Butterworth's Fortnightly Notes

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CONTENTS.

DISSOLUTION OF PARTNERSHIP.

MR. ALFRED De BATHE BRANDON, junior, is retiring from the firm of Brandon, Ward & Hislop as from March 31st, 1925. The remaining partners will continue to Practice under the existing firm name of Brandon, Ward & Hislop, at their present offices, 150-152 Featherston Street, Wellington.

Butterworth's Fortnightly Notes.

TUESDAY, MARCH 31, 1925.

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.

COURT OF ARBITRATION.

The following are the appointed sittings of this court—
WELLINGTON—19th March.
AUCKLAND—20th April, at 10 a.m.
WANGANUI—31st March, at 10 a.m.
PALMERSTON NORTH—2nd April, at 2.15 p.m.
NAPIER—4th and 6th April, at 10 a.m.

BANKRUPTCY.

The Supreme Court will sit in Bankruptcy as under—
AUCKLAND—March 27.
HAMILTON—June 9, at 10 a.m.
WELLINGTON—May 4, at 10 a.m.
CHRISTCHURCH—May 11, at 10.15 a.m.
DUNEDIN—May 4, at 11 a.m.
INVERCARGILL—May 19.

EASTER VACATION.

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

BENCH AND BAR.

Mr. J. R. Kirk, Barrister and Solicitor, has returned from England, and has resumed practice in Gisborne on his own account.

Mr. Everard M. Stace, lately of the staff of Messrs. Johnston & Croker, New Plymouth, has accepted an appointment on the staff of the Mortgage Division of the Public Trust Office at Wellington.

Mr. W. A. Dowd, LL.B., of the Land and Deeds Office, Wellington, has been admitted as a barrister and solicitor of the Supreme Court by the Chief Justice (Sir Robert Stout), on the motion of Mr. T. Cleary. Mr. Dowd has been appointed Assistant Land Registrar and Examiner of Titles at Napier.

Mr. Horace J. Macalister, Barrister of Invercargill, has been appointed to succeed his father, Mr. W. Macalister, on his retirement from the position of Crown Solicitor at Invercargill.

Mr. A. E. Currie, M.A., LL.B., formerly of the staff of Messrs. Carlisle, McLean, Scannell and Wood, barristers and solicitors, Napier, has been appointed Crown Solicitor in Wellington in succession to Mr. E. Y. Redward, who recently retired on superannuation.

Mr. W. F. Ward, of the firm of Brandon, Ward and Hislop, Wellington, and Editor of the New Zealand Law Reports, left on March 27th for a tour of England and the Continent. He is accompanied by Mrs. and Miss Ward. The tour will be an extensive one as it is anticipated that Mr. Ward will not return to the Dominion until the end of the year.

Mr. Ward's position as editor of the New Zealand Law Reports will, during his absence, be assumed by Mr. H. H. Cornish, Barrister, Wellington. The Wellington Reporter will be for that period Mr. J. S. Hanna, Barrister, of Wellington.

Mr. G. M. Spence, of the firm of Moss & Spence, New Plymouth, recently returned by the "Aorangi" from an extended tour of the United States.

Mr. Andrew Chrystal, of Eltham, has been admitted as a Barrister of the Supreme Court, on the motion of Mr. A. A. Bennett, by His Honour Mr. Justice Ostler.

Mr. J. C. Nicholson, of the firm of Roy, Nicholson & Bennett, New Plymouth, leaves by the "Ulimaroa" from Wellington on the 3rd April, en route to England via Suez. It is anticipated that Mr. Nicholson will be absent for about six months.

Mr. F. E. Wilson, of the firm of O'Dea, Wilson, Bayley & Freeman, who has been Mayor of New Plymouth since November, 1919, has consented to nomination for a further term of office.

SUPREME COURT.

Ostler, J. Feb. 26, 27, 1925.
New Plymouth.

OFFICIAL ASSIGNEE IN ESTATE OF BREDOW v. NEWTON KING LTD.

Bankruptcy—Moneys paid to one creditor under mistake of law by Official Assignee—Whether recoverable.

The bankrupt was a farmer of Urenui. For some time prior to his adjudication he was indebted to Newton King Ltd. He supplied the milk from his farm to a Co-operative Dairy Co. On 12th December 1923 he gave to Newton King Ltd. an order on or an assignment of all moneys payable or to become payable to him by the Dairy Co. for milk already supplied and to be supplied. There was no evidence that Newton King Ltd. when the order was given had any knowledge of an act of bankruptcy or that the debtor was insolvent. The giving of the order was not a fraudulent preference. Newton King Ltd. gave the Dairy Co. notice of the assignment. On 4th January 1924 the bankrupt committed an act of bankruptcy. On 6th February on a creditor's petition the order was made adjudging Bredow a bankrupt. From 4th January to 6th February the bankrupt supplied milk to the Dairy Co. to the value of £172 10s. 5d. The Dairy Co. paid this sum to the Official Assignee who acting on legal advice paid it over to Newton King Ltd. Now under the belief that the advice was bad the Official Assignee sought an order of the Court under Sec. 9 of the Bankruptcy Act 1908 to compel Newton King Ltd. to return the money.

Weston for Official Assignee.
Quilliam for Newton King Ltd.

OSTLER J. said: "The moneys were obviously paid under a mistake of law and the first question that arises is whether this fact debars the Official Assignee from recovering. It was decided by Sir John Salmond in **Dempsey v. Piper** 1921 N.Z.L.R. 753 that it did not. Where an Official Assignee under a mistake of law pays money to one creditor which belongs to all the creditors rateably, then this Court has power in its bankruptcy jurisdiction to order that creditor to refund such moneys. It is argued that as Newton King Ltd. in settling with the bankrupt's father who had guaranteed his indebtedness gave credit for this sum of money, it would be inequitable to order them to refund to the Official Assignee for otherwise they might have to take the risk of an action to recover from the father the amount so allowed. I do not think this argument should prevail. Even if Newton King Ltd. were unable to recover this amount allowed in settlement from the bankrupt's father, they would still be able to rank equally with the other creditors in the distribution of this amount, and to allow them to keep the whole of this amount would be to prefer them at the expense of the other creditors. If therefore this money really were the property of the Official Assignee when it was paid over to Newton King Ltd. in my opinion they should be ordered to refund it.

The question then is whether these moneys belonged to Newton King or passed to the Official Assignee upon the bankruptcy.

After looking carefully through the authorities, in my opinion there is no doubt whatever that they passed to the Official Assignee. Two lines of authorities have been cited in argument. On one side there are the cases of **Irvine v. Roulston** 1919 N.Z.L.R. 351, **Ex parte Nicholls** 22 Ch.D. 782 and **Wilmot v. Alton** (1897) 1 Q.B. 17 and on the other side **Official Assignee of Palmer v. Sharp** 1921 N.Z.L.R. 460; **Re Dunkerley & Sons, Ex parte Waller** (93 L.T. 248) and **Re Seaman** 1896 1 Q.B. 412.

In my opinion there is no conflict at all between these two lines of cases. They are perfectly reconcileable and read together establish this principle, viz., that where a person gives an order or an assignment of moneys which will become due to him at a future date under a contract the consideration for which on his part is executory, so that the moneys will not become due unless and until he executes that consideration, then if that person is subsequently adjudicated a bankrupt, and the bankruptcy relates back to an earlier date, the assignee under the order can only obtain a good title to so much of the moneys the consideration for which has ben executed by the bankrupt up to the date to which his bankruptcy relates back. In other words the assignee under the order can only obtain a good title to so much of the moneys as has become a debt.

