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, FEBRUARY 15, 1927.

THE FORTNIGHTLY NOTES.

This issue brings to a close the second year of publication of this Journal. The venture has met with the success which was anticipated. Almost every other practitioner is now a subscriber, and the overseas interest is growing. The chief cause of the success of the Journal can be attributed to the generosity of the Profession in supporting the Journal with contributions. It was, we believe, generally felt that the speedy publication of Notes of Cases would be of great assistance, and also that it was advantageous to have a medium through which a member could address his brethren. Concurrently with this factor has been the direction given to the Notes by the first editor, Mr. C. A. L. Treadwell. It must be a source of much satisfaction to him to know that within two years, under his editorship, the Journal has made the progress it has. This is an achievement of no small merit. He ventured upon an uncharted sea with neither compass nor sextant, for no previous experience in New Zealand was available to him. It is only by bearing this in mind that his work can be judged.

The demand for Mr. Treadwell's professional services has however, necessitated frequent excursions to all parts of the Dominion and the Reports bear witness to the varied nature of the calls upon his advocacy. Success in this direction, however, necessitated his relinguishing the position of Editor at the end of last year. While the result is to be regretted, the cause is one which none would have otherwise.

The "Fortnightly Notes" will continue under the editorship of Mr. Hugh Jenkins who has been closely associated with the Journal from its foundation. Among others associated with the new editor will be Mr. H. F. Von Haast, of Wellington; Mr. W. A. Beattie, of Auckland; Mr. C. Palmer Brown, of Wanganui; and Mr. Victor Raines, of Invercargill. The Journal therefore will thereby be certain of continuing to be of Dominion-wide appeal.

A special feature of the new Volume which commences with next issue will be a regular contribution by Mr. C. Palmer Brown, of New Zealand Conveyancing Precedents, with notes thereon. Mr. Brown has had a wide conveyancing experience and is a lucid expositor of legal problems.

THE STANDARD OF ADVOCACY.

The return of Mr. Myers, K.C., to New Zealand together with the cabled advice of his success in the **Distributors** case naturally prompts comparison of our standard of advocacy with that of England. Besides being a personal triumph for Mr. Myers to win five Privy Council appeals it is also a matter upon which the New Zealand Bar generally can congratulate itself. For one of its members, even granting him to be its most eminent advocate, to stand with such company as Sir John Simon, K.C. before so difficult a tribunal as the Privy Council indicates the high standard attained by leading Counsel in New Zealand. Let it be admitted quite frankly that outside the front rank the grade downwards is steep, yet there appears to be no reason to believe that with increasing opportunity others will be found to maintain the high standard of past and present leaders of the Bar, which Mr. Myers has clearly demonstrated to be equal to that of the standard of the Bar of England.

CONVEYANCING STANDARDS.

Is the present day Standard of Conveyancing high or low? This is a question which may well be asked after the Court of Appeal have used such phrases as "ill-drawn," and "perilously like nonsense," when discussing a document which had been drafted and assented to by conveyancers. There is an old adage that the cobbler's wife is always the worst shod woman in town, and tailors have seldom been known to set sartorial standards in their own persons. It maybe therefore that solicitors are no exception to this apparent rule and in consequence show greater concern in conserving the interests of their clients than they exercise in regard to their own affairs. While this may be so, it certainly cannot be commended either from a personal or from a professional viewpoint. The laymen may soon come to question the efficacy of legal aid in the drawing of commercial documents. What his alternative would be is beside the point at the moment, but the commercial community could be depended upon to take the flavour out of the lawyer's toast: "Here's to the man who writes his own will." All considerations combine to make desirable a high standard of Conveyancing so those considerations need not be catalogued here. They will occur to everyone upon very little reflection. Conveyancing is usually the most profitable side of practice, but while a lawyer will obtain up-to-date text-books to equip himself for the less lucrative side of his activities he is frequently found working with Conveyancing precedents which are decades old. It would be a good frame of mind for such as these remarks apply to, to be conscious that—

With every case a ghost is laid,
With every deed a ghost is made.

The time can never be known when the new-made ghost may begin to walk. Under these circumstances it is as well to have good ghosts.

THE JUDICIAL PROCEEDINGS ACT.

The highwater mark of undesirable reporting was undoubtedly reached in the now famous **Russell** case. From this distance it is difficult to appreciate the reasons for the Judge's overruling the objection of defendant's counsel to the tendering of evidence by the plaintiff of non-access during cohabitation, and this erroneous ruling let in evidence the publication of which, given in detail in many of the English papers, indicated that a section of the Press was prepared to abandon all the restraints that decency would impose in its nosing for news. The axiom of physics that every action has its consequent reaction equal in extent and opposite in direction is applicable to public opinion also. The Judicial Proceedings Act which received the Royal assent during December is the reaction from the **Russell** case reports. The new Act will put an end to lengthy

and detailed reports of matrimonial causes and will check the reporting of criminal cases in which indecent details are a prominent feature. In the latter case the onus is on the newspaper not to publish unseemly details. In matrimonial causes, the reports are to be confined to the names, addresses and occupations of the parties concerned, a concise statement of the charges, defences and countercharges upon which the evidence is given; legal points and decisions upon them; the summing-up and the finding of the jury (if any) and the judgment and any observations of the judge given in the judgment.

The Press of the Dominion can be congratulated upon the admirable quality of restraint exercised in respect to those reports which have made necessary the enacting of the statute under review in England. There is one matter, however, which merits editorial contemplation, and that is the giving of undue prominence to distressing tragedies. Recently there have been several cases of parents murdering their children. As the unfortunate persons committing the crime are usually of unbalanced or weak mentality at the time, it is reasonable to assume that a contributing factor in turning their minds to the crime committed has been the prior example of others, which example has been brought to their notice by the prominence given in the newspapers to like tragedies. It is unfortunate however that the rewards of circulation go to the journal supplying the startling news, with the result that the editor excising the kind of information here referred to is liekly to see a diminution in the number of readers. It may be in the interest of the Press generally that Coronors should be empowered to prohibit the publication of details of tragedies which can interest only callous curiosity, and which there is good reason to believe influences unstable minds to emulation.

LEVITY AND LAW.

The able leader writer of the Wellington "Evening Post" has been caught by the pages of this Journal which were contributed by the Wellington Law Students' Society under the caption "Levity and Law." The leader writer considers the "Deference to Dominions Act" the funniest item of all" which "covers under the guise of extravaganza what is essentially a serious argument on a question of general interest and supreme importance." Over a column is taken up in traversing the Act. The article finally cites the provisions which enact that should one Dominion become involved in difficulties with any other Dominion then the services of His Majesty's Naval and Military forces shall be made available to both, share and share alike, and concludes "with this triumphant '*reductio ad adsurdem*' and the extent to which it is a triumph of logic as well as of humour we must take another opportunity of dealing."

The Wellington Law Students' Society is to be congratulated upon its achievement and will doubtless wait with interest to see how the "Evening Post" deals with the Society's Triumph of Logic and Humour.

SALE OF STANDING TIMBER.

Owing to an unfortunate accident, portions of the first part of Mr. Von Haast's article on the law relating to the Sale of Standing Timber which appeared in last issue were misplaced, with the result that it has been necessary to republish in this issue the instalment in question. The accident is particularly unfortunate in view of the widespread interest shown in Mr. Von Haast's exposition of this difficult branch of Commercial Law.

COURT OF APPEAL.

Skerrett C.J.
Stringer J.
McGregor J.
Alpers J.

October 13, December 13, 1926.

HAGGITT AND OTHERS v. WATSON.

Partnership—Continuing at will after expiry of term—Partners paid salary—"Net annual profits"—Prima facie rule.

The partnership between Mr. Watson and Mr. Haggitt expired in May, 1920, but was continued without any new deed, the rights and duties of the partners remaining the same.

Clause (3) of the partnership deed provided that Mr. Haggitt should receive a salary of £600 for the first year, £700 for the second year; and Mr. Watson "all the nett "profits of the said business during the first two years "aforesaid." During each of the third, fourth and fifth years Mr. Watson should draw a salary of £1500 per annum and Mr. Haggitt £750 per annum, and each shall draw one half of the nett profits for each such year. Subsequently Mr. Haggitt's salary was raised to £1000.

Clause (5) provided that the outgoings should be paid out of the business and in the case of deficiency then by the partners in the shares in which they were entitled for the time being to the nett profits. Clause 21 provided that in the case of death or permanent incapacity of one partner the remaining partner should for 5 years thereafter pay to the executor or administrators of the partner so dying one-third of the nett annual profits of the partnership for each year. Mr. Haggitt died about the end of 1925. The question to be determined by the Court is what are the rights of the representative of Mr. Haggitt under clause 21 during the term of five years from the date of his death.

HELD (Skerrett C.J. dissenting) that in calculating the nett annual profits of the partnership business for the purposes of Clause 21 of the Deed of Partnership no such deduction in respect to salaries paid to the partners should be made.

Barrowclough for appellants.
Johnston & Stout for respondents.

