Butterworth's Fortnightly Notes.

"Of Law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in Heaven and Earth do her homage, the very least as feeling her care and the greatest as not exempted from her power."

—Richard Hooker

TUESDAY, DECEMBER 7, 1926.

THE IMPERIAL CONFERENCE.

The cable reports of the Imperial Conference have been fashioned with the object of impressing us with the weightiness of the deliberations of the Conference. In this they have failed because the information which the cables gave was conspicuous by its absence.

The lay mind is not impressed by the professions that the Dominions have attained complete autonomy, because the man in the street knows that such real facts as this country's dependence upon Great Britain for financial aid and naval protection are more necessary to his prosperity and freedom than constitutions autonomous or limited. Newspaper comment has been as various as the weather; ranging from acclamation of the Conference as having achieved a great step forward in Empire Evolution to the opinion that the report of the Imperial Relations Committee states the position as it is without making any material change.

The professional mind remains equally unimpressed in the absence of any indication of Imperial Legislation by which alone an extension of the present powers of Dominion legislatures can be conferred. Autonomy means more to New Zealand than to Australia for instance, for while Australia retains jurisdiction over a ship entered upon the Australian register throughout that ship's voyage round the world a ship on the New Zealand register ceases to be subject to New Zealand jurisdiction immediately she has passed beyond our territorial limits. It is worth while bearing in mind that the Imperial Conference is not a legislative body. Doubtless, its resolutions are treated with respect by the Imperial Cabinet, but the resolutions of the Conference are not legislation nor have they the force of legislation. The New Zealand legislature receives its sanction from the Imperial Parliament to enact Laws for the peace, order and good government of New Zealand. The jurisdiction of our Parliament, therefore, is confined strictly to our own territory. This limitation has very practical results as is illustrated by the fact that our General Assembly cannot pass legislation which will be enforcible against citizens of New Zealand for offences which have been committed beyond New Zealand. Such legislation has already been adjudged to be beyond the powers of our legislature. Further, to secure the title to a piece of land in London the Government had to purchase same through the Public Trustee and then pass an authorising Act, but it is doubtful whether this mode of procedure is really *intra vires*.

Legislation by the Imperial Parliament will be necessary before New Zealand can enjoy, or shall we say, experience, complete autonomy.

BOXING DAY.

Boxing Day this year falls on a Sunday. Should it be observed on the day following? The Public Holidays Act 1910 (sec. 2) provided that "Where in any Act or award or industrial agreement reference is made to Christmas Day or New Year's Day, such reference shall, when those days fall on a Sunday, hereafter be deemed to be the next succeeding Monday, and in that case any reference to Boxing Day shall be deemed to be the next succeeding Tuesday." No provision was made therefore for Boxing Day falling on a Sunday.

This section was amended by Section 2 of the Amending Act of 1921 in so far as it related to Christmas Day, Boxing Day and New Year's Day. The amendment provided that where Christmas Day fell on a Sunday then the Sunday was to be regarded as a Sunday and the Monday to be regarded as Christmas Day, and the day following as Boxing Day. The amendment, however, failed to provide for the Boxing Day falling on the Sunday so the question which now confronts employers of labour and workers is "Shall Monday be observed as Boxing Day a holiday being granted and wages paid therefor?"

The question can be answered by enquiring as to the purpose of the Act. The obvious purpose of the Act and of the amendment, is to secure to the worker two days holiday at Christmas-time irrespective of Sunday intervening, and keeping that intention in mind it appears that the Boxing Day should be observed on the Monday. If the other view is taken that because Christmas Day falls on Saturday then Sunday and Boxing Day coalese then a different result would eventuate upon the occasion of days falling as they do this year than could possibly occur under any other circumstances. Did the legislature intend such an odd result? Obviously, no.

TO DIM OR NOT TO DIM.

There is much conflict of opinion concerning the practice of motorists dimming their headlights when they are travelling in opposite directions. Should one motorist not dim his lights he may cause the other coming towards him to misjudge the track, in consequence of his sight being dazzled. Recently however, a motorist who did dim was unable to see a pedestrian in the comparative darkness and ran him down—illustrating again the dictum of Lord Darling that the motor has divided all people into two classes—the quick and the dead.

It would appear therefore that the use of powerful headlights on motor cars is likely to cause accidents either dimmed or not dimmed. Should it not be worth while therefore to first decide whether powerful and therefore dazzling headlights are really necessary. There may be use for them when travelling country roads, but this cannot apply to city conditions where there is a good road surface and night lighting is adequate.

OUR CHRISTMAS NUMBER.

The next issue of the "Fortnightly Notes" will be published a little previous to its due date December 21st, so to ensure subscribers receiving their copies before the Christmas vacation commences.

The next issue will be somewhat different from the usual. The Wellington Law Students' Society will be responsible for a section of the issue. This section will breathe the spirit (undergraduate brand) of the Festive Season and will contain contributions and illustrations in keeping with the beforementioned spirit. H. J.

SUPREME COURT.

Adams J. October 20, 1926.
Christchurch.

IN RE WALKER: EX PARTE HINKEY.

Bankruptcy—Creditor's petition—Whether bankruptcy notice may be issued against married woman—Whether may be adjudicated bankrupt.

This was an interesting application to have a married woman adjudicated a bankrupt. The act of bankruptcy alleged was failure to comply with a bankruptcy notice issued under Sect. 26 (f) of the Act.

Hall in support.
Sargent contra.

ADAMS J. refused to make the order. He said:—
Counsel for petitioner contends that under Section 176 of the Bankruptcy Act a bankruptcy notice may be issued against a married woman, and relies upon **In re Somerville**; Ex parte Zohrab—(1911) 13 G.L.R. 433—which is directly in point. Counsel for the respondent contends that that decision is erroneous and ought not to be followed.

In **in re Lynes**—(1893) 2 Q.B.D. 113—the Court of Appeal (Lord Esher M. R., Lopes L. J., and A. L. Smith L. J.) held that a bankruptcy notice under Section 4, subsection 1 (g) of the Bankruptcy Act 1886 (England) could not be issued against a married woman who was carrying on a trade separately from her hsuband, and against whom a creditor had obtained a judgment in the form settled in **Scott** v. **Morley** —20 Q.B.D. 120. The grounds of the decision are clearly stated by Lord Esher in his judgment, which is as follows: "In my opinion a bankruptcy notice cannot properly issue in this case. The person on whom it is proposed to serve the notice is a married woman, who is carrying on a trade separately from her husband in the City of London. It is true that such a person can be made a bankrupt; she may be made a bankrupt in some other way; but the question is whether a bankruptcy notice can be served upon her. A bankruptcy notice is issued under the provisions of s. 4 of the Bankruptcy Act 1883, subsection 2 of which says that the notice 'shall be in the prescribed form,' which, by s. 168, means 'prescribed by general rules,' and the prescribed form of a bankruptcy notice is Form No. 6 in the Appendix to the Bankruptcy Rules, 1886. The notice can be in no other form. The question is, whether such a notice can be served upon a married woman in order that she may be made bankrupt. The notice can be issued only under subsection 1 (g) of s. 4 of the Act, which provides that a debtor commits an act of bankruptcy if a creditor has obtained a final judgment against him, and has served on him a bankruptcy notice 'requiring him to pay the judgment debt in accordance with the terms of the judgment,' and the debtor fails to comply with the notice within the time limited for the purpose. The Form No. 6 does not follow the terms of a judgment against a married woman, and therefore no form of bankruptcy notice is given which does or can follow the terms of such a judgment. The judgment against a married woman is not a judgment against her personally; it is a judgment against her separate property. The bankruptcy notice says: 'You must pay' to the creditor 'the sum claimed by him as being the amount due on a final judgment obtained by him against you.' A married woman is not bound personally to pay the judgment debt: it is only to be paid out of her separate property. Sec. 4, sub-section 1 (g) and the Form No. 6 do not apply to such a case, and consequently a bankruptcy notice cannot be served upon a married woman. The registrar was quite right in refusing to issue the notice, and the appeal must be dismissed."

