7, 8 September; 10 November. Gresson P. Cleary J. Henry J.)

SETTLEMENT.

Construction—Life interest with gift over after death of life tenant to persons entitled according to law then in force as next-of-kin of settlor—Distribution according to statute law in force at death of life tenant. Mark Shaw, by deed dated 30 November 1906, declared certain trusts of real property in the following terms: "UPON TRUST to permit the said Jessie Ann Shaw to use and enjoy the said lands and premises hereby conveyed together with the lands contained in the said executed Memorandum of Transfer during her lifetime and from and after the death of the said Jessie Ann Shaw to the children of the said Jessie Ann Shaw in equal shares upon their respectively attaining the age of twenty-one years or marriage and if there shall be no children of the said Jessie Ann Shaw who shall attain that age or marry UPON TRUST for such person or persons who shall be entitled according to the law then in force in the said Dominion of New Zealand as the next-of-kin of the said Mark Shaw". The settlor died on 15 June 1917 and the life tenant, Jessie Ann Shaw, died on 2 April 1960 without children. On an originating summons for interpretation of the Deed of Settlement in the events which had happened, *Held*, 1. That the adverb "then" in the gift over could refer only to the time when the prior gift failed, and the settlor, by the use of the phrase "law then in force" created an artificial class of next-of-kin determinable at that time, the natural meaning of next-of-kin at the date of death of the settlor being excluded. 2. That the settlor intended succession to take place in accordance with the statutory provisions relative to succession to real estate in force in New Zealand at the time when the gift over would take effect and accordingly the next-of-kin to take should be determined on that basis. The relevant provisions were ss. 56 and 57 of the Administration Act 1952. *In re Shaw's Settlement. Shaw* v. *Day and Others.* (S.C. Invercargill. 1960. 1 November; 1 December. Henry J.)

TRUSTS AND TRUSTEES.

Implied trust—Advances made by one party but instrument by way of security taken by another—Grantee a trustee for party making advances. See CHATTELS TRANSFER (*ante*, 4).

WAGES PROTECTION AND CONTRACTORS' LIENS.

Claim for declaration of entitlement to charge or lien—May be brought before period of credit expired—Wages Protection and Contractors' Liens Act 1939, s. 34—Lien or charge—Claimant joining an action based on notice given out of time—Priority not affected—Wages Protection and Contractors' Liens Act 1939, ss. 26, 36 (2)—Subcontractor—Materials supplied generally and not in relation to particular contract—Supplier not a subcontractor—Wages Protection and Contractors' Liens Act 1939, ss. 20, 21. A claim under s. 34 of the Wages Protection and Contractors' Liens Act 1939 for a declaration that the plaintiff is entitled to a lien or charge is not defeated or impaired by being brought before the period of credit arranged between the parties has expired. For a supplier of material to come within the concept of a subcontractor within the meaning of that word as it is used in the Act it is necessary (*inter alia*) that the materials must have been supplied to a person in his capacity as a contractor or subcontractor. Thus the materials must have been supplied to the contractor for the purpose of his contract with a particular employer as distinct from a general supply unrelated to any particular contract. (*In re Williams, Ex parte Official Assignee* (1899) 17 N.Z.L.R. 712; 1 G.L.R. 224, followed.) Where a plaintiff whose notice claiming a lien or charge was given in time joins in an action brought by another plaintiff whose notice was late, the former's claim retains its original order of priority which is not affected by the lateness of the notice of the original plaintiff in the action. *Ngapura Timber Co. Ltd. and Others* v. *Ryan and Others.* (S.C. Auckland. 1960. 17, 18 October; 2 December. Shorland J.)

WILL.

Devisees and Legatees—Nature of interest of specific legatee or devisee in subject-matter of gift—Equitable interest—Oral disclaimer of such an interest in land ineffective—Property Law Act 1952, s. 12—See PUBLIC REVENUE (*supra*).

LEGAL LITERATURE.

Books published or received by Butterworth & Co. (New Zealand) Ltd. 1 January 1961 to 31 March 1961.

Cheshire & Fifoot's Law of Contract, New Zealand Edition, by J. F. NORTHEY, B.A., LL.M. (N.Z.), Dr Jur. (Toronto), Professor of Public Law, University of Auckland. 95s.

Devlin's Criminal Courts and Procedure, by J. Daniel Devlin, LL.B., Inspector and Training Officer, Southend-on-Sea Constabulary. 22s. 6d.

Garrow's Law of Real Property, 5th Edition, by E. C. ADAMS, I.S.O., LL.M., Barrister. (being *Butterworths Standard N.Z. Textbook No. 3*). £5 17s. 6d.

Gunn & Maas' Guide to Commonwealth Income Tax, 10th Edition, by J. A. L. GUNN, C.B.E., F.S.A.A., F.A.S.A., and M. MAAS, A.A.S.A. £2 7s. 6d.

Joske's Law of Marriage and Divorce, 4th Edition, by P. E. JOSKE, M.A., LL.M., Q.C. (in two volumes). £9 9s.

Leys & Northey's Commercial Law in New Zealand, 2nd Edition, by W. C. S. LEYS, M.A., LL.M., and J. F. NORTHEY, B.A., LL.M. (N.Z.), Dr. Jur. (Toronto). 65s.

Nevill's Concise Law of Trusts, Wills and Administration, 3rd Edition, revised, by P. H. NEVILL, LL.B., Barrister and Solicitor. 47s. 6d.

Selletto's Law of Gift and Estate Duties, 4th Edition, by BERNARD SELLETTO, Barrister-at-Law of the Supreme Court of Victoria and New South Wales, and O. M. L. DAVIES, Barrister-at-Law of the Supreme Court of New South Wales. 57s. 6d.

Wily's Magistrates' Courts Practice, 5th Edition, by H. JENNER WILY, S.M. (being *Butterworths Standard N.Z. Textbook No. 2*). £6.

The New Zealand CRIPPLED CHILDREN SOCIETY (Inc.)

ITS PURPOSES

The New Zealand Crippled Children Society was formed in 1935 to take up the cause of the crippled child—to act as the guardian of the cripple and fight the handicaps under which the crippled child labours; to endeavour to obviate or minimize his disability, and generally to bring within the reach of every cripple or potential cripple prompt and efficient treatment.

ITS POLICY

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

It is considered that there are approximately 7,000 crippled children in New Zealand, and each year adds a number of new cases to the thousands already being helped by the Society.

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

MR. PIERCE CARROLL, Secretary, Executive Council.

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

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

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

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

A WORTHY WORK TO FURTHER BY BEQUEST OR GIFT

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Magistrates' Courts Practice

FIFTH EDITION 1961

by

H. JENNER WILY

Stipendiary Magistrate

Since the Fourth Edition of WILY was published, there have been a number of amendments to the Magistrates' Courts Act 1947 and the rules thereunder and to the Imprisonment for Debt Limitation (Magistrates' Courts) Rules 1949. In addition, a large number of other Acts referred to have been either consolidated or amended.

There are also nearly two hundred new decisions of the Courts on matters of law and procedure referred to in the text.

These important changes in the Law have made it necessary to publish a new edition of WILY.

This work is now up-to-date and maintains its usefulness and reliability as a means of quick reference to the civil procedure of the Magistrates' Courts.

Throughout the useful life of this edition, supplementary matter, keeping the work up-to-date, will be issued in Cumulative Supplements.

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BUTTERWORTHS

CASE AND COMMENT.

Contributed by Faculty of Law of the University of Auckland.

What Price Stolen Cheques ?

In *R.* v. *Bennitt* (1960) the accused had been indicted on twelve counts of false pretences under " Section 252 (a)" of the Crimes Act 1908. In substance, it was alleged that the accused had obtained a series of over-payments for hire of machinery to the Works Department. The alleged over-payments had been made by way of cheques, each being for a lump sum of money which included money rightly payable and money alleged to have been procured to be paid by means of a false pretence. But though the payments had been made by *cheque*, the counts in each case charged that the accused had procured *sums of money* by the alleged false pretence. The accused moved pursuant to s. 407 (5) of the Crimes Act 1908 before he was given in charge to quash the indictment on the ground that it was not founded on the facts or evidence.

As McGregor J. held, it is a necessary ingredient of the offences created by ss. 252 (1) (a) and 252 (2) that the item procured to be delivered by means of the false pretence should be something capable of being stolen. What had been procured to be delivered in the instant case was not a sum of money as stated in the indictment but a cheque. The cheque certainly involved a bank credit, but a bank credit is no more than a chose in action (*Foley* v. *Hill* (1848) 2 H.L. Cas. 28 ; *R.* v. *Davenport* [1947] 1 All E.R. 602) and at common law a chose in action is incapable of being stolen (e.g. *R.* v. *Essex* (1857) Dears. & B. 371 ; *R.* v. *Crosby* (1843) L.T.O.S. 230). It followed that the counts in the indictment were defective.

The Crown accordingly moved to amend the indictment so as to charge the accused with procuring the cheques concerned in lieu of the moneys they represented. The learned Judge allowed the amendment, the defect in the indictment being one of form and not of substance.

The case does raise a further question, which McGregor J. found it unnecessary to decide, but which may have to be decided by the trial Judge when the matter comes to trial. By virtue of the 1952 Amendment Act, where the value of the thing obtained or procured by the false pretence exceeds in value the sum of £2, an offender is liable on conviction to three years' imprisonment. If the value is less than £2 he is liable only to three months. Assuming a cheque is capable of being stolen, what is its value for the purposes of the Amendment ? The question could conceivably arise in other contexts also. Thus, the maximum penalty prescribed for receiving under s. 284 is seven years or three months depending on whether the value of the object received is more or less than £2. Strangely enough there appears to be no binding authority on the point.

No doubt the commonsense view is that a cheque is worth the amount for which it is drawn, or at least the amount (if any) for which it can be cashed. This appears to be the view adopted by the American Courts (*Corpus Juris Secundum*, Vol. 52, pp. 852-853).

