# Butterworth's Fortnightly Notes

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# Butterworth's Fortnightly Notes.

TUESDAY, MARCH 17, 1925.

## LONDON LETTER.

Owing to the late arrival of the mail from England there will be no London Letter in this issue.

## 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.

**WELLINGTON.**
At 10.30 a.m. on Tuesday, 3rd February; Tuesday 5th May; Tuesday, 28th July; Tuesday, 27th October.

**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.

The Sittings of the Supreme Court originally fixed for 4th March at Greymouth, Westport and Hokitika has been adjourned until the 18th March.

### 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.

### BANKRUPTCY.

The following days have been appointed for the Sittings in Bankruptcy of the Supreme Court:—

WELLINGTON—4th May, at 10 a.m.
CHRISTCHURCH—11th May, at 10.15 a.m.

### EASTER VACATION.

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

# SUPREME COURT.

Stout, C.J. Feb. 14 and 17, 1925
Wellington.

IN RE BRIDGET THOMAS DECEASED.
WINCH v. THE PUBLIC TRUSTEE.

**Administration—Sec. 49 of Act of 1908—Whether "children" includes illegitimate children.**

Bridget Thomas was the owner of certain leasehold property in New Zealand. She had one child Annie. The plaintiff is the illegitimate child of Annie who had no other children and never married. She died in 1906. Her mother died in 1916 intestate. The question the Court was asked to decide was whether the plaintiff was entitled to succeed to the estate of Bridget Thomas.

**C. H. Treadwell** for plaintiff: The effect of enacting the last Sub-sections of Sec. 3 of the Administration Amendment Act 1885 as a separate Section and as an integral part of Part III. of the Administration Act 1908 is to give the Section a wider operation than it would have if it were held to be confined by Sec. 3 of the Act of 1885 to legitimate children. He referred to and relied on **re Stewart** 1903 N.Z.L.R. 186: **Public Trustee v. Sheath** 1918 N.Z.L.R. 129 (Chapman J. at 143): **Public Trustee v. Bishop** 34 N.Z.L.R. 1014 at 1016: **Public Trustee v. Morris** 1916 N.Z.L.R. 1147 There is no reason why Sec. 49 of the Act of 1908 should not apply to illegitimate as well as legitimate children.

**Rose** for Public Trustee: If "children" in Sec. 49 is to be interpreted as including illegitimate children then a "child" in that Sec. means a son or a daughter, illegitimate grandchildren will inherit through their father and will take in competition with legitimate children. Also illegitimate children of a deceased brother would take in competition with legitimate nephews and nieces.

Counsel as regards Sec. 52 referred to the American decisions summarised in the annotation of **Hardesley v. Mitchell** cited in American L.R. vol. 24, p. 569.

**Fair** for Attorney-General.

STOUT C.J. said "The question raised in this Originating Summons is as to the true interpretation of Section 49 of the Administration Act 1908. The Section reads as follows: 'In the event of the death of a child in the lifetime of the man or woman dying intestate, the children of such child shall take his or her parent's share, and the words 'brothers' and 'sisters' in the last preceding Section shall include a brother or a sister and the children of a deceased brother or sister, such children taking their parent's share.' This Section appears in the 'part' of the Statute dealing with the distribution of intestate estates, and if the 'part' had ended at Section 49 then there can be no doubt it meant that the child mentioned was a legitimate child. Can the words 'the children' where they first appear in Section 49 be read as including illegitimate children? If so read, and there happened to be, for example, one legitimate and one illegitimate child, they would take equally. Is that the true meaning of Section 49?"

His Honour then discussed the following decisions: In re Stewart 1903 N.Z.L.R. 186, McLaren v. Walters 17 Gaz.L.R. 96, Public Trustee v. Morris 1918 N.Z.L.R. 1147, Public Trustee v. Bishop 34 N.Z.L.R. 1014, Public Trustee v. Sheath 1918 N.Z.L.R. 129; in re Wilkins, Robinson v. Wilkins 1922 N.Z.L.R. 644, and concluded:

"I am of opinion that none of the cases that have been cited construing any of the provisions of the 1908 Act aid the Plaintiff in his construction of Section 49, and I must read Section 49 when it uses the word 'child' and uses the word 'children' as meaning legitimate child and legitimate children. Where the Act deals with illegitimate children there is express provision as appears in the Sections already quoted, namely, Sections 50, 51 and 52. To interpret the word 'child' in Section 49 as covering an illegitimate, and also the word 'children' in the second line of Section 49 as including illegitimates would have made some of the provisions in Sections 50, 51 and 52 unnecessary. In my opinion, therefore, I must read the words 'child' and 'children' as meaning legitimate child and legitimate children, and therefore the Plaintiff is not entitled to recover. I understand, however, that there are no next-of-kin in the estate, and it is a case of bona vacantia. That being so, and the property reverting to the Crown, it would surely be a proper suggestion to make that the Plaintiff ought to get what would have gone to his mother had she been alive. As to costs, it is only fair that some small costs should be allowed to all parties, to come out of the estate. I suggest the fee should be £5 5s. to each party and costs out of pocket, as the estate is a small one."

Solicitors for plaintiff: **Treadwell & Sons**, Wellington.
Solicitor for Public Trustee: **G. G. Rose.**
Solicitor for Attorney-General: **Crown Law Office.**

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Stout C.J. Dec. 23, 1924.
(In Chambers). Wellington.

In re WELLINGTON DIOCESAN SCHOOL FOR GIRLS (Nga Tawa, Marton) TRUST BOARD.

**Charitable Trust—Power to Mortgage—Jurisdiction of the Supreme Court to authorise alienation of trust property in proper cases—Religious Charitable and Educational Trusts Act 1908.**

This was a Petition by the Wellington Diocesan School for Girls (Nga Tawa, Marton) Trust Board, incorporated under The Religious Charitable and Education Trusts Act 1908, for leave to borrow large sums of money upon the security of the trust property with which to build an Hostel in connection with the school erected on the Board's property. The Hostel connected with the school had been destroyed by fire, and it was shown that the continued existence of the school depended upon the borrowing of the moneys necessary to build a new Hostel.

**Evans** for the Board in support of application:

The Trust Deed contains no express power to borrow or to mortgage. Such a power could doubtless be implied if it could be shown that the Board had power to sell. The powers of sale conferred upon Boards incorporated under Part II. of The Religious Charitable & Educational Trusts Act 1908 are set out in Section 13 of that Act, but the language of the Section indicates that any sale, exchange, or de-

dication under that Section must be for a public purpose. Whatever doubt there might have been upon that point is set at rest by Section 38 of The Reserves and Other Lands Disposal and Public Bodies Empowering Act 1920, and therefore it appears that no statutory power can be relied upon in this case.

It is submitted that the Supreme Court has a general jurisdiction, apart from the Act, to authorise any alienation of the property of a Charitable Trust where it is shown that such alienation is in the interests of the trust. In re **Ashton** 22 Beav. 288 and In re **Mornington Baptist Church** (1901) 10 Gaz. L.R. 520.

STOUT C.J.: "I think that the Court has the general jurisdiction suggested, and I am satisfied, upon the facts set out in the petition, that it will be for the benefit of the Trust to exercise that jurisdiction in this case.

Order accordingly."

Solicitors: **Bell, Gully, Mackenzie & O'Leary**, Wellington.

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Sim J. Feb. 5, 1925. Oamaru.

CRAWSHAW v. PUBLIC TRUSTEE.