Now the provisions of Section 26 (f) of our Act are the same as those of Section 4, subsection 1 (g) of the English Act, and the form of bankruptcy notice (No. 4 in schedule to Bankruptcy Rules) is the same as Form No. 6 in the appendix to the bankruptcy rules in England. Therefore, unless there is a variance between the bankrupty law in New Zealand and the bankruptcy law in England, which will render the decision in **In re Lynes** inapplicable, that decision ought to be followed. In In re Somerville the learned Chief Justice thought that the provisions of Section 176 of the New Zealand Act created such a variance, but on the best construction I can give I am unable to agree that Section 176 has any real bearing upon the question. The section reads thus: "This Act shall extend to married women, both to make them subject thereto and to entitle them to all the benefits given thereby, and shall in like manner extend also to aliens." This was first enacted as Section 5, subsection 2, of the Bankruptcy Act 1892, and that subsection, with the consequent repeal of subsection (5) of Section 3 of the Married Women's Property Act 1884, undoubtedly extended the application of the law of bankruptcy to all married women; but it left untouched the law as to the liability of married women upon their contracts and as to the form of judgment which may be entered against a married woman. A judgment against her must still be in the form in **Scott v. Morley** (supra), or, preferably, that in **Barnett v. Howard**—(1900) 2 Q.B. 784. It has to be borne in mind that under the statute law of England, when **In re Lynes** (supra) was decided, a married woman carrying on a trade separately from her husband was, in respect of her separate property, subject to the bankruptcy laws "in the same way as if she were a **feme sole.**" The difference in this regard between the law of England as it was then and the law of his country as it has been since 1892 is simply that, whereas in England only a married woman who was carrying on a trade separately from her husband was subject to the bankruptcy laws, as if she were a **feme sole**, in New Zealand all married women were subject to the bankruptcy laws; but the words "as if she were a **feme sole**" do not appear in our Act.

In England the difficulty in the way of proceeding in such cases by bankruptcy notice has been met by Section 125 (2) of the Bankruptcy Act 1914, which provides that "where a married woman carries on a trade or business and a final judgment or order for any amount has been obtained against her, whether or not expressed to be payable out of her separate property, that judgment or order shall be available for bankruptcy proceedings against her by a bankruptcy notice as though she were personally bound to pay the judgment debt or sum ordered to be paid." That subsection renders obsolete in England **In re Lynes** (supra) and other cases following it, such as **Re Hewett**—(1895) 1 Q.B. 328; **Re Hanford & Coy.**, (1899) 1 Q.B. 566—Williams' Bankruptcy Practice, 13th Edn. (1925), page 24. If it were thought desirable to bring the law on this subject into conformity with the English law, I think legislation on similar lines would be necessary. For the reasons given, and with great respect for the opinion of the learned Judge who decided In re Somerville (supra), I think the decision in **In re Lynes** (supra) applies to the provisions of Section 26, subsection (f) of our Bankruptcy Act, and that the procedure by bankruptcy notice under that subsection is not available upon a judgment against a married woman.

The petition is therefore dismissed with costs £5 5s. and disbursements.

Solicitor for H. H. Hinkey: **P. D. Hall.**
Solicitors for A. C. Walker: **Slater, Sargent & Dale,** Christchurch.

Stringer J. September 13; October 26, 1926.
Hamilton.

MANUEL ET AL v. JONES ET AL.

Costs—Judgment against several by default—Principle on which costs are awarded as between the defendants.

This was a motion under R. 236 to set aside the judgment which had been obtained by default. The main ground in support of the application was that the costs were erroneously orderd to be paid by all the defendants jointly and severally.

McGregor in support.
Johnston contra.

STRINGER J. said:—
I have examined the cases cited by Mr. McGregor, but they do not appear to me to support his contention. It is

true that in Dearsley v. Middlewick, 18 C.D. 236, Fry J., following a dictum in Real and Personal Advance Company, 18 C.D. 362, which had been cited to him, held that a Defendant cannot proceed against a co-defendant for contribution in respects of costs to which both were equally liable, but the dictum when examined shows that it had no reference to a common law action, and indicates that the rule is different in a suit such as the present, the principle governing which is that equality is equity. On the other hand it was expressly held in **Newry Salt Works v. McDonnell, 1903, 2 Ir. R. 754,** that not only can one of several co-defendants ordered to pay the Plaintiff's costs, who pays the whole costs, recover a contribution from the other defendants, but that he can do so by motion in the original action after judgment, although no leave has been reserved in the judgment. In the case Palles C. B., in delivering the judgment of the Court, said: "The effect of the judgment was to "make these various defendants joint debtors for the costs "when ascertained, and as a matter of course, when one of "several joint debtors pays the whole amount of the debt, "he is entitled to contribution from the others."

The learned Judge explained that the dictum in the case of **Real and Personal Advance Co. v. McCarthy** had not the meaning attributed to it by Fry J., and went on to say that once the payment was made by one of the joint debtors there was no reason why, according to law or common sense, that right should not be enforced in the action without an independent proceeding. That decision appears exactly applicable to the present case. With regard to the amount of the costs allowed, a mistake appears to have been made. The judgment was for costs as per scale, and it was wrongly assumed that the amount involved in the action was the whole amount paid by the Plaintiffs to the Bank under the guarantee, viz., £3522, whereas the amount really involved was the proportion only of the amount paid by the Plaintiffs which the Defendants were liable to contribute, viz., £1774 6s. 8d., for which latter amount judgment was given against the Defendants.

I think, therefore, that the judgment should be amended by reducing the costs by £55 13s., being the excess fee allowed for the trial, and that the following provision should be added to the judgment:—

"And leave is further reserved to the Defendants or any "of them to take further accounts as to their respective "liabilities as between themselves or as between them or "either of them and the Plaintiffs."

As the motion has been only partially successful, I make no order as to the costs of this motion as against the Plaintiffs, the Defendants who moved having a right to recover a proportion of the costs incurred by them from the other Defendants in the action.

Solicitors for the motion: **McGregor & McPherson,** Morrinsville.

Solicitor for plaintiffs: **C. M. G. McDavitt,** Morrinsville.

Alpers J. November 9, 16, 1926.
Wellington.

IRWIN v. HANNAH.

Negligence—Injury to infant—Child walking in yard of boardinghouse—Sustaining burns—Liability of boarding-house-keeper—Parent of infant—Whether there was contributory negligence.

This was an unusual case, and the case is important. We understand there is a probability of having this decision reviewed by the Court of Appeal. We take the facts from the judgment of Alpers J.

The defendants are joint owners of a cottage at Otaki, near the beach. It is their practice at Christmas-time to take in a certain number of boarders for the holidays. The plaintiff, W. C. Irwin, made a contract with the defendants to board himself, his wife, and their little boy, then aged one year and seven months, during the Christmas holidays of 1924, the remuneration agreed upon being at the rate of £1 15s. per week for each adult, and 15s. per week for the child.

The cottage consisted of three rooms and some offices, one bedroom, a dining-room, and a kitchen with bathroom and washhouse opening off it. At that time there were eight people living on the premises: defendant and his wife, who slept on a closed-in verandah; two young girls, who slept in a tent at one side of the house; a woman who occupied a "shack" on the other side; and the plaintiff, his wife and child, who were lodged in the bedroom. All took their meals together in the dining-room, moved apparently in and out of the kitchen to get to the bathroom and to give help occasionally in the kitchen. They all lived together, as defendants admitted, "as one happy family." In so small a house it would obviously be quite impossible, had it been desired, to mark off any part of the premises to which this or that person had or had not access.

At the back of the house was a large yard surrounded by a brushwood fence. The yard was merely an area of sand without clearly-defined paths. In this enclosure stood an earth-closet to which all the inmates had to resort. At the back of the house was a tank-stand with a large tank on top of it. A ladder leaned against the tank, and the foot of it was some four feet out from the concrete foundation of the stand.

The defendants were in the habit of using a lignite coal for fuel in the kitchen range. The ashes of this kind of coal, as is well known, resemble wood-ash, in that they remain hot for a very long time. Mrs. Hannah says it was her custom, when she removed ashes from the grate, to deposit them beside the concrete foundations of the tank-stand immediately under the ladder. At intervals of a few days she poured water on them, and then spread the wet ashes over parts of the sandy yard, where she was trying, apparently, to form paths. But she did not pour water over them, as she might easily have done, on each occasion when she cleaned the grate; she apparently thought the hot ashes would be safe under the ladder, if she thought about the matter at all.

One morning, while the plaintiff's wife was getting a bath ready for him, the little boy in his pyjamas wandered out into the back yard, and presently screams were heard. Mrs. Hannah brought him in, terribly burned on both feet. She says she found the child standing in the hot ashes, gripping the ladder with its hands. No one else saw where the child was when its feet were burnt. The plaintiff, however, states that when he arrived at Otaki later in the day Mrs. Hannah took him out and showed him the spot where she had found the child. "She simply said the boy ran into "the ashes. Then she showed me the ashes in the back "yard. Anybody was liable to walk into them: the colour "was the same as the sand, practically——. The ashes were "well out in the middle of the back yard—well away from "the tank."

Blair for plaintiff.
Leicester for defendants.

ALPERS J., in giving judgment for the plaintiff, said:—

If it were necessary to come to a decision upon this conflict of evidence, I should accept that of the plaintiff in preference to that of the defendant, Mrs. Hannah. But on the view I take of the matter it is immaterial whether the ashes were lying about in the open yard or were heaped under the ladder. The child had the right to be in the yard: his mother would have to take him across it to go to the closet. He used also, apparently to visit the young girls in the tent, with whom he was a favourite. A ladder would be an allurement rather than a deterrent to a child of that age, and nothing was more natural than that he should play about under it.