It will be noticed that in all three of the second line of cases, viz., **Palmer and Sharp, Re Dunkerley** and **Re Seaman** the Court is dealing with the assignment of a debt presently due, for which the consideration is already executed, or in other words it has already been earned. In the former class of cases the Court is dealing with the assignment of what is expected to become a debt in the future when the consideration for it has been executed, but the consideration for which is still executory.

The learned Judge finally came to the conclusion that the case was indistinguishable from Ex parte Nicols; Wilmot v. Alton and Irvine v. Roulston and made the order asked for.

Solicitors for Official Assignee: **Weston & Billing**, New Plymouth.

Solicitors for Newton King Ltd: **Govett, Quilliam & Hutchen**, New Plymouth.

Herdman, J. Sept. 11, 12, 1924.
Auckland.

SADLER v. AUCKLAND CO-OPERATIVE SOCIETY LTD.

Company—Share capital—Debenture—Power to give same—Power to borrow up to one half of share capital—Effect if debenture given when more than half borrowed.

The plaintiff was the holder of eight debentures of the face value of £100 each issued by the defendant and claimed he was entitled on the winding up of the Society to rank as a secured creditor in respect of such debentures. At the time the action was brought the Society was incorporated under the provisions of "The Industrial and Provident Societies Act 1908" and having carried on business unsuccessfully as a retail grocer for some years was ordered to be wound up on the 18th of June 1923. One debenture of £100 was issued in favour of the plaintiff on the 10th of December 1921 and the remaining seven debentures were issued on or about the 7th of April 1923. The debentures provided that the defendant society as beneficial owner charged its undertaking including the goodwill of its business and all its property and assets including its uncalled capital. The society was originally constituted in the year 1917 for the purpose of

taking over the business of a company known as The Civil Service Co-operative Supply Association Limited and was then registered as a company under the Companies Act. In December of 1919 it was decided to convert the company into a society registered under "The Industrial and Provident Societies Act 1908 Amendment Act 1919" and in February 1920 registration was duly completed. The society carried on its business upon principles which were typically co-operative and it issued share capital in the form of £1 shares upon which interest was paid.

Over a short period the society made profits but these were not distributed as dividends on share capital but in the form of bonuses computed upon purchases made. The last bonus was declared in January of 1923. In March 1923 the secretary, one Schroeder, disappeared and it was then found that the affairs of the society were in an unsatisfactory state and liquidation became inevitable. When the society was forced to wind up the assets realised about £1500 and the liabilities including bonds or debentures, amounted to about £8000.

The plaintiff from time to time advanced the defendant money. Before the 5th of May 1922 plaintiff had advanced the society £100 in two sums, viz., the sum of £50 in August 1921 and the sum of £50 on the 21st of March 1922. In addition to these sums he had lent the society £845 4s. 6d. which was accounted for in the following way:—

	£		
By debentures	700	0	0
By cash paid to plaintiff	40	0	0
By sums credited to pay for goods ..	105	4	6
	£845	4	6

Defendant contended that the issue of the debentures was ultra vires of the constitution of the society, Rule 23 of which provides:—

> "The Committee may obtain by way of loan from any person whether or not a Member of the Society for the purpose thereof from time to time, on security of bonds signed by three at least of the Members of the Committee and countersigned by the Secretary for the time being, such sums of money as any Special General Meeting of the Members sanction, not exceeding, together with such deposits as hereafter mentioned one-half of the amount of the declared capital of the society, at such rate of interest and subject to such provisions for repayment as are agreed upon such advance. The Committee may receive money on deposit in sums of £1 or any multiple thereof, subject to last paragraph in Rule 4, repayable on not less than seven clear days' notice. They may agree to pay upon such deposit such rate of interest as may from time to time seem desirable, but no payment on account of withdrawable capital shall be made while any claim due on account of such deposit remains unsatisfied."

Rule 8 is as follows:—

> "The future capital of this Society shall be raised in shares of One Pound each, and every Member other than the Members holding shares at the date of these Rules must hold at least two Shares, the nominal value of which shall be transferable capital only, and the whole or any part of which may be paid in advance. All interests and dividends after share capital has been fully paid up not withdrawn within 14 days after they become receivable in each half year shall be credited to loan capital and subject to the conditions pertaining to loan capital. All share capital over £2 held by any Member shall before payment by the Society of any rebates on purchases be credited out of the profits of the Society with such dividends or interest as the Committee may determine, not being less than 5 per cent. per annum."

H. G. R. Mason for plaintiff.
W. H. Cocker for defendant.

HERDMAN J. held that the declared capital of the Society consisted of its share capital contributed by members of the Society. In the opinion of the learned Judge it was intended that the Society could borrow upon bonds or otherwise such sums as members in general meeting authorised provided these sums in the aggregate together with deposits did not exceed one half of the "declared capital of the Society."

The learned Judge also held that when the money advanced by the plaintiff was borrowed the Society had exceeded its legal borrowing limits, inasmuch as the Society had when it had operated, as once it did, as a Savings Bank received on deposit £1360 which was money borrowed and this sum together with loan account amounted to £4753 a sum in excess of half the share capital. The learned Judge held therefore the Society could not legally give a debenture for £100 on 10th December 1921. He applied re **Pooley Hall Colliery Co.** 21 L.T. 691.

Solicitors for plaintiff: **Mason & Mason**, Auckland.
Solicitors for defendant: **Stanton Johnstone & Spence**, Auckland.

Ostler, J. March 5, 1925.
Nelson.

BERRYMAN v. HOWSON.

Contract—Sale of sheep—Stock Act—Legality of contract—Sheep lousy—Meaning of "fit to travel" —Meaning of "about 100."

Vendor's action for damages for failure to complete purchase of sheep under a written contract dated 3rd September, 1923, for forward delivery.

The material part of the contract was as follows:—

> "This serves to confirm the sale of 500 to 800 ¼-bred ewes and about 100 cross-bred ewes inclusive being all of my annual draft at 25/- each . . . the above sheep now depasturing on Stanley Downs also 400 to 600 ½ bred wethers 4, 6 & 8 tooth at 22/- each delivery in one draft on or before Febry. 14th, 1924. The ewes are guaranteed all not over 5yrs old all failing or broken mouth sheep or any not fit to travel to be rejected."

The defences raised were:

(1) That there was a collateral oral condition to dip off the shears.
(2) That when tendered the sheep were lousy entitling the purchaser to reject (a) as sale was illegal; (b) as not fit to travel in terms of contract; (c) as being breach by vendor of implied condition to properly tend and care for up to date of delivery.
(3) That the numbers of sheep tendered were not in accordance with the contract.

Fell and W. C. Harley for plaintiff.
Patterson for defendant.

OSTLER J. held on the facts that (1) was not proved, as to (2) (a) his Honour held that there was nothing in the Stock Act to make the sale of lousy sheep illegal. Section 50 of the Stock Act implied such a sale to be legal as it authorises an Inspector to have lousy sheep withdrawn from sale. As to (2) (b) His Honour held that "fit to travel" in the sale note referred to their physical condition, the context showing that both parties had this in mind and neither had in view the danger of liability to fine for driving lice infested sheep.