**Contract—Services rendered to relative—Presumption—Services in expectation of legacy.**

John Ross occupied 2 rooms of the plaintiff with his consent from February 1916 to December 1923 and the plaintiff supplied him with light and firing. From July 1922 to December 1923 plaintiff supplied Ross with meals. Plaintiff alleged Ross agreed to pay reasonable price for these things. Plaintiff's wife was a daughter of Ross by his first marriage. Ross's first wife died in June 1922. Ross re-married in December 1923. He then made a will in his wife's favour and died on his honeymoon at the age of 76.

Defendant is executor of the will of Ross. Plaintiff claimed £607 10s. as a reasonable price for things supplied Ross.

**Ongley** for Plaintiff.
**F. B. Adams** for Defendant.

SIM J. held that the plaintiff was entitled to recover a fair price and inter alia said . . . "The subject of remuneration for services rendered to relatives is discussed in Macdonnell's Law of Master and Servant (2nd Edn.) p. 111 where it is said 'frequently when work is done for relatives or friends, it is hard to say whether wages or remuneration is due. The difficulty is not one of law, but of fact, which it is for a jury, on a review of the whole circumstances, to settle.' The learned writer then refers to the American cases on the subject, and quotes a passage from Wood's Law of Master and Servant to the effect that where compensation is claimed for services rendered for near relatives the law will not imply a promise, and no recovery can be had unless an express contract, or circumstances equivalent thereto, is shown. Mr. Wood (2nd edn.) p. 132 thinks that in America it is not settled that the presumption that the services are gratuitous applies to the case of a son-in-law. There are, he says, cases holding both for and against the rule, but it is difficult, he adds, to understand upon what principle the presumption can be applied to him, particularly in a case where the services are continuous and valuable. He suggests that the better rule in such a case is that the mere rendition of the services prima facie entitles him to compensation therefor. Sir John Macdonnell (p. 112) thinks that all attempts to lay down any rule based upon relationship are futile, and says that an endless variety of circumstances may affect the answer to the question whether there is a contract."

In discussing the subject of services rendered in expectation of a legacy the learned Judge said it was "discussed in 14 Halsbury p. 306 para. 712 where the law is thus stated: 'A man who does work for a testator on the understanding that he is to be remunerated by a legacy has no claim against his estate if the testator fails to provide for the legacy, and the executors are not entitled to satisfy such a claim. It rests, however, upon the executors to show that the work was done upon such an understanding; the mere forbearance to send in a claim for work done in the expectation of a legacy is no bar to a claim against the executors for the services rendered if the party is disappointed in his expectation.' This statement of the law was approved of in **Te Ira Roa v. Materi Omipi** (1919) Gaz. L.R. 492, where there was held to be such an understanding, and in **Dick v. Nicholson** (1920) Gaz. L.R. 454, where it was held there had not been any such understanding. In the present case there was not, I think, any such understanding, but on the contrary there was an understanding that Ross was to pay for the use of the rooms. It is true that claims such as the present one must be regarded, in the first instance, with suspicion, but the evidence of the plaintiff and his witnesses has dispelled this suspicion, and I am satisfied that the plaintiff's claim to recover remuneration for the use of the rooms is an honest one."

Solicitors for Plaintiff: **Ongley & Bulleid**, Oamaru.
Solicitors for Defendant: **Adams Bros.**, Dunedin.

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Ostler, J. Feb. 10, 11, 1925. Wellington.

SIEVWRIGHT v. WELLINGTON BOWLING CLUB LTD.

**Company—Expelling member—Forfeiting share—Rule providing for share in Articles—Construction of.**

The plaintiff is a shareholder, holding one share, in the defendant club which is an incorporated Company with a liability limited by shares. Purporting to act under Rule 23 of its Articles the Directors of the defendant Club expelled the plaintiff from the Club and forfeited his share in consequence of a complaint made against the plaintiff by another member of the Club. Rule 23 provides that where the forfeiture of a share is in question for misconduct the charge against the accused must in the first instance be submitted in writing to the directors by a shareholder and a copy of such charge must be forthwith transmitted to the shareholder accused. A written charge was submitted to the Directors on the 18th March 1924 but a copy thereof was not transmited to the plaintiff for 6 or 7 days.

The plaintiff brought an action against the defendant Club for damages and asked for an injunction to restrain the defendant Club from acting on the Directors' resolution expelling him.

**Blair** for the plaintiff.
**Myers K.C. and Wiren** for the defendant Club.

OSTLER J. held on the facts that (1) the plaintiff had had due notice of the investigation and had an opportunity of meeting the charge (2) there was no want of good faith on the Directors' part (3) that the Directors on reviewing the evidence before them might reasonably have come to the conclusion they did and they had a reasonable cause for forfeiting the plaintiff's share.

On the question whether the rules had been strictly observed the learned Judge said: "The last question is whether the rules were strictly complied with. It is a condition precedent to the exercise of a power of expulsion that the rules must be strictly complied with, and the cases show that if the rules are not strictly complied with, then notwithstanding that the member expelled is not prejudiced by that non-compliance the expulsion is inoperative. In **Labouchere v. Wharncliffe** 13 Ch. D. 346 the rules provided for fourteen days' notice of the meeting being given, and only thirteen days' notice was given. The plaintiff was not in the least prejudiced by that slight non-compliance with the rules, as he attended the meeting to defend himself, but nevertheless it was held by Jessel M.R. that the power was not validly exercised and an injunction was granted.

A written charge was in accordance with Rule 23 submitted to the directors on the 18th March 1924. A copy of such charge was not transmitted to the plaintiff until the 25th March 1924, either 6 or 7 days later. In my opinion this was not a strict compliance with the rules. The grammatical meaning of the word "forthwith" is "immediately." I agree that the word must be used reasonably in accordance with the circumstances in which it is used, but where an act which is required to be done "forthwith" can be done without delay, it ought to be so done, and if not so done is not done "forthwith": See the decision of the Court of Appeal in **Ex parte Lamb: In re Southam** 19 Ch. D. 169. Moreover before the directors transmitted the written copy of the charge, the minutes show that they had held three separate meetings to consider the charge on the 19th, the 22nd, and 24th March, and at the last two meetings they had taken evidence. They therefore had ample opportunity to transmit a written copy of the rules at an earlier date than the 25th March.

It is contended that this non-compliance with the rules was waived by the plaintiff. I am of opinion that this is not so. In the letter of the 20th March which the secretary wrote the plaintiff there is no intimation whatever that the charge was being investigated under Cause 23 of the Articles and therefore no fair notice that the meeting would consider the question of expulsion. Plaintiff says that he did not realise that this was being seriously considered until the afternoon of the 25th March when he heard about the letter and a copy of the charge having been posted to him. There can be no waiver without knowledge.

But even if plaintiff could have gathered from the letter of the 20th March already quoted that the charge was being considered under Clause 23, still in my opinion there is no evidence to show that he agreed to waive a strict compliance with the rules. This point was raised in **Labouchere v. Wharncliffe** 13 Ch. D. 346. In that case there was a non-compliance with the rules in calling the meeting, thirteen days' notice having been given instead of the requisite fourteen days. The plaintiff attended the meeting, but according to the evidence did not take any objection to the proceedings on the score of the insufficiency of the notice. It was contended that this amounted to a waiver of the irregularity but Jessel M.R. rejected this contention. Plaintiff in this case on the 25th March wrote the secretary asking for a written copy of the charge, but he was not bound to claim that a breach of the rules had already been committed by it not having been transmitted to him six days earlier, and the fact that he did not so claim cannot in my opinion be held to be a waiver of that breach.

As there has not been a strict or even a substantial compliance with the Rules, the purported expulsion is in my opinion invalid.