The defence's suggestion is that the child had no business to be running about the back yard. Mrs. Hannah herself admits that "the child would run about the back yard and fall over occasionally;" but it is not suggested that she or her husband ever protested to the mother about this. She must have realised that sand and ladders have a great attraction for children.

The defendants plead contributory negligence on the part of the mother, in whose custody the child was, and says its injuries were solely due to the negligence of the mother in allowing him to go abroad alone and not preventing him from getting into danger. There is not a tittle of evidence to support this plea; nor is it easy to see how it could be supported in these circumstances, unless it were the duty of a mother, when she takes her children to the seaside for a holiday, to drag them about on a tether-rope.

I find the defendant Mrs. Hannah was clearly negligent in leaving hot ashes about the back yard, whether under the ladder or in the open. The question for determination therefore is: Are the defendants liable to the plaintiffs for the consequences of this negligence?

Counsel for defendants cited to the Court a number of cases on the limits of the duty of occupiers of premises to invitees or licensees. But these are not in point, for the infant plaintiff was neither one nor the other; he was a person on whose behalf an express contract for valuable consideration had been made with the defendants.

"Where the occupier of premises agrees for reward that "a person shall have the right to enter and use them for a "mutually contemplated purpose, the contract between the "parties, unless it provides to the contrary, contains an im-"plied warranty that the premises are as safe for that pur-"pose as reasonable care and skill on the part of anybody "can make them." **(McLean v. Segar, 1917, 2 K.B. 325 at 332).**

Even if the infant plaintiff in this case were a mere invitee or even a licensee, I should hold the defendants liable; for "The duty towards a child is much more extensive than "that towards an adult, inasmuch as many dangers which "would be open and obvious to the adult may be concealed "and secret traps for the child." **(Salmond's "Law of Torts," sixth edition, page 457.)** The Corporation of the City of Glasgow was held liable for the death of a child of seven who had eaten of poisonous berries growing on some specimen trees in the Botanical Gardens under the control of the Corporation because the berries presented a tempting appearance to children and there was no adequate warning of their dangerous character. **(Corporation of the City of Glasgow v. Taylor, 1922, 1 A.C. 44.)** **A fortiori** in the present case, where a contractual relationship existed between the infant plaintiff and the defendants.

Both feet of the child were dreadfully burned. Thanks to highly-skilful and painstaking surgery, the child—now aged four—has the use of his feet. The toes had to be removed, but by skin-grafting from the child's thigh in a series of operations—there were five altogether—the main part of each foot has been preserved. The contraction due to the burn produces a convex shape of the foot, and further operative treatment may conceivably be necessary as the foot grows. Dr. Bowerbank took, as it seemed to me, a very fair and hopeful view of the results of his work, but he does not think the feet can ever get better than they now are. Special boots will always have to be worn, and the child will never have a good balance. Assessment of damages in such a case is peculiarly difficult; adequate compensation is, of course, out of the question: one can only award a contribution towards it. I give judgment in favour of the infant plaintiff, Jack Hector Irwin, for £500.

The father, W. C. Irwin, claims special damages amounting to £157 3s. 6d. I disallow the claim in respect of the services of his wife, who was, fortunately, a professional nurse, and allow only the actual amounts paid in respect of medical attendances, hospital fees, and payment for domestic help and other reasonable disbursements. Judgment for Plaintiff W. C. Irwin for £73 13s. 6d., costs according to scale, witnesses' expenses and disbursements to be fixed by the Registrar.

Solicitors for plaintiff: **Chapman, Tripp, Blair, Cooke & Watson.**

Leicester & Jowett for defendants.

Adams J. October 17; November 2, 1926. Christchurch.

DUNCAN v. THE PUBLIC TRUSTEE.

Practice—Action for accounts—Finding that plaintiff owes sum to defendant—Power of Court to enter judgment for defendant.

This was an action and was referred to the Registrar to take accounts. He found that a sum was due to the defendant. The defendant moved that judgment be entered for him with appropriate costs.

Whitcombe for plaintiff.
Cuthbert for defendant.

ADAMS J. said:—

The Registrar has reported in this case that on the taking of the accounts it was found that the plaintiff was indebted to the defendant in the sum of £76 3s. 10d., and the defendant asks that judgment be now entered for him in that sum. Counsel for the defendant relied upon rule 298 and **Ell v. Harper**—4 N.Z.L.R., C.A., 141. From the report of this case it appears that accounts had been taken before the Registrar and an accountant who certified that the plaintiff owed the defendant £2166 9s. 7d. The plaintiff moved to review the certificate on the ground of mistake, but this motion was refused, and on the motion of the defendant Johnston J. thereupon entered judgment upon the Registrar's certificate. It is not stated in the report, but appears from the record that the judgment so entered was for the sum of £2166 9s. 7d. found to be due. Although in general a defendant who has not counterclaimed cannot have what Sir John Romilly calls active relief,—**Toulmin v. Reid,** 14 Beav., 499—it appears always to have been the practice in equity in actions where accounts are directed to order the plaintiff to pay the sum found due by him where the liability to pay is mutual. The practice is thus stated in **Seton on Judgments and Orders,** 7th Edn., Vol. II, page 1312: "It is usual and proper for a claim for an account to contain a submission by the plaintiff to account himself, and such submission should be recited in the order. The omission of it in the bill did not make it demurrable, because the submission was implied or might be made a condition precedent to making the decree; and after a decree or judgment for account the plantiff may always be ordered to pay the sum due from him where the liability to pay is mutual; but not where the amount found due is not a personal liability on the part of the plaintiff." In **Bergman v. Macmillan and others**—17 C.D. 423—which was an action for an account by an assignee of an interest in a patent against his assignor Macmillan and the manufacturers of the patented article, Fry J. said that the plaintiff had not submitted to pay to the defendants other than Macmillan any moneys which might be due from Macmillan to them, and that the accounts could not be taken at his instance against the manufacturers unless the plaintiff put himself in the position of his assignor."

I think, therefore, that the defendant is entitled to judgment against the plaintiff for the sum found due. Judgment will be entered accordingly, with costs of the action according to scale as on a claim for £300. Costs of order for discovery £1 1s., Affidavit of documents £2 2s., Summons for Interrogatories £3 3s., Interrogatories &5 5s., Motion to vary Registrar's report £5 5s., taking of accounts before Registrar £23 2s., motion to confirm report and for judgment £10 10s; disbursements and witnesses' expenses to be fixed by the Registrar.

Solicitor for plaintiff: **F. Whitcombe,** Christchurch.
Solicitors for defendant: **Garrick, Cowlishaw & Co.,** Christchurch.

Herdman J. September 30; October 18, 1926. Auckland.

SAUNDERS v. COMMISSIONER OF STAMP DUTIES.

Stamp duty—Deed—Transfer of rights under agreement for sale—Exchange—Duty payable.

This was an appeal from the Commissioners' assessment. We take the facts from the findings of the trial Judge.

Chalmers for appellant.
Paterson for respondent.

HERDMAN J., after reciting the facts, found as follows: On the 13th of July, 1923, Mr. Maddox agreed to sell to one Jens Carls Hansen certain pieces of land for the sum of £1625, and certain plant, machinery and chattels for the price of £2000, making in all the sum of £3625, of which the sum of £500 was paid in cash, leaving outstanding a balance of £3125 payable under the contract. I refer hereafter to this transaction as "the Hansen agreement."

On the 26th of January, 1924, Maddox agreed with the appellant Saunders to exchange for certain lands situated at Whakatane belong to the latter, **inter alia** "the Hansen agreement" securing the sum of £3125.

To give effect to the last-mentioned contract, the deed dated the 4th April, 1924, was executed by Maddox and Saunders.

This document, after reciting "the Hansen agreement" and the contract between Maddox and Saunders, then proceeds: **First,** to assign to Saunders the agreement dated the 13th of July, 1923, and the full and exclusive benefit thereof, and the unpaid balance of purchase-money, amounting to £3125. **Second,** to convey to Saunders the lands referred to in paragraph 1 of the contract of the 26th of January, 1924, which Maddox had agreed to sell to Hansen, and in respect of which purchase-money remained unpaid, the conveyance of the land being made subject to Hansen's rights under the contract of the 13th of July, 1923. It will be noted that in the agreement of exchange dated the 26th of January, 1924, there is no undertaking on the part of Maddox to convey the land which he had agreed to sell to Hansen.

The assessment made by the Commissioner in respect of this deed has given rise to the present dispute.

The case stated shows that on the 15th of April, 1924, the Assistant Commissioner of Stamp Duties at Auckland assessed the agreement dated the 26th of January, 1924, with conveyance duty amounting to £31 10s. in respect of the property which Maddox had agreed to sell to Hansen and in respect of which Hansen was under contract to pay to Maddox £3125. The duty was assessed at the rate of 10s. for every £50 or part of £50 of the sum of £3125. The assessment was made under paragraph (a) of section 79 of "The Stamp Duties Act 1923," and was subject to an arrangement that Saunders should have liberty to appeal against the assessment under section 36 of that Act.