As to (2) (c) His Honour said that the time for dipping in the South Island did not expire till 30th April. If the time for dipping had passed it would be different but on the 14th February the plaintiff had not omitted or failed in his statutory duty. Apart from dipping the sheep were proved to be in medium store condition.

As to (3) (the numbers tendered) His Honour held that 130 cross-bred ewes was not "about 100" and if plaintiff had insisted on defendant taking 130 cross-bred ewes defendant could have rejected the whole but plaintiff did not insist on delivering 130 cross-bred ewes this being the number yarded and defendant had a right of rejection. At the time the only objection raised by defendant was as to the lice and it was the duty of the defendant to inspect the sheep which were the annual draft and to throw out any he had a right to reject under the contract and as this was not done the defendant could not now raise this point.

Judgment for plaintiff for damages and costs.

Solicitor for plaintiff: **W. Carrol Harley**, Nelson.
Solicitor for defendant: **Isaac Patterson**, Reefton.

Adams, J. Feb. 26, Mar. 13, 1925.
Christchurch.

PENGELLY v. PENGELLY.

Divorce — Restitution — Wife justified in leaving home — "Without a reasonable cause"—Meaning of—Practice—Improper pleadings.

Petition for restitution of conjugal rights by husband refused on the ground that the wife was entitled to leave husband's house on account of his conduct.

Thomas for petitioner.
Cunningham for respondent.

ADAMS J. said with regard to the reply filed to the respondent's answer: "The first paragraph of the reply reads thus 'He denies that whilst living with the respondent or at any time he failed to provide her 'and/or' her infant child with adequate food and clothes or the means to purchase the same.' The form 'and/or' is repeated in paras 3, 4, 5 and 6 no less than seven times. In each case the word 'or' only was required. The use of the form and/or in pleadings is improper; and in this case is without any discoverable meaning."

With regard to the demeanour of the respondent in the witness box whether the illusage by the husband must amount to legal cruelty the learned Judge observed: "The demeanour of the respondent in the witness box was very unsatisfactory and it would be unsafe to rely upon her own evidence, if unsupported. That evidence, however, is corroborated in the essential points by the admissions of the petitioner and by the description given by her father of her condition on arrival at her house on 31st July; and, as Sir Joshua Williams J. remarked in **Newell v. Newell** 28 N.Z.L.R. 857, when a woman leaves her home and goes out into the world alone, then, unless there is a man in the background, there is a fair presumption that she leaves her home because the conditions there are intolerable. There is no suggestion of a man in the present case. I find that the respondent left her home because of the petitioner's violence and ill-usage and under a reasonable fear of further ill-usage if she remained.

It is not necessary to inquire whether the ill-usage which I have found amounts to legal cruelty. **Russell v. Russell** 1895 P.p. 315. In that case a wife petitioned for restitution of conjugal rights and there was a cross-petition by the husband for judicial separation. The Court of Appeal dismissed both petition and cross-petition. The husband unsuccessfully appealed to the House of Lords 1897 A.C. 395, but there was no appeal by the wife against the dismissal of the petition for restitution. The grounds of the decision of the majority of the Court of Appeal, Lindley and Lopes, L.J.J. are summed up at p.p. 333/335. The passage is too long for full citation and I will content myself by saying that the reasons given apply equally to the present state of the law in this country, and by quoting the following passage from p. 334 "By section 5 of the Act of 1884 disobedience to a decree for restitution of conjugal rights is equivalent to desertion without cause. If therefore, the petitioner obtains a decree for restitution of conjugal rights, she will at once be entitled to institute a suit for judicial separation for the statutory desertion created by the Act of 1884, although she could not, under section 16 of the Matrimonial Causes Act 1857, have obtained such a decree for desertion without cause. We cannot think such a result was ever intended, or that the necessity of proving absence of reasonable cause was intended to be taken away. It seems to us that since 1884, and by necessary implication, the Court must have power to refuse a decree for restitution wherever the result of such decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case." Section 3 of our Divorce and Matrimonial Causes Amendment Act 1920 is for this purpose in effect the same as Section 5 of the English Act of 1884, and Section 6 of our Act of 1908 is in the same terms as section 16 of the English Act of 1857.

Russell v. Russell was decided in 1895. The case of **Mackenzie v. Mackenzie** 1895 A.C. 384 was decided in the same year. That was an appeal from the Court of Session, Scotland, in a proceeding by an appellant for adherence, the equivalent of restitution of conjugal rights in England. The Lord Ordinary and three out of four Judges of the Court of Session held that the words "reasonable cause" in the Act of Scotland signified some lesser occasion for the wife's leaving her husband's home than would be accepted as a good answer to an action of adherence, and that the words were in no sense technical. The case is discussed in **Newell v. Newell** (Supra 861) where the learned Judge quotes with approval the opinions of Lord Herschell and Lord Ashbourne that conduct short of legal cruelty may be a good ground for refusing a decree in such cases. In **Butland v. Butland** 29 T.L.R. 729 a decree for restitution of conjugal rights was refused to a wife who drank to excess and had been guilty of physical violence short of legal cruelty. **Fisk v. Fisk** 122 L.T. 803 is a similar case.

In **Miller v. Miller** 1922 G.L.R. 338 Chapman J. held that a wife who had left her husband because of his conduct, though not amounting to legal cruelty, was justified in leaving him. In that case, as in this, the wife had applied to a Magistrate for a separation order which was refused.

On the view I have taken of the evidence the petitioner is not entitled to the decree asked for and the petition will be dismissed. The petitioner must pay the respondent's costs £25 and £10 10s. for second day, with disbursements and witnesses' expenses to be fixed by the Registrar."

Solicitor for petitioner: **C. S. Thomas**, Christchurch.
Solicitors for respondent: **Cunningham & Taylor**, Christchurch.

Ostler, J. Feb. 24, 25, 1925.
New Plymouth.

SOWRY v. MILES AND ANOTHER.

Mortgage—Mortgagee solicitor—Whether entitled to profit costs in respect of security given.

Whether a mortgagee solicitor may charge profit costs for work done in protecting his security?

In England there is statutory provision regulating the right of a solicitor trustee and a solicitor mortgagee to charge profit costs. See Statute, 58 and 59 Vic. Cap 25.

In New Zealand there is no similar statutory provision.

Quilliam for plaintiff.

H. F. Johnston for defendant the solicitor mortgagee: The English decisions on the question that were given before the statute of 1895 were founded on the existing practice of the Taxing Master in England and as the practice in New Zealand is different the reason for adopting the English rulings is not available in New Zealand. The different practice supports a different ruling.

OSTLER J. refused to adopt the assumption that the English decisions rested solely on English practice. On this point the learned Judge said:

"Having carefully read the authorities I am of opinion that in England before the law was altered by Statute it was a clearly established principle of equity, and not merely an established practice that a mortgagee solicitor could not charge profit costs against his mortgagor for work done in protecting his security and I see no reason why that law should not be held to prevail in New Zealand. A firm of solicitors of which two members are the mortgagees can charge costs for such work but the mortgagee partners can take no part of such costs. On the authorities it is clear that so much of the profit costs as amounted to the proportionate share of the two partners in the amount charged (£74 0s. 2d.) could not legally be charged, and judgment must be given for the plaintiff for that amount whatever it is found to be.