SKERRETT, C.J.: The learned Judge in the Court below held that the method prescribed by Clause (3) of ascertaining the nett profits for division amongst the partners during the continuance of the partnership must be applied as far as possible in ascertaining the nett profits for the purpose of this clause. In other words, he held that the parties contemplated that the expression "nett profits" should have the same meaning in Clause (21) as it had during the subsistence of the partnerships.

In his argument, Mr. Barrowclough, counsel for the representatives of the deceased partner, admitted that the **prima facie** rule to be applied in the construction of the clause was to give to the words "nett profits" the same meaning in the two clauses, but he contended firstly that the Judge had misinterpreted the meaning attributed to the words in Clause (3); and secondly that there were circumstances arising out of the provisions of the deed which prevented the application of the **prima facie** rule of construction and showed that the words were used in Clause (21) in what he suggested was their ordinary signification.

The first contention of the learned counsel is based upon the ground that Clause (3) of the deed regulates the distribution of the profits between the partners only during the continuance of the partnership term, and can have no application once the partnership is terminated. He says that the definition to be deduced from the clause is that "any profits" mean "the profits of the business after deducting "any (if any) so-called salaries to which the deed gives "either partner the right for the time being." He contends that after the termination of the partnership no salary can be paid to any partner under Clause (3); and therefore there can be no deduction of Mr. Watson's salary after the termination of the partnership. This argument is fallacious. Such expressions as "during the partnership term" or "dur-

"ing the continuance of the partnership term" are invariably construed as relating to the period during which the partners continue in partnership without entering into a new agreement. Moreover the argument does not touch the question whether the words "nett profits" are to be regarded as used in the same sense in the two clauses.

The covenant expressed in Clause (21) is to pay a sum equivalent to an one-third part or share of the nett annual profits of . . . . . the business for each year of the term of five years from the happening of any of the four events mentioned in it. The happening of any of these four events is treated in the clause as a termination of the partnership. In my opinion the clause contemplated that the nett profits of the business should be ascertained in the same manner and on the same principle as during the subsistence of the partnership. To properly construe Clause (21) you must for the purpose of the clause and as between the surviving partner and the representatives of the deceased partner, but as between them only, treat the partnership as subsisting for a further term of five years, and during each of the five years during which the surviving partner shall carry on the business the representatives of the deceased partner are to receive one-third of the nett annual profits of the business ascertained in precisely the same way as if the partnership were subsisting, modified only to the extent required by the changed circumstances, namely, the death of a partner who necessarily ceased to be employed in the business.

Clause (21) cannot in my opinion be read as an isolated and independent clause. All the provisions of the deed are parts of one contract. Clause (21) is a stipulation of the partnership arrangement. It must be deemed to refer to the incidence of the partnership and of the division of profits prescribed by the partnership deed. It provides for certain benefits to the representatives of a dead partner on the basis of the partnership business, being deemed to continue for the purposes of the clause. It is difficult to see how this language can be construed except in the light of the other provisions of the partnership deed.

The rule which I have acted upon is one, I think, sufficiently established by the authority of the decision in **ex parte Harper** (1 De G. & J. 180; 44 Eng. R. 692). The result of that case is thus stated in **Lindley on Partnership**, (8th ed.), p. 501:—

"Moreover, in construing a provision giving a widow of "a deceased partner a share of the profits, the partnership "which, strictly speaking, determined when her husband "died, is regarded as continuing, and the profits which she "is to share must be ascertained *on that principle*. They "ought not to be calculated as if the returns yielded by the "new business had not to be applied in liquidating the de-"mands on the old firm."

The judgments were the decisions of two great Equity Judges—Lord Justice Knight Bruce and Lord Justice Turner and the former with the agreement of his colleague laid down the principle to be applied in interpreting a clause providing an annuity or a share of profits for the widow of a deceased partner. He said:—

"I think it impossible to view the business, in the profits "of which she acquired a contingent title to share, as a "new business, as one not connected with that which until "his death the partners carried on together under the part-"nership articles. It is true that the partnership deter-"mined, or in a sense determined, upon the death. But for "the purpose of the provision for the widow, it seems to "me that the intention of the parties to the partnership ar-"ticles (to be collected from the instrument) was, that the "business to produce the profits in which she was to share "should be considered as a continuance of the business in "which her husband was a partner."

It should be remembered that the widow by virtue of her husband's appointment was entitled to claim under the provision of the deed under an enforceable trust. No right could possibly subsist to set off against her any debt or liability of her husband to the partnership. The effect of the decision was to continue the account of profit and loss of the partnership after the death of one of the partners as if he had been alive, and to hold that his widow was not entitled to any profits until all the partnership debts due at his death were paid. The words "one-fourth share of the "clear annual profits" were not read as an isolated provision dissociated from the provisions of the partnership deed.

Counsel for the appellant assumed that the words "profits" possessed a primary definite and determinate meaning. But I think this is not so. As was said by Lindley L.J. in **Werner v. General & Commercial Investment Trust** (1894, 2 Ch. at p. 266), the word "profits" is by no means free from ambiguity. In a careful examination of the word in **Bond v. Barrow Hematite Steel Co.**, 1902, 1 Ch. 353 at p. 356, Farwell J. said: "There is no single definition of the word profits which will fit all cases." In Articles of Association and of Partnership profits are frequently required to be ascertained on principles and by methods prescribed by them, and what are profits may differ whether they are required to be ascertained during the continuance of the business of a Company or upon or after its liquidation. The truth is that the meaning of the word must be ascertained by having regard to the provisions and context of the instrument in which it is used.

I am unable to conclude that the words used in Clause (21)—namely, "a sum equivalent to an one-third part or "share of the nett annual profits" prevent the application of the rule of construction which I have invoked. I cannot appreciate any difference in substance between these words and the words "an one-third part or share of the nett an-"nual profits." I certainly do not think that the use of the word "annual" makes any difference.

If what was described in Clause (3) as "nett profits" means such profits as are for the time being left after deducting such salaries as were payable for the time being to the partners, what difficulty is there in attributing the same meaning to the same expression used in Clause (21), modified only to the extent required by the changed circumstances contemplated by that clause? The clause contemplates that it becomes operative upon the happening of any of the events specified in it, all of which involve the termination of the partnership. Each of those events involves not only the termination of the partnership but the permanent inability or incapacity by death, or in some other specified manner, of the partner affected, to carry on or take an active part in the business. The portion of the profits denominated "salary" cannot therefore be payable to the retiring partner or to the representatives of a partner dying because by the very force of the term it was payable only in respect of services to be rendered to the partnership by him as a partner. When he dies or becomes incapable of acting as a partner he ceases to be able to render such services, and his salary by the very force of the expression ceases to be payable. To that extent, therefore, the provisions of Clause (3) become inapplicable under the circumstances contemplated by Clause (21). But there appears to be no reason why Mr. Watson's salary should cease while he is in fact rendering services as a partner during the term of five years. His salary is therefore properly first deducted and the net profits are ascertained in accordance with Clause (3) as the profits which remain after deducting the salary of the surviving partner.

It was urged by counsel for the appellants that there were circumstances arising out of the operation of the deed which prevented the application of the before-mentioned **prima facie** rule of construction and required that the words "net profits" in Clause (21) should be read in a different sense to that in which the same words were used in Clause (3). The main reason for this contention was that if the words were not so read anomalies might have arisen during the first two years of the partnership. . . . .

The suggested anomaly appears to me to be no reason for departing from the meaning ascribed by the Articles of Partnership to the expression "net profits," or from the principle that where profits are during the continuance of the partnership ascertained upon a clearly-defined basis that basis should be adopted for ascertaining the meaning of the same expression used in a clause providing for a benefit to the representatives of a deceased partner after the termination of the partnership. During each of the years of the partnership following the first two years, if a death occurred the construction placed upon Clause (21) by the learned Judge appears to me to work out justly as between the partners.

I do not think it necessary to invoke the rule of construction laid down in the case of **In re Birks** (1900), 1 Ch. 417; and perhaps it is not particularly applicable to the present case. The rule established by such cases as **Cortauld v. Legh** (L.R. 4 Ex. per Baron Cleasby at p. 130) and **In re National Savings Bank Association** (L.R. 1 Ch. per Turner L.J. at p. 549-550) that where a word is used in a clear and

definite sense in one part of a statute, will or deed, the presumption is that it means the same thing in another part unless that presumption is rebutted, is, I think, applicable. But the rule which affords the surest guide in the construction of the clause under consideration is that laid down in **In re Harper**, before cited.

I think that sufficient certitude is obtained in the present case by reading the provision under consideration as a term of a partnership agreement; as contemplating between the surviving or continuing partner and the representatives of the deceased or retiring partner the continuance of a **quasi** partnership during the five years; and as therefore necessitating that the share of the profits of the business to be paid to the retiring or dying partner should be ascertained in the same method as was the case during the actual subsistence of the partnership, modified only by the circumstance of the death or retirement, as the case may be, of a partner.

In my opinion the appeal should be dismissed with costs on the highest scale as upon a case from a distance. The question stated in the Originating Summons should be answered as stated by the learned Judge in his judgment.