Having come to this conclusion, it is in my opinion unnecessary to consider the question whether Clause 23 of the Articles is ultra vires of the Company. Plaintiff claims alternately that it is, but defendant denies this and claims that the clause is intra vires and valid. Were it necessary to decide the point I should be disposed to agree that such an article is valid in the case of a non-trading company, whose members cannot hold more than one share, and which though in form a company is in substance nothing more than a Bowling Club. It is, however, as I have intimated unnecessary to decide this question.

The point upon which I have decided this case has not been explicitly raised in the pleadings, although it was explicitly raised in his solicitor's letter to the defendant's secretary on the 27th March. If necessary I shall give leave to amend the pleadings to include this claim, as the defendant has had fair notice of it.

The plaintiff is in my opinion entitled to an injunction to restrain the defendant company from acting on its Directors' resolution. No evidence was given of any damages, but as a right of property has been invaded the plaintiff is entitled to nominal damages which I fix at £1.

As to the costs I think they should be awarded to plaintiff on the lowest scale but on this point if necessary I am willing to hear the parties.

Solicitors for Plaintiff: **Chapman, Skerrett, Tripp & Blair**, Wellington.
Solicitors for Defendant: **Wylie & Wiren**, Wellington.

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Ostler, J. Feb. 25, 27, 1925.
New Plymouth.

## STELLIN v. PATEA LICENSING COMMITTEE.

**Licensing—Certiorari to quash Committee's finding on ground of bias—Qualification as member of Committee — Hotel broker.**

Motion for certiorari to quash a certificate of the defendants refusing to grant a renewal of the license of the Railway Hotel at Waitotara and a mandamus to the defendant to hear and determine an application for renewal.

**O'Dea** for Plaintiff: I rely on two grounds (1) Bias on the part of the Magistrate and Committee and (2) Mr. Graves a member of the Committee acted improperly.
**Weston** for Defendants.

OSTLER J. found for the defendants on the facts on both grounds and made the following observations with regard to the law arising out of the argument.

On the question of bias the learned Judge said: . . . "I am content to follow the statement of the law propounded by Mr. Justice Williams in **ex-parte Freethy** 21 N.Z.L.R. 314, and adopted and followed by Sir John Salmond in **English v. Bay of Islands Licensing Committee** 1921 G.L.R. 18.

Mere possibility or suspicion of bias is not sufficient. There must be a real likelihood of bias, that is would a reasonable man consider in the circumstances of the case that there was a real likelihood of the Magistrate or the members of the Committee being so biassed that consciously or unconsciously it affected his decision. If so it is clear on the authorities that the decision is vitiated. As was said by the Court of Appeal in **Rex v. London Justices** 72 J.P. 137 it is a question of fact to be decided by the circumstances of the case, and it is also a question of degree, because every thinking and rational human being has some preconceived opinions. . . . . It has been well settled that the mere expression of an opinion by a Justice or a Magistrate is not sufficient to shew bias on his part. In **Reg v. Alcock** 32 L.T. 829 Cockburn C.J. said 'It is preposterous to suppose that anyone in the postition of a Magistrate would be biassed in his administration of justice by the mere expression of his views as to what was for the advantage of the defendants interests. This principle has been well settled and has been adopted in **ex-parte Freethy** (supra) and **English v. Bay of Islands Licensing Committee** (supra).'

On the second ground the learned Judge held that Mr. Graves was not disentitled from sitting as a member of a Licensing Committee because he was by occupation a hotel broker. He held that he was clearly entitled to sit by virtue of Sec. 43 of the Licensing Act 1908, inasmuch as hotel brokers were not in the list of persons disqualified from sitting on such Committees.

Solicitors for Plaintiff: **O'Dea & Bayley**, Hawera.
Solicitors for Defendants: **Weston & Billing**, New Plymouth.

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Stout, C.J. Feb. 16, 26, 1925.
Wellington.

## CHAPMAN v. CHAPMAN.

**Divorce—Jurisdiction—Domicile—Change of.**

Act on petition to have determined whether petitioner was domiciled in New Zealand when petition filed. The facts proved were that the petitioner (the husband) was born in Sydney in the year 1883 and remained there until the year 1908. He married on the 15th August, 1908. Shortly after his marriage he came to New Zealand and was in the employment of two Coal Companies that were located in New South Wales. One of the Coal Companies had purchased a business in New Zealand owned by Thomas Brown, and the petitioner was sent over by the Company to be employed in Thomas Brown's business, and, according to the evidence of his father, who was manager of the businesses in New South Wales, the two companies had amalgamated there. The father was liquidator of the two old companies and became the manager of the new company that was formed. This branch in New Zealand had as its manager in New Zealand Mr. Brown, and its name was Thomas Brown Limited. The petitioner was appointed to the position of runner-up to Mr. Brown, and went to Christchurch and resided. He remained in Christchurch for some time.

The following is a copy of the minutes of a meeting of the Company on the 31st January, 1911, at Christchurch:

> Mr. Isaac Chapman, General Manager of Abermain Colliery Company Limited, asking if he could spare the Secretary to proceed to Sydney for some months at any rate. After discussion the Managing Director (Mr. Brown) cabled that arrangements could be made for the Secretary to proceed to Sydney on 10th February, 1911.

A minute of the New Zealand Company of a meeting on the 23rd October, 1923, was as follows:

> The Chairman reported that Mr. N. R. Chapman (the petitioner) had been asked to proceed to Sydney to take up the duties of the Secretary of the Abermain Colliery Co. Ltd., for some months. It was resolved that during such absence Mr. T. T. Pettigrew be sent from the Head Office to take charge of the Wellington Branch.

The petitioner remained some time in Sydney and then war broke out. After a time he went to the war. Another officer of the Company also went to the war, and a Mr. Adams was sent to take charge of the Company's office and business in Valparaiso. The petitioner was demobilised in London in January, 1919, and he left Liverpool en route for Sydney in February, 1919. On his way to Sydney he received a cablegram in New York telling him to go to Valparaiso and take the position Mr. Adams had occupied. He

went to Valparaiso and took the position and remained there until the appointment of a successor to the previous agent. From there he took a trip to Sydney in the beginning of 1920 and returned to Valparaiso shortly afterwards.

In September, 1920, Mr. Thomas Brown died in Sydney and then an offer was made by cablegram to the petitioner to return to New Zealand and take up Mr. Brown's position as Managing Director of Thomas Brown & Company.

On receipt of this cablegram the petitioner came shortly afterwards to New Zealand arriving in March 1921. He has remained in New Zealand ever since and has held the position of Managing Director of Thomas Brown Ltd., in Wellington. He has been a member of a Wellington Club since 1911 and has continued his membership down to the present time.

**Skerrett K.C. and D. M. Findlay** for petitioner.
**Sir John Findlay K.C. and Perry** for respondent.

STOUT C.J. held on the above facts and the inferences to be drawn from the evidence taken before him that the Act on Petition must be decided in favour of the petitioner.

The following are some of the learned Chief Justice's observations: "The legal presumption is that a person's presence in a country is evidence of domicile, and it is for the other side therefore, to shew there is something to rebut that presumption." "The cases dealing with this subject are numerous. It has been said that the presumption of law is against a change of domicile. That is so, but here there is residence and there has been residence at different times within the last 17 years of the marriage. Nearly half the time of the 17 years has been spent in New Zealand, and the petitioner's reasons for going to Sydney and going to Valparaiso are both explained." "The fact that he continued as a member of a Club is slight evidence, but it is some evidence apparently of his intention to make New Zealand his home. It may be that in the future he may wish to return to his domicile of origin, but that would not make his domicile by residence here and his now expressed intention of no avail. A great number of cases were cited, but all these cases depend upon the circumstances. The law, which I have already referred to is clearly laid down in Dicy's Conflict of Laws beginning at page 139 and also in Halsbury's Laws of England Vol VI., page 185."