It is suggested that this Court has no jurisdiction in this action to take cognisance of this claim in respect of costs, and that the only procedure available for attacking the bill of costs is under the Law Practitioners' Act. I am of opinion that this is not so. Where a mortgagee has made a charge in his accounts which he is not entitled to make at law, and has retained moneys of the mortgagor to cover that charge the mortgagor may sue for the recovery of that money and this Court has jurisdiction to give judgment in such an action.

Solicitors for plaintiff: **Govett, Quilliam & Hutchen**, New Plymouth.
Solicitors for defendants: **Fullerton Smith & Co.**, Marton.

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

IN RE ROMHILD'S MORTGAGE.

Mortgage Final Extension Act, 1924—Practice—R. 405—Right to call viva voce evidence where affidavits filed too late.

In an opposed application for an Extension Order under the Mortgages Final Extension Act, 1924, the affidavits in reply to the application had not been filed and served until the morning of the hearing. The affidavit of the mortgagee, in particular, contained a number of serious allegations against the mortgagor, and was of such a nature as to take the mortgagor by surprise. The mortgagee refused to consent to an adjournment to enable the mortgagor to investigate the allegations, and wished to have the application disposed of immediately.

Roy, for the mortgagor, cited R.405, and submitted that the mortgagee's affidavits, having only been filed and served that morning, could not be read.

Croker, for the mortgagee, thereupon proposed to call the mortgagee, who was present in Court, to give evidence viva voce.

OSTLER J. said that the mortgagee could not, under the circumstances, be called to give oral evidence in opposition to the application. Where an affidavit purported to contain the whole of the deponent's evidence on the subject, and where it could not be read by reason of non-compliance with Rule 405 of the Code of Civil Procedure, the deponent could not thereupon be called to give evidence viva voce in substitution for the contents of his affidavit.

Adjournment ordered.

Solicitors for the Mortgagor: **Leicester & Jowett,** Wellington.

Solicitors for the Mortgagee: **Croker & McCormick,** New Plymouth.

Sim, J. Mar. 5, 11, 1925.
Dunedin.

IN RE AGNES NICHOLSON GUTHRIE DECD.

THE TRUSTEES EXECUTORS AND AGENCY CO. OF N.Z. LTD. v. GUTHRIE AND OTHERS.

Will—Gift of residue—Specific things mentioned therein—Whether specific gifts.

By her will the deceased disposed of her estate thus:

"(2) I give devise and bequeath my freehold property at Invercargill aforesaid known as 'Apsley' and consisting of all that piece of land containing three acres two roods and twelve poles more or less being part of Section 29 of Block I. on the Crown Grant Record Map of the Invercargill Hundred together with the dwelling-house and all other buildings and erections and the gardens and other improvements thereon and together with all my household furniture silver plate pictures chattels and effects unto my daughter Margaret White Guthrie absolutely.

"(3) I give and bequeath to my son William Ernest Guthrie a legacy of two thousand three hundred and ten pounds two shillings and seven pence in lieu of my 'Ranfurly' property in Dunedin which I sold some time ago.

"(4) I give devise and bequeath all my freehold property at Invercargill aforesaid known as 'Wellesley' and comprising all that piece of land containing four acres two roods eight poles more or less being the other part of said section twenty-nine Block I. Invercargill Hundred together with the dwelling house and all other buildings and erections and the gardens and other improvements thereon and also all my accumulated savings in The Southland Sawmilling Company with interest thereon owing to me at the time of my death and also all other residuary real and personal property of whatever nature and whereso ever situate belonging to me at the time of my death unto my daughter Margaret White Guthrie and son William Ernest Guthrie in equal shares as tenants in common absolutely."

By a codicil she bequeathed to the defendant William Kearney an annuity of fifty-two pounds per annum free of death duties and payable every four weeks from the date of her death.

A. B. Haggitt for plaintiff.
F. B. Adams for defendant M. W. Guthrie.
Hay for defendant W. E. Guthrie.
H. E. Barrowclough for defendant Kearney.

SIM J. said; "Clause 4 of the will clearly was intended to operate as a residuary devise and bequest, and the mere fact that in such a clause the testator enumerates some specific things does not make the gift of these things specific: **Jarman** (6th ed.) p. 1043; **Theobald** (7th ed.) p. 154, for as Lord Cranworth said in **Fielding v. Preston** 1 De G. & J. 438, 444, 'it would be very dangerous to hold that in a will where there is a gift of residue, and the testator unnecessarily chooses to enumerate some particular things in that residuary gift, such a circumstance was sufficient to constitute the things so enumerated specific gifts. It rarely happens that in the gift of residue something is not mentioned specifically.' In the present case the frame of the will and the terms of the residuary gift make it clear, I think, that the testatrix intended Wellesley and the accumulated savings to go as parts of her residuary estate. The testatrix begins by giving Apsley and the furniture and effects therein to her daughter, and bequeaths a pecuniary legacy to her son. She then proceeds to leave all the rest of her estate to these two children in equal shares. It was not suggested that, for the purposes of this gift, the testatrix could have any possible reason for making any distinction between the several parts of her estate of which she was then disposing. It is impossible to believe that she could have intended to make any such distinction, and the terms of the residuary gift appear to negative any intention to make any distinction. After the mention of Wellesley and the accumulated savings the testatrix speaks of 'all other residuary real and personal property belonging to me at the time of my death.' These words support the view that Wellesley and the accumulated savings were intended to go as part of the residuary estate, and that they were mentioned specifically merely ex abundanti cautela. As the two children take absolutely in equal shares the whole of the property dealt with by clause 4, it would be 'a sort of solecism,' as Lord Cranworth said in **Fielding v. Preston** 1 De G. & J. p. 443, 'to speak of any particular part of that property as being a specific bequest.'

It is not necessary to discuss at length the cases cited by counsel. Mr. Adams relied on the cases of **Bethune v. Kennedy,** 1 My. & C. 114 and **Mills v. Brown,** 21 Beav. 1, in support of his argument. But in these cases there was a gift of residue followed by an enumeration of specific things, and they are different, therefore, from the present case. It is to be noted also that Jarman (p. 1043) doubts whether these decisions would be followed at the present day.

In connection with the devise of Wellesley Mr. Adams referred to the case of **Lancefield v. Iggulden,** 10 Ch. App. 136. This and the case of **Hensman v. Fryer,** L.R. 3 Ch. App. 420 are cited in **Theobald** (7th ed. p. 153) and in 14 **Halsbury** p. 261 as authority for saying that a devise of lands, whether by specific description or by a residuary devise, is specific. **Jarman** (6th ed. p. 938) condemns this as a loose and inaccurate way of stating the law, and says that when it is said that a residuary devise is specific, all that is meant is that for the purpose of the payment of the debts of a testator his specific and residuary devises rank pari passu. If, as I think is the case, the testatrix intended that Wellesley should form part of her residuary estate, then, according to the decision of the House of Lords in **Greville v. Browne,** 7 H.L.C. 689, the legacies are a charge on Wellesley."

Solicitors for plaintiff: **Watson & Haggitt,** Invercargill.
Solicitors for defendant M. W. Guthrie: **Adams Bros.,** Dunedin.
Solicitor for defendant W. E. Guthrie: **W. G. Hay,** Dunedin.
Solicitors for defendant Kearney: **Ramsay, Barrowclough & Haggitt,** Dunedin.

