Butterworth's Fortnightly Notes

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Butterworth's Fortnightly Notes.

TUESDAY, MARCH 3, 1925.

WITH the first issue of "Butterworth's Fortnightly Notes" we take the opportunity of announcing that it is our intention to publish full notes of all decisions of the Court of Appeal, Supreme Court and the Arbitration Court within a week or two of their being delivered. That this has long been needed we are assured by many members of the legal profession.

Another item in which the profession has already displayed much interest is our intention to publish an article by an eminent lawyer which will be of use and interest to the legal profession. We are fortunate in being able by the courtesy of the Chief Justice to publish in this issue an article under his name which he has written specially for this occasion. We know our readers will appreciate with us his courtesy and the honour he has conferred upon us.

Readers will also be interest to know all the leaders of the New Zealand Bar and many members of the English Bar are contributors.

On page 1 of each issue will be found the various Sittings of the Court of Appeal, the Supreme Court and the Arbitration Court. We believe that by publishing this information we shall be of service to the profession.

It is our intention to publish all appointments and retirements of Bench and Bar and by publishing advertisements of the creation, alteration and dissolution of partnerships we shall become the recognised medium for advising members of the legal profession of all such events thereby doing away with the expensive and unsatisfactory circular.

Finally we propose to give Service to the profession on the lines indicated. In the course of time we shall include other material the better to serve our readers. From the welcome already accorded us we know we are supplying a want. The House of Butterworth denotes Service and this further addition to its household will maintain the ideal and performance of the House.

THE EDITOR.

CONGRATULATIONS.

We have received messages of good-will and cheer from two London contemporaries which we, on the threshold of our career appreciate and gladly acknowledge. The cables read as follows:—

"The LAW JOURNAL, the oldest Legal Weekly, wishes the youngest every success."

and

"The JUSTICE OF THE PEACE wishes BUTTERWORTH'S FORTNIGHTLY NOTES every success in its enterprise."

Court Sittings for 1925.

COURT OF APPEAL.

THE 2nd DIVISION.
Sits at Wellington on Monday, 16th March, at 11 a.m., and on Tuesday, 29th September, at 11 a.m.

THE 1st DIVISION.
Sits at Wellington on Monday, 29th June, at 11 a.m.

SUPREME COURT.

AUCKLAND.
At 10 a.m. on Tuesday, 3rd February; Tuesday, 5th May; Tuesday, 28th July; Tuesday, 27th October.

HAMILTON.
At 10 a.m. on Tuesday, 24th February; Tuesday, 9th June; Tuesday, 1st September; Tuesday, 24th November.

NEW PLYMOUTH.
At 10.30 a.m. on Tuesday, 17th February; Tuesday, 19th May; Tuesday, 11th August; Tuesday, 24th November.

GISBORNE.
At 10.30 a.m. on Monday, 9th March; Monday, 15th June; Monday, 24th August; Monday, 16th November.

WANGANUI.
At 10.30 a.m. on Tuesday, 10th February; Tuesday, 12th May; Tuesday, 18th August; Tuesday, 17th November.

PALMERSTON NORTH.
At 10.30 a.m. on Tuesday, 3rd February; Tuesday, 5th May; Tuesday, 4th August; Tuesday, 10th November.

NAPIER.
At 10.30 a.m. on Tuesday, 24th February; Tuesday, 9th June; Tuesday, 18th August; Tuesday, 10th November.

MASTERTON.
At 10.30 a.m. on Tuesday, 10th March; Tuesday, 8th September.

NELSON.
At 10.30 a.m. on Tuesday, 24th February; Tuesday, 16th June; Tuesday, 24th November.

BLENHEIM.
At 10.30 a.m. on Tuesday, 17th February; Tuesday, 9th June; Tuesday, 17th November.

CHRISTCHURCH.
At 10.30 a.m. on Tuesday, 10th February; Tuesday, 12th May; Tuesday, 18th August; Tuesday, 17th November.

TIMARU.
At 10.30 a.m. on Tuesday, 3rd February; Tuesday, 5th May; Tuesday, 11th August; Tuesday, 10th November.

HOKITIKA.
At 10.30 a.m. on Wednesday, 4th March; Wednesday, 17th June; Wednesday, 16th September.

GREYMOUTH.
At 10.30 a.m. on Wednesday, 4th March; Wednesday, 17th June; Wednesday, 16th September.

WESTPORT.
At 10.30 a.m. on Wednesday, 4th March; Wednesday, 17th June; Wednesday, 16th September.

DUNEDIN.
At 10.30 a.m. on Tuesday, 10th February; Tuesday, 5th May; Tuesday, 4th August; Tuesday, 3rd November.

INVERCARGILL.
At 10.30 a.m. on Tuesday, 24th February; Tuesday, 19th May; Tuesday, 18th August; Tuesday, 17th November.

OAMARU.
At 10 a.m. on Wednesday, 4th February; Wednesday, 2nd September.

ARBITRATION COURT.

The following are the appointed Sittings of this Court:—

INVERCARGILL—9th February.
CHRISTCHURCH—18th February.
BLENHEIM—5th March.
NELSON—9th March.
WELLINGTON—19th March.
AUCKLAND—20th April.
PALMERSTON NORTH, NAPIER, WANGANUI and NEW PLYMOUTH on dates to be arranged about the end of March or the beginning of April.

The Court will visit **GREYMOUTH** and **WESTPORT** after the Nelson sitting, before coming to Wellington.

EASTER VACATION.

Thursday, 9th April, to Saturday, 18th April. Both inclusive.

SUPREME COURT.

Reed, J. Dec. 1, 1924; Jan. 30, 1925
Napier

MANSON v. THE PUBLIC TRUSTEE.

Bankruptcy — Petition for adjudication — Judgment in deceased estate against three debtors—Petition against one only—Two of debtors beneficiaries—Whether Trustee acting impartially between beneficiaries—Practice—Rule 538 (e).

On the 20th November 1922 defendant obtained judgment in the Supreme Court at Napier as trustee in the estate of Samuel Manson deceased against the plaintiff, one Fred Millin, and Mabel Jane Millin his wife. He has now petitioned to have the plaintiff adjudicated bankrupt. He has not included the other two debtors in the petition because he was asked to petition against the plaintiff alone by the beneficiaries and because he ascertained the other two were unfinancial.

The plaintiff then by originating summons under Rule 538 (e) asked for an order (1) to direct the defendant, to abstain from proceeding against him alone and (2) to direct the defendant to join the other two debtors in the proceedings or any other proceedings he may bring to enforce the judgment.

Mason for plaintiff.
Grant for defendant.

REED J. said . . . "The Court has no jurisdiction to make an order requiring a trustee to do any act which is within his discretion unless he is exercising or proposes to exercise that discretion improperly **In re Laery, Levien v. Monteath** 23 N.Z.L.R. 557, a fortiori the Court cannot interfere if the trustee is doing an act which by law he is compelled to do unless he is doing that act in an improper manner. It is the duty of a trustee to collect outstanding debts owing to the estate. . . . . Now, if the plaintiff was an ordinary debtor, having no interest in the estate, it is clear that the defendant would be justified in proceeding to enforce the judgment, in any manner he thought proper, against him solely. As, however, the plaintiff is a beneficiary in the estate, and one of the other debtors namely Mabel Jane Millin, is also a beneficiary it is claimed that the defendant's act is in breach of the rule that requires a trustee to act impartially as between beneficiaries. I do not think the rule applies. The trustee is not dealing with the plaintiff as a beneficiary but as an ordinary debtor to the estate. The rule does not require a trustee to act towards an individual who happens to be a beneficiary in any manner different from any other person, it is only in his capacity as a beneficiary and directly affecting his rights as a beneficiary that a trustee is required to act impartially as between him and his co-beneficiaries. For these reasons I think no order can be made and the summons must be dismissed with costs £10 10s. and disbursements.

Solicitors for plaintiff: **Mason & Dunn**, Napier.
Solicitors for defendant: **Sainsbury Logan & Williams**, Napier.

Herdman, J. Dec. 3, 1924; Jan. 13, 1925
Hamilton.

WHITTON v. TYLER AND OTHERS.

Mortgages Final Extension Act 1924—Notice and objection given under Act of 1919—Motion not filed till 21st November 1924—"Proceeding."

Plaintiff on 16th August 1924 gave defendants notice demanding payment of principal and intimated his intention to exercise his power of sale. On 13th October 1924 Haddow one of the defendants lodged the usual objection. The plaintiff then moved the Court for an order granting him leave under the Mortgages Extension Act 1919 to call up the principal and to exercise his power of sale. This application was filed on 21st November 1924.

Hammond for plaintiff: There was a "proceeding pending" within the meaning of Sec. 21(2) of the Mortgages Final Extension Act 1924.

Gillies for defendant Haddow: As the Act of 1919 and its amendments have been repealed leave asked for cannot be granted.