For his part, McGregor J. did not think that the value of a cheque is merely the value of the paper it is written on, and he cited a passage from *Russell on Crime*, 11th ed., p. 1338, in the following terms :

> " But it is submitted that a cheque is something more than a mere piece of paper; it is a piece of paper which with the writing thereon constitutes a valid order for the payment of money by the bank, and if the bank cash it they cancel it, so that what the drawer ultimately receives is not a piece of paper which forms a cheque, but a piece of paper which forms a record of disbursement by the bank and the discharge of his obligation to the payee. Thus the offender by his false pretence does obtain the whole of the drawer's interest in the chattel which is a valid cheque, with full power to destroy it as such by putting it through the bank."

It ought perhaps to be added that that passage, in its context, is directed not to the value of a cheque, but to the different question whether, since in the ordinary course a cashed cheque is returned by the bank to the drawer, the offender either obtains ownership, or intends permanently to deprive the drawer of it.

However, it is to be remembered that we are here concerned with the value of a cheque, not in any general sense, but in the special context of stolen property. In the ordinary way, a cheque derives its value from the fact that it gives the ultimate payee the right to draw on a bank credit. In other words, its value is derived from its connection with a chose in action. As previously stated, a chose in action cannot be stolen, and it would seem to follow that, apart from statutory provisions relating to " valuable securities " and the like, a cheque is capable of being stolen only because of its existence as a piece of paper, that is, as a chattel. If a cheque can be stolen only *qua* chattel, ought it, once stolen, to be valued *qua* chose in action ? To ascribe to pieces of paper evidencing choses in action the value of the choses in action themselves would be to nullify the common-law rule in a wide range of cases. As was apparently said in *Hawkins's Pleas of the Crown* two and more centuries ago :

> " Such goods, the stealing whereof may amount to felony, ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen, as paper or parchment on which are written assurances concerning lands or obligations, or covenants, or other securities for a debt, or other chose in action."*

Assuming however that the view should prevail that a cheque shall be valued *qua* chose in action, interesting questions of valuation could arise. Would the value be taken as at the date on which the theft occurred ? And would it be the objective value of the cheque, or only its value in the hands of the thief ? Thus a " not negotiable " order cheque might be useless to a thief though of its full face value to the payee named in it. On the other hand, an open bearer cheque

* This passage was cited in argument by counsel for the prisoner in *R.* v. *Perry* (1845) 1 Den. 69, 71-72.

issued by a company which was wholly insolvent at the time the cheque was stolen, and therefore in that sense valueless, might subsequently be negotiated by the thief to some third person for its full face value.

B.C.

Liability to a Volunteer for Negligence.

Can a person, who has voluntarily assisted in the protection of the property of another which has been endangered by the negligence of a third party, claim damages against that third party if, in the course of his activities, he suffers injury? Henry J. in the recent case of *McCabe* v. *Russell and Another*, said that the answer to this question is: "Yes, provided that his acts might reasonably have been anticipated by the third party (the defendant) as likely to follow the negligence".

The first defendant, Mrs Russell, lit a fire in the sheep run which she occupied in the Middlemarch district of Otago. The fire got out of control and spread to other properties. In response to a call by the local constable, a number of volunteers, of whom the plaintiff was one, attempted to beat out the fire. The plaintiff was trapped in the flames and badly burnt. He claimed damages on the basis of: (a) the Rule in *Ryland* v. *Fletcher*; (b) negligence; and (c) breach of the statutory provisions requiring a permit for the lighting of fires such as that in question. As the learned Judge found that the first defendant was guilty of negligence in lighting the fire as and when she did, the other grounds of action were not pursued.

The defendants pleaded that if the plaintiff was lawfully present on the lands where he suffered the injury, he was not so present on the invitation or at the request or on the instructions of the defendants and that if his presence on those lands was for the purpose of fire-fighting he was present there of his own volition or at the request or on the instructions of some person other than the defendants and that, in the circumstances, the defendants owed no duty to him. His Honour found that the plaintiff did volunteer his services without any express or implied request by the defendants and, further, that the plaintiff's experience was such that he was reasonably competent to undertake the task which he assumed. He also made the further important finding that if the fire had not been stopped by the efforts of the plaintiff and other volunteers it might have spread, with a consequent danger to property and stock, though not to life and limb, except to those fighting the fire.

The plaintiff was, consequently, in the position of a person who, without any request on the part of the defendant, had reasonably and justifiably intervened to rescue property, albeit that of another person, from the danger in which it had been placed as the result of the defendants' negligence and had suffered damage in consequence. Such a person, the learned Judge held, was entitled to succeed in his action. Hence the plaintiff was awarded damages.

Intervention of this nature for the purpose of saving life and limb was first recognised in England as giving a cause of action to an injured plaintiff in *Haynes* v. *Harwood* [1935] 1 K.B. 146—the case in which a policeman suffered injury while stopping runaway horses negligently left unattended in a crowded thoroughfare. Intervention for the saving of property from injury was similarly recognised by the Scottish Courts in *Steel* v. *Glasgow Iron & Steel Co. Ltd.* 1944 S.C. 237 and by the English Court of Appeal in *Hyett* v. *Great Western Railway Co.* [1948] 1 K.B. 345. In the first case a railway guard was killed while attempting to minimise a collision between his train and some wagons belonging to the defendants which had run away owing to the negligence of the defendants' servants. In the second case, an employee of a firm of wagon repairers suffered injury in attempting to put out a fire in a railway wagon belonging to the defendants in which the defendants' servants had negligently left a leaking tin of paraffin. In both cases it was held that the plaintiff could succeed. Henry J. followed the dicta in both these cases and stated the relevant principle in the words at the beginning of this note.

Three comments may, with respect, be made: (a) Henry J. considered that the instant case did not come for consideration under what are termed the "rescue" cases. "In those cases", he said, "the distinguishing feature is the suddenness of the emergency and the natural reaction of a human being to lend his or her aid". Even if it be granted that both *Steel's* case and *Hyett's* case were cases of sudden emergency, it was the *dicta* in those cases which the learned Judge followed in *McCabe* v. *Russell*; and *Salmond* (12th ed. p. 48), *Winfield* (6th ed. p. 45) and *Fleming* (p. 181) all deal with these cases under the heading of "rescue". It is submitted that the "rescue" principle is not restricted to cases of sudden emergency; (b) the learned Judge said, towards the end of his judgment: "The act of the plaintiff was the kind of act which defendants might reasonably have anticipated as likely to follow the negligence which I have found". From these words, the test of liability would appear to be subjective: might *these* defendants reasonably have anticipated this kind of act? The proper test, it is submitted, is objective. As the Lord Justice-Clerk said in *Steel* v. *Glasgow Iron & Steel Co.* 1944 S.C. 237 at p. 251: "His [Steel's] intervention was a natural and probable consequence of the defender's negligence, which *ought* (italics supplied) reasonably to have been foreseen"; (c) in neither *Steel's* nor *Hyett's* cases was it clear whether, in order to impose liability on the defendant, it was necessary that the property attempted to be rescued should be that of the plaintiff, or of the defendant or of a third party. In *Steel's* case the property rescued was partly that of the defendant and partly that of the plaintiff's employers (for this purpose a third party). In *Hyett's* case it was apparently property belonging to the defendant. It is not clear from the statement of the facts whether the wagon on which the plaintiff was working was in peril. Henry J. has resolved one doubt. The plaintiff may, in appropriate circumstances, recover damages when it is the property of a third party he is attempting to rescue.

A.G.D.

What Will They Think of Next?—The fact that, during the course of a trial, one of a number of accused persons being tried together fails to answer bail and the trial proceeds against his co-accused, is not a ground for setting aside the conviction of the co-accused on the basis that the absent accused had exercised his right of challenge and thus caused the convicted person to be tried by a jury which might have been different from the one which tried him had the absent accused not so challenged.—*R.* v. *Nolan* [1961] V.R. 12.

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THE UNITED NATIONS SEMINAR.

Contributions by Mr Justice McCarthy.

One of the New Zealand delegation at the recent United Nations Seminar was his Honour Mr Justice McCarthy whose contributions to the discussion have already been fairly well publicised in the daily press. However, his addresses were characteristically thoughtful, forthright and at times provocative, and we feel that we would be doing a service to our readers if we published a number of extracts taken from the verbatim record of the proceedings. Many of the points made were in reply to other speakers.

His Honour first spoke on Tuesday, 7 February, when his subject was the constitution of New Zealand Courts with a description of our method of selection of Judges. In opening he said: "I would wish to dispel at the outset any impression that we in New Zealand consider in any way arrogantly that, because we follow a a certain practice in this or any other matter that practice is necessarily the best. We think nothing of the kind. We wish earnestly to obtain the benefit of the exchange of views; nonetheless, I would not speak truthfully, nor I believe helpfully, to this Conference if I did not make it plain that we in New Zealand hold certain firm convictions—convictions firmly held as the consequence of past experience in this country and the experience of England, the country from which, as you all know, we derive our law, our practice, our legal traditions.

"I am moved to speak because I believe that the matter of the selection and appointment of men to judicial office is of crucial importance in the development and maintenance of human rights. It is certainly one of the most important subjects, if not the most important which we have to discuss at this Seminar, because I believe that in the ultimate it is not so much what is written into the law which makes it effective, but rather the quality of the men selected to enforce the law."

Mr Justice McCarthy then continued with a relatively brief but graphic description of the New Zealand Courts, with a short statement of the jurisdiction of each, together with the steps adopted first in choosing an appointee for the Bench at each level, of the method of appointment in each case, and of the protection enjoyed from liability to removal from office. On the subject of the qualities looked for in persons for appointment to the Court of Appeal and Supreme Court he continued: "First of all the appointee must have a sound legal knowledge. The statute requires that he must have been practising at the Bar for not less than seven years. In actual fact those appointed are invariably practitioners of senior status who have had very many more years practice than that. However the emphasis is laid I think on character. We believe that moral qualities are perhaps more important than a profound knowledge of the law. By moral qualities I mean integrity, industry and, of course, courage. A Judge must also have a knowledge of men and of human nature. He must have a sense of fact. That is particularly important because a mistake in law can be removed or corrected on appeal, but a mistake in fact or a misjudgment in matters of credibility might well be fatal.