COURT OF ARBITRATION.

Fraser, J. Feb. 25, 1925.
Christchurch.

STELLA ANDERSON v. CHRISTCHURCH CITY COUNCIL AND WAIMAIRI COUNTY COUNCIL.

Workers' Compensation—"In the course of"—Whether relation of master and servant existed.

Action for compensation in the Arbitration Court by the widow of Stuart Anderson. Anderson was appointed by the Waimairi County Council in February 1923 as its ranger upon the terms appearing in an advertisement published in connection with the Council's advertisement for applications. The terms read as follows:—

1. To range the County thoroughly in accordance with the Impounding Act 1908.
2. Report to the Council monthly on work done.
3. Remuneration to be such driving fees as are collected together with payment per head of stock impounded on the following basis: One penny per head for sheep, 2s. per head for other stock.
4. Engagement to be subject to termination by either the successful applicant or the Council on giving one week's notice of such intention.

To enable him to pursue stock within the Christchurch City boundary Anderson obtained authority from the City Council to do so in the following terms:—

Christchurch City Council,
Town Clerk's Office,
Christchurch,
20th February, 1923.

Mr. Stuart Milne Anderson,
148 Bones Road,
Shirley.

Sir,—

I beg to inform you, that as you are Ranger for the Waimairi County Council, you are hereby authorised to act as Ranger for the Christchurch City Council, within the City of Christchurch.

The following resolution was passed by the Christchurch City Council on 21st December, 1914, which gives the necessary authority:

> 'The Christchurch City Council, being the local authority having charge of the roads and streets within the City of Christchurch, hereby authorises any person similarly appointed by the Waimairi County Council to impound any cattle which at any time of the day or night are found wandering at large, or straying in or lying about or tethered in any road or other place of public resort, or so immediately adjoining thereto as to obstruct the same.'

(Sgd.) H. R. Smith,
Town Clerk.

The Christchurch City Council employed one "T" as a ranger, but that officer's duties were pricipally confined to a portion of the City area remote from the Waimairi County boundary. It was admitted that the Chief City Inspector had at times notified the deceased of complaints regarding stock straying at large within the City area, and had in at least two instances concluded his memorandum with the words "Please attend to the matter." The deceased received no remuneration from the City Council, but retained the driving fees earned by him in respect of stock impounded. At one time, owing to T's work being considered unsatisfactory, the deceased was at his own request notified by the Chief City Inspector of complaints from the further part of the City area, but in these instances he received no remuneration from the City Council, being satisfied with the driving fees he collected. On 17th March 1924 Anderson died as a consequence of having been kicked by a wandering horse that he was pursuing. The accident occurred within the limits of the City of Christchurch. The horse was owned by a resident of the City and was found wandering within the City limits.

Thomas for Plaintiff.

Loughnan for City Council: There was no contract of service between the deceased and the City Council.

Upham for the County Council: It was no part of the duties of the deceased as a servant of the County Council to impound City stock wandering in the City limits.

FRAZER J., orally: "It is unnecessary in this case to embark on an examination of the cases that decide the difference between contracts of service and contracts for services. It is sufficient to deal with the facts of the present case. The history of the matter is that the Waimairi County Council appointed Anderson to act as its ranger on certain conditions. The arrangement with the Christchurch City Council merely gave Anderson authority to act within the City limits. The Chief City Inspector gave the reason for the arrangement; namely, that Anderson might lawfully be enabled to follow stock that had strayed into the Christchurch City area from the Waimairi County. We have also the evidence of the Inspector that the deceased asked for this authority. I think that it has been established that the relation of master and servant probably existed between the Waimairi County Council and deceased, but it was no part of deceased's duty to the Waimairi County Council to pick up City stock in the City. It follows, therefore, that an accident met with by the deceased while he was pursuing a City horse in the City would not be a subject of compensation for which the County Council could be held liable. We have considered the letters written by the Chief City Inspector to deceased. They are intimations that cattle were straying in named localities in the City. The words "Please attend to this matter" appearing in these letters may bear the construction of a request or of an order. Whether or not the Chief City Inspector has power to issue orders to deceased would depend on the arrangement made at the outset by the City Council. No conditions of appointment have been proved, and no terms. We can take nothing out of the letter of 20th February, 1923, except that it is a bare authority, worded in general terms. What happened when T's work became unsatisfactory, and the Inspector asked Anderson to undertake some of his work? Clearly the Inspector was not in a position to make an appointment binding on the City Council, and the evidence does not indicate that he purported to do so. All that happened was that Anderson went to him to ask for something to be put in his way, and the Inspector put a number of matters in his way. This makes it impossible to interpret the Inspector's letters as orders. All the circumstances indicate that the deceased's original authority from the City Council was purely an authority, and there is nothing in the arrangement with the City Council to entitle the Court to infer the existence of a contract of service. The deceased obtained a benefit under the arrangement, and no doubt the City Council also obtained a benefit, but this does not establish a contract of service. The City Council's authority was obtained at deceased's own request, primarily in order to make his arrangement with the Waimairi County Council more workable, and also that in order that he might have a semi-official standing that would enable him to earn driving fees in respect of stock impounded from the City area.

The Waimairi County Council is not liable, for the accident did not occur in the County area, nor was it caused by an animal that the deceased had followed across the boundary from the County into the City; and the City Council is not concerned for the relation of master and servant did not exist between it and the deceased. Judgment for both defendants."

Solicitor for Plaintiff: **C. S. Thomas**, Christchurch.
Solicitor for City Council: **J. R. Loughnan**, Christchurch.
Solicitors for County Council: **Harper, Pascoe, Buchanan & Upham**, Christchurch.

The Chattels Transfer Act 1924.

by

Alfred de Bathe Brandon, Esq.

It is proposed in this paper to examine "The Chattels Transfer Act 1924" as a specimen of legislation, and in order to prepare the ground a short survey of the several previous acts of legislation and of the conditions leading thereto is given by way of preface.

The first step of the legislature was the passing of "The Bills of Sale Act 1856" based on the English Act of 1854. These Acts excluded from the definition of personal chattels "any stock or produce upon any farms or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale."

The reason for the act was anounced in the preamble which is as follows "Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels for remedy whereof be it enacted, etc."

In the early days of the Dominion (then Colony) staple exports were wool, whale oil and whalebone, and as it was not possible as the law then stood to give security over property not then in the possession of the would-be-grantor the "Wool and Oil Securities Act 1858" was passed to enable this to be done.

The development of sheep carrying country particularly in Canterbury and the impecunosity of the farmer led to the custom of the man with capital buying sheep or cattle and letting or bailing them to a practical farmer on shares, and in order to give due protection to the owner of the stock so bailed and also to let the world know that the particular stock were not the property of the man who had possession of them "The Bailors of Sheep and Cattle Protection Act 1865" was passed.

The growth of wheat on a large scale for export led to "The Agricultural Produce Lien Act 1870."

The necessity for bringing mortgages of stock and cattle into line with Bills of Sale led to "The Mort-

gages of Stock Registration Act 1867," which repealed the "Bailors of Sheep and Cattle Act 1865."

Various amendments and intermediate consolidations were made from time to time, and in 1880 "The Chattel Securities Act" of that year consolidated into one Act the law in relation to the charging or bailing of chattels, leaving it to the conveyancer to draw the Bill of Sale mortgage or bailment of stock or chattels, wool lien, oil lien, bone lien or crop lien to suit the circumstances of each individual case.