STRINGER J.: I agree with the learned Judge in the Court below that this clause (Clause 21), if considered by itself, is free from ambiguity. Thus considered it would mean exactly what it says, viz., that the representatives of a deceased partner are, for 5 years after his death, to be paid "a sum equivalent to an one-third part or share of the net "annual profits" of the business, for each of those 5 years. His Honour, however, went on to say that as in Clause 3 the term "nett profits" had been used in a special and artificial sense, the same meaning must be attributed to it when construing Clause 21, in which the expression "nett annual profits" occurs.

With all respect, I think this is an incorrect method of construction, and is contrary to the weight of authority.

In Halsbury, Vol. 28, par. 1299, it is stated that "the force "of the context may give different meaning to the same "word when used in different parts of a will, and the Court "does not, merely because a word bears a special meaning "in one clause, necessarily give to it the same meaning in "another clause of the will, **in itself clear, and not con-"nected with the first clause.** The presumption, however, "is that a word used in one part of a will with clear and "definite meaning is intended to mean the same thing in an-"other part of the will, **where its meaning is not clear.**" These observations are made in connection with the interpretation of wills, but they seem to me to be equally applicable to the interpretation of other documents, as indeed is indicated by some of the cases cited in support of the passage.

Again in **Edyvean v. Archer**, 1903 **A.C.**, Lord Macnaghten, in delivering the Judgment of the Privy Council, quotes with approval the decision of Lord Eldon, in which the latter stated:—

"The best rule of construction is that which takes the "words to comprehend a subject that falls within their usual "sense unless there is something like demonstration plain "to the contrary."

In the Judgment of the Court below, and also in the argument before us, the case of **In re Birks**, 1900 1 Ch. 417, was relied upon as supporting the construction contended for by the respondent. Apart from the fact that this case appears to be of somewhat doubtful authority (see Hawkins on Wills, 116, and Jarman, 6th Ed., 1604), it does not seem to me, when properly considered, to support the Judgment appealed from. In his judgment Lord Esher, after pointing out that the testator having in 11 cases out of 12 used the word "issue" as meaning "children," it was the natural inference that in the twelfth case, where he had thrown no light upon the meaning of the word, he had used it in the same sense as before, goes on to say: "I do not know "whether this is law, or a canon of construction, but it is "good sense to say that, whenever in a deed or will, or "other document, you find that a word used in one part of "it has some clear and definite meaning, then the presump-"tion is that it is intended to mean the same thing where, "when used in another part of the document, **its meaning "is not clear.**"

In that case the word the meaning of which was in dispute was "issue," which has always been regarded as an elastic and ambiguous expression. There was therefore an ambiguity in the clause under the consideration of the Court, and it was regarded as permissible and proper to resolve that ambiguity by invoking the meaning clearly attributed to the doubtful expression in other clauses of the will. In the present case it seems to me that Clause 3 has been invoked by the respondent not for the purpose of resolving an ambiguity in Clause 21 (for admittedly there was none), but for the purpose of creating one.

In the case of **re Blowers Trust**, L.R. 6 Ch. 351, James L.J. said: "Before we alter the meaning of words in obedience "to a supposed indication of the intention of the testator— "before we deviate from the direct path in order to follow "a light which appears to be held out by the testator—we "must take care to be reasonably sure that it is a genuine "light, and that we are not following the glare of a will-o'-"the-wisp into a morass."

I think these observations are specially applicable to the present case, in which the Court is asked to presume that in Clause 3 of the partnership deed the partners have indicated their intention that the clear and unambiguous language of Clause 21 should be construed in a strained and artificial sense. If we followed the course suggested, there can be no doubt whatever, that it would lead us into a "morass" of anomalies, some of which were pointed out by Mr. Barrow-clough in his able argument for the appellant.

In my opinion Clause 3 is quite irrelevant to the question of the construction of Clause 21, being an ill-drawn and clumsy method of determining the share of the profits to which each partner was entitled so long as they both remained alive and mentally and physically able to devote their whole time and attention to the partnership business, the so-called "salaries" being in reality drawings on account of profits. The death of Mr. Haggitt **ipso facto** dissolved the partnership, and Clause 3 became inoperative, the rights of the executors of the deceased partner being then determined by Clause 21, which, when construed in its natural and ordinary sense, places the partners on an equal footing in respect of the contingencies therein mentioned, produces no anomalies or inconsistencies, and is fair and reasonable in its results. There is, moreover, it appears to me, a serious practical difficulty in applying Clause 3 in order to ascertain the amount payable to the executors of the deceased partner under Clause 21. The "salary" of £1500 payable to Mr. Watson is based upon the assumption that, in accordance with the deed of partnership, he would devote the whole of his time and attention to the business. Suppose that during the term of 5 years mentioned in Clause 21 he failed, through inability or unwillingness, to do this: Would he still be entitled to deduct the £1500 from the profits of the business, and if not, how is it to be ascertained what amount (if any) should be so deducted?

In the Judgment of His Honour the Chief Justice, which I have had the advantage of considering, he attaches great importance in the case of **re Harper, 1 De G. & J. 180**, as a guide to the construction of Clause 21. In that case the widow of a deceased partner in a firm of solicitors claimed that, in estimating the share of the profits to which she was entitled under the partnership deed, the language being "one-fourth share of the annual profits of the survivor," the profits referred to were the profits of the new business carried on by the surviving partner, and that the liabilities of the dissolved partnership could not be taken into account. The importance of this contention arose from the fact that the deceased partner had misappropriated large sums of money belonging to clients of the firm which the continuing partner had to pay, and if these liabilities were brought into account there would be no profits out of which the widow could obtain payment. It was held that the business which was to produce the profits in which the widow was to share should be considered as a continuance of the business in which her husband had been a partner, and therefore that the debts due by the partnership at his death must be taken into account in estimating whether there were any profits afterwards. The facts in the case were very special, and I cannot find that the judgments delivered laid down any general principle of construction which would be applicable to the present case. At most it is, I think, an authority for saying that for the purpose of the present case the old partnership business must be deemed to be continued for the purpose of ascertaining the share of the profits to which the executors are entitled, and therefore that losses (if any) resulting from liabilities incurred during the partnership must be brought into account.

For the reasons given above I think the appeal should be allowed with costs on the highest scale as on a case from a distance. The answers to the questions raised by the Originating Summons should be as follows:—

To question 1: No.

To question 2: In calculating "the nett annual profits of "the said partnership business" for the purposes of Clause 21 of the deed of partnership, no such deductions from the gross takings of the said business as are mentioned in sub-clauses (a) and (b) of the question should be made.

McGREGOR J.: I go along with the learned Judge in the Court below when he says in his judgment "if that clause "had stood alone it is clear, I think, that the defendant "would not have been entitled to take any deductions from "the profits by way of salary." But I am unable to agree with **Sim J.** that in order to interpret Clause 21 it is necessary to resort in the way he has done to the earlier clauses of the Deed. The words "nett annual profits" are clear and unambiguous. No business man could have any doubt as to their meaning. Accordingly, as stated in **Halsbury** (Vol. X, p. 435), "the instrument must be so construed ac- "cording to its literal import, unless there is something in "the subject or context which shows that this cannot be "the meaning of the words."

I am unable to find anything in the subject or context here which shows that the literal import of "nett annual "profits" cannot be the meaning of these words. **Sim J.** appears to have felt himself bound to construe them in an artificial sense, because of the rule of construction that the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument (**Halsbury**, X, p. 438). But the learned author of that article is careful to add to the rule so stated by him the following proviso: "If that interpretation does no violence to "the meaning of which they are naturally susceptible. **N.E. "Railway Company v. Hastings** (1900), A.C. 260/267."

The artificial construction placed on the words "nett an- "nual profits" in the lower Court undoubtedly does violence to their natural meaning, and in my opinion substitutes a presumed for the expressed intention of the parties. To justify this method of interpretation, such reliance was placed both in this Court and in the Court below upon the case of **In re Birks** (1900), 1 Ch. 417. I am not sure that **In re Birks** is altogether a safe guide in the present case. It has been commented on somewhat unfavourably in the two leading text-books on Wills (**Hawkins** (3rd Edition), p. 116; and **Jarman** (6th Edition), p. 1604, and was not followed by **Farwell J.** in **In re Waugh** (1903), 1 Ch. p. 747. Personally I prefer in this case to follow the more recent pronouncement of the **Privy Council** on the same subject in the case of **Endyvear v. Archer** (1903), A.C. 384, where the late **Lord Macnaghton** dealt with this vexed question of interpretation in the following terms:—

"There are three grounds upon which it has been con- "tended that their claim must be rejected. In the first place "it is said that although they may be issue of one of the "testatrix's other children in the ordinary sense of the "word, yet they are not included in the term 'issue' in the "gift over, because they were not comprehended in the term "'issue' in the original gift. That was the view of the "Full Court, citing and relying upon what was said by **Lord "St. Leonards** in **Ridgway v. Nunkittrick** (1841), 1 D. & "War. 84:—'It is a well-settled rule of construction,' said "His Lordship, 'never to put a different construction on "'the same word where it occurs twice or oftener in the "'same instrument, unless there appear intention to the "'contrary.' That dictum, asserted perhaps too positively "as a general rule of construction, does not help one much "in construing such a will as this. What is a clear inten- "tion? That which is clear to one man is not always clear "to another. A sounder, or at any rate a safer, rule is to "be found in the observations of **Knight-Bruce, V.C.**, on the "meaning of this very word 'issue.' 'Before I can restrain "'that word,' said the Vice-Chancellor in **Head v. Randall** "(1849) 2 Y. & C. p. 235, 'from its legal and proper import, "'I must be satisfied that the contents of the will demon- "'strate the testator to have intended to use it in a re- "'stricted sense;' and then he goes on to observe that the "language of **Lord Eldon** applied to property in **Church v. "Mundy** (1808) 15 Ves. 396 at p. 406 might well be applied "to persons in a case like that before him. **Lord Eldon's** "words were these:—'The best rule of construction is that "'which takes the words to comprehend a subject that falls "'within their usual sense, unless there is something like "'declaration plain to the contrary'!"