"It is because we seek these qualities in our Judges that we are wedded, I believe, irrevocably to the practice of appointments from the Bar, from the roll of practising barristers. Those who are offered appointment are invariably, as I have said, senior men, leaders of the Bar, experienced in the practical application of law, men whose industry, courage and independence have been demonstrated in the day-to-day contests in the Courts. You all know how revealing practice at the Bar is as to a man's mental and moral qualities. We believe that a man who has spent his life fighting for the causes of individuals, one day on one side and another day on the other, is unlikely to become submissive to the Executive. We believe that he will remain independent when he is later made a Judge.

"What then has been our experience in this country when following this method of appointment? It is difficult for me to be impartial, but I think I can say with justification that overall it has been most satisfactory. We have no doubt had mediocre Judges, but I doubt whether it can be said that we have had a bad Judge. The concept of appointing Judges by election, as is followed in some of the States of America, is not attractive to us. The dangers inherent in a contest for popularity with the masses are too apparent for us to accept. We do not suffer from the obtaining of men who are removed from the pulse of the people. Our Judges are men of the world. They should be. They have spent most of their working lives dealing with the public—with business men, with the widow, with the criminal. They know man and his appetites and his aspirations. Then, too, the frequent impact of criminal trials upon them should keep them in touch with human emotions during their life upon the Bench."

His Honour then went on to discuss the attributes looked for in prospective Magistrates, likening them to those sought after in Judges, and expressed the view that in New Zealand the search for good men has been highly successful.

It had been suggested by the Attorney-General for Pakistan that the appointment of Judges by the Executive was illogical. In reply, his Honour said: "May I respectfully agree with that observation, but there are so many practices in the British tradition which appear illogical and which somehow or other seem to work. I agree wholeheartedly that selection by some council, some competent body comprised of the Executive, the Judiciary and the practising Bar, would be an improvement on the system we have here in New Zealand. However we would still I think—and this is important—insist upon a limitation of appointments to members of the profession.

"What, then, of the appointment of jurists—teachers of law—to the Bench? Here I can advance only a personal view, but I think they would be unsuitable as trial Judges. In my opinion they are not sufficiently experienced in the practical application of the law to fact, in the procedure of the Court and the handling of juries. Moreover—and I speak broadly—many of them are often insufficiently experienced in the ways of men. To use a phrase that is common in this country, they are not sufficiently

earthy. However there could be a case for appointing them to a purely appeal jurisdiction, a Court where matters for decision are more often matters of law than of fact."

Passing to the question whether a Judge should be removable for inefficiency his Honour said: "I am inclined to the view that the risk of having an inefficient Judge is one which will probably have to be accepted if we wish to secure the overall requirement of independence. The power to remove for inefficiency or because a Judge is not "sufficiently responsive to the aspirations of the community" provides too ready a means for an Executive to remove a Judge whose decisions are hostile to it. We should remember that the preservation of human rights calls for the protection of minority rights often against the will of the majority. It was Jefferson who said that legislative majorities may be just as tyrannical as an individual ruler. It is one of the marks of a democracy that it accepts substantive and procedural limitations on the political authority of its majority, whether those limitations be effected by a Bill of Rights or by the common agreement of the general body of citizens. It is the necessity for a Judge sometimes to uphold human rights against inflamed political opinion or even against the views of the majority of citizens which makes the power to remove in such broad terms unacceptable. On the other hand I agree emphatically that there should be power to remove a Judge for moral lapses, or because physical or mental decay has rendered him unfit any longer to hold judicial office."

ADMISSIBILITY OF EVIDENCE.

On Thursday 16 February the subject under discussion was the admissibility in evidence of confessions. Mr Justice McCarthy in his contribution first outlined the legal position in New Zealand and also the procedure adopted when questions as to whether or not a statement was made voluntarily arose during a trial, stressing the fact that even when the Judge answered this question in the affirmative and ruled the statement to be admissible the defence may in the presence of the jury, go into the circumstances surrounding the making of the statement. He continued: "It is at this stage that the impact of reality becomes apparent, because, notwithstanding that a Judge may rule that the statement was voluntarily made and is therefore admissible, if it appears to a New Zealand jury that there has been some element of unfairness on the part of the plice leading to the making of the statement the jury will almost certainly reject the admission entirely from their consideration and are just as likely to dismiss the whole charge altogether, if only to show how little they think of the conduct of the police in the particular matter; and so a police officer in this country quickly learns that unfair treatment of an accused person brings its own proper reward and that is perhaps the best sanction which can be applied.

"I cannot see why as a matter of logic an admission whenever made should not be admissible if it is shown to be a voluntary admission of guilt."

Later in the same discussion came a statement with which we are, with the greatest respect, in full agreement but which will no doubt be received with hostility in some quarters. It was as follows: "I am one of the iconoclasts who thinks that our criminal law has gone too far in favour of the accused in some directions. I take the view that we have, if anything, been inclined to restrict the prosecution unnecessarily, and that some of our rules which were devised originally to correct abuses which were rampant in years gone by are no longer necessary, and are acting today, perhaps, as an aid to the guilty.

"I think it is basic that at a trial we must continue to impose the burden of proof on the Crown, and I agree that, having regard to the gravity of the issue in a criminal trial, the burden should be a heavy one. I see no reason to depart from the classic assessment of that burden as being proof 'beyond reasonable doubt'. Accepting that, I have difficulty in seeing justification—moral, logical or historical—for conferring on an accused person the right to avoid *all* interrogation during trial if and when the evidence already adduced is sufficient to establish a *prima facie* case against him.

"I agree that an accused person should be entitled to refuse to answer questions if he wishes, but if he does refuse to answer a particular question he should accept all proper inferences which may fairly be drawn from such refusal. I believe that, in that state of affairs, both the prosecution and the Judge should be entitled to point out to the jury the force and the probative value which, according to the facts of the particular case, may be attributed to the conclusions drawn from the accused's refusal to answer pertinent questions.

"I think that our criminal procedure in New Zealand is undoubtedly in favour of the accused. He is entitled, once arrest is effected, to refuse to answer any questions at all, and let me say that the public in this country are no longer generally ignorant of that right.

"Then we have adopted in essence the Judge's Rules as established in England to protect a person under arrest from unfair questioning, and when he comes to trial he is not obliged to give evidence and neither the prosecuting counsel nor the Judge may comment in any way on that refusal. The result often is that counsel for the accused will build his whole defence around the burden of proof, comment at length on the inadequacies of the Crown's case and spend his time pointing to its weaknesses and its gaps when he knows that in fact the only person in a position to supply the missing information is the accused himself.

"At least in my view, we in this country should do away with our rule prohibiting comment on the fact that the accused has not given evidence. I believe that in this country, with the law as it is, the dice are too heavily loaded against the prosecution and that is not desirable in the protection of the human rights of the community as a whole."

We ourselves would have liked to enlarge on this last point. In the Criminal Law of this country it is our firm opinion that we have not struck a proper balance between the right of the accused to a fair trial and the right of the community as a whole to see that criminals are convicted and punished. There is too much sympathy for the offender, even after conviction, and too little for the parties injured by his offence. Perhaps time will rectify this position but unfortunately the trend at the moment seems to be in the opposite direction.

LIABILITY TO DEATH AND GIFT DUTY IN NEW ZEALAND.

Some Hardships and Anomalies Considered.

Death Duties in New Zealand before 1910.

The modern system of levying death and gift duties in New Zealand stems from the coming into operation of the Death Duties Act 1909 on the first day of January 1910. Before that date death duties in New Zealand were comparatively light: with a few exceptions[1] the only property taxed was property actually owned beneficially by the deceased person as at the date of his death. There had, it is true, been in force for a few years what was known as "deed of gift" duty, but it did not comprehensively include all forms of gifts such as gifts by word of mouth: to be liable to deed of gift duty there had to be a deed of gift.[2]

Death Duty Law Tightened Up in 1910.

The law was made more comprehensive and many loop-holes of escape removed by the Death Duties Act 1909. Not only was property beneficially owned by a deceased person at the date of his death taxed, but with the exception of charitable gifts there were also made taxable, gifts made by a person within three years of his death. Such gifts are still liable under the present law: several classes of gifts, however made, maybe many years before his death, also came within the death duty net, such as gifts made with a reservation in favour of the donor or accompanied by a collateral benefit to the donor, for example the right to manage a gifted farm and to receive remuneration therefore, or the gift of a farm accompanied by an agreement or arrangement by the beneficiary to pay a periodic sum to the donor, such as an annuity.[3] The classes of gifts made by the 1909 Act liable to death duty although made more than three years before death are still liable under the present Act. They have in the intervening half century been the subject matter of much litigation between the Revenue authorities and the taxpayer in New Zealand as well as in England and Scotland, and many of the cases have gone as far as it is possible to go, to the Privy Council or, as the case may be, to the House of Lords.[4]

Gift Duty made more Comprehensive in 1910.

As from the first day of January 1910, gift duty was also made far more comprehensive than the former "deed of gift" duty. With a few exceptions gift duty was imposed on every disposition of property which was made otherwise than by will, whether with or without an instrument in writing, *without fully adequate consideration* in money or money's worth. Thus, even a sale of property will be liable to gift duty if the consideration therefore is not fully adequate. Charitable gifts were and still are exempt. Thus, it pays a wealthy person, if he is charitably inclined, to make gifts during his lifetime: if he waits to make such gifts by his will, estate duty will be payable on the gifts and the value of the gifts will be taken into consideration in assessing the rate of estate duty, estate duty being like income tax, based on a graduated scale, the greater the amount, the greater the rate of duty payable on the lot. However, estate duty will be payable even in respect of charitable gifts, if they have been made with a tag attached, such as a condition to pay the donor an annuity or other form of periodic payment, or with the reservation of a life interest to the donor.[5]

Exemption from Gift Duty of trifling Sums.