In 1889 The Chattels Transfer Act of that year superseded the Act of 1880 and introduced the system of implied covenants powers and conditions. That system no doubt saves a certain amount of ink and paper, but it is open to the great disadvantage that the man who signs the short statutory form has no knowledge of the obligations which he is taking upon himself.

In the year 1895 the Chattels Transfer Act was amended by establishing in law a very peculiar proposition namely that the term "Chattels" included "book and other debts." The author of this amending Act seems to have misunderstood entirely the conditions which the several Acts of legislation were intended to alleviate or remedy. One was to enable security to be given over certain classes of property not yet in being, and another was to protect an owner or mortgagee in relation to his property which he permitted to remain in the possession of another. Thus, a farmer became enabled to give a valid charge over the ensuing crop of wool then growing on his sheep or over the crop of wheat to be taken from his land, and the bailor or mortgagee of stock or chattels having duly registered his security was protected if the bailee became bankrupt. Instruments of bailment or mortgages not registered were declared void as against an Official Assignee thus establishing the "apparent possession" or "order and disposition" conditions of the Bankruptcy Acts, and as against a sheriff levying execution, thus protecting the innocent creditor who lent money to the debtor on the faith of a showy window display with no encumbrance disclosed on search being made in the proper quarter. Book debts cannot be made the subject of an ostentatious display of apparent wealth and as to charges or assignments, the law protects the diligent creditor who gives all necessary notices without delay.

* * *

The Chattels Transfer Act 1924 is "An Act to consolidate and amend certain Enactments of the General Assembly relating to Chattel Securities and the Transfer of Chattels." The term "Chattel Securities" is not to be found in the titles of any of the former Acts, though it was used as the "short title" of the Act of 1880. In Statutes most particularly, the language should be literary English and exact. The term "Chattel Securities" is simple slang.

The definition of "chattels" is no longer burdened with the inconsistent addition of "book and other debts," but that class of property is dealt with by Sections 31 and 32.

The definition of an instrument is any bill of sale etc. "that transfers or purports to transfer the property in or right to the possession of chattels whether permanently," etc. It would thus be seen that Section 18 declaring unregistered "instruments" void does not apply to a mortgage charge or assignment of book debts unless the opening words of Section 31 (1) "Book or other debts shall be deemed to be chattels situate in the place where the grantor etc." can be divided into two independent sentences, one making book debts chattels and the other declaring the situation of the book debts. It requires a very great stretch of the imagination to understand how, if Brown who lives in the Upper Hutt buys a pound of sugar from Jones who has been living in Petone for six months and Jones gives a charge over his book debts to a merchant in Wellington the book debt which is a chose in action, and is incorporeal can have a situation, and also if such should be the case why a debt owing by a man living in the Upper Hutt should be "situate" in Petone, when the creditor must go to the Upper Hutt when he wishes to collect it.

Section 4 (2) is a section which affects "a security granted . . . by a company . . . immediately upon the registration of such security in the manner provided by the said Companies Act 1908." The Companies Act 1908 requires registration of every "mortgage," but the word "security" is not used in that act. There are two points calling for criticism, the one that the draftsman has not used the appropriate term "mortgage," and the other that this subsection is really an amendment to the Companies Act 1908 and not being noticed in the title of the act is another pitfall for the unwary student who when studying Company Law would never think of looking for it in a Chattels Transfer Act.

The practice of amending statutes by clauses in other statutes not in pari materia is unfortunately too common at the present time, and in the act now under consideration there are other instances. For instance Section 57 subsection (4) should have been an amendment to the Bankruptcy Act 1908, and Section 59 to The Companies Act 1908.

Section 12 directing a separate register to be kept in the chief town of each Provincial District to be available for search introduces an element of danger. The assumption was of course that with a register in the chief town, search there would be sufficient, but it would seem that something in the nature of a fool's paradise has been created because at the time of search made in the chief town, there may have been registered in the local office some instrument of charge particulars of which were still in course of transmission to the chief town.

Section 17 (1) seems in view of the maxim omnia rite esse acta to be surplusage.

Section 20 is an example of careless language—"execution of an instrument shall be attested by at least one witness who shall add to his signature his residence and occupation." If the draftsman had remembered the words used in the earliest statute dealing with the execution of deeds he would have found a precedent which could have been followed with advantage. The Conveyancing Ordinance of 1842 put the requirements of due attestation by a witness in this way "the place of abode of the witnesses, their calling or business, shall be stated . . ."

In section 26 following the consolidators of 1908 when they replaced the specific numerical indicator of two preceding sections by the words "the three last preceding sections" the compiler of the present act has repeated the error in number and in expression. There cannot be "three last sections" but it would be quite proper to speak of the "last three sections."

The additions made to section 29 by the Amending Acts of 1922 and 1923 and now incorporated in the present Act are far reaching and weaken the value of the section.

If the sheep on Whiteacre are mortgaged to A and the mortgagor comes into possession of Blackacre and moves sheep from Whiteacre to Blackacre, he not only commits a breach of the implied covenant not to remove the sheep, but the mortgagee can claim the sheep so removed. Now supposing he buys further sheep and puts them on Blackacre and mortgages them separately, and a search shows the mortgage of the mortgage on Whiteacre and enquiry discloses the fact that the mortgaged sheep are still running on Whiteacre. A fall in market prices may reduce the value of each flock below the amount of the charge thereon, has the mortgagee of the Blackacre sheep any claim against the Whiteacre sheep or vice versa?

This would seem to be an open question.

Section 41 (1) suggests that the draftsman was under a misapprehension regarding the rights of a mortgagee of sheep with respect to the wool growing on such sheep. By the mortgage the sheep are assigned to the mortgagee, and are his property subject to the mortgagor's right of redemption. It follows then that the wool growing on the sheep is the property of the mortgagee and must be dealt with as he may direct. There is then no necessity for his taking a wool lien which implies that the growing wool is not his property. Section 40 confirms this view as it expressly forbids a mortgagor of sheep giving a wool lien without the consent of the mortgagee.

It would have been more methodical if the provision of subsection (2) of section 41 had been included in the 5th schedule as an implied covenant.

Section 57. The word "customary" is out of place here. "A custom is a particular rule which has existed either actually or presumptively from time immemorial" (10 Hals. para. 418). The appropriate adjective is "usual" as signifying a hire purchase agreement in a form established by local usage.

The essence of the Acts upon which the Chattels Transfer Act 1924 was founded was registration, thus affording publicity. Subsection (3) dispenses with the necessity for registration of "a customary hire-purchase agreement and such an agreement is not an "instrument" as defined in Section 2. Strict adherence to recognised principles of registration would require the enactments in section 57 to have been made either in a special act or in an amendment to "The Sale of Goods Act 1908."

The subsection (6) contains the objectionable features of substituting the Governor-General as a judge of fact and a consequent expounder of the law, thus usurping the functions of a judge and jury.

Subsection (7) purports to make a serious alteration in the law relating to fixtures as between vendor and purchaser and as between mortgagor and mortgagee and affords excellent opportunity for fraud.