Solicitors for petitioner: **D. M. Findlay & Moir**, Wellington.
Solicitors for respondent: **Perry & Perry**, Wellington.

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Hosking, J. Dec. 14, 1924; Jan. 24, 1925.

THOMPSON v. BURTON.

**Negligence—Car overtaking bicycle—Duty of each vehicle—Plaintiff's sudden action followed by wrong step by defendant.**

Plaintiff riding a bicycle and the defendant driving a motor car, both going in the same direction collided on a highway. Plaintiff brought an action for damages alleging negligent driving and swore that the defendant ran him down from behind. The defendant swore the plaintiff on the defendant's sounding the horn swerved from the centre of the road to the left and caused the collision.

The plaintiff, against whom the jury found, moved for a new trial on the ground that the verdict was against the weight of evidence.

**Glasgow and Moynagh** for the plaintiff.
**Fell** for the defendant.

The following are some of the observations of HOSKING, J. in dismissing the application.

"It is of course the duty of the car as the overtaking vehicle to have gone to the right to clear the plaintiff if he had been in the way. This was explained to the jury and the directions of Lord Ellenborough on the subject in **Mayhew v. Boyce** 1 Starkie 423 cited in Halsbury vol. 21 p. 413 were brought to their attention."

"It was the plaintiff's business before crossing over towards the curb, without any horn having been sounded to have looked out to see whether anything was coming in his way quite as much as it was the business of the motor car to keep a look out ahead."

"The plaintiff says that assuming it was his fault that a collision occurred yet the defendant dragged him 44 feet after it occurred and that this is a distinct act of negligence for which the jury should have held the defendant responsible. He suggests that most of his injuries were due to the dragging. He says that the defendant ought to have pulled up when the collision occurred and that to swerve the car to the right was quite the wrong thing to have done. The defendant's answer to this was that assuming pulling up was the right thing to have done the driver was nevertheless placed in such a situation by the unexpected action of the plaintiff in suddenly attempting to cross in front of the car that she ought to be excused for having taken the wrong step. On this point a passage from **Weir v. Colmore Williams** 1917 N.Z. 930 at p. 935 citing from **The Bywell Castle** 4 P.D. 219, was read to the jury one part of which is 'that when by the negligence of one ship another is put into a perilous and difficult position you ought not if the master of that ship does something wrong to hold his ship to be a contributory to the mischief and liable for damage inasmuch as perfect presence of mind accurate judgment and promptitude under all the circumstances are not to be expected and you have no right to expect men to be something more than ordinary men.'"

"But the point the jury had to decide was whether in view of the sudden and almost instantaneous incidents of the collision due to the unexpected action of the plaintiff the defendant in not putting on the brake was to be excused for not displaying 'perfect presence of mind, accurate judgment and promptitude.'"

"I cannot say that the verdict for the defandant is one which the jury acting reasonably ought not to have returned."

Solicitors for plaintiff: **Glasgow Hayes & Rout, Nelson.**
Solicitors for defendant: **Fell & Harley, Nelson.**

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Stout C.J. Feb. 27, Mar. 4, 1925.
Wellington.

CLEWER v. EDWARDS.

**Police Offences Act—Shop open for sale of confectionery and refreshments—Finding of Magistrate of facts—Effect of—Sec. 4(3) of Act.**

The appellant appealed from his conviction in the Magistrate's Court, for an offence under Sec. 4 of the Police Offences' Act 1908 with having kept his shop open for the purpose of exposing goods for sale. The Magistrate found that the shop was kept open for the sale of goods. It was not denied that the shop was kept open for the sale of confectionery but the appellant swore it was open only for selling refreshments for consumption on the premises.

**O'Leary** for appellant.
**Macassey** for respondent.

STOUT C.J. held that if the shop had been kept open for the sole purpose Appellant alleged then no doubt Sec. 4 subsection 3 of the Police Offences' Act 1908 would have applied. The learned Chief Justice added: "The Appellant mainly relied upon the decision in the case of **Monro v. Swan** 1918 G.L.R. 237. That was an appeal on a conviction, but not under this statute. That was an appeal in the case of the contravention of Section 17 of the Police Offences Act 1908, and that section said: "Every person is liable to a fine etc. . . . who keeps open any shop for the purpose of trading, dealing, transacting business or exposing goods for sale therein." And it also had this proviso: "Provided that nothing herein shall apply to works of necessity." In that case it was held it was a work of necessity to keep the shop open for the sale of refreshments. That is therefore not this case.

The law now allows the sale of refreshments explicitly under sub-section (3), but it does not allow the sale of goods that are not refreshments, nor sales that cannot be brought under the head of works of necessity or charity. The mere fact that part of the sales and keeping open were for a valid purpose does not excuse the keeping open of the shop for the sale of goods. Two things may be done in a shop, and one may be lawful and the other unlawful, and for doing the unlawful act the vendor may be punished. That is really this case, and the case of **Monro v. Swan** is therefore not in point.

The Magistrate found explicitly that though the appellant was keeping open his shop for the purpose of selling light refreshments, yet he was also keeping open his shop for the sale of the ordinary goods he sold on week-days, namely, confectionery of various kinds. It is clear that a shop might be kept open for more purposes than one, but if one purpose

is an illegal purpose then the keeping open cannot be held to be excused. There may be in the Act done a double purpose. That was decided in the English case cited of **Jenkins v. Turpin** 13 Q.B.D. 505, and the New Zealand case of **Fryer v. Steele** 23 N.Z.L.R. 20 is to the same effect.

In my opinion, the Magistrate having found that the shop was kept open for the sale of goods, it was no defence to say it was also kept open for the sale of refreshments which was permissable. I am therefore of opinion that the appeal must be dismissed with £5 5s. costs.

Solicitors for Appellant: **Bell, Gully, Mackenzie & O'Leary,** Wellington.

Solicitors for Respondent: **Menteath, Ward & Macassey,** Wellington.

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Hosking J. Sept. 21, 22, 1923 and Feb. 12, 18, 1925. Wellingotn.

MAYOR AND OTHERS OF CITY OF WELLINGTON v. STAFFORD AND DISTRICT LAND REGISTRAR.

**Public Works—Act of 1876 Sec. 79—What is road—Waste Land of Crown—Native Reserve—P.W. Act 1908 S. 101—Native Lands Act 1867 S. 13 and "voluntary dedication."**

Action for declaration that certain piece of land shewn on Public Survey Plan W.D. 375 is part of a public road known as Orangi Kaupapa Road. The plan showed that the land intersected allotment No. 5. The plaintiffs based their claim on the plan and the Crown Grant issued in respect of Allotment No. 5. The claim was also supported by other corroborative matter. The Orangi Kaupapa Block was set apart under Colonel McLeverty's award and was therefore a Native Reserve within the Native Lands Act 1867 Sec. 11.