Gift duty has never been payable on trifling amounts. The total amount of gifts which a donor may make during any period of twelve months without incurring liability has varied from £500 to £1,000; the present prevailing amount, which was last fixed when money was worth much more than it is today, is £500. This comparatively low amount of exemption must give the Department much work with as a general rule, very little benefit to the revenue. One may well inquire why the exemption has not long since been increased, say, to a thousand pounds at least.

Present High Rates of Death Duty.

The rates of gift duty were very considerably increased by the 1958 amending Act. Before that Act the amount of gift duty on a gift of £30,000 was £7,475 but today it is £9,000. Or to look at the comparison from a different angle before the 1958 amending Act the maximum rate of gift duty (on sums of over £30,000) was 25% of value, less £25, whereas today it (on sums of over £40,000) is 30% of the value of the gift. It is also to be borne in mind that in the United Kingdom, no gift duty whatsoever is payable.

Gifts made in pursuance of Moral Obligations.

What may in certain circumstances, amount to harshness and gross injustice is the principle of gift duty law that, with the exception of gifts for the maintenance or education of a member of the family or for a relative, gifts made in pursuance of merely moral obligations (that is payments and dispositions of property which one is not bound at law to make) are liable to gift duty, and will be subject to estate duty, if the donor dies within three years of the date of the gift.[6] To take an example, A devises and bequeaths

[1] Exceptions were settlements and conveyances made by the deceased to take effect after his death and *donationes mortis causa*: ss. 19 and 31 of the Death Duties Act 1908, which consolidated the Deceased Persons' Estates Duties Act, 1881, and amendments thereto. There were most liberal exemptions in favour of widows, widowers, children and grandchildren. The maximum rate of duty was ten per centum, with an additional three per centum in the case of strangers in blood.

[2] *Minister of Stamps* v. *Townend*, [1909] A.C. 663, 639.

[3] *Oakes* v. *Commissioner of Stamp Duties*, [1954] A.C. 571, [1953] 2 All E.R. 1563, *Ward* v. *Commissioner of Inland Revenue*; [1956] N.Z.L.R. 367.

[4] e.g. *Ward* v. *Commissioner of Inland Revenue*, [1956] N.Z.L.R. 367.

[5] e.g. *Bethell* v. *Commissioner of Stamp Duties* [1947] N.Z.L.R. 49; [1946] G.L.R. 482.

[6] See for example *Attorney-General* v. *Chamberlain*, (1904) L.T. 581. In *re Falkiner, Mead* v. *Smith*, [1924] 1 Ch. 88; [1923] All E.R. Rep. 681, Re *Stirling, Union Bank of Scotland* v. *Stirling*, [1954] 2 All E.R. 113; [1954] 1 W.L.R. 763.

her property by will to B, her executor, absolutely with the request expressed in the will that B dispose of it in accordance with any memorandum signed by her, such memorandum, however, not to be deemed to form part of the will, nor such request to creat any trust or legal obligation upon B. After A's death there is found a memorandum addressed to B and signed by A whereby she directs B to hand her (A's) property over to C. Now, if B is an honourable person, he will after duly administering A's estate (that is to say after paying her debts and the death duty payable in her estate) transfer the estate to C; but if he does so he will be primarily and personally liable for payment of gift duty, and if he dies within three years, A's estate which he handed over to C will form part of his own estate for death duty and be liable for estate duty accordingly and will increase the rate of death duty payable in his estate. This is because in law B became beneficially entitled to A's estate. Thus is B penalised for acting as a gentleman, whereas, if he is a tricky sort of person destitute of all honour and retains A's property for his own use the law will protect him and he will not be liable for any gift duty. It is considered that in cases such as the above example the Act should be amended so as to authorise the Commissioner to waive payment of gift duty and not to levy death duty on the executor's own estate, if he should die within three years of transferring the property to the person who morally was entitled to it.

Is a Disclaimer of a Gift liable to Gift Duty?

Except in the case of the heir at common law English law has never compelled a person to accept a gift. "A man cannot have an estate put into him in spite of his teeth", as it is quaintly put in *Townson* v. *Tickhill* (1819) 3 B & Ald. 31, 106 E.R. 575. It has never been the practice of the Department to levy gift duty on a disclaimer *simpliciter*. In *Commissioner of Inland Revenue* v. *McLaren* (to be reported) (reversing *McLaren* v. *Commissioner of Inland Revenue* [1959] N.Z.L.R. 1364) the Court of Appeal expressed strong doubts as to whether this practice was really correct. It is confidently submitted that this doubt should be removed by the Legislature at the earliest opportunity. Why should a person, who looks a gift-horse in the mouth, be mulcted in taxation?

Method of arriving at value of Net Estate for Estate Duty.

The Death Duties Act 1909, imposed two classes of death duty: the first class was called estate duty, which was (and still is) calculated on the amount of the final balance of the estate. The final balance was (and still is) ascertained by adding up the total of the various assets liable to estate duty and by making therefrom the following deductions:

1. Debts owing by the deceased at the date of his death.
2. The amount of the *reasonable* funeral expenses of the deceased, but no deduction is permissible in respect of expenses of the administration or realization of the estate, or in respect of commission or other remuneration payable to the deceased's legal personal representative, or in respect of the amount of estate duty payable.

Allowance for Debts of Deceased not always Sufficient.

It is only just of course that estate duty should be levied not on the gross value of the estate but on the net value after due allowance has been made for debts and the reasonable funeral expenses of deceased. But there is a catch here. It is expressly provided by the statute that no allowance shall be made for debts incurred by the deceased otherwise than for *full* consideration in money or money's worth *wholly for his own use and benefit*. There is no half-way house here: if a debt has been incurred by the deceased for partial consideration in money or money's worth or only partially for his own use and benefit, then no allowance whatsoever can be made for the debt. This provision has led to much litigation in the Courts and can act most unjustly towards the taxpayer. For example, A, a principle shareholder in a company in order to keep the company afloat may be obliged to guarantee the overdraft of the company: if the overdraft is called up either during his lifetime or after his death and is paid after his death by his estate no allowance can be made in A's estate for estate purposes. Thus in a case which went to the Supreme Court some years ago,[7] the deceased had guaranteed the overdraft of a company in which he held 23,646 shares out of a total shareholding of the company of 50,000 shares. The amount of overdraft called up amounted to £45,906 17s. 8d. It was held that no allowance could be made for estate duty purposes. It is suggested that the Act should be amended so as to permit in a case like this of an apportioned allowance proportionate to the deceased's shareholding. Thus in the example just given, unless the deceased's estate is successful in being re-imbursed for the sum of £45,906 odd or a proportionate part thereof, the estate of deceased ought to be given for death duty purposes an allowance of $^{23646}/_{50000}$ of £45,906 odd. The disallowance of such a large sum as £45,906 can have most serious results these days when the rates of estate duty are so high. A deceased person's estate should not be penalised in this manner just because the deceased during his lifetime made a worthy effort to salvage an asset in which he had a considerable interest.

Provision that all Death Duty payable within Six Months may work Hardship.

It is common knowledge that testators often make provision in their wills for a life interest to their wives. It is true that the Legislature has given worthwhile concessions to widows in respect of their successions to their husband's property, but an innovation which was introduced by the 1909 Act, and still continues to this day, can work considerable hardship to widows. Under the 1885 Deceased Persons Estate Act, provision was made for the postponement of part of the death duty until the death of the widow where a life interest had been left to the widow.[8] This provision has not been repeated in subsequent New Zealand Death Duty Acts. Since 1910 *all* the duty payable in respect of estate is payable at the expiration of six months from the date of death of the deceased. Although in the main the Death Duties Act 1909 was based on the Finance Act 1894, of the United Kingdom, *all* the duty is not in the United Kingdom payable at once as in New Zealand, some of it being postponed until the death of an annuitant or life tenant. It will be realised that the bigger the slice taken out of the

[7] *Guardian Trust and Executors Co. of N.Z. Ltd.* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 14; [1945] G.L.R. 61.

[8] c.f. s. 35 Death Duties Act 1908.

N.Z. METHODIST SOCIAL SERVICE ASSOCIATION

through its constituent organisations, cares for . . .

AGED FRAIL
AGED INFIRM
CHILDREN
WORKING YOUTHS and STUDENTS
MAORI YOUTHS

in EVENTIDE HOMES
HOSPITALS
ORPHANAGES and
HOSTELS
throughout the Dominion

Legacies may be bequeathed to the N.Z. Methodist Social Service Association or to the following members of the Association who administer their own funds. For further information in various centres inquire from the following :

N.Z. Methodist Social Service Association. Convener : Rev. W. E. Falkingham P.O. Box 1449, Christchurch
Auckland Methodist Central Mission. Superintendent : Rev. A. E. Orr .. .. P.O. Box 5104, Auckland
Auckland Methodist Children's Home. Secretary : Mr. R. K. Stacey .. .. P.O. Box 5023, Auckland
Christchurch Methodist Central Mission. Superintendent : Rev. W. E. Falkingham P.O. Box 1449, Christchurch
South Island Orphanage Board (Christchurch). Secretary : Rev. A. O. Harris P.O. Box 931, Christchurch
Dunedin Methodist Central Mission. Superintendent : Rev. D. B. Gordon .. 35 The Octagon, Dunedin
Masterton Methodist Children's Home. Secretary : Mr. J. F. Cody .. .. P.O. Box 298, Masterton
Maori Mission Social Service Work
Home and Maori Mission Department. Superintendent : Rev. G. I. Laurenson P.O. Box 5023, Auckland
Wellington Methodist Social Service Trust. Superintendent : Rev. R. Thornley 38 McFarlane Street, Welington

The Church Army in New Zealand

(Church of England)

(*A Society Incorporated under The Religious and Charitable Trusts Act, 1908*)

A Church Army Sister with part of her "family" of orphan children.