The omission from section 58 of the proviso which was part of the enactment as it appeared in section 52 of the Act of 1908 is a consequence necessarily following the covenant to be implied in mortgages of sheep requiring "the grantor to deliver to the grantee the wool shorn from such sheep" (Sec. 41 (2)) but while a mortgagor will be liable (a) to imprisonment if he sells the wool taken from sheep which are in law the property of his mortgagee or (b) to an action for breach of covenant, the Act throws no obligation on the grantee (or mortgagee) to account to the grantor for wool so delivered.

A consideration of the contents of the Fourth Schedule does not fall within the scope of this paper seeing that they are capable of modification. They should be carefully studied by a draftsman when settling any particular instrument, and be modified or denied as occasion demands.

London Letter.

The Temple, London,
4th February, 1925.

Dear N.Z.,

Over here, to the accompaniment of terrific gales, sheets of rain, warm summer days, hard frosts and *fog impenetrable*, we *pursue our legal business*, which is of a dissipated nature, at this time of year, and mainly decentralised. Thus, for all that we have recently appointed, as I mentioned in my last, two additional Judges, to-day we have only four or five left over from the Circuits to sit in London. Two of these are sitting in the Divisional Court, at date, hearing appeals from the County Courts. Their decisions are not of great material importance, having regard to the limitation of the amounts which may be involved in County Court actions; but nowadays their judgments are well worth watching, since they often decide interesting points of law and lay down rules for our guidance which are none the less useful because they arise from little cases. I will take care to report to you, from time to time, any essentially interesting points they decide. The present operations and the future outlook of our County Court system are matters of a greater importance than is generally realised. Historically, you will recollect, there was first the practice of trying all minor causes in local Courts; I refer to the past times, in which the going of circuit was a regular and thorough enterprise in the life of every common law man and in which at every Assize town of any importance there was always a full list of civil actions to be tried. With the growth of railway services and the increased accessibility of London, a centralisation took place, and only provincial cities of the size of Manchester, Liverpool, Newcastle and Birmingham retained any substantial amount of work. There followed the institution of the County Court system, with the later extension of its jurisdiction; and to-day we have the position that the latter tends to an altogether new and wider development and the existence of the smaller Assize centres is threatened with extinction. Within a year or two the question will, it is certain, be definitely debated and precisely legislated for; what the ultimate arrangement may be it is quite impossible to foresee, owing to the prevalence of two diametrically opposed and keenly canvassed views as to the continuance or discontinuance of the complete circuit system. In saying that, for the moment our work is dissipated and decentralised, I refer to the fact that, as is usual at this time of year, we have not only the circuits in full blast but also the Brewster Sessions proceeding in every quarter of England. Licensing work is not, of course, of anything like its old intensiveness, the early rush of compensation work having ceased and a more gradual process of extinction of licenses having become established. How far this latter is to be disturbed by new legislation has yet to be seen. The Bishop of Oxford's Bill, involving many drastic alternatives, was not encouraged

in the House of Lords; but I know, on first hand authority, that the cause of Disinterested Management is by no means regarded as a lost one and a strenuous campaign is being prepared, to obtain state management of the public houses and government handling of the sale of alcoholic liquor.

* * *

Moneylenders'-circulars have again become a pest and, whatever money they may be extracting from credulous and greedy clients, they have brought into discussion the need for still further curtailing the activities and limiting the profits of the "financiers" who despatch them. Lord Carson, as I write, is collecting his information and compiling his arguments and statistics for the case he is shortly about to state in the House of Lords on the subject. Last week we had an instance in the High Court of a harsh and unconscionable bargain, which Finlay J. ordered to be re-opened ab initio, notwithstanding that the money-borrower was neither a young nor an old fool incapable of understanding business matters and pecuniary negotiations. Indeed, the defendant was not only in business and borrowing the money for business purposes, but the transactions under review were the second series of his transactions with the same moneylender. As a result of the first transaction he owed plaintiff £350, the balance of moneys due under a compromise of litigation as to the original loan. The plaintiff had agreed to cancel this debt and to advance further cash to the extent of £550, in return for two promisory notes, one for £1000 payable by monthly instalments of £120 each, the whole to become due on default of payment of any instalment. The other promisory note was for £200, payable on demand. Notwithstanding plaintiff's contention that defendant had entered into this bargain with his eyes open and after fair negotiations, Halsey v. Wolfe (1915) 2 Ch. 330 was applied and the bargain condemned. The name of the case referred to was Cohen v. Jonesco and Finlay J. delivered his judgment on January 27th.

* * *

I cannot honestly say that this, or any other of the cases decided during the last fortnight, is of first importance or fit to loom large, for all time, in the English and Empire Digest. Hall v. Evans (January 22nd) decided a point as to the remuneration of pilots, which was of sufficient technical importance to be the subject of a leading article in Lloyd's List & Shipping Gazette. A ship hoisted the pilot Jack upon nearing the pilot stage, and a pilot came aboard in answer to it. He was then told that his services were not immediately required, and he got off at the next stage, without having been employed at all. It was held that he was entitled to be remunerated, as if he had actually rendered services, a reason for the decision being that section 48 of the Pilotage Act, 1913, requires pilots to respond to a ship's summons under a heavy penalty for failure to do so. Wesman v. McNamara and the Cup of Knowledge Co. Ltd. (January 30th) pointed the distinction betwen the rights of an author and the rights of an inventor of a patent, reaffirming the principles laid down in Corelli v. Gray 29 T.L.R. 570: "Under the Copyright Act, 1911, as under the former law, no absolute monopoly is given to authors analogous to that conferred on the inventors of patents . . . What is given is merely the negative right to prevent appropriation of the labour of one author by another author." Thus, where A. conceived a design and published it, and B., years later, published the same design but was able to show that he had not got at it by appropriating A's original, of which he knew nothing, A., it was held in the Chancery Division by Russell J., had no right to restrain B. nor any other remedy at law. Lastly, in the case of In the Estate of the Rt. Hon. A. H. Chichester, Third Baron Templemore (January 26th) the judgment of Horridge J., in the Probate Court, afforded an illustration of the principle that when a will is not forthcoming at the death of the testator, the presumption is that he destroyed it in his lifetime animo revocandi, but that this presumption is capable of being rebutted. The fact, established by evidence, that within ten days of his death the testator had discussed the lost will with his sons, with whom he remained till his death upon the most affectionate terms, and had described it as representing his testamentary intentions, was held to be good enough to rebut the presumption in this case.

* * *

Upon other subjects, we are glad to know, at this end, and you will no doubt be glad to know, at your end, that the promotion of Sir Hugh Fraser to the Bench is not to deprive us of the boon of his learning, in the law of defamation, a new edition of his Principles and Practice of the Law of Libel and Slander being announced to be likely to emerge from the press at any moment, now. As to the appointment of new Judges, the subject is not a dead one, even yet, a very forcible plea now being promoted for the appointment of yet another, to cope with the congestion in the Admiralty Court. A Memorial, over the signature of Sir Leslie Scott K.C. and of officials of every body of any influence in legal-commercial circles in the City, emphasises the unique reputation which this Court has earned for itself, throughout the maritime world; so much is this the case (state the Memorialists) that it is looked upon as almost an international Court; and it may certainly be said that the efficiency of its procedure and the wisdom of its judgments have done much to improve conditions of traffic at sea, the world over. You will probably share the pride in this, which the Memorialists themselves openly entertain, and you will be impatient with the niggardly spirit, of cheese-paring economy, which alone stands in the way of the proposed measure and the establishment of a system by which two Judges, of the Probate, Divorce, and Admiralty Division, are marked in priority for Admiral work. I confess that my own views of a too rigorous economy in national expenditure have considerably changed, since I returned to England and to our overwhelming taxes! Apart from that, you may take it that, in legal matters, commercial and maritime affairs assume an ever increasing importance, and more and more attention is being focussed upon them. This is a subject of imperial import, and, it may be said, of imperial encouragement, in which you will be as interested, sentimentally and materially, as we are. It is relevant to mention that a new edition of Steven's Elements of Mercantile Law is also promised at an early date.