HERDMAN J. in refusing the objection to the motion and holding that the application should be considered on its merits notwithstanding that it had been filed 28 days after the Act of 1924 came into operation said: "The effect of the passing of the Mortgages Final Extension Act 1924 is, in effect, to deprive a mortgagee who holds a mortgage which is subject to the provisions of that legislation of the most effective remedy that he had against a defaulting mortgagor, during a period commencing upon the 24th of October 1924 and ending on the 31st of March 1925. Before the passing of this legislation the mortgagee could obtain some relief in a proper case by making application to this Court for leave to demand payment of principal moneys secured by the mortgage or to exercise his power of sale. That right has now been taken away from him for the period mentioned. The Mortgagee is now almost impotent. All that is left to him *in the way of security is a right to commence an action for* breach of certain subordinate covenants other than a covenant to repay the principal moneys if the Court's leave is obtained, a right which is of little or no value if the mortgagor disappears or is insolvent. . . . . His remedy is, with the leave of the Court, to sue the erring mortgagor if his whereabouts can be discovered, for breach of covenant to pay the principal sum secured. He has apparently one other right left. He may sue for interest without getting the leave of the Court."

As to the meaning of "proceeding pending" in Sec. 21(2) of the Mortgages Final Extension Act 1924 the learned Judge observed: "The word 'proceeding' may relate to the sale proceedings or to proceedings actually commenced in the Court or to the proceedings antecedent to the Court proceedings but in my opinion it is more reasonable to hold that the word covers all the steps in a system of procedure specially prescribed to meet the case of a mortgagee who proposes to take action to enforce rights conferred upon him by a formal contract. I have been unable to discover any sound reason for laying it down that the words 'proceeding pending' mean a sale after leave of the Court is granted or a motion to

the Court for leave to sell but do not mean the state of things existing when a notice is given by a mortgagee which might or might not be followed by an objection lodged by the mortgagor. In **Thompson & Sons v. North Eastern Marine Engineering Co.**, 1903, 1 K.B. at page 435, Kennedy J., in considering what meaning could be given to the word 'proceed' which appears in Section 6 of the Workmen's Compensation Act 1897, a section which gives a workman a right to proceed either against a person other than his employer at law or against the employer for compensation under the Act, said: 'I do not think, if it were necessary to decide the point, that anything bars me from holding that the word 'proceed' is sufficiently satisfied by a claim for compensation being made under the Act.' So, in the present case I am not aware of anything which prevents me from deciding that a notice given by a mortgagee is covered by the words 'proceeding pending.' ''

Solicitors for Plaintiff: **Rogers Stace & Hammond**, Hamilton.
Solicitors for Defendant: **H. T. Gillies**, Hamilton.

Sim, J. Dec. 18, 1924; Jan. 26, 1925
Invercargill.

IN RE MORTGAGES FINAL EXTENSION ACT, 1924.

BISSETT v. WILKINSON & ALEXANDER.

Mortgages Final Exetension Act., 1924 — Agreement for sale—Non-payment balance purchase money—Non observance of other covenants—''Action or proceeding'' in S. 6 (3)—Application to rescind, retake possession, resell and sue for any deficiency.

On the 7th May 1919 Bissett agreed to sell to Wilkinson and Alexander certain land for £13,260 10s. Of this sum £2000 was paid on execution of the agreement the balance with interest being payable on 1st May 1924. No part of this balance has been paid and the vendor alleges the following further breaches of the agreement: Failure (1) to keep farm buildings, etc., in good and tenantable repair (2) to pay fire insurance premiums (3) to farm and cultivate land properly and keep down rabbits. Vendor then moved for an order granting leave to rescind agreement and retake possession of land, to resell it and to take proceedings to recover any deficiency on resale and to commence any other action as the Court may seem fit.

H. J. Macalister for Bissett.
Sec. 10(3) gives necessary jurisdiction for order asked for. Proceeding contemplated by this subsection includes such a proceeding as rescission of contract for sale of land. **In re Exhall Coal Mining Co.** 4 de G.J. & S. 377. Matters specified in Sec. 6(1) are only relevant to an application which might result in enforcing payment of the purchase money.
J. S. Sinclair for Wilkinson.

SIM, J. held that a vendor's suit for specific performance of such an agreement being a proceeding for enforcing payment of the purchase money came within the prohibition contained in Sec. 10(2) of the Mortgages Final Extension Act 1924: **Boswell v. Reid** 1917 N.Z.L.R. 225.

''The words 'action or proceeding' in Sec. 10(3) must mean,'' the learned Judge added, ''some action or some proceeding in the nature of an action. *In* **Hood Barrs v. Cathcart** 1894, 3 Ch. 376 the word 'institute' was held to make this clear. The word 'commence' in Subsection 3 appears to have the same significance. To construe Subsection 3 in the way suggested by Mr. Macalister would be to nullify in the present case the plain language of clause (b) Sec. 10 (2) and to enable the vendor notwithstanding the prohibition contained in that Subsection to enter into possession of the land and to resell it before the 31st March 1925. That cannot have been the intention of the legislature, and the only leave that can be given to the vendor is to bring an action to obtain relief in connection with the breaches of agreement, other than non-payment of purchase money, complained of by the vendor.''

Solicitors for Bissett: **Macalister Bros.**, Invercargill.
Solicitors for Wilkinson: **Stout & Lillicrap**, Invercargill.

Reed, J. Dec. 10, 1924; Feb., 1925
Gisborne.

HUNIA HAARE v. DUNLOP.

Native Land—Alienation—Confirmation—Sec. 92(1) Native Land Amendment Act 1913—''Unpaid balance.''

In an application for confirmation of the sale of Native land from Waoku Haare to the plaintiff the Maori Land Board insisted that the whole of the purchase money be paid to the Board before confirming the alienation . At that time the defendant a solicitor was acting for the plaintiff.

The plaintiff sued the defendant for the sum of £274 being the amount of money paid by him to the defendant as the purchase money which the defendant had properly disbursed but had not paid into the Maori Land Board.

Chalmers for plaintiff.
Defendant in person.

REED J. in considering Section 92 (1) of the Native Land Amendment Act 1913 which reads as follows ''In any case in which the tribunal hearing an application for confirmation considers that it is not in the interest of any Native alienating that the money payable on such alienation, or any unpaid balance thereof, shall be actually paid to the Native entitled thereto or paid immediately to him, it may require the same to be paid to the Board or to the Native Trustee'' said ''It is clear that the discretion there conferred must be exercised judicially, the Board cannot act arbitrarily, the members must arrive at the state of mind which enables them to 'consider' what is the right thing to do in the case, upon proper materials brought before them in a proper manner, and, I am disposed to think, upon notice to the vendor. I must assume that everything has been done correctly and that the order is made upon proper enquiry. It is not at all clear, however, that the Board has any power to compel a purchaser to pay the purchase money twice over. The use of the words 'unpaid balance' instead of 'any part of the money payable on such alienation,' suggests the implication that the legislature did not intend to give the Board any jurisdiction over instalments of purchase money already paid. However, this question was not argued and I have formed no concluded opinion.''

In giving judgment for the defendant the learned Judge said he was unable to find any evidence of negligence and on the facts disclosed he did not think there was any right of action against the defendant.

Solicitors for plaintiff: **Suckling & Chalmers.**
Solicitor for the defendant: **In person.**

Hosking, J. Dec. 19, 1924; Jan. 14, 1925
Wellington.

KANE v. THE EDUCATION BOARD OF THE DISTRICT OF WELLINGTON.

Education Act 1914 Sections 71 and 76—Amendment Act 1920 Section 16 and Amendment Act 1921-1922 Section 8—Appointment of teachers—Power of defendant to reject all applicants and readvertise.—Acts reasonably necessary to grant of Statutory authority—Practice—Mandamus.

On 15th August 1924 the defendant Board invited by advertisement applications for the position of Headmaster of Mount Cook School. The Plaintiff among others duly applied. A Committee of the Defendant Board, called the Appointments Committee, recommended the appointment of a Mr. Howarth to the Defendant Board. On the 27th August the Board adopted the recommendation and resolved that the selection be confirmed subject, however, to the approval of the Senior Inspector. The Senior Inspector did not approve, being of the opinion that a higher grade teacher should be appointed. He recommended the Board should advertise again. This the Board did on the 1st October and in the result the Board selected and later appointed a Mr. Clark who had not applied under the first advertisement but did so under the second.

The Plaintiff brought proceedings under Rule 466 for a Writ of Mandamus directing the Board ''to make an appointment to the position of Headmaster of the Mount Cook School in accordance with the provisins of Section 76 of the Education Act 1914 as amended by Section 16 of the Education Amendment Act 1920 and Section 8 of the Education Amendment Act 1921-22.''

Myers, K. C. and Evans, for the Plaintiff contended the Board was under a Statutory duty to make the appointment from amongst those who applied under the first advertisement and those who are specially mentioned for the purpose of Section 71 Subsection 5 of the 1914 Act; Section 8 Subsection 2 of the 1921-22 Act and Section 71 Subsection 8 of the 1914 Act. It was also contended the Board had no power to readvertise.

Brandon and Hislop for Defendant.

Fair for the Attorney-General allowed to intervene as amicus curiæ.