The Assistant Commissioner, purporting to act under section 91 of the Act, charged the deed, dated the 4th of April, 1924, with duty amounting to 2s. 6d.

Saunders objected to the assessment of £31 10s., contending that the correct conveyancing duty was the rate fixed by paragraph (b) of section 79. His submission was that the transaction between Maddox and himself was really a transfer of "money payable."

The Commissioner upheld the objection of Saunders and altered the assessment, reducing the duty to £8 upon the agreement, but at the same time he requested the appellant to produce the deed in order that duty over and above the sum of 2s. 6d. already charged might be assessed. Saunders cannot now escape from the position that he took up when he claimed that the contract to which he and Maddox were parties was in effect a transfer of money payable.

The Assistant Commissioner finally assessed the deed with conveyance duty amounting to £16 10s.

The duty was computed upon the sum of £1625, the amount of the consideration stated in "the Hansen agreement" to be paid for the land.

In the result, then, we have two assessments, as if there existed two separte instruments.

There is first the assessment of duty, amounting to £8, upon the agreement dated the 26th of January, 1924, made by Maddox with Saunders, in which, among other things, Maddox purported to part with the benefits of the agreement between Hansen and himself, which bound Hansen to pay the sum of £3125.

Then there is the assessment of duty, amounting to £16 10s., upon the conveyance contained in the deed between Maddox and Saunders, which vested in Saunders the land in respect of which Hansen was bound to pay part of the £3125, namely, £1625.

Saunders offers no objection to the assessment of duty upon the agreement, but says that he is not obliged to pay the £16 10s. assessed upon the conveyance of the land.

If the deed made between Maddox and Saunders had done no more than effect an assignment in favour of Saunders of all the rights of Maddox against Hansen under his agreement with Hansen, no question would have arisen; but the instrument goes beyond that. The agreement between Maddox and Saunders is silent as to the sale of the fee simple of the land which is conveyed by the deed of the 4th of April, 1924. In the original contract it forms no part of the consideration for the transfer by appellant of his Whakatane land. But in the conveyance tendered for stamping this new disposition of the property appears and is stated to be part of the consideration moving from Maddox. One of the effects of the deed is to vest the legal estate in the land in Saunders. He became the legal owner of the land, subject to Hansen's right to get the title upon the performance of his obligations under the Hansen agreement.

By the contract of the 26th of January, 1924, what then did Saunders get? He got, amongst other items of property, a certain land sale agreement between Maddox and one Hansen securing the sum of £3125 at 6½ per cent. But there the matter does not end, for nothing is plainer than that, as a result of the experiment in the art of drafting deeds, which resulted in the creation of the conveyance now under consideration, he got something more—namely, the fee-simple of the land which Hansen agreed to buy. There is therefore contained in the instrument of conveyance two separate and distinct dispositions of property; one, an assignment of "the Hansen agreement," upon which duty had been paid when the agreement was stamped; the other, the conveyance of the freehold land upon which no duty has been paid.

The consideration for the assignment of the rights of Maddox against Hansen under the agreement and for the conveyance of the freehold to Saunders, is the property of the latter situated at Whakatane, but what its value is it is difficult to ascertain. The transaction is an exchange of one property for other property. I think, therefore, that the proper course for the Commissioner to take is to act under section 84 of "The Stamp Duties Act 1923," the consideration for the conveyance on sale being not ascertainable with reasonable certainty. That section provides that in such a case the instrument shall be deemed to be one of voluntary conveyance to the extent of any resulting inadequacy, therefore, and shall be charged with duty accordingly.

It might be argued that Maddox was the owner of the bare legal estate only, and that when he signed a contract with Hansen he had parted with his equitable interest in the land; but it would seem from the observations of Brett **L. J. in Rayner v. Preston, 18 Ch. Div. at page 10,** that a vendor placed in the circumstances in which Maddox stands is not a trustee for the vendee Hansen. "They are only "parties to a contract of sale and purchase of which a Court "of Equity will under certain circumstances decree specific "performance." There never was any instrument of agreement between Maddox and the appellant providing for a sale of the land conveyed. The Commissioner has before him nothing more than an instrument which purports to vest the land in appellant subject to Hansen's rights under his contract. Hansen may or may not perform his part under the agreement to which he is a party. If he should fail to complete his purchase the property will remain in the hands of appellant; so if in computing the value of appellant's interest in the land sold some deduction were made because of the sale to Hansen, appellant might hold the land as owner without having paid full duty as on a conveyance of land. I think the proper course to take is to treat the instrument as an ordinary conveyance of land the duty on which should be assessed as in the case of a voluntary conveyance, and that in computing the value of appellant's interest in the land no regard should be had to the fact that he is bound to respect a contract for its sale entered into by Maddox with Hansen.

Solicitor for appellant: **C. C. Chalmers.**
Solicitors for respondent: **Meredith & Paterson.**

Alpers J. November 5, 16, 1926.
Wellington.

FASHIONS, LTD. v. BURSTON.

Trade-mark—Trade name—Passing off.

This was an application to have made perpetual an order nisi which had been made by Mr. Justice Reed. The facts involved were as follows:—

On the 22nd of October, 1926, an order was made by Mr. Justice Reed restraining the defendant from carrying on her business under the name or title of "Fashions Unlimited," either alone or in connection with any other word or words, until further order of the Court.

The plaintiff company was incorporated on March 13th, 1926, and since that date has carried on, at Courtenay Place, Wellington, the business of manufacturers and vendors of frocks, dresses, and all kinds of women's clothing. The defendant was employed as a workroom manager by the plaintiff company from the time of its incorporation till September 30th, 1926, when she resigned. Shortly afterwards the defendant commenced business in Willis Street, Wellington, as a maker and vendor of frocks, dresses, and other kinds of women's clothing, and she carried on this business under the name of "Fashions Unlimited."

O'Leary in support.
Brown contra.

ALPERS J., in making the order nisi perpetual, said:—

It is urged on behalf of the defendant that her's is a retail business, while that of the plaintiff company is exclusively wholesale. But the retailer of to-day is often the wholesaler of to-morrow; on the other hand, the plaintiff company may at some future time desire to change its policy and, instead of selling the goods it manufactures to "the trade," may decide to establish retail shops of its own. As was said by **Cozens-Hardy M.R.**, in **Ouvah Ceylon Estates Ltd. v. Uva Ceylon Rubber Estates Ltd. (103 L.T. 416):** "'Calculated to deceive' is not a phrase which has reference to-day or when the writ is issued. It means, according to the proper use of language, calculated in the ordinary sense of business, assuming business will be carried on in future not precisely and not exactly in the mode it is carried on to-day by this new company, but with one's knowledge of affairs how it is likely to be carried on."

Counsel for defendant also contended that "Fashions" is a common noun, in everyday use, to which defendant has a right with the rest of the community; and he relied upon the observation of **Farwell J.** in **Aerators Ltd. v. Tom** (1902, 2 Ch. 319 at p. 323):—"It appears to me impossible to say, as a general proposition, that a company can, by registering a single word, whatever its nature, remove that word from the English language so far as regards its use in the title of subsequent companies." But as the learned judge in that case goes on to point out, the word "aerators" is "the one word in the English language which aptly describes the articles they manufacture or deal in." The word "Fashions" is not the only word that aptly describes frocks, dresses, and other kinds of women's clothing; and used in that sense the word "Fashions" is forced out of its proper and usual meaning and is really in that application an invented word. Moreover, the name "Fashions Unlimited" seems to me to be and to be intended as a challenge to comparison with "Fashions Limited" by a person employed in a responsible position by that company during the first half-year of its existence. Confusion in the two names must inevitably result, especially as there will be a tendency to abbreviate both names to "Fashions." It is not surprising to learn that some confusion has already occurred in that correspondence addressed "The Manager, Fashions Unlimited, Wellington," has found its way into the Post Office letter-box of the plaintiff company.

The case, in my opinion, is fully covered by the decision relied upon by counsel for plaintiff—**National Timber Co., Ltd., v. National Hardware, Timber & Machinery Co., Ltd. (1923, N.Z.L.R. 1258).** I therefore order the interim injunction of October 22nd, 1926, to be made perpetual.

Costs of the motion for an interim injunction were reserved. The defendant must pay to the plaintiff the sum of £21 and disbursements as costs of the two motions.

Solicitors to move: **Bell, Gully, MacKenzie & O'Leary,** Wellington.

Solicitors to oppose: **Salek, Turner & Brown,** Wellington.

Alpers J. November 3, 16, 1926.
Wellington.

HUME v. PUBLIC TRUSTEE.