Applying this rule here, I can find nothing at all like "de- "claration plain to the contrary" in this deed to show that the parties intended to use the words "nett annual profits" in any other than their usual and proper sense in Clause 21. The intention underlying that clause obviously was to make provision that in the event of the incapacity or death of either partner he or his representatives should receive some payment for his accrued share of the goodwill of the partnership business (see **Allan on Goodwill**, p. 95). Instead of fixing a lump sum for this payment they have chosen the somewhat empirical method of arriving at the amount set out in Clause 21, which method obviously might in certain events lead to anomalous results. The question we have to determine, however, is not what would have been a wise arrangement for the partners to have made, but what is the meaning and effect of the arrangement that was actually made by them, as embodied in their deed. One thing at least is certain from the words of Clause 21, and that is that if one partner should die the surviving partner should pay to his representatives a sum of money as the share of the goodwill belonging to the deceased partner on the dissolution of the partnership caused by his death. That payment is to be "a sum equivalent to an one-third part or share of the "nett annual profits of the said partnership business for "each year of the said term of five years." It is to be noted that the words are not that the surviving partner is to pay "one-third part or share of the nett annual profits, "etc.," to the representatives of the deceased partner. If these words had been alone they might have given to Haggitt's representatives "a right to a share of the profits of "the business" as suggested by **Sim. J.** in his judgment. On the contrary I think the words are carefully chosen so as to exclude such an implication. The payment to be made is of "a **sum equivalent** to the nett annual profits, etc." In other words the "nett annual profits" of the new business for its first five years are used merely as an arbitrary method of determining the amount to be paid to the deceased partner for his share of the goodwill of the old business now dissolved. It is in effect simply an agreed machinery for arriving at a sum of money. Now, it is our duty to construe the precise words of Clause 21 so, if possible, as to effectuate, and not to frustrate, the expressed intention of the parties. The partnership commenced in 1905, and was dissolved by Mr. Haggitt's death twenty years later. Contrary to all human expectation, the senior partner survived. Now, had Haggitt died during the first year of the partnership he would clearly have been entitled under Clause 21 to a sum equal to a third of the profits of the next five years. Assuming that Mr. Watson thereafter made a nett annual profit of **£1500**, he would then have had to pay Haggitt's representatives **£500** a year for five years, or **£2500** in all, as representing his share of the goodwill. But in point of fact the junior partner lived till the end of 1925, and no doubt for all these years helped to build up the goodwill of the partnership business. On the death of the younger and more vigorous partner the nett annual profits would doubtless tend to decrease. Let us assume that for the next five years the nett annual profits made by Mr. Watson amount once more to **£1500** a year. On the normal construction of Clause 21, which I think should be adopted, Haggitt's executors would still be entitled to be paid **£2500**. But, according to the interpretation put upon Clause 21 by the learned Judge in the Court below, the goodwill must be deemed in effect to have disappeared in the course of the twenty years, and his representatives would be paid nothing for his accrued share therein.

This result is surely an example of what **Lord Cranworth** meant when he said "the great cardinal rule is that which "is pointed out by **Mr. Justice Burton**, viz., to adhere as "closely as possible to the literal meaning of the words. "When once you depart from that canon of construction you "are launched into a sea of difficulties which it is difficult "to fathom." (**Grundy v. Pinniger**, 1 D'G. Mc. 502, p. 505.)

His Honour has based his dissenting judgment almost entirely on the decision in **ex parte Harper** (1 De G. & G., 180) I have read the various reports of that case with care, but am quite unable to gather therefrom any rule of construction applying to any document other than the particular deeds laid before the Court in that case. The Court there did not even profess to lay down any rule or principle of

interpretation of general application. All that was decided in **ex parte Harper** was that in the singular circumstances of that case the partnership must in bankruptcy be deemed to be a continuing one, and therefore that the debts due by it in the past must be set off against the future profits. Indeed, **ex parte Harper** and the present case, while superficially alike, are fundamentally different. They are in some respects similar, but in no sense identical. In these circumstances the decision in **ex parte Harper** is not binding on the question of pure construction now before this Court (see per **Jessell M.R.** in **Sack v. London Provident Building Society**, 23 Ch.D. at p. 111).

The conclusion of the whole matter would appear to us to be that in this deed, as in all other instruments, the ordinary sense of the words is to be adhered to, unless the context otherwise requires. In this case, therefore, the term "nett annual profits" used in Clause 21 (the only part of the deed in which these words appear) must bear their usual meaning, as the context does not otherwise require. For the foregoing reasons I think that each of the questions in the Originating Summons should have been answered in the negative, and accordingly that the present appeal must be allowed, with costs on the highest scale as from a distance.

ALPERS J.: As to Clause 3, it is common ground that the parties to the deed must have agreed for the purposes of the clause to assign to each of two very ordinary words—"salary" and "nett"—a very extraordinary meaning. They have, as it is said, made their own dictionary. Their intention, however, is quite clear: by "salary" they can only mean, not remuneration payable to a servant whether the business has earned it or not, but a fixed portion of profits payable to partners if—and only if—actually earned. By the word "nett" in the same clause they must mean "remaining;" "nett profits" (in its extraordinary sense) must mean the balance of "nett profits" (in its ordinary sense) remaining after payment to one partner in the first two years, and to each partner in all subsequent years, of that portion of profits which they have agreed, by a rough analogy, to call "salary." The use of these two words in the senses assigned to them is neither logical nor apt, but the meaning is at least clear.

It is suggested that the word "nett" in Clause 5 bears the artificial sense assigned to it in Clause 3, and that this adds weight to the argument for assigning that meaning to it in Clause 21 also. But it is to be noted that the word "salary" in Clause 5 has its natural meaning—"salaries of "clerks, apprentices, etc."—and not the artificial meaning it bears in Clause 3. It is obviously quite impossible, therefore, to make this ill-drawn document consistent with itself.

But to assign to "nett profits" in Clause 5 the sense it bears in Clause 3 leads to difficulties and anomalies. In the first two years of the term Watson is entitled to "all the "nett profits." If a deficiency occurred in either of those years, therefore, he would have to pay the whole of it out of his private funds, while his junior partner would escape. The deficiency might well have been caused entirely by an act of negligence or error of judgment on his part, for which the firm is held liable in damages. The senior partner in that case, though free from blame, would have to make good the whole loss incurred by his junior's default. And the position in any of the third, fourth, or fifth years is nearly as bad. In those years Haggitt received a "salary" of £750, Watson a "salary" of £1500. If the receipts of those years were only adequate to pay these "salaries" and nothing more, Watson would draw from the partnership an income exactly double that of his partner. But they share the "nett profits" equally. If a deficiency occurred in one of these years, therefore, the junior partner would have to contribute exactly the same sum as the senior, though only entitled to half as much income from the business.

The fact is that Clause 5, when it stood alone in a book of precedents, was doubtless a perfectly intelligible and well-drawn clause. But when the draftsman copied it into this document and left it there to be applied to the terms of this partnership as defined in Clause 3, he produced something which is perilously like nonsense.

A Court will not readily place upon words a strained and artificial construction which produces such manifest inconsistencies and anomalies unless driven to do so by the compelling force of a clear context.

We come then to Clause 21—that which the Court is asked to construe.

"If that clause had stood alone," says Sim J. in his judgment, "it is clear, I think, that the defendant would not have been entitled to make any deduction from the profits by way of salary." In other words, the learned Judge thinks it clear that if Clause 21 stood alone the word "nett" therein would bear its ordinary and natural sense. But he feels constrained by the doctrine propounded in the case of **In re Birks** (1900, 1 Ch. 417) to read Clause 21 with Clause 3 and to give to the word in 21 the extraordinary and unnatural meaning it bears in 3. A Court, if possible, should so construe a document that the various clauses of it are consistent with each other; no one will dispute the soundness of that as a general principle. But what have we here? First a clause in which the words "nett profits" must of necessity be read in an artificial sense, different from their meaning in ordinary speech. Then we have a clause in which these same words, if used in that sense, produce anomalies and inconsistencies. And finally we have a clause in which, if it stood by itself, the words are fully capable of bearing their usual and ordinary meaning and which, if the words be read in that meaning, is a sensible and logical clause. Why, then, should the Court be compelled to place a strained and artificial construction upon words in a clause which, by itself, is admittedly clear, simply because the draftsman in an earlier clause, of entirely different scope and purpose, has used the words in this strained and artificial sense, while in an intermediate clause he has employed them in a way that produces inconsistencies in diction and anomalies in meaning?