Headquarters : 90 RICHMOND ROAD, AUCKLAND, W.1.

President : The Most Reverend R. H. Owen, D.D. Primate and Archbishop of New Zealand.

THE CHURCH ARMY:

Undertakes Evangelistic and Teaching Missions,
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Conducts Holiday Camps for Children,
Trains Evangelists for work in Parishes, and among the Maoris.

LEGACIES for Special or General Purposes may be safely entrusted to—

The Church Army.

FORM OF BEQUEST:

"I give to the Church Army in New Zealand Society of 90 Richmond Road, Auckland, W.1. [*Here insert particulars*] and I declare that the receipt of the Honorary Treasurer for the time being or other proper officer of the Church Army in New Zealand Society, shall be sufficient discharge for the same."

A Gift now . . .

TO THE

Y.M.C.A.

— decreases Death Duties.

— gives lifetime satisfaction to the donor.

THE Y.M.C.A. provides mental, spiritual and physical leadership training for the leaders of tomorrow — the boys and young men of today. Surely one of the most important objectives a donor could wish for.

The Y.M.C.A. is established in 15 centres of N.Z. and there are plans for extension to new areas. Funds are needed to implement these plans.

Unfortunately, heavy duties after death often means that charitable bequests cannot be fulfilled. But there is a solution, a gift in the donor's lifetime diminishes the net value of the estate — and the duty to be paid. It also gives immediate personal satisfaction — another worthy objective.

General gifts or bequests should be made to —

THE NATIONAL COUNCIL,
Y.M.C.A.'s OF NEW ZEALAND,
276 WILLIS STREET

On a local basis, they should go to the local Y.M.C.A.

GIFTS may be marked for endowment or general purposes.

The Young Women's Christian Association of the City of Wellington, (Incorporated).

★ **OUR AIM**: as an interdenominational and international fellowship is to foster the Christian attitude to all aspects of life.

★ **OUR ACTIVITIES**:

(1) A Hostel providing permanent accommodation for young girls and transient accommodation for women and girls travelling.

(2) Sports Clubs and Physical Education Classes.

(3) Clubs and classes catering for social, recreational and educational needs, providing friendship and fellowship.

★ **OUR NEEDS**: Plans are in hand for extension work into new areas and finance is needed for this project.

Bequests are welcome; however, a gift during the donor's lifetime is a less expensive method of benefiting a worthy cause.

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Y.W.C.A.,
5 BOULCOTT STREET,
WELLINGTON.

President:
Her Royal Highness,
The Princess Margaret.

Patron:
Her Majesty Queen Elizabeth,
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N.Z. President Barnardo Helpers' League:
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A Loving Haven for a Neglected Orphan.

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Charter: "No Destitute Child Ever Refused Admission."

Neither Nationalised nor Subsidised. Still dependent on Voluntary Gifts and Legacies.

A Family of over 7,000 Children of all ages.

Every child, including physically-handicapped and spastic, given a chance of attaining decent citizenship, many winning distinction in various walks of life.

GIFTS, LEGACIES AND BEQUESTS, NO LONGER SUBJECT TO SUCCESSION DUTIES, GRATEFULLY RECEIVED.

London Headquarters: 18-26 STEPNEY CAUSEWAY, E.1
N.Z. Headquarters: 62 THE TERRACE, WELLINGTON

For further information write
THE SECRETARY, P.O. BOX 899, WELLINGTON.

The Wellington Society for the Prevention of Cruelty to Animals (Inc.)

A COMPASSIONATE CAUSE: The protection of animals against suffering and cruelty in all forms.

WE NEED YOUR HELP in our efforts to reach all animals in distress in our large territory.

Our Society: One of the oldest (over fifty years) and most highly respected of its kind.

Our Policy: "We help those who cannot help themselves."

Our Service:
- Animal Free Ambulance, 24 hours a day, every day of the year.
- Inspectors on call all times to investigate reports of cruelty and neglect.
- Veterinary attention to animals in distress available at all times.
- Territory covered: Greater Wellington area as far as Otaki and Kaitoke.

Our Needs: Our costs of labour, transport, feeding, and overhead are very high. Further, we are in great need of new and larger premises.

GIFTS and BEQUESTS GRATEFULLY RECEIVED

Address:
The Secretary,
P.O. Box 1725,
WELLINGTON, C.1.

SUITABLE FORM OF BEQUEST

I GIVE AND BEQUEATH unto the Wellington Society for the Prevention of Cruelty to Animals (Inc.) the sum of £.................................free of all duties and I declare that the receipt of the Secretary, Treasurer, or other proper officer of the Society shall be a full and sufficient discharge to my trustees for the said sum, nor shall my trustees be bound to see to the application thereof.

estate for death duty, the smaller is the corpus of the estate from which the widow's income from the estate must come. Probably this innovation was introduced by the Death Duties Act 1909 for the purposes of administrative convenience from the view-point of the executors as well as of the Department. But, as the rates of duty were then much lighter than at present, any possible hardship suffered by life tenants was not then noticed, and not nearly so burdensome as at present.

Annuities payable to widows. Results sometimes harsh.

It may be convenient at this stage to mention another hardship which widows may suffer under the present death duty Act. There is a provision, as there is in the United Kingdom Act, which renders liable to death duty any interest purchased or provided by the deceased, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.[9] This provision catches many transactions such as a business arrangement in articles of partnership by which a junior partner undertakes on the death of a senior partner to pay the senior partner's widow an annuity of ....per annum for the term of her life. The value of this annuity is actually calculated according to the life expectation tables set out in the Act and the resulting sum is added to the value of the deceased's assets for death duty purposes. If the annuity is, say £500 or more, and the widow is not an old person, the actuarial value of the annuity will run to several thousands of pounds. But, if the widow dies shortly after her husband, no allowance can be made for the lessened value of the annuity by reason of the widow not living the normal span of life, unless it can be established by clear and cogent evidence that at the date of her husband's death she did not have the normal expectation of life by reason of her suffering from some mortal illness, such as cancer, and even if that is proved no refund can be granted more than six years after the date of payment of the duty. The law, it is submitted, should be altered, so as to authorise the Commissioner of Inland Revenue to grant refunds in all cases where an annuitant or tenant for life (being a successor) does not live the normal span of life according to the actuarial tables. But it may be urged that sometimes widows and other annuitants and life tenant live longer that the normal span of life. What then? Well, it is submitted that that is a business risk which in view of the present very high rates of death duty the State may very well take. It would be highly inconvenient to an estate to have to keep a sum of money in hand to meet such an event.

Even Property Sold by the Deceased may sometimes be Taxed.

As a general rule property not beneficially owned by the deceased at his death is not liable to death duty unless the deceased in some way during his life-time has disposed of it to some person by way of bounty. But there is one provision in the Act which forms an exception to this rule.[10] If the deceased disposes of land in consideration of some periodic payment to him for the rest of his life or for the term of any other person's life, or with the reservation of a life interest to him or an interest to him for the life of any other person, the property forms part of his dutiable estate and is taxable no matter how great is the amount of the consideration he has received for the transfer. And in such cases it matters not one iota that, if the consideration is a periodic payment, such as an annuity, it is more than adequate consideration calculated in accordance with the actuarial tables which the Department uses as a basis in taxing transactions not of this special nature; death duty must be paid on the value of the property as at the date of death and at the rates of death duty prevailing at that date.

It is submitted that this exception from the general rule that there must be a gift, is wrong in principle and cannot be justified. It is true that a concession was written into our statute law in 1959—the Department cannot now tax on the value of any improvements made to the property after the date of the transfer otherwise than by or at the expense of the deceased, but, as the Department never did as a matter of practice assess on the value of such improvements, the 1959 legislation does not in this respect appear to benefit the taxpayer to any appreciable extent.

Farmers Suffering Hardship with respect to Homes on Farms.

The writer of this article has a strong opinion that farmers, whose homes are situated on their farms are suffering from an injustice because they are virtually unable to take advantage of what a Judge of the Supreme Court has called this "beneficial piece of legislation," the Joint Family Homes Act. In most cases the farmer's family home and its appurtenances, such as gardens, are included in the title to the farm. If the farmer seeking registration of his family home under the Joint Family Homes Act makes inquiries, he soon discovers that he must bear the costs, often considerable, of a survey of the home site and that that will, as a subdivision of land, be subject to the Land Subdivision in Counties Act, requiring the approval of the Minister of Lands and in all probability either the giving by the farmer of other parts of his farm for reserves or the making to the local body of a monetary payment in lieu of reserves. Consequently, few farmers are prepared to go to this trouble and expense, and the family farm home does not in fact become registered under the Joint Family Homes Act. On the farmer's death his estate does not get the very liberal exemption from death duty provided by that Act—the cutting out from the dutiable estate of the value of the home to a maximum sum of £3,000, thus lowering appreciably the value of the dutiable assets and also the rate of death duty payable on the balance of the assets.

It is submitted that a farmer's estate should enjoy this exemption, if it is established that for at least three years before his death the house on the farm was occupied by the farmer and his wife as a family home. This could be effected by a simple amendment to the Joint Family Homes Act.

E. C. Adams.

[9] S. 5 (i) (g) of the Estate and Gift Duties Act 1955.

[10] S. 5 (i) (j) of the Estate and Gift Duties Act 1955, as to which see *Ward* v. *Commissioner of Inland Revenue* [1956] N.Z.L.R. 367.

FORENSIC FABLE.

By "O"

Mr Blowhard K.C. and Mr Footle K.C.