Will—Restraint against anticipation—Assignment—Whether complete deed or escrow.

This was an originating summons to ascertain whether the plaintiff had forfeited his interest in the estate of his father through an attempt to anticipate a portion of his income accruing therefrom. We take the facts from the reasons of the learned trial Judge.

H. F. Johnston for plaintiff.
C. A. L. Treadwell for Mrs. Hume.
G. G. Rose for Public Trustee.

ALPERS J. said, in answering the question in favour of the plaintiff:—

By a codicil to his will, dated June 19th, 1923, George Hume, of Tauanui, sheepfarmer, deceased, directed his trustees within three years of the date of his death to pay to the Public Trustee of New Zealand the sum of £8000, to be held by him upon the following trusts:—

"To pay the net annual income arising therefrom to my son George Gordon Hume during his lifetime without power of anticipation and so long as he does not become bankrupt or make a composition with his creditors. As and from his death or any attempt to anticipate the income or on his becoming bankrupt or making a composition with his creditors, I declare that the Public Trustee shall pay the net annual income from the said sum to the wife of my son George Gordon Hume if he shall then be married during her lifetime and after her death I declare that the Public Trustee shall hold the said sum capital and income alike for and on behalf of the children of my said son born in wedlock in equal shares on their attaining the age of twenty-one years and if there shall be only one child then the whole for that child."

If no children of the said George Gordon Hume live to succeed to the capital of the said sum of £8000, then the Public Trustee shall hold it for such person as the said George Gordon Hume shall by deed or will appoint, and in default of appointment the sum shall fall into residue.

The testator died on July 1st, 1923, and on July 1st, 1926, the executors under the will paid to the Public Trustee the sum of £8000 as directed by the codicil. The plaintiff, who is now 25 years of age, was married on January 9th, 1926; his wife was served with this originating summons by order of the Court and was represented by counsel at the hearing. There are no children of the marriage.

On June 29th, 1926, two days before the sum of £8000 was paid over the Public Trustee, Mr. A. W. Gould, of Ohakune, solicitor, forwarded to the Public Trustee an order in the following words:—

"The Public Trustee,
"Public Trust Office,
"Wellington.

"Please pay to Albert William Gould at Ohakune, Solicitor, the sum of sixteen pounds (£16) free of exchange out of first month's interest coming to me on a fund of £8000 of mine in your hands. This order to stand irrecoverable.
"G. G. HUME.

"Dated 29th June, 1926.
"Witness: E. M. Pearce, Law Clerk, Ohakune."

This order was enclosed with a letter from Mr. A. W. Gould in the following words:—

"I enclose herewith an Order on your Department to pay to me £16 of 1st month's interest upon a sum of £8000 which I understand from perusal of correspondence is to be paid to you on his behalf.

"The money in connection with this Order has been advanced by a client to enable Mr. Hume to go to Wellington to interview your Office, and if possible obtain a loan from you for the purpose of paying off his creditors.

"Will you kindly protect me in this matter and pay same when the interest becomes available for that purpose?"

The order was despatched by Mr. Gould on the same day it was signed by the plaintiff, and reached the Public Trustee on the following day.

On July 16th, 1926, the solicitor to the Public Trustee wrote to Mr. Gould intimating that in his opinion the order

operated to determine the interest of the plaintiff in the trust fund; and on July 27th Mr. Gould wrote in reply to say that he thereby cancelled and withdrew the order in his favour, and asked that it be returned to him. The £16 had in the meantime been repaid to Mr. Gould, and at the date of the cancellation no money was in fact due by Mr. Hume to Mr. Gould.

Both the plaintiff and his solicitor have filed affidavits in which each gives the same account of the circumstances in which the order of June 29th was given and subsequently forwarded to the Public Trustee. Hume says that at the time of making the order referred to he told Mr. Gould that there was some clause in his father's will restraining him from anticipating the income bequeathed thereunder. He wished to go to Wellington to confer with the Public Trustee on the matter, and it was arranged that a document should be signed by him as evidence of his indebtedness to Gould, but that this document was not to be forwarded to the Public Trustee until the precise nature of the clause restraining anticipation of the income had been ascertained. The plaintiff avers that had he realised the document could have been construed as an attempt to anticipate the income he would not have been so foolish as to sign it. The order was forwarded to the Public Trustee without his knowledge or authority.

Mr. Gould fully corroborates these statements. He says he agreed to Hume's request not to forward the order to the Public Trustee until the precise provisions of the will were ascertained; but subsequently, "without his authority "or knowledge, and through inadvertence and mistake," he sent the order to the Public Trustee. Mr. Gould goes on to say that he admits that this was contrary to the intention of the plaintiff and himself expressed at the time, but adds: "In my anxiety to safeguard my own interests and that "of a client who had advanced money to me I overlooked "and forgot the instructions of Mr. Hume."

As the word "subsequently" can only mean "later on "the same day," it would seem that Mr. Gould's lapse of memory operated very quickly; but one must suppose that his "anxiety to safeguard his interests" accounts for some of his "inadvertence" and confusion of mind. As, however, his affidavit completely corroborates Mr. Hume's statement that the order was to be held merely as an evidence of indebtedness and was not to be forwarded to the Public Trustee until the precise nature of the restraint clause had been ascertained, I must assume that the two affidavits, uncontradicted as they are give an accurate account of the transaction.

The question I have to decide is whether the direction or order of June 29th operates to determine the Trust of the income declared by the second codicil in favour of the plaintiff.

The language of the codicil itself, particularly in the use of the words "without power of anticipation" as applied to the income of a man, leaves something to be desired from the point of view of conveyancing, and it may quite possibly come before the Court at some future time for interpretation.

In the view I take of the matter before the Court, however, the question, namely, whether a forfeiture of the plaintiff's interest has or has not been created, I do not think it is necessary to go into the difficulties of construction of the codicil raised by counsel in the course of the argument.

The Public Trustee was fully justified in the attitude he adopted, but now, very properly, submits to the order of the Court. The plaintiff's wife, also very properly, identifies herself with her husband in the matter, and instructs her counsel to support him in argument. There are, as stated, no children of the marriage, and it was not thought necessary by the Judge who made the order for directions for service that the interests of unborn children should be separately represented before the Court.

Of the authorities cited there are two only to which I need particularly to refer. In the New Zealand case of **MacGregor v. The Public Trustee (31 N.Z.L.R. 587)** the plaintiff, under his father's will, was entitled to certain income to be paid to him during his life or until he should become bankrupt, or should assign, charge, or encumber the said income or some part thereof. In ignorance or forgetfulness of this provision, an assignment called a "deed of cession" was made by him of four quarterly instalments of income. When the attention of the parties to this assignment was drawn to the provisions of the will they cancelled the assignment. It was held by **Sim J.** that the assignment determined the plaintiff's interest under the will and that the cancellation was of no effect in getting rid of the forfeiture which had already accrued.

The document, prepared, apparently, with the deliberation and with all the formalities of a deed, was clearly a good assignment of the income of the plaintiff and would have operated effectually to assign it had the income belonged absolutely to the plaintiff. Assignor and assignee attempted to explain away the document by stating that it did not express the real transaction between them, but was intended to be and to operate as a power of attorney from assignor to assignee to collect the four instalments of income. That explanation, however, in the face of the consideration given by the assignee, was obviously incredible and was rejected by the Court.

In the case of **"In re Sheward ((1893) 3 Ch.D. 502)** the plaintiff was similarly entitled for life to the income of a trust fund, provided he did not "assign or incumber" his interest. On the occasion of a loan to him he signed in favour of the lender a document which amounted in terms to an equitable assignment of his interest in the income. It was proved that as between assignor and assignee the document was not intended as a charge or assignment and that it would have been a fraud on the bargain between them so to use it. It was held in that case that as the document could have been set aside for fraud or mistake it was competent for the Court to go behind its literal meaning and ascertain the intention of the parties from evidence extrinsic to the document itself. On that evidence the Court was of opinion that there had not been a forfeiture of the life interest.

A fair test to apply in the present case is, I think, that applied by **Kekewich J.** in **Sheward's Case.** If Mr. Hume were plaintiff in an action to set this order aside on the ground of mistake or on the ground that it was given as an escrow, could Mr. Gould successfully resist judgment? In the face of his own admission as to what took place between him and Hume when the order was signed he clearly could not do so. There was present to the minds of both some knowledge of the purport of the codicil, though they had not the instrument before them; they knew at any rate that the income of the fund was subject to some restriction or other. It is difficult to believe that Hume in signing the order intended for the sake of a present advance of £16 to imperil his interest in an income of some £400 a year for life. Even Mr. Gould, though he was a professional man, cannot have fully apprehended the position, or he would not have allowed his client to sign such a document, especially if he realised that the mere execution of it by the borrower would destroy any value it might have as security, and imperil the repayment of the loan. If Mr. Gould's act in forwarding the order to the Public Trustee had been deliberate it would have been a fraud on the bargain made by him with Mr. Hume. As it was not deliberate, but due to inadvertence or some clumsy blunder or other, it was a mistake in dealing with a document held by him in escrow.