* * *

In the less responsible aspect of professional affairs, we are all being kept alive and agog by the renewal, not too early, of the publication of cartoons of our luminaries. The best are yet to come, and the Law Journal, it appears, is only at the beginning of its campaign of invigorating humour. Too long have we departed from the good old days when "Spy" (Sir Leslie Ward) kept us all happy and amused and

on good terms with our great men and ourselves, by this medium. I have had a private view of some of the artist's originals, and I am particularly glad to be able to tell you that "Kapp" has done full justice to that grand old man of Privy Council practice, Lord Finlay. You have not to carry your minds very far back, to recall the days when he was called in, as K.C., as imperial appeals of importance fell to be debated in the Judicial Committee. The strength of "old Fin," as he was called in those days, and the inveterate and infallible steadiness of his judgment all appear in "Kapp's" admirable picture. It is hardly a cartoon, and it is certainly not a caricature; it is inevitable to describe the picture as a beautiful portrait of a peculiarly attractive face. Of the other pictures which we have seen, that of Willes Chitty is easily the best. Here the artist has let his whimsical tendencies have full play, and however little you may know the man you will undoubtedly welcome the cartoon of the most legally minded of all lawyers, in a deliciously quaint and effective setting. What the opinion of counsel, at large, may be, and what view our professional brothers hold, as to this jovial venture, I do not pretend to know. I am fairly confident, however, that the feeling is as universal as instinctive, that we badly want stirring up in as much as we were getting to take life too seriously. To become excessively serious is to become more than a little pompous. I do not exactly know how it was going with you, but I was certainly getting too much in love with the portly phrase and the magisterial pose, until this salutary diet was imposed upon me! If we become irretrievably dull, hereinafter, it will not be the fault of "Kapp" or the Law Journal.

* * *

To conclude this letter with some stop-press news: You will be distressed to hear that the gentlemen who are responsible for maintaining the excessive heating of our Law Courts, in London, recently went on strike, so that there was no heat at all. The fresh winds, untempered to the shorn lamb, have brought the colour of youth to some cheeks and have sent the weaker brethren to their beds, with severe attacks of influenza. So prevalent is the epidemic, that each one of us listens to himself with the utmost anxiety, as he blows his nose, dreading an intimation of the worst!—Yours,

INNER TEMPLAR.

CORRESPONDENCE.

(To the Editor, "Butterworth's Fortnightly Notes.")

Sir,—I have received the first issue of "Fortnightly Notes," and may I congratulate you on the publication of same. One does not need to enumerate the benefits which should be derived from them, nor the interest in our profession which they should stimulate amongst practitioners.

I take it that, acting in the same way as such well-known English periodicals as "The Solicitors' Journal" and "The Law Journal," you will open your columns to correspondents who desire to comment on any matter published in the Notes or of general legal interest.

Assuming this, I wish to make a few observations on the article "Dominion Citizenship" contributed to your first issue by Sir Robert Stout. In Rex v. Lander referred to in the article Mr. Justice Chapman doubts whether there can be such a thing as "Citizenship" in international law, but, assuming there can, it seems that at the present time we have no New Zealand "Citizenship" as distinct from British "Citizenship." I think all would agree with Sir Robert as to the desirableness of distinct citizenship being created for the Dominions if such will give a more effective control over wrongdoers in our midst, but I further think that the only means of bringing this about is by legislation of the Imperial Parliament and not by any re-consideration of the case of Rex v. Lander. In Lander's case the submission that there was at that time (1919) a distinct New Zealand citizenship was rejected by the Judges who formed a majority of the Court and who quashed the conviction. The dissenting judgment upholding the conviction favoured the view of a separate citizenship. I cannot see that the British Nationality and Status of Aliens Act 1923 alters the position as we had virtually the same provision in The Aliens Act 1908 and Lander's case was decided in 1919. In any event our legislature has not at present the power to pass an enactment which would affect acts done not within our territory, and therefore an attempt to control the acts of New Zealand "citizens" outside of New Zealand by creating a distinct New Zealand "citizenship" would be ultra vires. Mr. Justice Hosking said in Lander's case:

> "If a dependency desires to be armed with further powers (than those contained in the Constitution Act) in any respect it must approach the Imperial Legislature."

The parentheses are mine and are required to make the quotation clear.

The simple reason why our New Zealand Courts could not deal with Lander in the same way as the English Courts dealt with Earl Russell is that Britain is a sovereign State whilst New Zealand is a subordinate State. The legislative power of the one is unrestricted whilst the other is restricted by its Constitution Act.

In his review of Rex v. Lander the learned contributor contends that that decision was based on an obiter dictum in the judgment of McLeod v. Attorney-General of New South Wales. I respectfully suggest that this was not the opinion of the majority of the Court. Mr. Justice Edwards in his judgment makes it abundantly clear that he does not consider the passage relied on from McLeod's case as in any way obiter, and the reason of His Honour in coming to that conclusion seems to be irresistible. Mr. Justice Chapman while not definitely saying whether the passage is obiter or not says quite clearly that "it was not a hasty incidental opinion such as all Courts feel themselves entitled on re-consideration to ignore." Mr. Justice Sim says "The judgment of the Privy Council in McLeod's case appears to be a clear authority for saying it (i.e., the New Zealand Legislature) had no jurisdiction to do so (i.e., enact the particular section under review)." Mr. Justice Hosking expressed similar views, and it seems therefore that the portion of McLeod's case relied on cannot be treated as obiter dictum, but as a definite decision. In any event the decision in Rex v. Lander stands and it certainly cannot be re-considered by our Courts, nor indeed by our Legislature. It can alone be altered by the Imperial Legislature giving the requisite power to the New Zealand Parliament, and with respect I say it does not seem possible to help the position by our Legislature attempting to create a New Zealand citizenship.

Probably the time is approaching when the Dominion should be given control over those domiciled within its shores in respect of criminal acts wherever committed, but the obtaining of this power is of course a matter for the politician and the statesman and is somewhat outside our scope as lawyers.—I am, etc.,

H. F. O'LEARY.

Law Societies.

CANTERBURY.

The annual general meeting of the Canterbury Law Society was held in the Supreme Court Library on Friday, the 20th March, when the following officers were elected for the ensuing year: President, Mr. W. J. Hunter; Vice-President, Mr. M. J. Gresson; Hon. Treasurer, Mr. K. Neave; Members of Council, Messrs. R. A. Cuthbert, C. H. Holmes, F. D. Sargent, W. J. Sim, H. C. D. van Asch, and E. W. White; New Zealand Council of Law Reporting, Mr. Geo. Harper, Mr. A. T. Donnelly; Members of Council of N.Z. Law Society, Mr. H. J. Beswick, Mr. J. J. Dougall and Mr. F. W. Johnston.

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