HOSKING J. said "..... It is a well recognised principle that the grant of statutory authority covers every act reasonably necessary for accomplishing the thing authorised; it is not merely what is absolutely necessary, but what is reasonably so—**Harrison v. Southwark & Vauxhall Water Company** 91, 2 Ch. 409 at p. 414 — and I think the same principle must be applied where the doing of something is imposed as a duty. If a statutory duty to do something is imposed on a public authority, power to do it is necessarily conferred, so that there is really no ground for distinction *so far as the application of the principle stated is concerned* between a power directly conferred and a power arising of necessity because of a duty imposed. The Board's functions of appointing teachers is, as already indicated, created in absolute terms, subject to the provision of the Act and regulations thereunder. It is imposed as a duty, thus involving the power to do what is reasonable to perform it. The result is that where the Act or the regulations do not provide to the contrary, the mode of exercising this power or duty is impliedly left to the reasonable action of the Board. So also is the method of arriving at the teacher to be appointed in any given case. In the next place, the appointment of teachers is of the very essence of the legislation in question, the object of which, according to the title of the principal Act, is to make better provision for the education of the people. This cannot be achieved without teachers. That the Board in making appointments of teachers should have regard to the promotion of education, and, as incidental thereto, should have regard to the suitability of teachers for the positions to which they are to be appointed cannot, in my opinion, be gainsaid for unless such considerations are acted upon education instead of being promoted will lapse into inefficiency. While it is not expressly provided that the Board shall act upon the consideration stated this is nevertheless recognised in the legislation as underlying the Board's powers and duties. It is particularly recognised in subsection (3b) of Section 71, by which the Board is, as already pointed out, authorised to remove a teacher and appoint another in his place in any case where, in the opinion of the Board, the efficient conduct of the school requires that to be done. It is also recognised in Section 8, subsection (2), of the Act of 1921. *There, in making provision for a preferential appointment* out of certain classes of teachers, it is in effect enacted that no such preference is to be given if the Board is of opinion that none of those teachers is suitable to fill the vacant position. It is further recognised by Section 16 of the 1920 Act making provision for cases where teachers of a particular description or with special qualifications are required.

Now, if the plaintiff's contention is to prevail, namely, that the effect of Section 16 of the 1920 Act is to deprive the Board of the power to make a selection outside of those who come before it as candidates on the original invitation, the result might be, as the Board holds it would be in the present case, an unsuitable appointment. Let the contention be tested by reference to subsection (3b). That enables the Board to remove a teacher and appoint one more suitable in order to secure the efficient conduct of some particular school. If, on the original invitation the Board is of opinion that none of the candidates before it is suitable to fill the vacancy, it must nevertheless according to the plaintiff select one of those candidates although he may be even less suitable than the one removed and although there are suitable teachers in the Board's employ who have not seen fit to apply, or who have not applied originally, perhaps because the advertisement has not come to their notice, but who may be led to apply if a further invitation be issued. Such a position would be grotesque. The same considerations apply to such a case as that provided for in Section 16 of the 1920 Act in which the Board's opinion is that a teacher of a particular description or with special qualifications is required. Suppose that of the candidates for such a position none comes up to the mark. Is the Board bound to select one of the actual candidates and so act in direct opposition to the opinion which its proceeding was taken to give effect to? Why should it not in the instances put be entitled, even if it is not bound, as I should rather hold to be the case, to try and prevent the mischievous results by refraining from making any selection from the original candidates and by inviting further applications. That the Board should refrain from making an unsuitable appointment appears to me to be an entirely reasonable, if it be not a necessary incident in the performance of its duty and power of making appointments. But the contention of the plaintiff is that Section 16 deprives the Board of the power to so refrain and compels it to make the selection out of the candidates before it under the original invitation. In my opinion, the purpose of Section 16 is not to put the Board in any such position. Its purpose in my opinion is to ensure that appointments shall as the general rule be made according to the candidates respective gradings so as to give the higher graded teacher a preference over the others as a recognition of his status, and to prevent the appointment of a candidate of a lower grade although equally suitable for the position. Still, even under this rule of preference the Section is careful to provide in substance that the test of grade is not to be absolute if some candidate of a lower grade should be considered more suitable for the position than those of the higher grade. On this view of Section 16 the Board's power to refrain from making any selection from the candidates before them under the original *invitation is left unaffected, and the duty to make a selection* in accordance with the rule laid down in the section will only operate if the Board, being satisfied that there is a suitable candidate before it, proceed to make a selection. By thus construing Section 16 as a rule for selecting, if the Board proceeds to make a selection, effect is given to all its language, and consequences destructive of the Board's power to select with regard to the suitability of the candidates—consequences which the plaintiff's contention involves — are avoided.

I hold, therefore, that Section 16 does not compel the Board to make a selection from the candidates before it under the original invitation if it considers none of them suitable for the position to be filled, but that in such a case it may resolve to refrain from making any selection. If then in a given case the Board considers it would not be proper to make any selection out of the candidates before it, but that it would be desirable in the interests of the school that further applications should be invited so as to give a further opportunity of obtaining a suitable candidate, it would I consider be not only reasonable but imperative for it to take the ordinary business course indicated by the Act of advertising for further applications. There is nothing in the Act to prescribe the frequency of an advertisement inviting applications. That appears to be left to the Minister to decide. A limit is, of course, imposed by reason of a date being given within which response is to be made; but if on any reasonable ground as for example, a total absence of applications the Board should deem it right to enlarge the date and advertise the fact there is nothing in the Act to prohibit it from doing so as an incident of its general powers. In the *present case the Board, being of opinion that none of the* original candidates was fitted for selection, in effect enlarged the date for and invited further applications. Once it is established that the Board may refrain from selecting out of the original candidates then the power to re-advertise for further applications equally, with the power to do so in the case of enlarging the date for any other cause, is in my opinion a reasonable and necessary incident of its duty or power to appoint.

"I therefore hold that the plaintiff's claim is altogether unsustainable.

"In the result there is no need for me to enter upon the question raised by the defendant whether, assuming the plaintiff's claim to have been well founded, the remedy of mandamus was available to him.

"The plaintiff's claim is dismissed with costs which I fix at £30 and disbursements in full of all costs."

Solicitors for Plaintiff: **Bell Gully Mackenzie and O'Leary,** Wellington.

Solicitors for Defendant: **Brandon Ward & Hislop,** Wellington.

Reed J. Dec. 17, 1924; Jan. 30, 1925
Auckland.

ELLIS & BURNAND LTD. v. FERGUSON.

Wages Protection and Contractors' Lien Act 1908—Assignment for benefit of creditors—Effect on right of lien—Vendor's notice of rescission of agreement for sale preceding notice of lien—Vendors not continuing intention to rescind—Estoppel—Trustees estopped from denying right of lien.

On 3rd December 1923 defendant agreed in writing to purchase certain land and paid a cheque for £50 as a deposit. He took possession and began building operations. The cheque was dishonoured. The vendors, however, owed the defendant more than £50. On 17th December 1923 vendors wrote to defendant as follows "Kindly take notice that we . . . do hereby rescind and repudiate the agreement for sale and purchase dated 3rd December 1923 and purporting to be made between ourselves as vendors of the one part and you as purchaser of the other part upon the grounds that the deposit of £50 as required by the alleged agreement has not been paid." The defendant continued in possession and with the knowledge of the vendors carried on his building operations. On 18th January 1924 by deed defendant assigned his estate to trustees for the benefit of his creditors "saving nevertheless the rights of lienors against the property of the debtor." The trustees took possession of two sections of the land originally agreed to be sold on which were two partially completed houses which the trustees proceeded to complete with moneys provided by certain of the lien holders.

On 19th January 1924 plaintiff served notice of lien and registered it against the land.

As a result of negotiations between the vendors and the trustees an arrangement was come to on the 21st January whereby the vendors agreed to transfer the two sections of land to the defendant or his nominees upon terms requiring prompt payment of the purchase money (£770), the payment of £50 deposit by defendant and if the transfer was to defendant's nominee he was to join in as a directing party. Accordingly the plaintiff and certain other lien holders paid the purchase money and a transfer of the sections to the trustees was executed subject to the encumbrance of a numbr of liens including the plaintiff's. Certain of the lien holders including the plaintiff paid more than £1100 to complete the buildings, pay purchase money and put title in order. It was intended throughout that lien holders' rights should be admitted. The lien holders learnt of the vendors' notice to defendant of the 17th December only after the assignment of the 18th January. The trustees then became doubtful of the position and put the lien holders to the proof of their rights. This action was thereupon begun claiming a lien over the land in question under the Wages Protection and Contractors' Liens Act 1908.

Towle for the plaintiff.

Inder for the defendant submitted (1) If the defendant still had an interest in the land after 17th December the assignment to the trustees for the benefit of his creditors on the 18th January defeated any unregistered claim of lien. (2) That the notice of 17th December however was a valid notice and that therefore on 19th January when plaintiff's claim for lien was filed defendant had no interest in property within Sec. 49 of Wages Protection and Contractors' Lien Act 1908: He relied on **Somerville v. Briscoe & Co.** 8 G.L.R. 137 and **McConachie v. Webb** 6 G.L.R. 272.

REED J. held that the assignment for benefit of his creditors did not defeat a right of lien. This case was entirely different from the two cases cited by Mr. Inder inasmuch as "all parties to the assignment were cognisant of, and in the deed acknowledged the existence of, the rights of the lienors, and the assignment was made for the benefit of creditors 'saving nevertheless the rights of lienors against the property of the debtor.' "

The learned Judge added "In **Somerville v. Briscoe** Mr. Justice Cooper (p. 141) on the authority of **Nortcliffe v. Warburton** 4 De F. & J. 449 expressed the opinion that a bona fide purchaser for value was protected and the lien defeated even though the purchaser may have had some knowledge of the contractor's claim."