**O'Shea** for the Plaintiffs.
**Prendeville** for District Land Registrar.
Defendant Stafford did not appear.

HOSKING J., after reviewing the evidence came to the conclusion that the whole of the road shown on plan W.D. 375 so far as it passed through Allotment 5 was a public highway. In discussing some of the facts and the law bearing thereon the learned Judge said: "The plaintiffs rely upon Section 79 of the Public Works Act, 1876, in force at the date of plan W.D. 375 and of the Crown Grant. By this enactment a road includes the soil of, inter alia, 'waste lands of the Crown over which a road is laid out and marked on the survey-maps.' The reply of the District Land Registrar is that the Native Reserve was not waste lands of the Crown. It is not necessary to go into that question for Section 78 of The Public Works Act of 1882 is a sufficient answer. That section declares that 'road' throughout the Act means a public highway and includes the soil of inter alia Crown lands over which a road is laid out and marked on the survey maps. Now, if the Reserve in question was not waste lands it was certainly Crown lands and this enactment is retrospective in its operation. Its effect as regards roads laid out on the public survey maps has always been treated as recognising and denoting such a road to be a public highway not merely for the purposes of the Public Works Act but for all purposes. If pegging out on the ground was at all necessary to satisfy the definition the road was pegged out in the present case. See on this **Snushall v. Kaikoura County** 1920 N.Z.L.R. 783. The current definition of road in Section 101 of the Public Works Act, 1908 as 'Crown Lands over which a road is laid out and marked on the Record Maps' if it be more restrictive than the definition in the Act of 1882 does not I think render any such land less a road if it were already such by virtue of the definition in the Act of 1882.

*Again, the Act of 1882, Section 78, by declaring a road to* mean also lands over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication, substantially covers cases in which a public highway has been held to be created at Common Law. By providing for a dedication in any manner it extends the definition contained in the 1876 Act which spoke only of dedication by deed. In the present case there is as already stated no record or evidence as to how it came *about that the road was laid out as shown on the plan* W.D. 375 and the several Crown grants referred to but I think at this distance of time upon the facts proved or admitted and in the absence of evidence to the contrary the principle of Omnia praesumuntur rite et solemniter esse acta donec prodetur in contrarium should be applied and that it is to be presumed that all Crown officials did their duty and that if the consent of the Native owners was requisite to the appropriation for a public road such consent was given. The appropriation for road purposes when suggested would probably not have been resisted in any event because the Governor would appear to have then had the right at any time within 10 years after the date of the grant to take a line of road through lands granted under the Native Lands Act, as allotment 5 was, provided that not more than five per centum of the area were taken.

See Section 106 of The Native Land Act, 1873. At any rate, it certainly does not appear that any objection to the appropriation was ever raised by the owners—a circumstance which accords with the truth of the presumption referred to. But apart from this presumption of consent the grantees and those claiming under them could not approbate and reprobate the terms of the grants.

To the point that the grantee was by the terms of the grant as required by Section 13 of the Act of 1867 prohibited from alienating by sale or mortgage or by lease for more than 21 years without the consent of the Governor the answer is that the voluntary dedication of a road such as is presumed in the present case does not fall within the language. Moreover, as the road was already laid out when the grant was issued and the grant is valid ought as I have suggested to be considered as issued subject to the road so that the road did not pass by the grant the prohibition can have no application as regards the portion of land comprised in the road."

*Solicitor for Plaintiff:* **The City Solicitor.**
Solicitor for District Land Registrar: **Crown Law Officer.**

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Stout, C.J. March 3, 5, 1925. Wellington.

IN RE JARVIE DECEASED: PUBLIC TRUSTEE v. CANTERBURY EDUCATION BOARD.

**Will—Ambiguity—"Burnham Government School"—"or"—Anti-Catholic.**

Originating Summons to construe a clause in will of deceased. The will was made in England in June 1918 and the testator later returned to New Zealand where he died in August 1921. The clause in question reads as follows:

> I give devise and bequeath in equal shares as follows as to one half thereof to any hospital in which I may die but should I not die in a hospital then I direct that such share as aforesaid shall be paid to Christchurch Hospital New Zealand and as to the other half of the said residue to the Burnham Government School Canterbury New Zealand or to any other anti-Catholic school in New Zealand and more in need of it such decision to rest with and be settled by the Canterbury Board of Education New Zealand.

**Rose** for Public Trustee.
**Fair** for Attorney-General.
**Stevenson** for defendant Board.

STOUT C.J. said: "I am of opinion that the words 'Burnham Government School' mean the Government School that was in Burnham at the time the will was made, and that there is nothing to show that the Industrial School which belonged to the General Government was meant by the Testator. There being an existing Burnham Government School in Burnham, I do not see how the Court can assume that the testator meant another school which has a different title, namely, Burnham Industrial School. There being a school coming within the very words of the gift, the Court must assume that he meant that. It may be that the testator did not know that the Burnham Industrial School had ceased to exist, but even if the Burnham Industrial School had been at present in existence, and in existence at the time the will was made I doubt if the Court would not have been bound to hold that the Burnham Government School meant the Government School that was in existence at Burnham and not the Industrial School.

This being so, the gift must go to the Burnham Government School.

What is the meaning of the word "or" to any other anti-Catholic School? The word "or" might be meant as failing there being a Burnham Government School then the gift is to go to any other anti-Catholic school, or it may mean that if the Canterbury Education Board thinks that the Burnham

Government School does not require assistance, and that there are other "anti-Catholic" schools requiring assistance, the Canterbury Board of Education would have a discretion in granting assistance to such other schools. As to the words "anti-Catholic School," I am of opinion they mean the secular schools which we have in New Zealand, and that no Church school has a right to assistance. I think the words "anti-Catholic School" are used to define our "secular" schools. In the will it says "or to any other anti-Catholic School." The testator gives his own dictionary and assumed that the Burnham Government School was an "anti-Catholic School." A secular school where secular education only is provided is often, may it be said, miscalled not only "anti-Catholic" but even "Godless."

In the Education Act of 1914 the programme of primary instruction does not include the teaching of religious subjects. It is true the school may be lent for that purpose, but when it is so lent it is not used for teaching by the Board or Committee. The phrase used might permit the granting of money to some other Government School held under the provisions of the Education Act. How that aid is to be given is not disclosed in the will—that is, whether the money is to be given for the purpose of an endowment or as capital to be at once distributed."

Solicitors for Public Trustee: **Public Trust Solicitor**, Wellington.

Solicitors for Attorney-General: **Crown Law Office**, Wellington.

Solicitors for Board: **Weston, Ward & Lascelles**, Christchurch.

# Restitutio in Integrum in Innocent Misrepresentation Cases.

by

Claude H. Weston, Esq.

"What is Truth?" said jesting Pilate; and would not stay for an answer. Our own Judges sitting in London were pinned to it and the result of their decisions is summarised by the Learned Author of Misrepresentation in Halsbury's Laws of England in language more categorical than evidently the Roman was prepared to use.

> "A misrepresenation must be either fraudulent or innocent. It cannot be both. Fraud and innocence, just as much as falsity and truth, are mutually exclusive categories. It follows, therefore, from the definition already given of a fraudulent misrepresentation as connoting the absence of actual honest belief in its truth that the connotation of an innocent misrepresentation is the presence of such actual honest belief; and that, in neither case, is anything more than this absence or presence, required to constitute fraud or innocence respectively."

A Defendant may consider himself fortunate if the Judge or Jury decide to place him in the category of innocence for the rule is, that damages are only given in respect of fraudulent misrepresentation, and although to the Plaintiff seeking Rescission, innocent misrepresentation is a powerful argument, yet from the consequential remedies given, damages are apparently to be rigidly excluded.