With regard to the authorities cited: I have nothing to add to the comments of MacGregor J. upon **In re Birks.** As to **ex parte Harper,** I confess I have been quite unable to see that any rule of construction, of general application, is to be found in the case. It is a reasonable inference, no doubt, that the Court considered the business carried on by the surviving partner after Harper's death to be a continuation of the partnership business; but that inference must, I think, be limited to the particular and extraordinary circumstances of that case. So in his judgment in this case Sim J. is of opinion that a "quasi-partnership" is created between him (Mr. Watson) and Mr. Haggitt's executors.

But if we grant that this is so, what follows? The death of Haggitt did, in fact, terminate the partnership; but whether the relationship created by the deed between Watson and Haggitt's executors be called a "quasi-partnership" or a "continuation of the business" it was at any rate a new and essentially different relationship. Clause 3 purports to define the relationship between the two partners in their lifetime; Clause 21 that between the surviving partner and the executors of the deceased partner. While both partners are alive and engaged in the business the scheme in Clause 3 is a convenient way of allocating profits so as to give to the senior partner, Watson, at first a preferential £750 and later a preferential £500 a year before the balance of profits is divided equally between them. But to meet the contingency of the death of either, they decided to adopt an entirely different plan: the allocation of a so-called "salary" was obviously no longer an appropriate way of adjusting the respective interest of the surviving partner and the executors of a deceased partner; a dead man could not earn "salary," nor could he, in ordinary language, be said to earn "profits." So they decided, on the death of a partner, to reduce his interest from one-half to one-third, and to pay to his executors, not "salary" or "profits," but "**a sum equivalent to**" one-third of the nett annual profits. Here, it would seem, the draftsman does, for once, appreciate the value of precise and apt diction.

I am unable to see any necessity, in construing this document, to depart from the ordinary and commonsense view of Clause 21 that would, admittedly, be taken of it if it stood alone, namely, that it is simply a method adopted for paying the executors of a deceased partner for his share in the goodwill. Payment is spread over five years and each instalment, instead of being a fixed sum, is the equivalent of an aliquot part of the profits in each year of the five.

I think, therefore, that this appeal ought to be allowed.

Solicitors for appellants: **Ramsay, Barrowclough & Haggitt,** Dunedin.

Solicitors for respondent: **Stout & Lillicrap,** Invercargill.

SUPREME COURT.

Adams J. October 14, 1926.

WATERSON v. DELARGEY.

Licensing—Appeal from Magistrate—Magistrate's decision correct respecting offence charged—Should case be referred back to hear another charge of different offence—Section 296, Justices of the Peace Act 1908—Emeny v. Nolan distinguished.

The licensee of the Empire Hotel was charged with selling liquor during the time when such premises are directed to be closed. The magistrate dismissed the information.

On appeal it was contended that the case should be remitted to the magistrate under Sec. 296 of the Justices of the Peace Act 1908, in order that the magistrate should hear a charge against the respondent of aiding and abetting a lodger, Harneford, in supplying one Arnold with liquor at a time when Arnold was not entitled lawfully to be supplied.

Donnelly for appellant.
Murphy & Olliver for respondent.

ADAMS J.: Counsel for the appellant relied on the case of **Emeny v. Nolan**—1920 N.Z.L.R. page 260. The distinction between that case and the present one is that there the appellant had been convicted before the Magistrate, and on appeal it was held that the conviction of the offence charged was wrong, but that the appellant could have been convicted of another offence upon the evidence. The case was remitted to the Magistrate to hear the appellant's defence to such fresh charge, the Court expressing the opinion that after hearing the appellant it was competent for the Magistrate to convict the accused on that charge. In this case it is admitted that on the charges before the Magistrate the case against the respondent was properly dismissed, and Section 10 of the Inferior Courts Procedure Act 1909 cannot be invoked. The time limit for laying an information under the Licensing Act has expired, and if the case were sent back to the Magistrate the result would be that the respondent would be tried on a fresh charge which is barred by the expiry of the statutory limit of time for laying an information under the Act (Section 241). I do not think that in these circumstances it would be proper to put the respondent in such a position. The fact that the case was properly dismissed by the Magistrate makes all the difference between this case and that of **Emeny v. Nolan.** The proper course in such cases is to proceed by fresh information. It is unnecessary to deal with or decide the other contentions relied upon by counsel for the respondent. The appeal is therefore dismissed.

Solicitor for appellant: **A. T. Donnelly,** Christchurch.
Solicitor for respondent: **R. W. Olliver,** Christchurch.

Reed J. November 2, 6, 1926.
Wellington.

OATES v. JENSEN.

Interpretation of Lease—Date of expiry—From the 15th day of September next—Originating Summons—Browne v. Burton, 5 D. & L. 289, and Shore v. Wilson, 9 Cl. & F. 355, 525 followed.

The original lessors and lessees are dead and the present plaintiff and defendant are their successors. The lease purports to have been signed on September 15th, 1905, and is "for the space of twenty-one years to be computed from the 15th day of September **next.**

The Court was asked as to whether the lease expires on September 15th, 1926, or on September 15th, 1927.

Blair for plaintiff.
Kennedy for defendant.

REED J.: A document speaks from the date of its execution and, prima facie, the date of execution is the date apparent on the face of it. **Browne v. Burton,** 5 D. & L. 289. There is no evidence in this case that the date stated is not the true date. I am asked to infer that it is not, but with that I shall deal later; in the meantime I propose to consider the question on the assumption that it is the true date. What then is the grammatical and ordinary sense of the words in question? The document speaks as on the 15th September, 1905, and provides for the lease commencing on the 15th September **next.** Clearly that refers to the 15th September of the following year. It is hardly necessary to refer to authority, but if precedent be required it may be found in **Browne v. Burton** (supra).

The internal evidence relied upon is the provision for payment of the first rent "on the fifteenth day of September "**next,** coupled with the fact that the lessee did actually pay a half year's rent on the 25th September.

I cannot concede that any of these circumstances warrant a finding that the date of the document is an arbitrary one. But even if it were there is nothing to show whether the true date of signing was before or after the date stated in the document. If it were after, then the case against the plaintiff would be still stronger. The document was stamped on the 27th September, and no inference either way can be drawn from that, except that it was executed before that date. I think, therefore, that it must be accepted that the prima facie evidence is unshaken that the document was executed on the 15th September.

The position is, therefore, that it must be taken that the document was executed on the 15th September, 1905, and that according to the strict and grammatical construction of the words used the lease did not commence until the 15th September, 1906. The rule of construction to be applied in such circumstances is thus stated by Coleridge J. in **Shore v. Wilson,** 9 Cl. & F. 355, 525, and 526.

The answer to the question submitted will be that the term of the memorandum of lease expires on the 15th day of September, 1927.

I think that the plaintiff should pay the defendant's costs, which I fix at £7 7s. and disbursements.

Solicitors for plaintiff: **Chapman, Tripp, Blair, Cooke & Watson,** Wellington.
Solicitors for defendant: **Hart, Tucker & Daniell,** Carterton.

Skerrett C.J. December 15, 17, 1926.
Wellington.

IN RE THE WILL OF EDWARD J. J. LE RAY: KELLOW v. LE RAY AND OTHERS.

Will—Construction—Residue divided equally between three relatives—One sister died before will made—Cross-remainder not implied—Baxter v. Losh, 14 Beav. 612; 51 E.R. 420 followed—Practice—Intestacy—Ascertaining whereabouts of next-of-kin—Public Trust Office Amendment Act 1913.

By his will the testator devised and bequeathed the residue of his personal estate and the whole of his real estate to the trustee, the plaintiff, upon trust for conversion and after payment of his just debts, funeral and testamentary expenses,

(a) "To divide the said residue equally among my full "brother John James Le Ray . . . (giving his address) . . . "my sister Laura Selina Dowdney . . . (giving her address) ". . . and my sister Margaret Martha Augusta Alley . . . "(giving her address)."

The testator declared that in the event of all of them, his said brother and his said two sisters, predeceasing him, his trustee was to divide the residue in equal shares among such of the children of his said brother and his said two sisters who should be living at the date of his death. The residue referred to by the testator means the remainder of his personal estate and the whole of his real estate.

One sister, namely, Mrs. Alley, died before the testator and before the date of his will, leaving one child her surviving, who is of adult age.

The question submitted on the construction of the will is thus set out:—

(1) HOW the share of the residue of the testator's estate given by the said will to testator's sister Margaret Martha Augusta Alley is to be disposed of, and in particular

(a) WHETHER such share falls to be divided equally between the defendants John James Le Ray and Laura Selina Dowdney; or
(b) WHETHER a partial intestacy arises in respect to such share and the same becomes distributable among the next-of-kin of the testator.