His Honour's judgment was an unconsidered one, moreover the judgment was not based on such opinion, as the learned judge found, when dealing with the effect of a Land Transfer title having been acquired by the purchaser, that, upon the evidence, no knowledge of any unpaid claim of the claimant could be imputed to the purchaser. However that may be, it is a very different position in the present case, where, in the very document which is relied upon as defeating the claim of the lienor, the rights of the lienor are acknowledged. The decision in **McConachie v. Webb** is based entirely upon the fact that it was a bona fide purchase without notice of any lien, and title of the purchaser had been completed by registration. Lastly, although upon bankruptcy the estate of a bankrupt is vested by statute in the Official Assignee, it has been held by the Court of Appeal in **In re Williams** 17 N.Z.L.R. 712 that the bankruptcy of the employer does not destroy a contractor's right of lien, a fortiori a voluntary assignment for the benefit of creditors does not destroy such a right of lien. For these reasons, therefore, I am of opinion that the Deed of Assignment did not destroy the plaintiff's right to a lien upon the land."

With regard to the other contention the learned Judge held that on the facts the inference was irresistible that the vendors had waived their right, if they possessed it, to insist on rescission. He held that the trustees completed the purchase of a subsisting right of the defendant to an interest in the land. In his opinion the trustees were estopped from alleging that the defendant had no interest in the land which could be the subject of a lien.

"It was futile to contend in face of this position" the learned Judge concluded "that the mere proof of a notice of rescission having been given, which notice admittedly was never followed up by any act shewing continuing intention to terminate the agreement for sale and purchase, but on the contrary was followed by acts consistent only with an admission of a continuing agreement, would warrant any Court in holding that the defendant's lien did not attach to the land in question."

Solicitor for plaintiff: **Alan M. Hume**, Auckland.
Solicitors for defendant: **Inder & Metcalfe**, Auckland.

Reed, J. Dec. 11, 1924; Feb. 4, 1925
Gisborne.

ZENKER v. PIKE.

War Legisatilon and Statute Law Amendment Act. 1918 Sec. 6—Person of enemy origin—"Interest in land"—Vendor of enemy origin taking mortgage for balance purchase money.

The plaintiff is a person of enemy origin within the meaning of Sec. 6 of the War Legislation and Statute Law Amendment Act 1918. He is the owner of certain leasehold properties occupied by a number of tenants and such ownership is not adversely affected by any legislation. The plaintiff entered into an agreement to sell this property to the defendant upon terms, and the defendant entered into possession and began to collect the rents from the tenants from 1st January 1923 until 1st August 1924 when he surrendered the property to the plaintiff.

The agreement for sale was in the form of a sale note and contained a provision that the defendant should give the plaintiff a mortgage over the property to secure the balance of the purchase money. On consulting a solicitor the parties were advised the transaction was illegal owing to beforementioned Sec. 6. It was thought that by the plaintiff's becoming naturalised the difficulty would be overcome. A verbal agreement was then come to rescinding the original agreement and while adopting its terms as to price and terms of payment made it dependant on the plaintiff's obtaining naturalisation papers and on the defendant's being satisfied with the new head lease the terms of which were then under negotiation. In August 1924 as the plaintiff could not obtain naturalisation papers and the defendant was not satisfied with the terms of the new head lease the parties cancelled the verbal agreement and the plaintiff retook possession.

The plaintiff sued the defendant for the rents he collected.

Burnard for plaintiff.

Wauchop for defendant contended the defendant entered into possession under a written agreement for sale which contained a provision that the defendant should give a mortgage to the plaintiff for the balance purchase money such contract being illegal as it was a contract by which the plaintiff obtained an interest in land in breach of the abovementioned Sec. 6.

REED J. said " . . . I am not prepared to hold that when a person of enemy origin parts with an interest in land, and to facilitate the sale, and as part of the consideration, takes a lesser interest in the same land that the acquisition of such lesser interest is a prohibited acquisition within the meaning of the section."

Referring to the verbal agreement the learned Judge continued "Now this last mentioned agreement clearly was not illegal. The plaintiff had a perfect right to sell his property and it was entirely within the law for him to give time to the purchaser for the payment of the purchase money. As I interpret this verbal agreement there was no contract to give a mortgage unless the transaction could be made legal by the plaintiff being placed in a position to hold a mortgage. Such a transaction is not illegal. Further, assuming the original contract to be illegal, it is not necessary for the

plaintiff to rely upon either contract in order to prove his case, whilst the defendant in order to succeed must set up and prove an illegal contract. I agree that the law is as stated by Mr. Justice Chapman in **Kaimoana v. Nolan** 1923 N.Z.L.R. 184, 189, 'A plaintiff who can make out his case without reference to the invalid or illegal contract may succeed, despite his having taken part in a void or an illegal transaction, and despite the fact that the joint acts of the parties have involved the defendant in loss.' That principle may not apply in all cases, as if, for instance, it was a contract involving fraud; but undoubtedly applies to the present case where, as soon as it was found that the proposed transaction was prohibited by law, the contract was repudiated. Further, there is no evidence that any of the rents collected by the defendant were so collected during the period before the rescission of the original contract. The position, therefore, is this: The plaintiff proves his ownership of the property and that the defendant has collected the rents from that property. His case is complete. To that case the defendant answers: 'I went into possession of the property under an illegal contract, it is true that when we discovered that it was illegal we rescinded it and entered into an agreement which was not illegal, but the whole case is tainted by the original illegality and you can recover nothing.' In my opinion that is no sufficient answer and the plaintiff, therefore, is entitled to judgment."

Solicitors for plaintiff: **Burnard & Bull**, Gisborne.
Solicitors for defendant: **Rees Bright & Wauchop**, Gisborne.

Reed, J. Nov. 18, 1924; Jan. 26, 1925
Napier.

KITTOW & OTHERS v. EVANS & OTHERS.

Will—Advances to Son—Codicil reducing share by amount of advances—Subsequent letter to accountant making advances gifts — Not communicated to Son — Effect of this—Some advances made after date will and before codicil—Some made after codicil—Son an executor.

On 23rd September, 1920, testator by a codicil to his will directed his executors to ascertain the quantum of his son's (Dr. Evans) share in the residuary trust fund and he directed that that amount was to cease to be a portion of the residuary trust fund and certain trusts were declared with regard to the quantum of the share (described as "the said fund") so ascertained. The testator then directed "that in computing the amount of the said fund all moneys which I may from the day of the date hereof advance to or pay on behalf of my son . . . . but without any charge of interest thereon shall be taken into account as if the same were portion of the residuary trust funds and on division into shares of the total fund so constituted shall be charged against and deducted from the share so found of the residuary trust funds to which in terms of my said will the said O.G.N. Evans (the said son) would have been entitled if he had survived me and the balance shall constitute 'the said fund.'" The testator employed an accountant to look after his books.

Prior to the date of the codicil the books shewed payments by the testator for the son amounting to £265 12s. 4d. Entries in the books after the date of the codicil shew payments amounting to £689 18s. 2d.

On 10th October 1921 testator wrote his accountant acknowledging receipt of a statement of account shewing these payments and added that these sums and any other money advanced to his son were a loan only to be paid back "and I wish it to be shewn in the books as a loan and not a gift."

On 31st October 1921 he again wrote to the accountant cancelling his letter of the 10th October and added that the moneys advanced as shewn in the books were to be a gift to his son and added "you will therefore not charge it against him in my books."

On 21st February 1922 the books shew a payment of £15 11s. for the testator's son.

On 19th April 1922 the testator wrote to the accountant cancelling all previous instructions and added "all payments made to him to be treated as a loan."

On 5th December 1922 testator died and his son died a little more than a month later leaving a wife and children. None of the letters referred to were communicated to the son.

Grant for plaintiffs.
Wedde for William Griffith Evans and others.
Mason for Dr. Evans' widow.

REED, J., held that as to the letter of the 31st October it did not constitute a gift. Possibly had he communicated the letter to his son it would have been a gift, but not having done so it remained incomplete and an incomplete gift could be revoked at any time: **Standing v. Bowring**, L.R. 31 Ch. D. 282,290.

As to the moneys advanced to the son the first class was the moneys amounting to £265 12s. 4d. advanced subsequent to the date of the will but prior to the date of the codicil and the second class was the moneys amounting to £705 9s. 2d. advanced subsequent to the date of the codicil.

On consideration of the evidence the learned Judge held that as to the first class the payments were all casual payments of the nature referred to by Jessel M.R. in **Taylor v. Taylor** L.R. 20 Eq. 155,159 and not that class of payment that learned Judge considered constituted an advancement by way of portion. The learned Judge also referred to re **Scott, Langton v. Scott** 1903 1 Ch. 1. and held that the nature of the payments in this class rebutted the presumption that they were made in anticipation of the son's share in the estate, and in part performance of it, and that consequently being gifts they need not be brought into account.

As to the second class the learned Judge said that the words "all moneys which I may from the day of the date hereof advance to or pay on behalf of my son" are plain everyday words the meaning of which are obvious. They are comprehensive and inclusive and mean any and all money disbursed by the testator for and on behalf of his son, whatever the purpose for which they were advanced. They must be brought therefore into account."