Mr Blowhard K.C. and Mr Footle K.C. Stood Jointly on the Top Rung of the Professional Ladder. Whether Blowhard Made more Money than Footle was a Moot Point. Whether Footle's or Blowhard's Methods of Advocacy were to be Preferred was Another. Solicitors Wondered how on Earth they would Get On when Blowhard and Footle were Gathered to their Fathers. When in Difficulties, Managing Clerks Rushed to Retain Blowhard, and if they Found that his Services had Already been Requisitioned, they Hurried to Retain Footle. And *Vice Versa*. Blowhard was Violent, Noisy, Quarrelsome, Aggressive, and

Occasionally Insolent. Footle was Gentle, Submissive, Diffident, Deprecating and Invariably Inaudible. Blowhard Lost an Immense Number of Actions by Getting Up an Unnecessary Row with the Judge. Footle Lost an Immense Number of Actions by his Rabbit-like Behaviour. Their Respective Incomes were Enormous. They Despised Judicial Honours. They Continued to Practise at the Bar long after the Decay of their Faculties had Set In ; but Happily those who Briefed them never Noticed the Difference. When they Passed Away, as they Ultimately did, the Business of the Royal Courts of Justice went on just as if Nothing had Happened.

Moral.— *Acquire a Reputation.*

CORRESPONDENCE.

Second Chamber.

Sir,

In your issue of 22 November, you asked for expressions of opinion upon the question of the re-establishment of a Second Chamber. I agree that a nominated Second Chamber might be of little value ; but I contend that a Second Chamber of 20 to 30 members elected by proportional representation would be of great value to New Zealand. If such a Chamber had merely a power of veto for three months of any bill not declared by the Government to be urgent, then it could not be said that this Second Chamber would be unduly obstructive. They would be a valuable revisionary body. The kind of Second Chamber outlined above would ensure that every school of thought having a substantial body of followers would have at least one voice in the Councils of the Nation. This would be only just. During the past three elections political groups having a following approximating about one seventh of the voters have had no representative elected and thus no voice in Parliament. The position has been similar in previous elections. Again new and valuable thought comes originally, generally from a small group. Progress would be greatly accelerated if these new ideas could be advanced by a spokesman in Parliament, so that they could either be demonstrated to be faulty or, if true, they would the sooner be accepted by the nation.

I am etc.,

F. C. JORDAN.

D.P.P. *v.* Smith.

Sir,

The issue of the *New Zealand Law Journal* dated 20 December 1960 has just reached me.

While I thoroughly enjoyed the account of the Second Commonwealth and Empire Law Conference, commencing on page 427, it was with some embarrassment that I discovered that the excellent paper on *D.P.P.* v. *Smith* referred to on page 428 had been mistakenly attributed to me. The paper was, in fact, delivered by Professor Stuart Ryan, of the Faculty of Law, Queen's University, Kingston, Ontario.

Yours faithfully,

J. D. Morton

Professor

Osgoode Hall Law School
Osgoode Hall
Toronto 1, Canada

BOARD OF REVIEW.

The Board of Review set up under the Inland Revenue Department Amendment Act 1960 will begin its work on 1 April 1961.

The board comprises Mr W. H. Carson S.M. (chairman), Mr G. E. Turney, recently retired from the position of Public Trustee and Mr G. Broker, public accountant of New Plymouth. The Registrar is Mr P. H. J. Nota.

Offices have been secured in the Shell Building, The Terrace, Wellington.

BOY SCOUTS

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Costs over £250,000 a year to maintain.
Maintains 21 Homes and Hospitals for the Aged.
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Undertakes General Social Service including :
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" **The Presbyterian Social Service Association of Hawke's Bay and Poverty Bay (Inc.).**" P.O. Box 119, HAVELOCK NORTH.
" **The Wellington Presbyterian Social Service Association (Inc.).**" P.O. Box 1314, WELLINGTON.
" **The Christchurch Presbyterian Social Service Association (Inc.).**" P.O. Box 2264, CHRISTCHURCH.
" **South Canterbury Presbyterian Social Service Association (Inc.).**" P.O. Box 278, TIMARU.
" **Presbyterian Social Service Association (Inc.).**" P.O. Box 374, DUNEDIN.
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There is always present the need for continued support for the Camps which are maintained by voluntary subscriptions. We will be grateful if Solicitors advise clients to assist, by ways of Gifts, and Donations, this Dominion wide movement.

KING GEORGE THE FIFTH MEMORIAL CHILDREN'S HEALTH CAMPS FEDERATION,
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Red Cross Society (Inc.)

Dominion Headquarters
61 DIXON STREET, WELLINGTON,
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I Give and Bequeath to the NEW ZEALAND RED CROSS SOCIETY (INCORPORATED) (or)..........Centre (or).......... Sub-Centre for the general purposes of the Society/ Centre/Sub-Centre..........(here state amount of bequest or description of property given), for which the receipt of the Secretary-General, Dominion Treasurer or other Dominion Officer shall be a good discharge therefor to my Trustee.

If it is desired to leave funds for the benefit of the Society generally all reference to Centre or Sub-Centres should be struck out and conversely the word " Society " should be struck out if it is the intention to benefit a particular Centre or Sub-Centre.

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Church of England Men's Society : Hospital Visitation.
"Flying Angel" Mission to Seamen, Wellington.
St. Barnabas Babies Home, Seatoun.
St. Mary's Guild, administering Homes for Toddlers and Aged Women at Karori.
Wellington City Mission.

ALL DONATIONS AND BEQUESTS MOST GRATEFULLY RECEIVED.

Donations and Bequests may be earmarked for any Society affiliated to the Board, and residuary bequests subject to Life interests, are as welcome as immediate gifts.
Gifts made in the Donor's lifetime are exempt from Gift Duty and they have also the effect of reducing the Estate Duties.

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MRS. W. G. BEAR
Hon. Secretary,
P.O. BOX 82, LOWER HUTT.

SOCIAL SERVICE COUNCIL OF THE DIOCESE OF CHRISTCHURCH.

INCORPORATED BY ACT OF PARLIAMENT, 1952

CHURCH HOUSE, 173 CASHEL STREET CHRISTCHURCH.

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

The Council was constituted by a Private Act and amalgamates the work previously conducted by the following bodies :—

St. Saviour's Guild.
The Anglican Society of Friends of the Aged.
St. Anne's Guild.
Christchurch City Mission.

The Council's present work is :—

1. Care of children in family cottage homes.
2. Provision of homes for the aged.
3. Personal care of the poor and needy and rehabilitation of ex-prisioners.
4. Personal case work of various kinds by trained social workers.

Both the volume and range of activities will be expanded as funds permit.

Solicitors and trustees are advised that bequests may be made for any branch of the work and that residuary bequests subject to life interests are as welcome as immediate gifts.

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" I give and bequeath the sum of £ to the *Social Service Council of the Diocese of Christchurch* for the general purposes of the Council."

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Established—1885

Supplies 15,000 beds yearly for merchant and naval seamen, whose duties carry them around the seven seas in the service of commerce, passenger travel, and defence.

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Inquiries much welcomed :

Management : Mrs. H. L. Dyer,
'Phone - 41-289,
Cnr. Albert & Sturdee Streets,
AUCKLAND.

Secretary : Alan Thomson, J.P., B.Com.,
P.O. BOX 700,
AUCKLAND.
'Phone - 41-934

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Those desiring to make gifts or bequests to Church of England Institutions and Special Funds in the Diocese of Auckland have for their charitable consideration :—

The Central Fund for Church Extension and Home Mission Work.

The Orphan Home, Papatoetoe, for boys and girls.

The Henry Brett Memorial Home, Takapuna, for girls.

The Queen Victoria School for Maori Girls, Parnell.

St. Mary's Homes, Otahuhu, for young women.

The Diocesan Youth Council for Sunday Schools and Youth Work.

The Girls' Friendly Society, Wellesley Street, Auckland.

The Cathedral Building and Endowment Fund for the new Cathedral.

The Ordination Candidates Fund for assisting candidates for Holy Orders.

The Maori Mission Fund.

Auckland City Mission (Inc.), Grey's Avenue, Auckland, and also Selwyn Village, Pt. Chevalier,

St. Stephen's School for Boys, Bombay.

The Missions to Seamen—The Flying Angel Mission, Port of Auckland.

The Clergy Dependents' Benevolent Fund.

FORM OF BEQUEST.

I GIVE AND BEQUEATH to (e.g. The Central Fund of the Diocese of Auckland of the Church of England) the sum of £..................... to be used for the general purposes of such fund OR to be added to the capital of the said fund AND I DECLARE that the official receipt of the Secretary or Treasurer for the time being (of the said Fund) shall be a sufficient discharge to my trustees for payment of this legacy.

A POLICEMAN'S LOT.

Even the youngest of our readers will be old enough to notice how much younger the policemen are nowadays. In our youth the country policeman was frequently an ex member of the armed constabulary who made it his duty to arrest a sufficient number of near drunks to keep his leggings and belt spic and span, his garden tidy and his rheumatism properly massaged. He usually lived in the main street and as it was necessary to see the local hostelries shut at least by 11 p.m. he could not be expected to be an early riser.

About this era a gentleman known as Jack the Ripper was keeping Whitehall 1212 on the qui vive and—not to be outdone—practically every whistle stop in New Zealand claimed as townsman a gentleman named Spring Heeled Jack who was particularly active at night. At the edge of our town between the hotels and the residences there was a small piece of swampy bush and it was a brave man who passed this area alone after 10 p.m. Spring Heeled Jack's reputation was much more efficient than anything this generation knows in making the girls go home early.

One Burns night three customers were making their way home after closing time when they heard a noise in this bush, and to their horror they sighted something part black and part white moving towards them. They withdrew hastily and after consultation, two men stood by while the third man made for the police station. In due course the Sergeant, followed by the later leavers, arrived at the bush where the watchers reported continued movement of the black and white object. The Sergeant, mindful of his rheumatism, moved slowly to the edge of the swamp while his audience shivered excitedly. In a stentorian voice he addressed the bush "I call on ye in the name of the Queen to come forth and surrender yourself." There was no reply, so having dispersed his forces so as to cover the rear of the swamp, the Sergeant once more called on the bush to come forth and surrender, this time with an addendum calling on all those present to assist Her Majesty's forces to carry out their duties. The onlookers felt that if something more definite was not done the Sergeant would lose his crowd appeal. They therefore urged him to enter the bush and capture Spring Heel Jack. To help matters along the crowd armed themselves with sticks and as the Sergeant for the third time repeated his demand for a surrender, the crowd started throwing stones. There was a crash and splash, and while those behind cried forward and those before cried back, Jones's Black and White house cow approached the Sergeant, shook herself, and said "Moo."