Ray for executors and defendants J. J. Le Ray and L. S. Dowdney.
Rose for Public Trustee, to represent the other defendants, some of the next-of-kin of testator.

SKERRETT C.J.: I think the case of **Baxter v. Losh, 14 Beav. 612; 51 E.R. 420**, is a clear authority that the suggested implication of a cross-remainder is not permissible. Apart from authority I should have thought that this was clear. By the death of Mrs. Alley in the lifetime of the testator, the share going to her in the residue lapsed and the substitutionary gift had no operation in the circumstances.

Question (1) will therefore be answered as follows:—
The share of Mrs. Alley does not fall to be divided equally divided between the two defendants John James Le Ray and Laura Selina Dowdney, but a partial intestacy arises in respect of such share and the same becomes distributable amongst the next-of-kin of the testator.

The Originating Summons also asks that in the event of it being determined that a partial intestacy arises with regard to the share mentioned, what inquiries should be directed to ascertain whether Phillip William Le Ray, brother of the testator, is alive or dead, and, if dead, when he died—whether he left issue who survived the above-named testator, or in the alternative whether his said third share may be distributed on the assumption that the said Phillip William Le Ray predeceased the testator without leaving issue. In order to deal most efficiently with this matter, a course was suggested during the argument which it is probable that the parties will adopt. The suggestion is that the plaintiff, as executor and trustee of the will, should act upon the order made upon the originating summons, and should pay the two one-third shares to the brother John James Le Ray and Laura Selina Dowdney. He should further distribute the one-third share of the testator amongst such of the testator's next-of-kin who can be ascertained and located. The testator's next-of-kin appear to be six in number, including Phillip William Le Ray, a full brother of the testator, who has been previously referred to. The trustee may distribute the one-third share of Mrs. Alley's share amongst the five next-of-kin who have been ascertained and located, retaining the share therein of Phillip William Le Ray before mentioned.

The trustee could then immediately take the appropriate steps to have the Public Trustee appointed executor and trustee of the will. The Public Trustee has, under the Public Trust Office Amendment Act 1913, an appropriate procedure for dealing with the shares of persons whose whereabouts there is difficulty in ascertaining.

Solicitors: **Mazengarb, Hay & Macalister**, Wellington.

McGregor J. November 27, 30; December 1, 20, 1926. Blenheim.

BENNETT v. GREENSILL.

Contract—Sale and Purchase—To Bennett Bros.—One a minor—Minor disclaiming—Plaintiff suing alone for specific performance.

On July 15th, 1926, the defendant offered by letter to "Bennett Bros." to sell a station property in Marlborough, with live and dead stock, for £18,000. On July 21st Bennett Bros. accepted by telegram and letter. On July 27th defendant declined to complete the sale on the ground (inter alia) that one of the purchasers was an infant. On September 13th the infant purchaser, Moriss Bennett, executed an instrument purporting to disaffirm and repudiate the said contract. This instrument was sent to defendant, who was called upon to perform the contract with the remaining purchaser, Hyla Bennett, the present plaintiff. Defendant refused, contending that plaintiff alone was incapable of completing the contract.

Action for specific performance, or damages for breach of contract.

Johnston & Fitzherbert for plaintiff.
Kennedy & Churchward for defendant.

McGREGOR J.: The first and main question to be determined is whether the plaintiff, Hyla Bennett, can himself maintain this action in the absence of his brother Moriss Bennett, who was one of the two persons who agreed to purchase the property in question. The general doctrine is quite clear that a contract, to be specifically enforced, must as a rule be mutual. In other words, it must be such a contract as might at the time it was entered into have been enforced by either of the parties thereto against the other of them. Whenever, therefore, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. One necessary result of this doctrine is that "you cannot get specific performance against an infant!" (per **Lindley L.J.** in **Lumley v. Ravenscroft**, (1895) 1 Q.B., p. 684).

In the present case, accordingly the defendant could not, it seems have sued Moriss Bennett for specific performance of the contract, nor could Moriss Bennett, for lack of mutuality, have sued the defendant. This latter the plaintiff evidently realises, inasmuch as he has brought action in the present case in his own name, without making his brother and co-contractor a plaintiff along with himself. Now it is clear law that where a promise is made to several persons jointly, they are entitled collectively to performance of it. Proceedings to enforce the performance of such a promise can be taken only in the names of all the joint promisees: one of them cannot sue alone, because the promise was made to all of them jointly, and not to any of them severally. (**Halsbury**, VII, p. 337; **Kendall v. Hamilton**, 4 A.C., pp. 542/543.) How then can the present action be maintained by the plaintiff Hyla Bennett alone? Most of the cases so relied on by the plaintiff are referred to in **Halsbury** (Vol. VII, pp. 73/4), where I find the effect of some of them thus broadly stated: "where an adult and an infant enter jointly "into a contract which does not bind the infant, the adult "is not bound by it, if it can only be performed by them "jointly" (p. 73), and "Where specific performance can-"not be ordered against an infant, it will not be ordered "against an adult co-contractor with him" (p. 74).

The term "void" is applied somewhat loosely to the contracts of infants in this connection. As a rule that term —according to **Sir Frederick Pollock**—simply means "unen-"forceable against the infant." Particularly, as stated in **Pollock on Contract** (p. 62), "it appears to be agreed that "the sale, purchase or exchange of land by an infant is both "as to the contract and as to the conveyance only avoid-"able at his option."

But as the learned author goes on to point out (at p. 64): "There is one exception to the rule that an infant may en-"force his voidable contracts against the other party during "his infancy, or rather there is one way in which he cannot "enforce them. Specific performance is not allowed at the "suit of an infant, because the remedy is not mutual, the "infant not being bound" (see **Flight v. Bolland**, (1828) 4 Russ. 298.

In the result it seems to me that this was a joint contract, and accordingly that Hyla Bennett cannot alone sue for a breach of it.

Solicitors for plaintiff: **Johnston, O. & R. Beere**, Wellington.
Solicitors for defendant: **Burdon, Churchward & Reid**, Blenheim.

Reed J. December 9, 14, 1926. Auckland.

IN RE THE NEW ZEALAND GUM MACHINE COMPANY, LIMITED (in Liquidation).

Company—Liquidator issues misfeasance summons against late directors—One director seeks security for costs—Company has no assets—Strand Wood Company, 2 Ch. 1, followed.

The Official Liquidator of the New Zealand Gum Machine Company, Limited (in liquidation), has issued a misfeasance

summons against the late directors. One of the directors applies for an order that the liquidator give security for costs upon the grounds (1) the Court has jurisdiction to grant the order; (2) the circumstances (a) that the Company possesses no assets, (b) that the real mover, a creditor, is a foreign company, justify such an order.

West in support.
Beckerleg to oppose.

REED J.: The latter consideration is not relevant; it is quite immaterial where the creditors of a company in liquidation reside, they, under no circumstances, would be responsible for the costs, nor does it matter who moves the Liquidator, provided there are good grounds for taking proceedings. This Court will not assume that the Liquidator is acting upon frivolous and untenable grounds. It is not disputed that the company has no assets.

If the action were brought in the name of the company, Section 115 of the Companies Act 1908 would apply, and the Company, having no assets, could be called upon to give security. That is a jurisdiction specifically conferred upon the Court. No such provision is made with regard to actions commenced in the name of the Liquidator. At one time the practice was, in proper cases, to order a Liquidator to give security, **Re Seventh East Building Society,** 51 L.T. 109. Since 1904, however when the **Strand Wood Company case, 1904 2 Ch., 1, 3,** was decided by the Court of Appeal, the practice has been otherwise. I do not think that a Judge, sitting alone, is justified in holding that a practice, established by a judgment of the Court of Appeal in England, is not applicable to New Zealand; I must hold, therefore, until reversed by superior authority, that the same practice must obtain here. In order that, if it be so desired, the matter may be taken to the Court of Appeal, the present proceedings will be deemed to have been removed from Chambers into Court, and this judgment to be a judgment of the Court.

The summons will be dismissed with costs £7 7s. and disbursements.

Solicitors for applicant: **Jackson, Russell, Tunks & West,** Auckland.

Solicitor for the liquidator: **A. Hanna.**

Sim J. November 17, December 7, 1926.
Invercargill.

McCROSTIE v. QUINN AND OTHERS.

Will—No power to postpone conversion—Power to carry on business in which testator engaged—Interest in another business—Immediate realisation would involve loss—Whether power to postpone should be granted—In re New (1901), 2 Ch. 534, followed—Income—Whether net annual income or fixed rate of interest at present capital value to be paid to widow—Rate of interest.

Testator died on November 9th, 1925. By his will he bequeathed to his wife absolutely his household furniture and effects and devised and bequeathed his real and residuary personal estate to his trustees, to sell and convert into money and invest the proceeds, in securities specified, in the Trustee Act 1908, paying the income to his widow during life or until remarriage, thereafter to hold the capital and income for the testator's children (of which there were none), failing such children, in trust for testator's brother, Walter Macfarlane Quinn, and of his sister, Agnes Henderson. A codicil bequeathed certain pecuniary legacies.