To the submission that the son having been appointed an executor of the testator's will any debt due by him was thereby extinguished in terms of the principle stated in 2 **Jarman on Wills** (11th Edn.) 1054., the learned Judge applied the principle based on the decision of Sir George Jessel in **Strong v. Bird** L.R. 18 Eq. 315 as stated by Neville J. in **In re Stewart, Stewart v. McLaughlin** 1908, 2 Ch. 251,254 and found there was no evidence of intention that the money advanced should be by way of gift or that the debt should be extinguished. Even if the letter of the 31st October had not been cancelled it was doubtful if it would have been admissible: **In re Hyslop, Hyslop v. Chamberlain** 1894 3 Ch. 522.

Solicitors for plaintiffs: **Sainsbury Logan & Williams**, Napier.
Solicitors for defendants, G. Evans and others: **R. H. Wedde**, Napier.
Solicitors for widow of Dr. Evans: **Mason & Dunn**, Napier.

Rules under the Judicature Act.

As from 1st February, 1925, Rules 254, 255, 256, 257, and 258 are revoked and the following have been made in substitution therefor:—

254. In an action in which the only relief claimed by the plaintiff is damages in respect of a cause of action not being exclusively a breach of contract, either party may have the action tried before a jury on delivering to the proper officer of the Court, at least eight days before the commencement of the sittings at which the action is to be tried, a notice that he requires the action to be tried before a jury, and at the same time paying the cost of the jury for the first day of trial in accordance with the Juries Act, 1908. Thereupon such action shall be tried before a jury of four if the damages claimed do not exceed £200, and before a jury of twelve if the damages claimed exceed £200.

255. For the purposes of Rule 254 a cause of action which may be regarded as arising either out of breach of contract or out of tort shall be deemed to arise exclusively out of breach of contract.

256. The party applying to have the action tried before a jury shall serve upon the ohter party a copy of the notice mentioned in Rule 254 at least four days before the commencement of the sittings at which the action is to be tried.

257. (a) All other actions shall be tried by a Judge without a jury, but if it appears to the Court, either before or at the trial, that any action or any issue therein can be more conveniently tried before a jury, the Court may direct that the action or issue be so tried. In an action in which the only relief claimed by the plaintiff is the recovery of a debt or damages not exceeding £200 the

order so made may be either for trial before a jury of four or before a jury of twelve. In all other cases the order shall be for trial before a jury of twelve.

(b) Subject to the provisions of Rule 133, this rule shall apply, **mutatis mutandis**, to the trial of every counterclaim.

258. The party on whose application an order is made for trial before a jury shall within such time as is limited by the order in that behalf, or if no time is so limited then within four days after the making of such order, set down the action or counterclaim or issue for trial before a jury accordingly, and pay the cost of the jury for the first day of trial in accordance with the Juries Act, 1908; and in default of his so doing the order for a jury shall be **ipso facto** discharged, and the action or counterclaim or issue shall be tried in the same manner as if such order had not been made.

Dominion Citizenship.

by

THE RT. HON. SIR ROBERT STOUT, P.C., K.C.M.G., D.C.L., Oxon., LL.D., Manchester and Edinburgh.

Chief Justice of New Zealand.

New Zealand has been celebrating the birthday of George Washington, and this makes us recall the position in which the Colonies now stand in reference to the Empire. If the wide authority given now to the Dominions of Britain had been conferred on the North American Colonies there would have been no Revolution, and the United States might now have been part of the Empire of Britain.

Times have changed, and the opinions of statesmen and citizens have changed with the times. There are, however, many questions yet to be settled as to what the future relationship is to be between the Dominions and the Empire. The question may be put even in this way: is there to be recognition in Britain of Dominion citizenship apart from what may be termed Imperial citizenship, or, to use the phrase that was used in a book by Richard Jebb "Is there to be a Colonial Nationalism?" This matter may well be considered. We have now a statute dealing with British nationality and the status of aliens in New Zealand. Our statute on this subject was passed in 1923 and reserved for the signification of His Majesty, and there the definition of a British subject is as follows: "A British subject means a person who is a natural born British subject or a person to whom a certificate of naturalisation has been granted in New Zealand." This definition, it will be seen, excludes perhaps many millions of British subjects. In fact, it excludes British subjects in British Dominions. For example, to take an extreme case, there is British territory in Hongkong, China, and if the Hongkong Legislature issued a certificate of naturalisation to a Chinaman, could it be said that that Chinaman was a British subject within the meaning of the definition in our British Nationality and Status of Aliens New Zealand Act, 1923? It could not be said that this person naturalised in Hongkong was a natural born British subject. A law somewhat similar was in force in New Zealand in our 1908 Act, because it provided that a person who had got naturalisation and was not a natural born British subject had to get that naturalisation recognised in New Zealand before he would be treated in New Zealand as a British subject.

Then the question will arise: what will be the rights of this British subject in New Zealand who has become in a sense a New Zealand citizen? Is there such a thing as New Zealand citizenship? This question has been raised in more than one New Zealand case. It may be sufficient, however, to refer to the case of "Rex v. Lander." That case was heard by our Court of Appeal in 1919, and the question reserved was whether a person who was a New Zealand citizen, being born in New Zealand, domiciled in New Zealand, married in New Zealand, employed in the Expeditionary Force of New Zealand, went to England as a New Zealand soldier and there entered into a bigamous marriage could be prosecuted in New Zealand on his return for the crime of bigamy? Our Court of Appeal by a majority held he could not on the ground that our Legislature had no power to pass Section 224 of the Crimes Act. That section defined bigamy as a crime in the following words: "The act of a person who, being married, goes through the form of marriage with any other person in any part of the world." If there was power to pass that Act the person charged with the offence was guilty of bigamy, but the majority of the Court of Appeal held that the words "in any part of the world" were ultra vires of the New Zealand Constitution Act. That Act provided that the General Assembly of New Zealand, which is its Legislature, had power to pass laws for "the peace, order and good government of New Zealand." The contention was that if the bigamy was committed outside of New Zealand and the New Zealand citizen returned to New Zealand it was not against the peace, order and good government of New Zealand to have New Zealand a kind of Alsatia, and that such a criminal had a right to remain in New Zealand without being prosecuted. This contention has been discussed and objected to in a very able paper published in the Canadian Law Journal by the Chief Professor of Law in Ontario. The decision of the Court of Appeal was based on the judgment of the Privy Council in "McLeod v. Attorney-General of New South Wales," and there are no doubt phrases in the judgment of their Lordships that show that the Courts must assume that laws passed in the Colonies can only deal with acts done within the jurisdiction. The phraseology of the Privy Council was as follows:—

> "Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the Bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, "Extra territorium jus dicenti impune non paretur," would be applicable to such a case." See 1891 A.C. 455, 458.

It has to be remembered, however, that this is really obiter dictum, because in the interpretation of the New South Wales statute the Council came to the decision that it was not the intention of that statute to provide for the punishment of bigamy outside New South Wales. The New Zealand statute, however, has the words: "an act done in any part of the world," and therefore, in order to rely on the McLeod case, it had to be assumed that this obiter dictum was binding on the Court of Appeal of New Zealand. Our statute, the British Nationality and Status of Aliens New Zealand Act, 1924, shows that there is recognition of New Zealand citizenship as distinct from that of Britain, because a citizen of the British Empire or a subject of the British King will

not be recognised as a British subject in New Zealand, if he does not come within the very words of section 2 of the British Nationality and Status of Aliens New Zealand Act, 1923, which says "A British subject means a person who is a natural born British subject or a person to whom a certificate of naturalisation has been granted in New Zealand."

A person who came from South Africa who had been born in India, or born in China, and claimed to be a British citizen because he had been naturalised in the Dominion of South Africa, would not in New Zealand be recognised as a British subject nor as a British citizen. It will therefore be seen that we have created two kinds of what may be termed British subjects. We have a British subject who is a natural born British subject, one born in British Dominions, and we have also those British subjects who have been naturalised in British Dominions, perhaps even in Britain itself, and New Zealand will not recognise the latter class as British subjects nor as citizens. Before they can become a citizen of New Zealand with all its advantages and duties, there must be a naturalisation in New Zealand if a person is not a natural born British subject. This is then a kind of New Zealand citizenship. There is closely connected with this position a further question: if there is to be this British subject created into a New Zealand subject or a New Zealand citizen, what is to be the control in New Zealand over this New Zealand citizen? Is the Dominion to have the same control over this New Zealand citizen as Britain has over a British subject who had been naturalised? Further, is New Zealand to have the same control over its natural born citizens and naturalised citizens as Britain has over its natural born and naturalised citizens? The basis of the jurisdiction must rest on the definition that it is necessary that there should be authority so as to provide for peace, order, and good government in Britain. Has then Britain power to punish for bigamy committed by one of its subjects outside of British territory? There have been many cases in Britain in which persons have been convicted for bigamy outside of England, such as Earl Russell's case (1901, A.C., 446). In that case a British subject married after a divorce granted in the United States. It was held that the marriage contracted in the United States was invalid by English law, and that Earl Russell was guilty of bigamy in marrying in the United States after such a divorce. That being so, why should not a citizen of New Zealand who acts as Earl Russell did not be liable to be punished in New Zealand? The law existed in England because it was said the morals of the community were affected. That means that peace, order, and good government of the people were infringed. Would not the peace, order, and good government of New Zealand be infringed by people committing bigamy abroad? Our Court of Appeal has felt itself bound by the obiter dictum in McLeod's case to hold to the contrary, but in view of the fact that there is now a distinct citizenship from the British citizenship created in New Zealand by the Act already referred to passed in 1923, it will surely be necessary to reconsider the case of "Rex v. Lander." In fact, the full power that Britain has in dealing with its subjects must be granted to the Governments of the Dominions in dealing with their subjects, and we may have a person recognised in England as a British subject who is not recognised in New Zealand as such. We therefore have what may be termed a New Zealand citizenship differing from British citizenship, and our laws must surely be made applicable to such a position.