The case is not free from difficulty, but a Court is not industrious to discover grounds for declaring a forfeiture, and on the whole I think the facts take it out of the decision in **MacGregor's Case** and bring it within that in **Sheward's Case.**

I therefore answer the question in the originating summons in the negative.

As to costs, I am of opinion, as was **Kekewich J.** in **Sheward's Case,** that it would be wrong to throw the costs of these proceedings, occasioned as they are by Mr. Hume's own imprudence, on the capital of the trust fund: they must be borne by income. Costs of all parties, including the plaintiff himself, as between solicitor and client, to be paid by the Public Trustee out of capital in the first place, but debited against income; he may spread the refund of the amount from Hume's income over a period of twelve months, and for this purpose may disregard the restriction imposed by the codicil. Should Hume die within the period of twelve months the balance of costs not refunded must fall upon capital.

Solicitors for plaintiff G. G. Hume: **Johnston, Beere & Co.**
Solicitors for plaintiff's wife, Mrs. Hume: **Treadwell & Sons.**
Solicitor for Public Trustee: **Public Trustee.**

THE NEW ZEALAND UNIVERSITY AMENDMENT ACT, 1926

(By A. de B. Brandon, Esq.)

An Act with such a high sounding title should be a model of draftsmanship and language. How far this Act falls short not merely of perfection but of commonplace may be judged from the following cursory examination of its contents.

Section 1 contains two subsections (1) the short title and (2) the commencement. The better practice is to make separate sections of independent enactments.

Section 2. "Registrar" means the Registrar of the New Zealand University. Neither the principal Act nor any amendment makes any provision for the appointment of a statutory officer to be called the Registrar. By section 5 (1) (b) notice of resignation must be delivered to the Registrar. If the Council should appoint say only two officers and call one the secretary and the other the clerk there is no one to whom the notice of resignation can be legally delivered. The principal Act directed such notice to be sent to the Senate.

Section 3 (1) makes unnecessary reference to the Canterbury College Ordinance 1873 and the Victoria College Act 1897 both of which have been repealed, and subsection (2) seems to be an attempt to negative the consequences of the change made by subsection (1).

A body corporate under the name of the University of New Zealand was established in 1870 and the component parts were declared to be the Chancellor, Vice-Chancellor and Senate. In 1874 the Act of 1870 was repealed by an Act which said: "The body corporate established by the said Act under the name of the University of New Zealand shall, any alteration made by this Act in the constitution of the said body corporate notwithstanding, remain and be the University of New Zealand, &c."; this is very different from the impossibility set out in section 3 (2) which says: "the University shall notwithstanding the change in its constitution effected by this Act continue to be for all purposes *the same University as before the passing of this Act.* (Note: the words are not italicised in the Act). How can it be the same University? and how can a University be the same as a prepositioned phrase which refers to time only?

A question may someday be raised on the effect of section 3 (1) on the three constituent colleges. Has their own incorporation disappeared in that of the University of New Zealand?

There is little doubt that the draftsman assumed that a University like say the University of Cambridge is a corporation consisting of incorporated colleges. He may be surprised to learn that the University of Cambridge is an incorporation of students under the name of "The Chancellor Masters and Scholars of the University of Cambridge."

The constituents of the University of New Zealand might well have been left at "The Chancellor Vice-Chancellor Fellows and Graduates as was the case before the passing of this Act."

Section 4 (1) establishes a Council of the University and subsection (2) proceeds to say "The Council shall be constituted as follows, &c."; but it was already constituted by subsection (1) and the proper words are "shall consist of."

Subsection (3) of this section opens with this sentence: "In addition to the members provided for under the "last preceding subsection the Council may, &c." One reads the last preceding subsection but can find no provision for members made in the way of board lodging or salary or in any other way.

Subsection (4) speaks of persons "in the employ-"ment of the University Council or the Council of any "constituent college or the Council of the New Zea-"land College of Agriculture." The draftsman overlooked the fact that the Councils named are merely managers of their respective corporations and that the servants appointed by them are the servants of the corporation and not of the Council.

Subsection (5) says "The members . . . . shall . . . . "be appointed or elected for a term of three years "but shall . . . . be entitled to continue in office until "the appointment or election of their successors in "office." The use of the plural is objectionable as the particular enactment is intended to apply to individual members separately and not collectively. An objection which may be urged to the section generally is that the term of all appointed or elected members ends at the same time so that there is a general exodus every three years. This is subversive of continuous policy and opens the door to frequent incursions of malcontents.

Subsection (7) enacts that "The Council shall be "deemed to be constituted on a day, &c." The draftsman had forgotten that he had already constituted the Council by subsection (1).

Section 5 (1) is open to the objection that it does not discriminate between cesser of membership by natural causes such as death or resignation and disqualification for cause. In its present form it says: "If a member "of the Council dies he shall thereupon cease to be "a member." One is tempted to wonder what would happen if this sapient enactment had not been made and a member died.

Subsection (2) is food for study: "Every casual "vacancy shall be filled in the same manner as in "the case of the vacating member." It may well be asked what was filled in the case of the vacating member. There is no doubt one case in which the body of the deceased member will fill the vacancy but that does not seem to suit the present circumstances. The draftsman in his paste and scissors work omitted after the word manner the words "and by the same "appointing authority" which appear in a corresponding section of the Principal Act.

This section offends the elementary rules of draftsmanship by using inexact words and phrases. The proper word to use when referring to a vacancy in office where in the ordinary course there is a fixed periodic ending is the word extraordinary. The phrase "shall hold office only for the residue of the term of "the vacating member" is quite inoperative because on the death resignation or disqualification of a member his term of office *ipso facto* comes to an end and there is no residue.

Section 5 (4) enables the Governor-General to appoint a "suitable" person to fill such vacancy but the Act nowhere gives any guide to His Excellency by defining "suitable."

Section 6(1) creates the office of Chancellor of the University and subsection (2) creates an office of Principal of the University and makes the Principal *virtute officii* Vice-Chancellor of the University. Nowhere else in the Act is the word Principal used except where reference is made to the principal Act. Probably because the head of a college is variously denominated as Master or Provost or Principal or Dean or President or Rector or Warden the draftsman thought that the University

required some such head forgetting that he had already furnished the University with the accustomed head known as the Chancellor.

Other minor matters for criticism are " be entitled to " in section 7. " In that behalf " in section (8)(1) and " shall . . . . of his own motion " in subsection (2) and " reasonable " in section 12 without definition.

Section 15 establishes an Academic Board which cannot meet except at such times and places as may be determined by it with the consent of the Chancellor or Vice-Chancellor (poor little puppies to be led by a string!) and which is then by section 17 (3) magnanimously given power to " conduct its business in " such manner as it thinks fit."

Section 18 (3) puts forth as a proposition of law to be established by the Act that " the fact that the Board " with the consent of the Council exercises any such " power shall be sufficient evidence of its authority " to do so." Who can know if the consent of the Council has been given to the exercise of a power by the Board unless evidence that such consent has been given is adduced. The clause quoted cannot mean otherwise than that if the Board purports to do an act which would be unlawful if done without the consent of the Council having been first obtained, and the Board as a fact did the act without having obtained the consent of the Council then the fact of the Board having done the Act is sufficient evidence of the legality of the Act notwithstanding that the act was by statute illegal.

The University Entrance Board is in the proud position that its members hold office during the pleasure of the appointing or electing authority as the case may be and there is no cesser of office in case of death resignation, bankruptcy, crime, etc.

Lord Thring in his book " Practical Legislation " says " A draftsman should pay attention to collecting " and arranging for his own use any relative terms." How far this has not been done by the draftsman of the Act under consideration may be gathered from section 10 (2) which is " The said degrees may be con- " ferred either after examination or *ad eundem* and " in either case the grantee shall be deemed to be a " graduate of the University."

The words in the context which appear to be relative are " conferred " and " grantee," but grantee presupposes a grantor. No degree can be conferred *ad eundem* but a candidate may be admitted *ad eundem gradum;* that is, if he is already a graduate of one University and is admitted to the same degree by another University, his degree in the latter University is called an *ad eundem* degree. The expression " confer " a degree " is generally used when a university honours a distinguished man.

Section 20 (7) gives a valuable privilege to Parliament of which it may avail itself some day: " In so far as " the expenditure of the Board is not defrayed by the " Council of the University it may be defrayed out of " moneys to be from time to time appropriated by " Parliament for the purpose." Possibly the draftsman thought that he would give Parliament the right to vote these moneys without having first been requested by the Crown to do so.

How the Society of Comparative Legislation will chuckle when this Act comes before them.

LONDON LETTER.

Temple, London,
13th October, 1926.