As far as rescission is concerned part of the Judgment of Turner L.J. in Rawlins v. Wickham 28 L.J. Ch. 188 at p. 193 is illuminating:—

> "If one of the parties to a contract makes a representation materially affecting the subject matter of the contract, he cannot be allowed to retain any benefit which he has derived, if the representation proves to be untrue, and no man can be held to what he has done, under circumstances which have been erroneously represented to him by the other party to the transaction, however innocently the representation may have been made. A contrary doctrine would strike at the root of fair dealing and would open a door of escape in all cases of representation as to credit and indeed in all other cases of false representation."

Lord Herschell in Derry v. Peek, 14 A.C. 337 at p. 359 said:—

> "Where rescission is claimed it is only necessary to prove that there was misrepresentation then however honestly it may have been made, however free from blame the persons who made it, the contract having been obtained by misrepresentation, cannot stand."

But rescission is only possible when the parties can be restored to their original condition, for avoidance of an agreement must be accompanied by restitutio in integrum. Time and completion of the contract however, in some cases need not necessarily bar such remedy. In Rawlins v. Wickham, a person who had been induced by false representations to enter into a partnership continued in that partnership for four years, and then for the first time discovering the fraud which had been practised upon him, was held entitled to relief. Major Newbigging was a partner of Mr. Townend for close upon two years before he discovered the misrepresentation of the Adam Bros. (Newbigging v. Adam 34 Ch. D 582).

Strictly speaking Restitutio in Integrum should place the parties in the same position as if the contract had never been made but in innocent misrepresentation cases, the proposition that the representee is to be placed in statu quo ante, must be understood with this limitation "That he is not to be placed in exactly the same position in all respects; otherwise he would be entitled to recover damages, but is to be placed in his position as far as regards the rights and obligations, which have been created by the contract." Bowen L.J. in Newbigging's case p. 592.

There the Court of Appeal held that the Plaintiff was entitled to be indemnified by the Defendants against liabilities of the partnership incurred during the time it was in existence although the Lords Justices arrived at the same conclusion by somewhat different roads. Some years after Farwell J., as he then was, in referring to Newbigging's case said: "I do not think that Cotton L.J. intended to go further than Bowen L.J. If he did I prefer to agree with Bowen L.J. But Fry L.J. certainly went further." Farwell J. had to decide whether a Poultry fancier was entitled to the value of some of his prize birds which had met an early death through leasehold premises proving to have a poisoned water supply, in spite of the Landlord's innocent representation that the premises were in a thoroughly sanitary condition. Farwell J. rescinded the Lease but following Bowen L.J. he would not allow the claim regarding it as one for damages, pure and simple. Rent rates and repairs under the covenants in the Lease, admittedly, had to be made good. (Whittington v. Seale-Hayne 82 L.T. 49).

As often happens, the same question arose in New Zealand in two cases about the same time. What expenses and liabilities can the Plaintiff recover or be indemnified against? The late Mr. Justice Salmond in Palmerston North was asked to give to the disappointed purchaser of the Imperial Hotel, reimbursement of certain expenses incurred by him as

incidental to his preparations for the completion of the contract and for his entrance into possession of the Hotel. (Power v. Atkins 1921 N.Z.L.R. 763). The expenses were:—

| | £. | s. | d. |
|---|---|---|---|
| 1. Board and lodging at Palmerston N. | 7 | 13 | 0 |
| 2. Advertising .. .. .. .. | | 19 | 0 |
| 3. Train fares .. .. .. .. | 3 | 0 | 0 |
| 4. Expenses preliminary to proposed sale of furniture and effects at Dannevirke .. .. .. .. | 13 | 3 | 6 |
| 5. Freight of personal effects to and from Palmerston North .. .. | 1 | 10 | 0 |
| 6. Valuation of stock and liquors in Imperial Hotel .. .. .. | 10 | 10 | 0 |
| 7. Accountant's fee investigating record of takings of Imperial Hotel .. | 5 | 5 | 0 |
| 8. Costs of investigation of title and of obtaining Magistrate's Certificate of fitness and making application for temporary Transfer of License .. | 50 | 0 | 0 |
| 9. Costs of preparation of documents securing money to be raised by the Purchaser in order to enable him to complete the purchase .. .. | 21 | 0 | 0 |
| | £113 | 0 | 0 |

As to the first five of these items, the learned and lamented Judge was clear that they represented nothing more than damages and that they were not recoverable on the basis of restitutio in integrum on rescission. As to the sixth item the contract provided that the stock in the Hotel was to be valued by two valuers, one to be appointed by each party. That expenditure, therefore, was incurred by the Plaintiff in fulfilment of an obligation imposed upon him by the contract itself and was held to be recoverable. The seventh claim was disallowed. The contract contained a warranty that the takings of the hotel were £300 a week and an undertaking by the Defendant to produce books and vouchers in proof of this. The act of the Plaintiff in having those books and vouchers examined by an Accountant was not done in fulfilment of any obligation imposed upon the Plaintiff by the contract. Again no allowance was made to the Plaintiff for the cost of preparing the securities required to enable him to borrow the money required for the completion of his purchase seeing that the contract imposed on him no obligation to raise the purchase money by way of loan. The eighth claim embracing the costs of investigating the Vendor's title was allowed.

Mr. Justice Stringer decided the other of the two cases (Duncan v. Rothery and another 1921 N.Z.L.R. 1074) and followed Bowen L.J. and Farwell J. The action was brought by the Plaintiff to rescind a contract for the sale of a Block of Native Leasehold land on the ground of innocent misrepresentation by the Defendant as to the lands included within the boundaries of the property. Stringer J. would not allow to the Plaintiff two amounts—firstly of £62 expended by her in connection with negotiations for acquiring the freehold of the Block and secondly of £9 5s. 7d. legal costs incurred in connection with the Agreement for sale and purchase and the repudiation thereof. Apparently the latter point had never been decided although Williams on Vendors and Purchasers 3rd ed.p. 816 had questioned the right of either party to recover his expenses of entering into the agreement as that loss would seem to be in the nature of damages suffered by reason of the representation rather than outlay made in discharge of an obligation imposed by the contract.

The two cases are valuable additions to the law on the subject for as Salmond J. said in the Palmerston North case "The precise meaning and scope of the rule is by no means free from doubt and is described by Lord Watson in Adam v. Newbigging as a question of great nicety and difficulty."

## APPLICATIONS UNDER MORTGAGES FINAL EXTENSION ACT.

His Honour Mr. Justice Hosking, who is hearing all these applications, has intimated that he will, as far as practicable, accept the oral statements of Counsel for the parties, and will not require evidence on oath, either by affidavit or otherwise, unless there is a conflict in some statement materially affecting a proper decision.

## A SUGGESTED REFORM.

A learned contributor has suggested to us that there is room for reform in the method of approaching the Court with applications other than the Writ of Summons. We welcome the contribution and while we do not necessarily endorse the contention of the learned gentleman we publish his submission, nevertheless, so that our readers if they deem it of such importance may ventilate the matter through their respective District Law Societies.

Our correspondent writes as follows:—

"The tendency in the Supreme Court since The Judicature Act has been to get to the merits and the real issues as soon as possible, to brush aside formalities and technicalities and so simplify procedure. There is one respect, however, in which our present procedure might be modified with advantage to the public, the profession and the Court officials. In proceedings other than actions we have too many different forms of applications to the Court, with the result that (a) there is often—even in the minds of our courteous Court officials—considerable doubt as to which form should be adopted and (b) forms are often unnecessarily duplicated.