The will contained no power to postpone conversion, but empowered the trustees to carry on the business in which the testator should be engaged at the time of his death, and for that purpose use part or whole of his real or personal estate as he should think fit. At the time of his death testator was engaged in the business of T. Quinn and Co., bacon curers, of Invercargill.

Testator owned 4650 £1 shares, 13s. 4d. paid up, in J. M. Brown, Limited, a private company of £12,450 capital. The other shareholders are unable to purchase the testator's shares. To sell the shares at the present time would result in loss. There is a fair prospect of making a profit if they are retained.

The first question submitted is as to whether or not plaintiff is empowered or should be authorised to postpone the realisation of the shares in J. M. Brown, Ltd.

The second question submitted is as to whether plaintiff is empowered or should be authorised to postpone the calling up of a sum of £3935 14s., which the testator lent at interest to J. M. Brown, Ltd., without any security.

The third question submitted is as to whether or not the plaintiff is empowered or should be authorised to join in the execution of a joint and several guarantee to the bankers of J. M. Brown, Ltd., to secure an overdraft up to £7500. The overdraft account, which the testator with the other shareholders had joint and severally guaranteed up to £10,000, has been closed with a debit of £5427 13s. 9d. The company has overdrawn the new account opened to the extent of £1688 5s. 7d. The bank holds a debenture over all the assets of the company.

The fourth question is as to whether or not the plaintiff is empowered or should be authorised to carry on the business of bacon-curing.

The fifth question is as to whether the widow should be paid the net annual income derived from the estate, or a fixed rate of interest on the present capital value of the estate.

W. S. Tait for plaintiff.

A. M. Macdonald for widow of testator.

Stout for Public Trustee, who was appointed to represent all other defendants.

SIM, J. answering Question 1:—

The will, as I have said, does not authorise the trustees to postpone the conversion of the residuary estate, save in so far as the power to carry on the testator's business involves a power to postpone conversion. Under such a trust it is the duty of the trustee to effect the conversion within a reasonable time after the death of the testator, and ordinarily this period is twelve months: **Grayburn v. Clarkson,** 3 Ch. App. 605; **Sculthorpe v. Tipper,** 13 Eq. 232. The plaintiff, therefore, is not entitled himself to postpone the sale of the shares in the company, and the only question is whether or not the Court ought to give him authority to do so. As a rule the Court has no jurisdiction to give, and will not give its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the instrument creating the trust authorised by its terms: **In re New,** (1901) 2 Ch. 534, but, as was laid down by the Court of Appeal in that case, there may be circumstances which justify the Court in authorising the trustees to do something which in ordinary circumstances they would not have power to do. That case constitutes, as Cozen-Hardy L.J. said in **In re Tollemache,** (1903) 1 Ch. 955, the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts. **In re New** was discussed by Chapman J. in his judgment in **Quill v. M. Hall,** 27 N.Z.L.R. 545; 10 Gaz.L.R. 530, and he there expressed the opinion that section 8 of the Administration Act 1879, now replaced by section 9 of the Administration Act 1908, conferred a power under which sales for shares and debentures might be sanctioned without reference to exceptional emergency. One of the powers given by section 9 of the Administration Act 1908 is to make orders and give directions "generally in regard to the administration of the estate for the greatest advantage of all persons interested." This section appears to give jurisdiction to make the order asked for in the present case, but the jurisdiction conferred by that section ought not to be exercised, I think, to sanction a deviation from the strict letter of a trust, unless the case comes within the rule laid down in **In re New.** The decision in that case was followed and applied in New Zealand in **Potter v. Ewington,** 17 G.L.R. 534; **Melville v. Lees,** 17 G.L.R. 761; and **In re Douglas,** (1922) G.L.R. 524. In the case of **In re Hazeldine,** (1918) 1 Ch. 433, Eve J. made an order authorising trustees to retain some unauthorised investments for the duration of the war and for six months afterwards. In the present case it is clear that the shares, if saleable at

all, could only be sold at a great sacrifice, and that it is in the interest of all the beneficiaries to have the sale postponed. The circumstances are such, I think, as to justify the Court in granting the application, and an order is made authorising the plaintiff to postpone the sale of the shares until the further order of the Court, but the plaintiff must take advantage of any opportunity which may arise of disposing of them at a reasonable price.

Answering Question 2:—

In these circumstances it is hardly necessary to make any order on the subject, but for the protection of the plaintiff an order is made authorising him to postpone, until the further order of the Court, the collection of the debt.

Answering Question 3:—

In the circumstances there does not appear to be any necessity for the plaintiff to incur any further liability on behalf of the estate in connection with the company. The answer to the question submitted is that the plaintiff should not join in the proposed guarantee.

Answering Question 4:—

The answer to the question is that the plaintiff is empowered by the will to carry on that business for such period as he shall think fit, and to postpone in the meantime the sale and conversion of the assets employed in carrying on that business.

Answering Question 5:—

In the case of a bequest of personal estate in trust for sale where the proceeds are to be invested and held for several in succession, the tenant for life, in the absence of any indication of a contrary intention, is not entitled to the income of the estate **in specie** so far as it is not derived from authorised investments, but is entitled to a sum representing interest at a fixed rate on the value of the estate calculated at the date of the testator's death: **In re Woods,** (1904) 2 Ch. 4; **In re Chaytor,** (1905) 1 Ch. 233; **In re Hartigan,** 17 G.L.R. 703. On the other hand, where there is a devise of real estate in trust for sale and the proceeds are to be held for several in succession, the tenant for life is entitled until sale to the rents and profits of the land: **Jarman** (6th ed.) p. 1241; **Casamajor v. Strode,** 19 Ves. 390n; **Hope v. D'Hedonville,** (1893) 2 Ch. 74; and this rule applies in a case such as the present where real and personal estate are devised and bequeathed together and the proceeds of both are to be held as one fund: **In re Oliver,** (1908) 2 Ch. 74. In the present case the real estate consists of the property in Invercargill on which the bacon-curing business is carried on. Mr. Macdonald suggested that £3 10s. per week would be a reasonable sum to treat as the rent payable for the business premises, but, without some further information on the subject, this question cannot be determined. Unless, therefore, the parties can agree on the subject, it will have to stand over for further consideration. Mr. Macdonald suggested that the rate of interest to be allowed in connection with the personal estate should be £6 per cent. In the case of **In re Hartigan,** 17 G.L.R. 703, Hosking J. fixed the rate provisionally at £5 per cent. In the recent case of **In re Hutchinson,** (1926) G.L.R. 506, the Chief Justice fixed the rate at £6 per cent., but there were special circumstances in that case. The Chief Justice referred in his judgment to some other case in which the rate had been fixed at £6 per cent., but said that he regarded £5 per cent. as the generally accepted rate. It is desirable to have uniformity, as far as possible, in this matter, and following the decision in these cases I fix the rate in the present case at £6 per cent. Power is reserved, however, to the Court to vary this order, on the application of any party, in the event of a different rate being fixed hereafter by the Full Court or Court of Appeal as the rate to be allowed generally in such cases. The further consideration of the summons is adjourned, with leave to any party to apply to the Court or a Judge in Chambers. The costs of all parties are to be fixed by the Registrar as between solicitor and client and paid out of the estate.

Solicitors for plaintiff: **W. O. & J. Tait,** Invercargill.

Solicitor for widow of testator: **A. M. Macdonald,** Invercargill.

Solicitors for Public Trustee: **Stout & Lillicrap,** Invercargill.

Sim J.

December 7, 14.
Dunedin.
(In Chambers).

IN ESTATE OF WILLIAM JOHN OLIVER (DECEASED).

Intestacy—Statutory Declaration—Proof Next-of-kin—Whether sufficient proof—Sections 75 and 76 Trustee Act 1908—Petitions must state specific facts.

In re Griffiths, 12 G.L.R. 533, followed.

Fairmaid for petitioner.

SIM J. This is a petition for directions under section 75 of the Trustee Act 1908. The petitioner is the executor of the will of William John Oliver, who gave devised and bequeathed all his estate to his brother John Thomas Oliver. This brother died before the testator, and the estate has to be distributed as on an intestacy. The petitioner has been supplied with statutory declarations in proof of the claims of the four persons who appear to be the only next of kin of the testator. The petitioner now prays for a direction as to whether he should accept these declarations as sufficient to justify him in distributing the estate of the testator amongst the said four persons.

The scope of sections 75 and 76 of the Trustee Act 1908 was considered by Mr. Justice Edwards in the case of **In re Griffiths,** 12 G.L.R. 533. After referring to the cases in which it had been held that the sections simply enable the Judge to give directions upon points of minor importance arising in the management of the estate, the learned Judge said that in a proceeding under this enactment the petitioner must state specific facts, sufficient to enable the Judge to come to a conclusion upon the points submitted to him. One of the questions submitted in that case was the same as that submitted in the present case, and Edwards J. held that he had no jurisdiction to answer the question. That is a clear authority for saying that the direction asked for in the present case cannot be given.