It may be pointed out that in the case of "Russell and the King" on the information of Woodward (7 A.C., 829), it was held by the Privy Council that the words "peace, order, and good government" dealt with a class of subjects different from mere property and civil rights, and that the morals of the people had to be considered. This being so, the time is surely ripe for reconsidering the decision of "Rex v. Lander." It is true that the Court of Appeal's decision stands, and it cannot be varied apparently even by our Legislature, because the Court of Appeal held that it was ultra vires of the New Zealand Parliament to deal with the conduct of New Zealand citizens outside New Zealand territory, and that therefore the legislative powers of New Zealand were not so extensive for the governance of New Zealand as the legislative powers of the Imperial Parliament are for the governance of England.

This then is a question which requires perhaps legislative interference by the Imperial Parliament, and the time is surely not far distant when the full status of New Zealand and other Dominions for the governing of their citizens will be granted to the Dominions of the Empire. It all turns upon what is to be the control of Dominion citizens by Dominions. Does a New Zealand soldier who goes to fight for the Empire cease to be under control of New Zealand when he goes abroad, and has he a right to come back to his domicile and his country free from any responsibility for his acts when abroad? That is not allowed in England, and surely the time has come when citizenship of New Zealand will be recognised as meaning the same as citizenship in the Mother Country.

London Letter.

The Temple,
London, E.C.4,
22nd January, 1925.

My Dear N.Z.,

Before dealing with the Law or the facts, I ask leave of the Court to make a personal statement. No instructions, which I have ever received, have given me more intense and genuine pleasure than Messrs. Butterworth's brief to keep my learned friends overseas informed of what is going forward in legal circles in this country. I make bold to profess the sentiment, felt by so many but expressed by so few, of a deep love of our Empire and a profound respect for the men "out there" who make and maintain it. Amongst these I place the lawyers very high indeed, if not actually at the top; for, whatever officials or merchants may contend, I am convinced that the Empire is mainly founded on British sportsmanship and British justice. Eighteen years of practice in these Chambers, whose work consists to a large extent of appeals to the Judicial Committee of the Privy Council from all parts of the Empire, has engendered the belief that our system of law, practice and administration is an element as indispensable and indestructible in the life of the Dominions and the Crown Colonies of the Great Commonwealth as it is in that of every town and village of the Old Country. A short, personal experience as a law of-

ficer in the Straits Settlements and an opportunity of calling on my professional brethren in India on the way out and in Western Australia, Natal and the Cape on the way back, has further convinced me so that now neither our Sir John Simon nor your equivalent advocate could ever shake me. To condescend from the general to the particular, I want to make the short point that it is a rare pleasure and a delightful privilege to set about writing, once a fortnight, to my professional kin in New Zealand, with some of whom I fought recently in France; and, since a compliment to the immediate client from whom the instructions come is never out of place and least of all when it is sincere, I may add that I particularly like doing it for Messrs. Butterworth, about whose business and undertaking there is ever the true, Imperial touch.

* * *

In London, we are still at our wits' end to cope with the mass of causes in the Lists. We have recently appointed, as you know, two additional Judges of the King's Bench Division, two men who commanded the affection and respect of all who really knew them as "Hugh Fraser" and "Will Finlay." The majority opinion, and I think the right opinion, is that both appointments are surprising but sound. Strong personal characteristics, common to both men, are a kind heart and a marked common sense, without which initial qualifications a man can never hope to be a Judge entirely and unequivocally satisfactory to the profession or the public. These appointments complete the complement of a Bench which is, on the whole, the most level-headed and the best behaved in living memory. It is said, not without truth, that the Court of Appeal lacks to-day any outstanding brilliance, and comprises no Bowen L.J., for example, or, to compare the more immediate past, no Fletcher Moulton L.J. It may be said that this is the only weakness in the Judicature and it may be admitted that the permanent authority of contemporary "authorities" must suffer in consequence. On the other hand, from top to bottom of the list of His Majesty's Judges in the country, supreme or pusine, there is to-day not one unsafe, unsound man, not one terror nor confusion-maker such as we have known in our own time but will not identify by name. The litigant, it is true may never be sure, these days, of a speedy trial, but he may always be sure of a conscientious, courteous and competent one. It is early as yet to express a view as to what the litigant has gained, or lost, by the inclusion of women on our juries. One paradox tends to evidence itself: the arrival of the "weaker sex" in the jury box renders its atmosphere less emotional, less sentimental, more practical, more logical and, to be candid, more cold-blooded.

* * *

In the Statute Book revolution is present and more revolution is pending. With the new Law of Property, in prospect, you will feel less concerned than we are. It is not to be hoped that I may discover in you any sympathy for the die-hard campaign, in the ranks of which I enlist myself. Shortly it may be stated that there are two very different opinions as to the merit of the sweeping reforms and modernization to be effected by the Birkenhead legislation; Lincoln's Inn, on the whole, is in favour of them while the silent mass of country solicitors (who, together, know most about these things and are most intimately involved in the workings of the system) are against them. Both sides may be acquitted of any interested motive; the changes are being discussed in a remarkably detached and academic spirit: The logical men are inclined to be radical, the practical men to be conservative. However this may be, the process of change is now well advanced, and it is intended that this year shall see passed and ready to come into operation the consolidating acts which bring into effect all the changes provided for and contemplated in the Birkenhead Act. For the present, the Law of Property Act, 1922, is postponed, as to its coming into operation, for another year. For a detailed account I may refer you to the Conveyancer's Letters in the Law Journal.

You will take a more lively interest in our present, than in our pending changes of the law; the Carriage of Goods by Sea Act, 1924, which came into force three weeks ago, must have a much more real interest for you than any mishap to the Statute of Uses or any upheavals in the world of Copyhold tenures. After a prolonged struggle for the preservation of freedom of contract in the shipping world, we have succumbed to the Hague Rules and have followed your example in adopting compulsory legislation. Of the benefits of this innovation you could inform me better than I could inform you. I can only tell you that our Act is so drafted as to leave infinite scope for litigation, especially on the point as to what is and what is not "reasonable deviation"; and that you may find a full statement of the arguments, contra this tampering with Bills of Lading in the preface to the last edition of "Scrutton on Charterparties and Bills of Lading," but you may anticipate a tone of submission to fate and of hope for the best in the new edition, which is now in the press.

* * *

The ten days of the Hilary Law Sittings, which have passed at the date of writing this letter, have produced a number of decisions of which many are fit to be reported in the "English and Empire Digest" but none is of universal interest. The rating case of The Metropolitan Water Board v. The Assessment Committee of Kingston Union establishes, or re-affirms, some guiding principles as to the mode of rating property occupied by public bodies for public purposes; forbids the application of the "contractor's principle" to cases where the "profits" basis is not applicable but there are figures of receipts and expenditure available upon which to found the calculation of the rent to be expected from a hypothetical tenant, and decides that that calculation must not disregard the statutory restrictions under which the actual tenant lies. A case of Russoff v. Lipovitch, decided on January 20th, will excite some discussion in this country but is of an interest confined to our own Rent Restrictions Acts and our County Courts Act, 1888: Possibly the case of Bowron v. Bowron, decided on the same day in the Court of Appeal, will interest you more, deciding as it does, an interesting point in the theory of "constructive desertion." I suspect that, of all current decisions, you will pay most attention to the judgment of the Judicial Committee in the Canadian Appeal, The Toronto Electric Commissioners v. Snider and Others, The Attorneys General of Canada and Ontario Intervening. As complete candour must be a paramount element in the relations between you and your London Correspondent, I will confess that I have not had the time, since receiving my instructions, so to acquaint myself with the details of your

legislation as to be able to say how far the conclusion arrived at, is relevant to your constitutional problems and to the principles and administration of your law in the matter of labour disputes and conciliation boards. The judgment is a very lengthy one, and is well reported in the "Times" newspaper of January 21. Should you want further information than there appears, I can, as it happens readily obtain it, and will as readily supply it. Indeed, I have no doubt that the Editor of "Fortnightly Notes" will be only too glad to receive suggestions and queries, as to this and any other matter upon which I can inform you, and to forward them to the proper quarter.—Yours,

INNER TEMPLAR.

Inner Templar Cable.

Inner Temple,
London,
27th February, 1925.

To all to whom These Presents Come, Greeting:

This from the Temple London to our Legal Kith and Kin in New Zealand as earnest of a communication to be maintained fortnightly in this paper. No doubt Lincoln's Inn would join, but that it is preoccupied with its devastating reforms of the Law of Property descending from the Birkenhead Act, and likely to revive the business of Equity Draughtsmen if their sanity survives the complexities involved.