Speaking generally, applications to the Court may be by notice of motion, petition or summons. The summons may be a Chambers summons, a Court summons or an originating summons. The order made upon a summons is sometimes a Judge's order, sometimes a Court order. Where the application is by Petition, the facts upon which the petitioner relies are set out in full in the petition and there is a formal affidavit prescribed verifying the petition. But the petitioner is required to repeat all the facts in the Petition once more in an affidavit and swear that affidavit in addition to the formal verifying affidavit. In addition he has to file a motion or summons praying for an order in terms of the petition. All this involves unnecessary time, unnecessary expense and an unnecessary increase of the number of papers in the Court files.

The reform that I propose is that application by petition and by summons should be abolished and that all applications to the Court (other than actions) should be by notice of motion only. The relief asked for should be stated clearly and in such detail that an order could easily be framed in terms of the motion, the grounds upon which the relief is asked should be set out succinctly and in separate paragraphs. In all other than ex parte motions the names of the parties interested would be set out at the foot of the motion, which would be served upon them. All the necessary facts required to support the motion would be set out in an affidavit or affidavits of the deponents within whose knowledge they were and duplication thus avoided. Such motions could be heard either in Court or by a Judge in Chambers and the orders to be made upon them would in every case be Court orders, so that the inconvenience and delay often caused by the absence of a Judge where a Judge's order has been made would be obviated.

If this reform were adopted there would then be no doubt as to the correct method of procedure, time and expense would be saved, and the Court files considerably reduced in bulk."

# BENCH AND BAR.

Mr. Justice Hosking to whom we bade farewell in our last issue has been prevailed upon to return to the Bench for a short period. The Government has arranged for his appointment to the Bench in order that he may deal with the many applications filed under the Mortgages Final Extension Act 1924. We understand that his Patent is for six months in which time he will be able to dispose of all the applications filed throughout the Dominion.

The profession is fortunate in the appointment having been made of Mr. E. Y. Redward to compile the Statutes in succession to the Hon. Sir Frederick Chapman. Mr. Redward has recently retired from the Crown Law Office where his duties comprised among others the drafting and alteration of statutes. We are indeed to be congratulated in having so experienced and skilful a lawyer to carry on the responsible work of a further consolidation of our Statutes. Mr. Redward's connection with the Crown Law Department extended over 36 years.

Mr. G. J. Jeune, who is commencing practice in Gisborne in partnership with Mr. Woodward, is a native of that town. He served his articles in Wellington, and then went to Christchurch, having been associated with Messrs. Slater, Sargent & Dale, and until recently was Managing Clerk to Mr. J. A. Flesher.

Mr. Woodward has been on the staff of the Public Trust Office in Wellington and Gisborne during the last six years.

Mr. W. R. Brugh, of the firm of Brugh, Calvert and Barrowclough, of Dunedin, leaves by the "Aorangi" from Auckland on 17th March for an extended tour of U.S.A., Canada, England and the Continent. He will return via Suez, Singapore and Java. It is anticipated that Mr. Brugh will be absent for about nine months.

Mr. F. H. Haigh, Solicitor, Wellington, on the staff of Mr. P. J. O'Regan, is leaving Wellington on the 21st March, to take an appointment on the staff of Messrs. Russell, Campbell & McVeagh.

Mr. W. F. Grogan, at present on Mr. Rothenberg's staff in Wellington, is taking over Mr. Haigh's position with Mr. O'Regan.

Mr. Cheviot W. D. Bell, son of the Attorney-General, has been admitted as a solicitor of the Supreme Court by the Chief Justice, Sir Francis Bell, K.C., Attorney-General moved.

Mr. S. G. Stephenson of Wellington has been admitted as a solicitor of the Supreme Court on the motion of Mr. Mazengarb, by His Honour, the Chief Justice.

Mr. G. H. B. Kenrick, K.C., LL.D., formerly Advocate-General of Bengall, and principal Law Officer to the Government of India, has just arrived from England and is staying with his cousin, Mr. W. G. K. Kenrick, S.M., at Rotorua.

### UNDER SECRETARY OF JUSTICE.

The appointment of Mr. R. P. Ward as Under-Secretary of Justice, in the place of the late Mr. Matthews, will be received with approval by the profession.

# Law Societies.

### AUCKLAND.

The annual general meeting of the Auckland District Law Society was held in the library of the Magistrate's Court at Auckland on Thursday, the 27th February, when the report and balance sheet were adopted. The following officers were elected for the ensuing year: President, Mr. A. H. Johnstone; Vice-President, Mr. J. B. Johnston; Hon. Treasurer, Mr. West; Members of Council, Messrs. J. Alexander, R. McVeagh, H. P. Richmond, F. G. Massey, R. P. Towle and J. H. Reyburn; Members of Council of N.Z. Law Society, Messrs. A. H. Johnstone, R. McVeagh, and H. P. Richmond; Members of Council of Law Reporting, Messrs. R. McVeagh and H. P. Richmond.

### WELLINGTON.

At the annual meeting of the Wellington District Law Society held in the Supreme Court House on the evening of February 23rd the following officers for the year were elected: President, Mr. Robert Kennedy; Vice-President, Mr. A. W. Blair; Hon. Treasurer, Mr. William Perry; Ordinary Members of Council, Messrs. H. H. Cornish, H. F. Johnston, P. Levi, M. Myers, K.C., H. F. O'Leary and C. G. White; Auditor, Mr. J. S. Hanna; New Zealand Council of Law Reporting, Wellington Members, Messrs. C. H. Treadwell and M. Myers, K.C.; New Zealand Law Society, Wellington Members, Mr. R. Kennedy (president of Wellington Law Society), Mr. C. H. Treadwell (Treasurer of Council of Law Reporting), Mr. A. Gray, K.C. (Vice-President of N.Z. Law Society).

### OTAGO.

The annual meeting of the Otago District Law Society was held at Dunedin on the 20th February. Mr. W. G. Hay, LL.M., was elected President, and Mr. W. L. Moore, LL.B., Vice-President for the ensuing year. Mr. A. A. Finch was the retiring president On the motion of Mr. J. C. Stephens it was resolved: "That this meeting records its high appreciation of the distinguished career at the Bar and on the Bench of the Hon. Mr. Justice Hosking and its regret that illness should have made his retirement necessary."

# REVIEWS.

THE ENGLISH AND EMPIRE DIGEST. With Complete and Exhaustive Annotations. Being a Complete Digest of every English Case reported from Early Times to the Present Day, with Additional Cases from the Courts of Scotland, Ireland, the Empire of India, and the Dominions beyond the Seas, and including Complete and Exhaustive Annotations giving all the subsequent Cases in which Judicial Opinions have been given concerning the English Cases Digested. Vol. XIX. Easements and Profits a Prendre. Ecclesiastical Law. Education.—Butterworth & Co.

This volume of the English and Empire Digest follows very quickly on Vol. 18, and it makes the seventh published in the year which has just closed. It is impossible to overlook the magnitude of the undertaking which renders completion gradual but, seven volumes in a year is an earnest of the intention of the publishers to complete the work with all possible speed.

Each of the three subjects included in the present volume represents an important branch of the law. The Title "Easements and Profits a Prendre" has been contributed by Mr. J. A. Reid and Mr. A. R. Clarke-Williams, M.A., LL.B. Occupying some 200 pages, the greater part is devoted to Easements, and these, of course, are of much more frequent occurrence in ordinary practice than Profits a Prendre. Few mat

ters have furnished more difficulty than the proof of title to easements. At Common Law they depended either on immemorial user or a grant. Immemorial user would have been a good test if a reasonable view had been taken of "immemorial." But legal memory went back to Richard I., and the period was never shortened so far as the Common Law was concerned. Hence it was always possible to destroy an easement by showing that it was first used at a later date. But though the judges did not feel equal to shortening the time of legal memory directly, they did so indirectly by inventing the fiction of a lost grant, and this served until fictions went out of fashion, and then in 1832 Parliament intervened with the Prescription Act, and remedied, to some extent, the defects of judge-made law.