My Dear N.Z.,—

We were a little cheered, on having to return to work after a brief rest of ten weeks, to read yesterday a leader in the" Morning Post " as to the necessity of certain legal reforms. It mattered less that the certain legal reforms, thus led in evidence, amounted in the main to a curtailing of our yearly ten weeks to something regarded habitually by meaner-minded men as more economically representing a brief rest; the proposal is invariably made, when the Long Vacation is under discussion, but it does not generally come under discussion, under its annual discussion I should say, until it is over and, for that year at any rate, past reforming. No; what pleased us is the following passage and in the " Morning Post " of all papers which, notwithstanding the incomparable **Legal Digest** that once appeared, in the good old twopenny days, every Monday morning and was edited by me. . . . I thank you for the deafening generosity of your applause . . . which, as I say, has consistently been as rough-spoken, not to say rude, upon the subject of ourselves as any print I have ever read. This is the passage:—

" With the opening of the Michaelmas term at the Royal Courts of Justice to-day, attended by all due and appropriate ceremony " (not the least ceremonial of which I may say in parenthesis, was your Myers K.C., very complete in frock coat and all) " the wheels of the majestic and unparalleled machine of English law begin once more to revolve for their appointed season. Deep in their hearts, despite the hard things they occasionally say of lawyers, the English people do, in fact, estimate at its true value the judicial system of this country . . . " I read that passage more than twice, in the train, and I should certainly have read it aloud, had I not had my compartment to myself. I did think of going down the corridor and finding some scurrilous, unappreciative layman to read it to. . . .

Warrington has justified the prophets who, like myself foresaw his retirement, because we were positively informed of it by announcements emanating from Warrington himself; but Providence, or whatever operates in her place when a Conservative Government is in power, has put us prophets in a pretty mess over Warrington's successor: P. O. Lawrence, the very last of six excellent Chancery Judges whom one would have, or did, mark out for promotion. I am a tawny conservative myself; but I think my politics are less inspired by admiration for conservative methods of appointment than by the hope, unconscious though it be, of being some day promoted to something or other myself, notwithstanding considerations of merit! P.O. Lawrence has some merit, and, when he is on his day, is quite a good Judge, being noticeably polite and courteous at times, indeed at quite a number of times. Some of us quite like him: what little I have done before him has passed off agreeably and I have not been left with any sense of disappointment or ruffle; but the beginning of my pupilage, which was twenty years ago in Lincoln's Inn, put me in touch with a number of Chancery men who would, for quite a small consideration (a peppercorn, even) have gladly murdered P. O. Lawrence and who, I always anticipated, would murder him upon his becoming a Judge. Ah well! I dare say that, as he survived then, he will survive now. With age he has become, perhaps, less damnable

or the less damning; but his appointment, from among such men as Russell, Romer, Tomlin, Astbury or Eve, leaves me despairing of ever comprehending how appointments come about. Clauson was inevitable, to succeed whatever Judge left the Chancery Division bench; everyone knew that it must be so, down to the young woman who married the son of the attendant (retired) in the robing rooms over the way. It will be curious indeed, to see who succeeds to the very certain and important position at the Bar, occupied in recent times by Clauson. Maugham is hardly a patch on him; Greene is probably too young; Upjohn is far and away too old and too cold. I expect to be one of the first to get an inkling, since his place has now to be filled up in our team for the Crown, in your **Distributors** case.

There is less congestion, than there was this time last year, in the King's Bench Division lists, but things are still slow to sluggish in the Divorce Court lists, notwithstanding that division's full equipment of Judges, permanent and borrowed. The causes in Chancery seem to keep up, in number, well enough; on our side they are down on last year, and still more down on the year before. Commercial causes were a hundred strong, at Michaelmas, 1922; at this Michaelmas they are but a quarter of that figure. All told, actions triable of all sorts in the High Court, from matters of Appeal to Undefendeds in the Divorce Court, are down, in the last four years, by something like five hundred in a less than three thousand total. At this rate, another five years will see the end of litigation in this country, and we shall be writing to suggest to you the possibility of a demand for a really competent man out in New Zealand. "I have," we shall write, "succeeded in killing all litigation in England. May I not come and purge your Commonwealth for you?" It will not be merely your jealousy which causes the answer to be in the negative.

For such other news as is, I direct your attention to the "Law Journal" of October, where, at page 230 I think, you will also find recorded the first shadow of the coming stream of authoritative decisions to be noted (curse 'em!) This is an "unreported" case, necessarily, and concerns a dispute between a father and the L.C.C. as to the payment by the former of the penalty due upon default to fulfil an agreement that a daughter should be educated for a certain number of terms. When she reached sixteen, the daughter refused to continue attendance; it was with him as it is with so many of us, man proposes and his daughter disposes.

Victor Russell, it is seen, becomes Recorder of Bedford; some little recompense, and earnest of more to follow we must all hope, for the shocking effects of his gallant war-service upon his professional practice. It is amazing that he should have recovered so much ground as he has, even, at the Junior Bar in the Probate and Divorce Division, having regard to the thoroughness with which it was covered by the less gallant during his absence in the field. But, quiet and excessively polite as you may think him on hearing him, he should if there had been no war or if fair was fair, have been by now the leader, or one at least of the leaders there.

With these observations we may repress for good the vacation spirit and begin once more, in the words of the leader-writer "to revolve, majestic and unparalleled, for our appointed season."

Yours ever,

INNER TEMPLAR.

PUNISHMENT OF A BIGAMIST.

To the following satirical remarks passed by Maule J. is attributed to a great measure the passing of the English Divorce Act of 1857. The remarks are regarded as one of the finest pieces of satire ever uttered by a member of the Justiciary. The prisoner had pleaded guilty to a charge of bigamy and after the facts leading up to the committing of the offence had been explained to the learned Judge, Maule J. in sentencing the prisoner said:—

"Prisoner at the Bar, you have been convicted "before me of what the law regards as a very grave "and serious offence—that of going through the mar-"riage ceremony a second time while your wife is still "alive. You plead in mitigation of your conduct "that she was given to dissipation and drunkenness, "that she proved herself a curse to your household "while she remained mistress of it, and that she had "lately deserted you; but I am not permitted to "recognise any such plea. You had entered into a "solemn engagement to take her for better or for "worse, and if you got infinitely more of the latter, "as you appear to have done, it was your duty patiently "to submit. You say you took another person to be "your wife because you were left with several young "children who required the care and protection of "someone who might act as a substitute for the parent "who had deserted them; but the law makes no "allowance for bigamists with large families. Had "you taken the other female to live with you as your "concubine, you would never have been interfered "with by the law; but your crime consists in having "—to use your own language—preferred to make an "honest woman of her. Another of your irrational "excuses is that your wife had committed adultery, "and so you thought you were relieved from treating "her with any further consideration. But you were "mistaken. The law, in its wisdom, points out a means "by which you might rid yourself from further associ-"ation with a woman who had dishonoured you; "but you did not think proper to adopt it. I will tell "you what that process is. You ought first to have "brought an action against your wife's seducer, if you "could discover him. That might have cost you money, "and you say you are a poor working man; but that "is not the fault of the law. You would then be "obliged to prove by evidence your wife's criminality "in a Court of Justice, and thus obtain a verdict with "damages against the defendant, who was not un-"likely to turn out to be a pauper; but so jealous is "the law (which you ought to be aware is the per-"fection of reason) of the sanctity of the marriage tie "that in accomplishing all this you would only have "fulfilled the lighter portion of your duty. You must "then have gone, with your verdict in your hand, "and petitioned the House of Lords for a divorce. It "would cost you, perhaps, five or six hundred pounds, "and you do not seem to be worth so many pence. "But it is the boast of the law that it is impartial, and "makes no difference between the rich and the poor. "The wealthiest man in the kingdom would have had "to pay no less than that sum for the same luxury; "so that you would have no reason to complain. You "would, of course, have to prove your case over again, "and at the end of a year or possibly two, you might "obtain a decree which would enable you legally to "do what you have thought proper to do without it. "You have thus wilfully rejected the boon the legis-"lature offered you, and it is my duty to pass upon

" you sentence as I think your offence deserves, and " that sentence is, that you be imprisoned for one day ; " and, inasmuch as the present assize is three days old, " the result is that you will be immediately dis- " charged."

BECCARIA.

In view of the publicity being given to the deliberations of the International Prisons Congress, it is appropriate that a glance backward be taken at the author of the modern methods of treating crime.

It is said that " the science of penal legislation owes to this great man the first decisive steps towards its deliverance from the trammels of medieval barbarism." Born in Milan, in 1738, into an aristocratic family, Beccaria's early training tended to withdraw him from the study of such a subject as the reform of penal legislation. A fortunate circumstance, however, threw him into contact with a small and select group of young men of good family—Pietro and Allesandro Verri and others who were all alike anxious to throw off the dull yoke of society as then constituted.