A policeman's lot today is much easier. Some few years ago in the Wellington football team there was a Fitz something and a Fitz something else. In our town we have a senior officer, still another Fitz, who in his day attained a certain amount of prominence, first as a cricketer and footballer and later as a referee of New Zealand standard. Our district has two school teams the local equivalent of Marists and St. Pat's Old Boys and when they meet it is usual—perhaps even safer—to have the Senior Sergeant in charge. Their last match ended somewhat abruptly. The game had not been going long when a forward struggled out of the scrum minus the top of his ear—claiming damages. "Play on" said the Sergeant. "I didn't see anything." Like the Auckland-Wellington Shield the next to go down was the second five eighth who had lost the top of his finger. "Play on" said the Sergeant, "I didn't see anything." The game went on, but just before half time, after a melee Maurice Brownlie would have enjoyed, another forward struggled out of the scrum with a gash torn out of his trousers and a gap bitten out of his buttocks. The Sergeant's whistle blew—"We'll take the half time now and" (with a flash of inspiration) "we'll take the second spell next Friday."

ADVOCATUS RURALIS.

Television Not a Necessary.—"Many people will be relieved to know that even to-day possession of a television set is not necessarily a necessity. At least, that is the view of His Honour Judge Shove, who was required to consider the point in a recent case in the Gainsborough County Court. It appears that an infant, the defendant, entered into a rental agreement in respect of a television set and the contract provided that in the event of a default in payment by the defendant the set could be recovered together with thirty months' rent. The defendant defaulted and the plaintiff, a television dealer, sought to enforce the agreement. His Honour Judge Shove gave judgment for the defendant and added: 'I realise the place of a television set in every home but even giving the word "necessary" its widest meaning I am not prepared to say a television set comes within that category'. Of course, it is a rule of common law that an infant is bound to pay a reasonable price for necessaries that have been supplied to him and the term 'necessaries' includes not only those things which are necessary to the support of life, but also articles and services suitable to the infant's station in life and to his particular circumstances (*Peters* v. *Fleming* (1840) 6 M. & W. 42: see also s. 2 of the Sale of Goods Act 1893). In *Chapple* v. *Cooper* (1844) 13 M. & W. 252, Alderson B., was prepared to concede that 'the proper cultivation of the mind is as expedient as the support of the body' and that 'instruction in art or trade, or intellectual, moral and religious information may be a necessary also', but it seems that His Honour Judge Shove, who does not possess a television set, did not think that television programmes amounted to such cultivation or instruction. So far as we are aware this is the first occasion on which the merits of television have been judicially considered and it must now be regarded in the same light as the fancy waistcoats of *Nash* v. *Inman* [1908] 2 K.B. 1, and the jewelled solitaires and antique goblet which gave rise to the dispute in *Ryder* v. *Wombwell* (1868) L.R. 4 Exch. 32, although it is possible to envisage circumstances in which a television set would be held to be necessary to a particular infant's station in life."—*104 Sol. Jo.* 434.

Blackstone on Sputniks.—"Just imagine what Blackstone would have said about space missiles in relation to the notion of ownership *ad coelum et ad inferos*. A matter of no significance, you say? No, not now, but if we all go on ignoring space law we shall soon be faced with practical problems as insoluble as that of parking vehicles in our cities flavoured, for good measure, with the complications and embitterment of rival national claims. At the moment we seem scarcely able to settle our law of the sea."—Theo Ruoff in (*1960*) 34 *A.L.J.*, 181.

THE MORTGAGEE'S SALE UNDER CONDUCT OF THE REGISTRAR.

I.

These notes collect at one point some scattered material on the subject and give fuller treatment than appears to be available elsewhere on some aspects of the sale. Practicality, not profundity, has been sought. The writer would hope that any practitioner having contrary views or comments will not hesitate to express them.

The Registrar's sale is a significant contribution by the Legislature to the legal system of the country. Provision was first made for it in 1860 and it is now contained in a modestly few sections of the Property Law Act 1952 (ss. 99-103). It is generally thought to have been devised to overcome the difficulties which mortgagees experienced in the early days of the Colony in obtaining purchasers at realisation sales in sparsely-settled areas. Such sales were often fruitless through lack of interest, or sympathy with the borrower. The Registrar's sale allowed the mortgagee himself to buy the mortgaged land if he wished. Nevertheless although the statutory power to buy in is an important feature of this type of sale it is not its whole purpose. The mortgagee may have no wish to buy in and yet may obtain great benefit from the Registrar's sale.

The mortgagee (on default of his mortgagor) may act either under the powers conferred on him by his mortgage or he may sell under conduct of the Registrar. Generally speaking, for the reasons given below, the latter procedure is preferable, although circumstances can well arise where it becomes desirable for the mortgagee to sell under his contractual powers. The principal advantages of use of the Registrar's sale are :

ADVANTAGES.

(i) An inexpensive and convenient method is provided whereby the mortgagee may if he desires, following default of his mortgagor, become the owner of the land mortgaged to him. The cumbersome English procedure of foreclosure is avoided and, indeed, is prohibited by s. 89 of the Property Law Act. It should be noted that a mortgagee who, in exercise of a contractual power of sale, buys in in terms of his mortgage or under para. 8 of the Fourth Schedule to the Act (which gives him power "to buy in the mortgaged property") does not, on his purporting to do so, change his status from that of mortgagee to purchaser ; the sale is simply abortive. As stated in Ball's Law of Mortgages at p. 224 :

> "The power to buy in means to buy for the purpose of retaining the present position—that is the mortgagee may bid and force up the price. It does not give the power to buy the mortgagor's interest."

Only by the procedure of the Registrar's sale may the the mortgagee acquire the mortgagor's interest. This prohibition upon the mortgagee acquiring the mortgagor's interest has, it seems clear, its foundation in the equitable doctrines evolved to protect the mortgagor against oppressive exercise by the mortgagee of his great powers. If, by statute, such a right is given to the mortgagee it must be carefully circumscribed and here enters the touch of genius in the requirement of the mortgagee's estimate of value, dealt with more fully below.

(ii) The second advantage is the freeing of the mortgagee from various possible lines of attack by the mortgagor, e.g., as to price obtained ; place of sale (alleging that the sale should have taken place in Town X rather than Town Y) date of sale (mortgagee should have delayed till the end of the dairying season etc.) ; extent and manner of advertising the sale (inadequacy or wrong medium selected) ; amount of the reserve price ; contents of the conditions of sale ; unsuitability of the auctioneer chosen. It is not suggested that all or any of these grounds of complaint would succeed in any particular case but it is a comforting thought that the Registrar's sale disposes of then out of hand. The Registrar has the responsibility of approving conditions of sale, place and date of sale, manner of advertising, and auctioneer. The reserve aspect is replaced by the "estimate" machinery. The Registrar's function is to see the mortgagor is reasonably protected and in furtherance of this duty binds the mortgagor on such aspects : So Sir Michael Myers C.J., remarks in that valuable case on the Registrar's sale, *Public Trustee* v. *Wallace* [1932] N.Z.L.R. 625 ; [1932] G.L.R. 254 : "I do not at present see how in the absence of something in the nature of fraud or collusion the mortgagor could have any cause of action against the mortgagee by reason of, or in consequence of, the sale" . . . The Registrar's control is absolute.

DISADVANTAGES.

(i) By s. 99 (2) the Registrar fixes the date of sale not less than a month nor more than three months from the date of application. This delay may lose a good sale.

(ii) The sale must be for cash. The mortgagee cannot sell on terms : *Public Trustee* v. *Wallace* [1932] N.Z.L.R. 625 ; [1932] G.L.R. 254. He could, of course agree to finance a cash purchaser by taking a mortgage from him but the original mortgagor is entitled to credit for the purchase price at once. If the mortgagee wishes to sell by agreement for sale he will have to use any power to do so conferred by his mortgage.

(iii) The Registrar's supervision of the conditions of sale and other details may be irksome but the protection thus given to the mortgagee must not be overlooked.

PREPARATORY STEPS.

Notices.—Default having arisen under the mortgage the mortgagee must comply with the terms of his mortgage as to service of any notices contractually necessary. He must also comply with s. 92 of the Property Law Act 1952 and serve notice as required under that section. It is to be noted that where it is proposed only to *call-up* money due under a mortgage, notice under s. 92 is not necessary unless the call-up is due to default, i.e., the normal case of call-up of principal because of default in meeting interest or other payments. The section does not apply to call-up where the principal is due on demand, for the money is then due in terms of the contract, not because of default in other matters : *O'Brien* v. *Skidmore* [1951] N.Z.L.R. 884 ; [1951] G.L.R. 447. On expiry of all necessary notices without default being remedied

application may then be made to the Registrar to conduct the sale.

Possession.—Should the sale take place subject to the mortgagor's occupation or should he be removed beforehand by the mortgagee ? In the depression it was almost the invariable rule to require the mortgagor to vacate if he had not already done so, and if necessary, to sue him for possession. There has been a growing tendency in later years for mortgagees to conduct the Registrar's sale with the mortgagor still in the property. This may be in part due to the spread of Welfare State principles and the wish to leave an unpleasant task to someone else, but the mortgagee should not lightly sell with the morgagor still in possession. The chief factor for attention seems to be whether the mortgagee is reconciled to becoming the purchaser at the sale and to dealing thereafter as owner with the mortgagor rather than as mortgagee. On becoming owner he can either then sue for possession or conclude a tenancy with the mortgagor and thereby have simpler remedies for his removal if further default arises. But if the mortgagee's concern is to get paid out, and not to buy in, the sale price will plainly be depressed by the presence of the mortgagor and his family. From the outsider's point of view the property is being sold subject to what appears to be a tenancy. Most buyers wish to buy for their occupation. There will be little competitive bidding if the prospective purchaser has, after buying, to undertake the task of removing the mortgagor.