While however, the statute introduced a definite period of prescription and provided that an easement should not be destroyed by showing first user prior to that period, destruction in other ways was not barred, and much of the old law was kept afoot. Hence we have the threefold arrangement of this part of the Title—Prescription at Common Law, The Doctrine of a Modern Lost Grant, and The Prescription Act. As to the lost grant, a very interesting passage is quoted from the judgment of Cockburn C.J., in Bryant v. Foot, L.Q. 2 Q.B. 101, showing how the Courts had endeavoured in that way to supply the deficiencies of the law. But in the next case digested, A. G. v. Simpson, 1901, 2 Ch. p. 698, it was objected that a judge could not be required to prescribe a grant of the non-existence of which he was convinced, the very presumption which, according to Cockburn C.J., might have to be made. However, with the Prescription Act, the old doctrines lost much of their importance, and for the easement of light, the period of twenty years was allowed to give an absolute right, a result made clear by the leading case of Tapling v. Jones, 11 H.L.C. 290, of which a very full digest is given at p. 126. One of the best cases for showing the difficulties which may still occur in establishing easements is Bright v. Walker, 1 Cr. M. & R., 211. Each of the cases just cited has a lengthy "annotation," stating the cases in which it has been subsequently considered.

There are important sections digesting the cases on right to water, and distinguishing between natural and artificial water-courses—a distinction on which Wood v. Waud, 3 Ex. 748 (fully digested and annotated at p. 153) is the leading case; and on the right to support. The leading case on the latter right—Dalton v. Angus, 6 App. Cas. 740, has been fully digested at the commencement of the Title (p. 7), and is dealt with under Right to Support by cross-reference. The result of the case is very usefully shown—at p. 7—by a series of thirteen points taken from the judgments, chiefly in the House of Lors, and there is a long list of annotations; and under the same section, many of the mining cases, including the Butterknowle Case, 1906, A.C. 305, are digested. This title required for its arrangement and compilation exceptional ingenuity and skill, and the work has been very successfully done.

The Title "Ecclesiastical Law" has been contributed by Mr. R. Lee Campbell, Mr. A. J. Fellows, and Mr. G. F. L. Bridgman. We regret that Mr. Lee Campbell has died in the course of its production A subject of not such general interest as the one we have just noticed, it appeals, nevertheless, to a considerable number of persons. Many of the clergy are keenly interested in the law of the Church, and are doubtless ready on occasion to give advice to their advisers. The labours of a country parish might well be diversified by a study of these digest pages. On the cases collected here and on a multitude of statutes, the well-known works of "Phillimore" and "Cripps"—an author now transferred to the wider utilities of the League of Nations—are founded. And the Digest of this subject is very complete. Take such a matter as pensions for aged and infirm clergy. The Incumbents' Resignation Act, 1871, as amended by the Act of 1887, under which a parson may have to share his income with his predecessor, have been the subject of several decisions, chiefly Robinson v. Dand, 17 Q.B.D. 341, and Manning v. Hardy, 20 T.L.R. 776, all of which are duly noted, and since these are, as it were, in an out of the way corner of the law, they furnish an index to the completeness of the Digest. But there has been no decision yet on a point which is widely discussed in clerical circles—whether, in fixing the amount of the pension, regard can be had to the private means of the retiring incumbent. Another subject which forms an interesting part of the Title is the validity of charges on benefices, but Ecclesiastical Law opens out in so many directions that any detailed notice of the Title would take us beyond our limits.

"Education" has been contributed by Master Valentine Ball and Mr. Maurice E. Watts. The Title has a much wider scope than would have been necessary in former days. Then it would have been mainly devoted to Public Schools. Now it includes Elementary Schools, and although elementary education is mainly a matter of statute law and of departmental regulation—and this is recognised in the Digest by references to the Statutes and Orders—yet quite a number of cases have been decided by the Courts, such, for instance, as Gateshead Union v. Durham County Council, 1918, 1 Ch. 146, on the general duty of the Board of Education and the local education authority to provide and maintain efficient schools. Other parts of the subject, including Universities and Public Schools and Educational Charities, are also dealt with, and the Title provides a complete guide to the case law of the subject. We are glad to note that corporal punishment must be moderate and reasonable, but so recently as 1860, death resulted from a breach of this rule under peculiarly shocking circumstances: Rex v. Hopley, 2 F. & F. 702. In punishment here, as in other spheres, time has an ameliorating influence, and it is a safe rule that the greater the tact of the teacher, the less need is there for punishment of the scholar. The volume bears throughout its pages evidence of the skill and care which have been expended on its production.

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STEVENS MERCANTILE LAW (7th Edition by Herbert Jacob B.A.)—Butterworth & Co.

When a legal work reaches its seventh edition it has a solid claim to being called a standard work. The advance copy of STEVENS MERCANTILE LAW before me is a forerunner of the seventh edition, and a perusal reveals that again it has been edited by Herbert Jacobs B.A. making the fifth edition he has edited. This edition has been entirely reparagraphed and rearranged and this has been carried out on novel lines and some comment is due upon this re-arranging. Advertisement writers have for a long time practised the art of getting the printer to aid the mind of the reader. They have carried out extensive tests to find out how to get their message into the minds of readers. Students of text-books have long since found that scoring up a book aids the memory doing in a rough and ready way what the advertising man does by scientific means. It is a well-known fact that a student by studying a subject with the aid of a text-book learns the subject in two ways: one, by the operation of the mind comprehending the subject matter and two, by the aid of the memory. For examination purposes the memory method is greatly relied on and the eye is a great aid to the memory. It is in this respect that the rearranging and reparagraphing of STEVEN will be a student's boon, for the greatest possible assistance is given to the eye by the use of various type and by arrangement. Digging out the major points is no longer necessary. They stand out.

The important Carriage of Goods by Sea Act 1924, which came into operation on January 1st, 1925, and which revolutionises certain aspects of Commercial Law has been adequately dealt with and the chapter on Stock Exchange Practice has been brought upto-date.

In conclusion, it should be mentioned that this is a good workable treatise for the legal practitioner. In New Zealand, almost every practice comprises some commercial connexions, hence the usefulness of this work will be apparent.

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## 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 Jan. 10, 1925, and many of the cases will be reported later in the Law Reports).

**HUSBAND AND WIFE.**—Action for divorce—Adultery of petitioner—Effect of finding of adultery in previous suit between different parties.—Parkington v. Parkington and Atkinson 1925 L.J. p. 34.

**Held, that the co-respondent in an action for divorce wherein he was decreed to have committed adultery is not barred by such decree when he is petitioner in an action for divorce—the respective actions being between different parties.**

As to estoppel in matrimonial causes: see **Halsbury**, Vol. 16, Title "Husband and Wife," Part XI, Sec. 3, Par. 995.

**POLICE.**—Strike at colliery—Special emergency—Requisition for special service of police—Payment therefor—Billeting.—Glassbrook Bros., Ltd. v. Glamorgan County Council 1925 L.J. p. 32.

**Held, that the lending of constables for special duty in connection with a strike and for payment is not illegal nor against public policy, and that in special circumstances the billeting of the loaned constables on the property where the strike occurs is legitimate.**

As to the appointment of special constables in emergency and payment therefor: See **Halsbury**, Vol. 22, Title "Police," Part VII., Sec. 1, Pars. 1009-1016.