At the present date our cause Lists are intolerably congested and our Judiciary depleted by the Calls of Circuit and the inroads of the sick list, but a new Administration of Justice Bill is being expedited and another additional Judge is to be appointed. At any moment now the trial of Causes in London may resume full speed and effective decisions may be expected in quantities. A highly important Judgment is shortly to be delivered as to the Criminal Liability of Doctors whose patients die as a result of their treatment or failure to treat.

From the point of view of the Bar the forthcoming announcement of the New Batch of Kings Counsel is awaited with excitement. It must cause a very considerable redistribution of work before and behind the Bar.

Macquisten's Bill in Parliament to check the compulsory political levy upon members of Trades Unions is regarded with disfavour among Lawyers. It is profoundly desired that Trades Unions may be left to manage their own affairs as other corporations, though it is hoped against hope by Lawyers that they may also be as an ultimate result of the present movement deprived of the immunity they frequently enjoy under the 1906 Act.

Sir Leslie Scott publicly denies the rumour that he will be promoted to the Bench as a result of the Reform of the Admiralty and Commercial Judicature which he has successfully promoted. Otherwise we live as Lawyers in quiet times, for the moment only disturbed every now and then by the pleasant shock of Kapps Legal Caricatures in the Law Journal.

MR. JUSTICE HOSKING.

BENCH AND BAR.

On Wednesday, the 18th February, at 11 a.m. in the main Court at the Wellington Supreme Court House, the Bar of New Zealand assembled to say farewell to His Honour Mr. Justice Hosking, who retired from the Supreme Court Bench. There were present a great gathering of the Wellington Bar, including Mr. C. P. Skerrett, K.C., Sir John Findlay, K.C., Mr. A. Gray, K.C., and Mr. M. Myers, K.C.

The Magisterial Bench was represented by Messrs. Riddell and Cooper.

The proceedings comprised three speeches, the first by Mr. Skerrett on behalf of the Bar of New Zealand, which was followed by a speech by the President of the Wellington District Law Society (Mr. Myers). His Honour Mr. Justice Hosking then replied in tones which displayed the depth of his feelings at what he described as a compliment paid him not only by the thronged attendance but by the words in which the speakers had expressed their sentiments with regard to himself personally and with regard to his service.

The speech of Mr. Skerrett so fittingly and eloquently described the sentiments that every member of the Bar feels towards this great and humane judge that we publish it at length for the information of the profession. Mr. Skerrett said:

Your Honour,—

It is understood that this is the last day you will sit in Court—under your present Commission.

The Practitioners of the Dominion (for whom I am spokesman) desire to bid your Honour a ceremonious farewell, and to express in some small measure their appreciation of the great services rendered by you to the Country. I speak of a ceremonious farewell only because we desire to take this opportunity to do you honour; and thereby mark the high place which you hold in the

esteem, respect and the affections of those who have practised before you.

It is natural that some reference should be made to your distinguished career at the Bar. Your Honour was admitted in the year 1875 and up to the time of your elevation to the Bench in 1914 you were in constant practice amongst us. I need hardly enlarge upon the success to which you attained or to the high position you held at the Bar. The facts are known and appreciated by all of us; but to one matter I might briefly refer. To you was entrusted the extremely difficult task of devising and framing the novel and complicated legislation connected with the intervention of the State in the affairs of the Bank of New Zealand. It is difficult to exaggerate the skill, knowledge and experience required in the performance of this task; and yet it was fulfilled by you without mistake, error, or mischance.

Great as was your position at the Bar, few have succeeded quite in the same way as you have done. On your way to success you pushed no man down and clambered over the backs of no other aspirants to fame. Nature has fortunately given you a kindly disposition, and a helping hand and a kindly word of advice and assistance from you were never lacking when they were wanted.

In practice your Honour ever adhered to a high standard of honour and integrity; and felt that the well-being of the profession to which you belonged was worthy of your care and concern and of any self-sacrifice it involved. Your Honour left the Bar better than you found it—better for your association with it.

Your Honour took your seat on the Bench in the year 1914 with the high hopes which your many years of practice evoked in us. Nor were these hopes disappointed.

A just Judge—who discharges with care and conscientiousness the duties of his high office is a vital and powerful influence for good in the community in which he administers justice. Apart from his practical use as an arbiter of disputes—he is a living exemplar to his world. He is continually teaching us the wisdom of obeying the laws of our country and exhibiting to us the exercise of one of the highest functions of the human brain—a just and well-informed decision. Conclusions arrived at without fear, favour or affection, supported by reasonings used without affectation or display and designed only to illumine and explain the decision which has been arrived at with conscientious care.

High as has been the standard of the Judicial Bench your Honour need not fear to be measured by that standard in the mind of your contemporaries or I believe in the minds of posterity who are the ultimate judges.

We shall always remember that you brought to the Judicial Bench a deep and compendious knowledge of law; and a wide experience of practice and of human nature—so necessary to a successful judge. You will leave behind you valuable expositions of the law contained in our Law Reports which will keep your memory green amongst us. By the public—and by us also—you will be remembered as a man of the highest integrity, of great industry, of an almost meticulous conscientiousness and a burning desire to be just.

Your Honour will step down from the Judgment Seat after some 10 years of service with your robes of office unsullied amidst the regrets of the Profession and with the respectful esteem and affection of all those who have practised before you. Our sorrow at parting from you is tempered by the feeling that opportunities will occur whereby your knowledge and capacities may not be wholly lost to the Dominion.

MR. JUSTICE OSTLER.

By N.Z. Gazette dated 2nd February, Mr. Henry Hubert Ostler, Barrister, was appointed by His Excellency the Governor General to be King's Counsel and by Gazette of the same date he was appointed to be a Judge of the Supreme Court of New Zealand. His Honour who is 48 years of age was educated in New Zealand and at Blue Coat School in London and in 1900 he commenced his study of the law. After a brilliant scholaristic career he was appointed Editor of the New Zealand Law Reports and he practised as a Barrister in Wellington. In 1910 he was appointed Crown Solicitor and joined the Crown Law Office. He remained there conducting the criminal prosecutions on behalf of the Crown until in 1915 he went to Auckland and joined the well-known firm of Jackson, Russell, Tunks & Ostler. His career in the legal profession has been one of rapid progress and success and his wide experience augurs well for the high and responsible position to which he has been elevated.

MR. JUSTICE ALPERS.

His Honour Mr. Justice Alpers who assumes the position on the Supreme Court Bench just vacated by His Honour Mr. Justice Hosking, was born in Copenhagen in 1857 of Danish parents, and at the age of 10 he came with them to New Zealand. He did not speak English then. Before he actually had reached 13 he not only had mastered the language, but had qualified as a pupil-teacher at the Napier School. He continued his studies, and in 1884 he came to Christchurch and entered Canterbury Coolege on a scholarship. In 1887 he graduated as a Bachelor of Arts, winning the John Tinline scholarship in English literature. In the following year he graduated as Master of Arts, taking first-class honours in Latin and English literature. He then became an assistant to Professor J. Macmillan Brown, and on the visit of the last-named to Europe in 1983 Mr. Alpers held the chair as his locum tenens. On the return of Professor Macmillan Brown, Mr. Justice Alpers entered upon the position of assistant master at the Christchurch Boys' High School, and he remained at the school until 1904. In this year he began his study of the law at Canterbury College and soon added the degree of LL.B. to his honours and was called to the Bar. He immediately began practice in Timaru in partnership with Mr. J. W. White, the Crown Prosecutor. Added to a soundness in law were his elocutionary attainments, and it was not surprising that he came into prominence in Court work, his ability in cross-examination being responsible for the winning of several sensational jury cases. In 1907 he removed to Christchurch, practising there on his own account. On January 1, 1910, he joined the firm of Garrick, Cowlishaw and Fisher, taking the place of the late Mr. J. B. Fisher, who retired. He has been a principal in the firm ever since.

Mr. N. H. Rawson has commenced practice as a solicitor at Ngaruwahia. For a number of years he was with the Hamilton firm of MacDiamid, Mears and Gray. Mr. Rawson is the son of the late Stipendiary Magistrate, of Westport and Hamilton.

Mr. R. B. Scott, well-known member of the Junior Bar in Wellington, has severed his seven years' connection with the firm of Young, White and Courtney, and is now practising on his own account.

Law Societies.

AUCKLAND LAW SOCIETY.

The Auckland District Law Society on the 12th inst tendered a congratulatory dinner to Sir James Parr, Minister of Justice, and His Honour, Mr. Justice Ostler, in honour of their recent preferment.

The dinner which was held at the Auckland Club was attended by some seventy members of the Society. There were also present his Hon. Mr. Justice Herdman, his Hon. Mr. Justice Reed, the local Magistrates, and the President of the Hamilton Law Society. Mr. A. H. Johnstone, the President of the Auckland District Society, presided, and a number of toasts were honoured.

CANTERBURY LAW SOCIETY.