Beccaria soon became intensely interested in the theories propounded by Montesquieu who with remorseless satire had struck at abuses in French society. The gulf between what they conceived to be the true principles of social welfare and the existing state of things prompted Beccaria and his friends with an ardent desire to re-kindle in their fatherland the lights of civilization which had unhappily grown dim through two centuries of oppression under Spanish misrule.

In order to give utterance to their views, the young reformers founded a society akin to the speculative Society of Edinburgh of Robert Louis Stevenson's day, and published, but for a short period only, a periodical magazine called " Il Caffe."

Though indolent in habits when it came to stating his ideas in concrete form, the year 1764 saw the publication of his first treatise—" Dei delitti e dele pene " (on crimes and punishments). It met with a surprising reception. In eighteen months it had passed through six editions. It was translated into French, German, Dutch, English, Spanish, Russian and Greek. Lord Mansfield was profoundly impressed by the insight and sagacity of the reformer. The strength and value of the principles enunciated by the author lay in the fact that he applied plain commonsense and practical reasoning to the treatment of crimes—a department wherein previously blind prejudice had entirely held sway. In Section II he lays down for the first time the principle that " Every punishment which exceeds the measure required by the preservation of public safety is unjust."

In Section XVI of his treatise he attacks capital punishment, declaring that, far from controlling passions, it prompts ferocity—that the spilling of blood even by duly constituted authority, calls up desires in the breasts of those who witness the occurrence to retaliate in a like manner.

Beccaria attacks the principle of King's Pardons (Section XIV) as also does he dislike pecuniary rewards (Section XXII). In Section XX he declares his adherence to the proposition that it is better that the penal legislation be certain than that it be ideally just. There was to be no difference between rich and poor—aristocrat and plebian, so far as Beccaria saw the duty of justice.

He stressed the need of a jury system, proclaimed the principle that the province of the magistrate is to apply and not to modify the enactment of the legislature. He dismissed the third degree as a method of extracting truth as archaic and absurd. All trials, in his view, ought to be open as the day ; espionage and secrecy were diametrically opposed to the true spirit of justice.

A number of other matters of great importance are dealt with in the treatise, and he lays the coping stone to a work much in advance of the times in which he lived by developing the theme of the influence of a free and rational legislation on the moral character of the people.

The arguments proved to be irrefutable. Attacks were launched but they crumpled up. One Father Facehinli, bribed by the degraded aristocracy of Venice, assailed the reformer very venomously, but Pietro Verri delivered a quietus.

Beccaria lived—a rare case—to see many of his suggested reforms adopted by the authorities. It is said that Lombardy, Tuscany, and Naples in particular became morally and intellectually influential and wealthy by the adoption of his principles, but the influence of the man and his work was truly world-wide.

(Collected from several authorities, particularly from a brochure by Count Aurelio Saffi, Oxford University, by L. A. Taylor.

NELSON DISTRICT LAW SOCIETY.

The Annual Meeting of the Society was held on the 5th ultimo, when there was a large attendance of members.

President, Mr. C. Richmond Fell. Council, Messrs. J. Glasgow, E. B. Moore, G. Samuel, W. C. Harley, W. V. Rout, and W. Nicholson. Secretary, Mr. E. J. Kemnitz.

The period of the Christmas Vacation was fixed from the 24th December, 1926, to the 16th January, 1927 (both days inclusive), whilst the Easter Vacation was fixed from the Good Friday to the following Tuesday (both days inclusive).

Several matters affecting the profession were discussed, and rulings given in two ases. It was decided that the Annual Dinner, which has been such a success since its inception two years ago, should again be held during the Supreme Court sittings in June, 1927.

LEGAL LITERATURE.

ENGLISH EMPIRE DIGEST, Vol. 29.

This volume has been published in London. This brings the number of cases now dealt with up to the surprising total of 415,255 cases, made up as follows : English leases digested, 144,299 ; annotations (approx.) 219,896. Overseas, etc., leases, 51,060. The claim that this Digest is a complete record of our case law appears to be well founded.

BENCH AND BAR.

Mr. Noel S. Gaze, LL.M., recently of Conveyancing Staff of Stewart, Johnston, Hough and Campbell, has opened his Chambers in Auckland to practice as a Barrister and Solicitor.

Mr. Eric Blampied, Solicitor, recently with the law firm of Calder and Goldwater, has commenced the practice of his profession at Auckland.

THE CONVEYANCER.

CONVEYANCE BY A MORTGAGOR AND A MORTGAGEE.

THIS DEED made the day of BETWEEN C. D. (the Mortgagee) of the first part and A. B. (the Mortgagor) of the second part and E. F. (the Purchaser) of the third part WHEREAS by Deed of Mortgage etc. (recite mortgage) AND WHEREAS the said A. B. has agreed to sell to the said E. F. the said lands at the price of £ AND WHEREAS the said principal sum of £ and no more is now owing on the security of the hereinbefore recited Deed of Mortgage but all (or some) interest thereon has been paid up to the date of these presents AND WHEREAS upon the treaty for the said sale (or whereas it has been agreed between the parties hereto) that the sum of £ part of the said purchase money of £ should be paid to the said C. D. in satisfaction (or in partial discharge) of the debt owing to him as aforesaid (or in the security of the said Deed of Mortgage) and that he should join in these presents in manner hereunder appearing NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £ part of the said principal sum paid by the said E. F. to the said C. D. at the request of the said A. B. testified etc. (the receipt whereof the said C. D. doth hereby acknowledge) and as to £ the residue thereof to the said A. B. (the receipt whereof etc.) the said C. D. at the request of the said A. B. doth hereby convey assure and release and the said A. B. doth hereby convey assure and confirm unto the said E. F. his executors administrators and assigns all that piece or parcel etc. TO HOLD the same unto the said E. F. his executors administrators and assigns for ever freed and discharged from the said Deed of Mortgage and from all monies intended to be thereby secured and from all claims and demands thereunder (Covenant against encumbrances by C. D. the Mortgagee) (usual covenant for title by A. B. the Mortgagor) IN WITNESS WHEREOF etc.

COVENANT BY MORTGAGEE AGAINST ENCUMBRANCES.

PROVIDED ALWAYS that no covenant shall be herein implied on the part of the vendor save and except a covenant that he hath not done executed or been privy to any act or deed by means whereof the said piece or parcel of land may have been charged or encumbered in any way whatsoever.

MEMORANDUM OF TRANSFER OF PART OF MORTGAGED LANDS BY MORTGAGOR AND MORTGAGEE FREED FROM THE MORTGAGE DEBT.

I A. B. of being registered as the proprietor of an estate in fee simple subject however to such encumbrances liens and interests as are notified by Memoranda underwritten or endorsed hereon in all that piece of land situate in the of containing be the same a little more or less being the sections numbered etc. and being part of the land comprised and particularly described in Certificate of Title Register Book Volume folio (delineated and particularly described in the plan thereof drawn hereon and coloured in outline red) IN CONSIDERATION of the sum of £ paid to me by E. F. of do hereby etc. (follow ordinary form to end).

MEMORANDUM OF ENCUMBRANCE.

MORTGAGE dated the day of Registered in the office of the District Land Registrar as Number from A. B. to C. D. and given to secure the sum of £ and interest as therein mentioned.

I C. D. of the Mortgagee named and described in a certain Memorandum of Mortgage dated the day of Registered in the office of the District Land Registrar at as Number whereby A. B. Mortgaged to me Sections Numbered etc. being the (whole) of the lands comprised and described in Certificate of Title Register Book volume folio to secure the sum of £ and interest as therein mentioned do hereby in consideration of the sum of £ (being the purchase money mentioned in the foregoing Transfer from A. B. to E. F.) this day paid to me by the said A. B. (the receipt whereof I do hereby acknowledge) consent to the said foregoing transfer and do hereby for the consideration aforesaid release and discharge the whole of the lands comprised and affected by the said Memorandum of Transfer from all principal moneys and interest secured by the said Memorandum of Mortgage Registered Number and from all claims and demands under and by virtue of the said Memorandum of Mortgage.

DATED this day of 19 .

SIGNED by the above named C. D. in the presence of :—

ENCYCLOPAEDIA OF FORMS AND PRECEDENTS (2nd Edition).

Volumes 19 and 20 of the Encyclopaedia of Forms and Precedents have been published in London. These volumes should be available in New Zealand during December, and the Publishers anticipate that they will be in the hands of purchasers of the Encyclopaedia before the Christmas vacation.

HUDSON'S BUILDING CONTRACTS. (5th Edition).

This edition has been published by Butterworth's, London. The work of bringing up-to-date has been carried out by A. A. Hudson, assisted by Lawrence Mead, B.A. It is now twelve years since the previous edition was published.

ELLIOTT WORKMEN'S COMPENSATION. (9th Edition).

Mr. M. Perryman is responsible for the ninth edition of this work.