Hence from the mortgagee's point of view it is suggested that it is better to remove the mortgagor before sale if the mortgagee wishes to get himself paid out, and there is insufficient equity to absorb the depressing effect of the mortgagor's presence.

The procedure for removal of the mortgagor before sale is clear and certain. The mortgagee can institute action under s. 31 of the Magistrate's Court Act 1947 by virtue of s. 108 of the Land Transfer Act 1952, if the value of the land does not exceed £4,000 or he can issue an originating summons under R. 550 in the Supreme Court if the value exceeds that. But upon the mortgagee or a stranger becoming the purchaser the procedural rights of obtaining possession are not so clear. The only ground of action under the Magistrate's Court Act is s. 31 (d)—where the defendant is in possession without right title or licence. In *Patterson* v. *Patterson* (1938) 1 M.C.D. 27, it was held that a husband in possession of his wife's property was not without right title or licence because of the earlier conduct of the parties and again in *Wyndrum Estates Ltd.* v. *Morris* (1939) 1 M.C.D. 207, it was held that a purchaser, under an agreement for sale with the plaintiff, who had unknowingly trespassed on other land due to a mistake to which the plaintiff had contributed was similarly not in possession without right title or licence. The plaintiff in each case was left to the action of ejectment in the Supreme Court. But in *Beasley* v. *Higgins* (1942) 2 M.C.D. 424 a vendor who had rescinded an agreement for sale was entitled to possession as the defendant had no longer right title or licence to remain. Whether a mortgagor remaining in possession after sale by his mortgagee is in the first or second category is not clear. In *Wellington Catholic Education Board* v. *Cronin* (1924) N.Z.L.R. 816 ; [1923] G.L.R. 625, a mortgagee who had bought in at its Registrar's sale and had registered the transfer to itself could not proceed under R. 550 against the mortgagor for possession as the relationship of mortgagor and mortgagee had been terminated. It had to proceed by action for ejectment. Possibly R. 550 may be used before the title of the purchaser is perfected by registration (*Ball's Law of Mortgages*, 179) although the view that the relationship ceases at the fall of the hammer may be preferred. However, enough has been said to show that the purchaser at the sale, whether he is the mortgagee or a stranger, may well have a Supreme Court action of ejectment on his hands with its attendant delay and expense. The mortgagee can very simply evict the mortgagor before sale either under R. 550 if the security is valued at over £4,000 or in the Magistrate's Court if under that.

The Mortgagee's Estimate.

The next consideration is the fixation of the estimate. Section 99 requires the mortgagee to state in his application " the value at which he estimates the land to be sold ", While we may rightly admire the concept of the ' estimate ' we cannot include in that admiration the choice of expression " estimate of value ". Firstly " value " here does not mean any genuine assessment of value by the mortgagee and secondly the coupling of value and sale in the section is inappropriate. Land is sold at a price not a value. Perhaps confusion could be avoided if the Act had required the mortgagee to name a sum " for the purposes of this section " thus avoiding " value " and " sale " and showing the special nature of the figure.

Under the statute the estimate has relevance in two situations only :

(a) the mortgagor can under s. 100 redeem before sale at the estimate or the mortgage debt, whichever is the lower. He remains personally liable for the balance if he redeems at an estimate which is less than the debt ;

(b) the mortgagor is entitled to credit under s. 101 (3) for the amount of the estimate *if the mortgagee buys in* having bid the estimate or any lower figure.

If neither of these events occurs, and a stranger buys at the sale, the effect of the estimate is spent and the mortgagor is entitled to credit for the highest bid irrespective of what the estimate was. The quantum of the estimate may, however, exercise an influence on prospective bidders. See (viii) below.

As the mortgagee must deliver a release of his mortgage to a mortgagor redeeming before sale at an estimate less than the debt, he is thus left unsecured for the deficiency and this must tend to keep the estimate up to the debt. If on the other hand the estimate is fixed above the debt, the mortgagee, if he buys in, will then have to pay the excess in cash to the mortgagor or other person next entitled—a possibility regarded with great loathing by the average mortgagee.

This is the genesis of the estimate procedure. Too low an estimate leaves the mortgagee unsecured for part of his debt which might otherwise be adequately secured ; too high an estimate may involve the mortgagee, if he is the only bidder, in making a cash payment to the mortgagor.

In *Hamilton* v. *Bank of New Zealand* (1904) 24 N.Z.L.R. 109 ; 7 G.L.R. 277 the mortgagee was able to buy a £50,000 property for £5,000. As a result of this, the estimate concept was evolved. If it had been available at the time of the case, and the mortgagee had estimated at £5,000, the mortgagor may have been

able to refinance at this figure and thus save his property.

It must, however, be admitted that the mortgagee's handling of the estimate may work hardship on the mortgagor for which the latter may have no practical remedy. For instance even if the estimate is low as compared with market value the mortgagor may be unable to redeem because the mortgage market may be restricted at the time or the locality or other factors may be unacceptable to other lenders. The mortgagor then may see the property knocked down to the mortgagee at a figure well below value and still be liable for a deficiency under the mortgage.

Fixing the Estimate.

There is not a great deal of extant practical information on the factors to be taken into account in fixing the estimate. In *Goodall's Conveyancing in N.Z.*, 2nd. ed., it is stated in footnote (d) p. 189 that the mortgagee estimates the security at the figure which will return him principal and interest plus costs of sale. This general statement however needs some attention. Before passing to detail, the following considerations are mentioned. First the mortgagee has complete discretion in fixing his estimate subject only perhaps to questions of fraud or collusion. The estimate is the value of the property to *the mortgagee himself* and not its market value: *Wellington City Corporation* v. *Government Insurance Commissioner* [1938] N.Z.L.R. 308; [1938] G.L.R. 170. Secondly while the estimate will normally include the whole mortgage debt, this is subject to the important exception that if the debt and expenses exceed the market value of the security the estimate is best put at the market value only. Thus if the mortgage debt and expenses are £4,000 but the property is worth only £3,000 the estimate should be £3,000. If the mortgagee buys in at the estimate this means that *ad valorem* stamp duty on the transfer is kept to the proper figure and also the mortgagor's liability for the deficiency is kept alive (for what it is worth). Thirdly circumstances can arise where it is possible that the mortgagee may be exposed to some claim from the mortgagor. For instance the mortgagee may have been in possession and his administration of the property may be attacked. Or the mortgagee as a preliminary to the exercise of his power of sale of the land may find himself obliged to take some arbitrary step which his mortgage may not justify. It often happens that the mortgagor will on vacation of the mortgaged premises leave there some oddments of furniture and personal possession which have very little value but which can suddenly become extremely costly items when the subject of a claim against the mortgagee who has been obliged to remove and sell them so that he can proceed with the sale. If the mortgagee has a judgment for debt against the mortgagor he can sometimes issue a distress warrant against these goods, offering to indemnify the bailiff if the debtor's exemption of £100 is likely to be available. Or he may if unable to obtain action or authority from the mortgagor, simply take the plunge and sell them (after careful inventory by an independent examiner), holding the proceeds to await the result of the sale of the land. If then this has to be done or some other claim is possible it is desirable to keep the estimate low. If the mortgagee buys in he thus gives credit for a lower figure than otherwise and he has a deficiency on realisation which he can set off against any claim the mortgagor makes. If the mortgagor is later held by the Court to be entitled to redemption at say £200 less than is owing due to maladministration by the mortgagee in possession or gets judgment for £200 for arbitrary sale by the mortgagee of some sticks of furniture left in the house it is comforting to be able to claim that or a greater sum as a deficiency on realisation. The mortgagee buying in in these circumstances will normally have obtained the property at less than market value and as well as this benefit, will have the shield of his deficiency claim. If a stranger buys and there is a surplus for the mortgagor complaint is less likely from him although, of course, the mortgagee must face any claim then made without the above coverage.

Lastly, fixation of the estimate can in some circumstances call for a very careful assessment of many inter-acting factors and assuming that the purpose of the sale is to get for the mortgagee his money or as much of it as possible, the weight to be given to the relevant factors may vary from case to case. While " debt or value whichever is the less " may be a handy rule of thumb, care spent in following the various possibilities to their conclusion where there are complicating factors such as are mentioned below may well profitably involve a variation of this rule in the particular case.

In the concluding instalment of this article the various factors to be taken into account in connection with the mortgagee's estimate of value will be discussed in more detail.

(To be concluded) G. Cain.

STATUTORY REGULATIONS.

The following Statutory Regulations of general interest have been made in recent months.

The Law Practitioners Fees Regulations 1960 (1960/168). Prescribing admission, practising and restoration fees for barristers and solicitors.

The Trustee Savings Banks Investment Account Order 1958 Amendment No. 2 (1960/175). Increasing from £1,000 to £2,000 the total amount of the deposits made in any Investment Account on which interest will be payable.

The Trustee Savings Bank Interest Order 1960 (1960/176). Prescribing the rate of interest to be paid by trustee savings banks on deposits. The rates are:

On the first £1,000 .. .. 3 per cent.
£1,000 to £2,000 .. .. 2½ per cent.

The Magistrates' Courts Rules 1948 Amendment No. 3 (1960/184). Prescribing the fees payable for Magistrates notes etc.

The Transport Licensing Regulations 1960 Amendment No. 2 (1960/186). Varying the restrictions implied in Goods Service Licences.

The Solicitors' Audit Regulations 1938 Amendment No. 5 (1960/197). Substituting new paragraphs for paras. (c) and (d) of Reg. 7 (8).

The Licensing Regulations 1949 Amendment No. 3 (1960/198). Empowering Magistrates to grant conditional licences for race-meetings in no-licence districts.