On Thursday the 19th February the Canterbury Law Society held a farewell dinner at the Canterbury Club to Mr. Justice Alpers upon his accession to the Bench. The evening was characterised by much enthusiasm and the keynote to various speeches of the evening was affection for the new Judge and appreciation of his varied talents. The appointment of Mr. Justice Alpers is, in Christchurch, where he is best known, universally acknowledged as a fitting climax to a brilliant career, and high expectations are entertained that he will adorn the Supreme Court Bench.

The toast of the guest of the evening was proposed by the President of the Canterbury Law Society (Mr. F. W. Johnston) and seconded by Messrs. George Harper, F. Wilding K.C., and M. J. Gresson, all of whom have been intimately associated with the new Judge during his whole career at the Bar, the last mentioned also having been a pupil of his at the Christchurch Boys' High School. The speeches of the

evening were mainly reminiscent and eulogistic of Mr. Justice Alpers' pre-eminent qualities—in particular his brilliant intellect and capacity to grapple effectively with any class of problem that came before him, his practical knowledge of life and mankind, and his instinctive sympathy for those in need of help. Mr. George Harper recalled the dinner that was tendered to Mr. Justice Williams when he was called to the Bench from Christchurch, and told how the latter with that modesty which he retained until the end of his days had said that he may not become a great Judge, but he hoped to be a good Judge. "Mr. Alpers," said Mr. Harper, "will bring to the Bench that same degree of culture and scholarship which was the foundation of Mr. Justice Williams' eminence and I feel that the results attained may be the same."

Mr. Justice Alpers in rising to reply, said that he could not trust himself to say all that was in his heart in response to what had been said of him. One quality, however, he would lay claim to and that was a sincere intellectual humility. He preferred not to be sworn in on the morrow in public but intended to take his oath in Mr. Justice Adams' private Chambers, as he regarded the ceremony in the nature of a sacrament. He also thought that from past experience he would be able to cultivate a detached state of mind amid the controversies in which he would find himself. He told his audience also how by a coincidence some twenty-four hours before his appointment to the Supreme Court Bench he had received the appointment of Danish Consul-General to the South Island, which he had forthwith relinquished, and in consequence he could apply to himself the words of Cicero in speaking of a certain Consul that the latter never slept while the interests of Rome were at stake. As he and his wife had been paid a compliment at the theatre on the evening of his appointment, a distinguished member of the profession, noted for his scholarship, had reminded him of Horace's comment upon Maecenas that his great career dated from the day when he was "plausus in theatro."

Mr. George Weston subsequently proposed the health of Mrs. Alpers and children, to which Mr. Justice Alpers shortly responded.

DIGEST AND NOTER UP FOR HALSBURY'S "LAWS OF ENGLAND."

(A full note of each of the cases referred to hereunder will be found in the Law Journal for Nov. 22, 1924, and many of the cases will later be reported fully in the Law Reports.)

ARBITRATION.—Railway taken over by Corporation under statutory powers—Price to be fixed by arbitrators—Applications to set aside award—Basis of valuation.—Toronto Corporation v. Toronto Railway Co. and Cross Appeal—1924 L.J. p. 726.

Held, that where a corporation were empowered by statute to take over the undertaking of a railway company at a price to be fixed by arbitrators, the arbitrators were justified in making their award on the basis of the prices current at the time, and not on any theoretical calculation of values.

As to the grounds for setting aside an award: See **Halsbury** Vol. 1, Title 'Arbitration,' Part I, sec. 14, Pars 995-996.

CONTRACT.—Lease of flat—Conditional offer—'Subject to suitable agreement being arranged.'—Lockett v. Norman-Wright 1924 (L.J. p. 728).

Held, that where an informal contract for a lease for a term of years is made 'subject to suitable agreements being arranged' between the parties' solicitors, there is no binding contract until the formal contract is prepared and signed.

As to the form of the memorandum or writing evidencing a contract: See **Halsbury**, Vol 7, Title 'Contract,' Part III, Sec. 3, Par. 760. As to operation of informal agreement for a lease: See **Halsbury**, Vol. 18, Title 'Landlord and Tenant,' Part II, Sec. 2, Par. 819.

CRIMINAL LAW AND PROCEDURE. — Merchandise marks—False trade description—Liability to penalty—Defence.—Allard v. Selfridge and Co., Ltd. 1924 (L.J. p. 729).

Held, that a trader is guilty of selling goods to which a false trade description has been applied if he fails to prove one of a number of defences allowed by Merchandise Marks Act, 1887, Sec. 2(2); it is not sufficient to prove a portion of one of them, and then have recourse to another.

As to sale of goods to which a false trade description is applied: See **Halsbury**, Vol. 9, Title 'Criminal Law and Procedure,' Part XI, Sec. 6, Pars. 1146-7.

ESTATE AND OTHER DEATH DUTIES.—Construction of will—Rent-charge and legacies 'free of all duties'—Duties payable out of residue—Future estate duty.—In re Sarson; Public Trustee v. Sarson 1924 (L.J. p. 728).

Held, that where a testator directed that all legacies, devises and bequests should be free of all duties, and that all duties payable in respect of any of his property should be paid out of his residuary estate, which was then to be vested in the Public Trustee: (1) The whole of such duties should be discharged before the estate was handed over to such trustee; (2) with respect to a devised rent-charge and two legacies, the only duty payable thereon out of residue was that payable on testator's death; (3) any future duty was payable out of the subject of the gifts respectively.

As to property out of which estate duty is payable: See **Halsbury**, Vol. 13, Title 'Estate and Other Death Duties,' Part II, Sec. 7, Pars. 285-292. As to property out of which legacy duty is payable: See **Halsbury**, Vol. 13, Title 'Estate and Other Death Duties,' Part IV, Sec. 7, Pars. 349-351. As to property out of which succession duty is payable: See **Halsbury**, Vol. 13, Title 'Estate and Other Death Duties,' Part V, Sec. 6, Pars. 413-419. As to property out of which probate duty is payable: See **Halsbury**, Vol. 13, Title 'Estate and Other Death Duties,' Part VI, Sec. 6, Par. 443.

INCOME TAX.—Pension scheme—Lump sum provided by employers—Deduction—Computation of profits.—Atherton (Inspector of Taxes) v. British Insulated and Helsby Cables, Ltd. 1924 (L.J. p. 727).

Held, that in computing their profits for income tax purposes, employers are not entitled to deduct a lump sum paid by them into a fund for inaugurating a pension scheme for their employees and that the expenditure of such lump sum was in the nature of an employment of capital as indicated by Rule 3(f) of the Rules applicable to Cases I and II of Income Tax Act, 1918, Schedule D.

As to deductions from gross profits: See **Halsbury**, Vol. 16, Title 'Income Tax,' Part VI, Sec. 2, Pars. 1310-1312.

INCOME TAX.—Super Tax—Shareholder in company — Profits distributed as bonus in form of debenture stock—Liability to assessment.—Inland Revenue Commissioners v. G. C. Fisher's Executors, 1924. (L.J. p. 726).

Held, that a bonus, in the form of debenture stock, issued by a company to its shareholders, although derived from profits, is not income assessable to super-tax in the hands of the recipient.

As to assessment of profits of a British company: See **Halsbury**, Vo. 16, Title 'Income Tax,' Part VI, Sec. 2, Par. 1307. As to the incidence of super-tax: See **Halsbury**, Vol. 16, Title 'Income Tax,' Part XII, Par. 1416.

SHIPPING AND NAVIGATION.—Charter-party—Deviation—Delay—Liability of Shipowners.—United States Shipping Board v. Bunge y Roen, Limitada 1924 (L.J. p. 727).

Held, that the liberty given by a charter-party to a ship to call at any port for the purpose of taking bunker coal must be restricted to ports on the line of route of the chartered voyage, and that a deviation, for the purpose of obtaining oil fuel, is not justified.

As to stipulations in a charter-party regarding deviation from line of route: See **Halsbury**, Vol. 26, Title 'Shipping and Navigation,' Part VII, Sec. 1, Pars. 168-171.

SHIPPING AND NAVIGATION.—Charter-party—Provision to lighten vessel to safe winter draft—Delay—Injury to vessel—Unknown danger—Liability of charterer.—Great Lakes Steamship Co. v. Maple Leaf Milling Co. 1924 (L.J. p. 726).

Held, that the failure of the charterers of a ship to carry out a provision in the charter-party that the 'vessel should be lightened immediately on arrival to safe winter draft' renders them liable to the owners of the vessel for damage caused by the ship's grounding upon a hidden danger in the harbour, owing to the fall of the water.

As to liability of charterer for naming an unsafe port: See **Halsbury**, Vol. 26, Title 'Shipping and Navigation,' Part VII, Sec. 5, Pars. 349-351.

WILLS.—Codicil—Construction.—Neville, In re; Neville v. First Garden City, Ltd. 1924 (L.J. p. 728).

Held, that in codicil containing the direction 'I forgive all debts owing to me,' the word 'debts' was not intended by the testator to cover all his investments, so as to release sums secured on mortgages and loan stock, but that the word was given a much more limited meaning by the personal note introduced by the use of the word 'forgive.'

As to words being given their usual sense in the construction of wills: See **Halsbury**, Vol. 28, Title 'Wills,' Part XIII, Sec. 3, Par. 1263. As to the construction of codicils: See **Halsbury**, Vol. 28, Title 'Wills,' Part IX, Par. 1153.

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