It is to be observed that the section of the English Trustee Act from which sections 75 and 76 of the New Zealand Act were taken was repealed by the Trustee Act 1893, for the reason, as stated in **Lewin,** 12th Ed., p. 772, that it had been rendered obsolete by the improved procedure in connection with Originating Summonses.

Solicitors for petitioner: **Sievwright, James & Nichol,** Dunedin.

Stringer J.

November 30; December 4, 1926.
Christchurch.

ATTORNEY-GENERAL, EX. RELATIVE RICHARD SEDWARD OWEN, v. MAYOR ET AL, THE BOROUGH OF NEW BRIGHTON.

Municipal Corporation—Nuisance—Injunction to Restrain—Bridge—Over "Tidal Water"—Jurisdiction of Harbour Board.

Plaintiff sought an injunction to restrain Defendant Borough Council from entering into a contract to erect a bridge over the River Avon at its junction with Sea View Road within the Borough, which bridge would impede navigation and create a nuisance. The River Avon is a "tidal water" within the meaning of Section 5 of the Harbours Act 1923, and for six chains beyond Sea View Road forms part of the Lyttelton Harbour, and is under the jurisdiction of the Lyttelton Harbour Board. The Defendant Council had complied with the provisions of Sec. 119 of the Public Works Act, and obtained the Governor's warrant and contended that such warrant was sufficient authority to construct the proposed bridge.

Wright & Cuthbert for plaintiffs.
Flesher & Upham for defendants.

STRINGER J.: The Council contends that it has the power to do this by the conjoint operation of Section 164, ss. (d), of the Municipal Corporations Act 1920, and Section 119 of the Public Works Act 1908, having obtained a Governor's Warrant under sub-section (e) of the last-named Act.

Public work by the Muncipal Corporations Act includes any public work within the meaning of the Public Works Act 1908, and by the last-named Act "public work," amongst other things, includes any "bridge, drain, harbour, "dock, canal, river work, water work," etc. Assuming, therefore, that the erection of a bridge over a tidal water is a public work within the meaning of Section 164 of the Municipal Corporations Act, would the Borough Council under that section have power to erect such a bridge when such erection would create a nuisance? It would seem not, for Section 169 expressly provides that "nothing in this Act "shall be deemed to entitle the Council to create a nuisance, "or to deprive any person of any right or remedy he would "otherwise have against the Corporation or any other per- "son in respect of such nuisance."

It is suggested, however, that this difficulty is overcome by the provisions of Section 119 of the Public Works Act.

The Council complied with the provisions of this section, and having obtained the Governor's Warrant under Subsection (c), it contends that the warrant is sufficient authority to construct the proposed bridge. I do not think that this contention is sound.

It appears to me that the section presupposes that the proposed work can be lawfully carried out, and that the Local Authority which invokes its aid, already possesses the necessary power to do so. Now in the present case the authority which, according to the contention, the Council had for the construction of the bridge, is conferred by Section 164 of the Municipal Corporations Act, and this authority is subject to the limitation imposed by Section 169 quoted, which disentitles the Council to create a nuisance. As the erection of the bridge in the manner proposed would admittedly create a nuisance, it follows, in my opinion, that the Council has no authority to erect such a bridge.

The Mandamus is therefore granted with costs, which I fix at £35 and disbursements.

Solicitors for plaintiffs: **Duncan, Cotterill & Co.**
Solicitor for defendants: **J. A. Flesher.**

COURT OF ARBITRATION

Fraser, J. November 5, 16, 19, 26.
Christchurch.

DELLOW v. BELL.

Workers' Compensation—Well Sinker—Injury to left eye—Whether piece-worker or independent contractor.

This is a claim for compensation for an injury to the plaintiff's left eye, received while the plaintiff was sinking a well for the defendant. There is no dispute as to the happening of the accident or the amount of the plaintiff's average weekly earnings. The only question submitted to the Court for determination was whether the plaintiff was a piece-worker or an independent contractor.

The defendant invited the plaintiff and Messrs. Booth, McDonald and Coy.'s agent at Waimate to submit prices for sinking a well on his property. Each tenderer was informed that water was expected to be found at a depth of 60 feet. It was understood that if water was reached at a less depth, a *pro rata* payment would be made. The plaintiff gave the following document to the defendant:—

"Price List for Well.

"10 ft. at 5s. a ft.
"10 ft. at 7s. a ft.
"10 ft. at 8s. a ft.
"10 ft. at 9s. a ft.
"10 ft. at 9s. 6d. a ft.
"10 ft. at 10s. a ft.
"Total £24 5s. down to 60 ft.

"A. Dellow."

The plaintiff is known in the district as an expert well-sinker, and his offer was accepted by the defendant. The plaintiff supplied his own tools and gear, with the exception of a windlass, which the defendant undertook to supply, in order to save the inconvenience of bringing the plaintiff's own windlass a distance of 15 miles. The plaintiff's written tender or "price-list" was accepted by the defendant without any stipulation as to the retention of any control of the work or the manner of its performance. The plaintiff took his brother-in-law with him to assist him, and agreed to pay him half the money received from the defendant. After the well had been sunk to a depth of 48 or 50 feet, the weather broke, and the well was flooded by surface-water and the overflow of a river. Operations were suspended for ten months, at the expiration of which time the defendant asked the plaintiff to resume work. He was unable to do so at the time, but sent another man, Carvis, in his place. After working a day, Carvis injured a foot and had to cease work. Through a misunderstanding, the defendant's insurers paid him compensation without question. The contract money for the work done by Carvis was paid to the plaintiff, less the agreed wages (14s.) of a labourer (Ottley) supplied by the defendant. In July, 1926, the plaintiff recommenced operations, with the assistance of Carvis, with whom he made a similar arrangement to that originally made with his brother-in-law. A few days later he was injured, and the present claim for compensation arises from the injury he then received.

Judgment of the Court, per FRASER J.: Sir Frederick Pollock, in his Law of Torts (11th edition, p. 80) says: "It is quite possible to do work for a man in the popular sense, and even to be his agent for some purposes, without being his servant. The relation of master and servant exists only between persons of whom one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or, as it has been put, retains the power of controlling the work." The same author defines an independent contractor as "one who undertakes to produce a given result; but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand."

No control whatever was exercised by the defendant over the plaintiff. He simply accepted his tender for the work, and there is no suggestion that anything was said from which the retention of control can be inferred. He regarded the plaintiff as an expert well-sinker, and gave him a free hand. He did not seek to regulate his hours, or to interfere with his assistants. The existence of a power of dismissal is negatived by the nature of the contract entered into. The defendant acknowledged the plaintiff's right to substitute Carvis for himself at an intermediate stage of the work, but said that he held the plaintiff responsible for its proper performance, and he paid all moneys owing under the contract to the plaintiff. All these circumstances point in the direction of the plaintiff being an independent contractor rather than a piece-worker. It is true that there is a suggestion that the defendant told the plaintiff that he had insured him against accident, but the defendant denies this. Even if the defendant had made such a statement, it would not affect these proceedings, unless the plaintiff was in fact a piece-worker, but the statement might be the foundation of a different action (**Barnes v. Evans and Coy.**, 7 B.W.C.C., 24). It is by no means an uncommon circumstance that a man should be under the impression that anybody working on his property is covered by his ordinary Workers Compensation Act policy. The action of the defendant in engaging Ottley to assist Carvis seems also to negative the view that the plaintiff was an independent contractor, but, as against this, Carvis was told of the arrangement, and apparently assented to it, and the amount of Ottley's wages was deducted from the next payment made to the plaintiff.

The facts in this case are somewhat similar to those in **Hughes v. Quinn** (11 B.W.C.C., 420) where a well-sinker was held to be an independent contractor, though there were elements in that case in favour of the plaintiff's claim that do not exist in the present case. When we examine the facts of the case before us, and consider the transaction as a whole, we are bound to conclude that the plaintiff has failed to satisfy us that he was a worker within the meaning of the Act. We must regard him as an independent contractor and accordingly not entitled to compensation.

Judgment will be for the defendant, and leave reserved to him to apply for costs.

Solicitor for plaintiff: **P. J. O'Regan,** Wellington.
Solicitors for defendant: **Ramsay, Barraclough and Haggitt,** Dunedin.

LONDON LETTER.

Temple, London,
24th November, 1926.

My Dear N.Z.,—

The case as to the two independent brakes on a motor vehicle, to which I referred in my last letter as being *sub judice*, was decided the day after I wrote: it was held that the two brake blocks constituted two brakes, notwithstanding that both operated on the one brake drum. The reason of this decision was that, though it might well be said that one defect (in the brake drum) would render both brakes ineffective, yet the drum was to be regarded as part of the wheel. This is a matter more mechanical than legal, perhaps; I feel, however, that you will not speak crossly to me, for mentioning it, if it be the fact that running-down cases, sequel to motor car traffic, constitute so vast a part of present day litigation with you as they do with us. I almost feel that I own and drive myself as a professional duty rather than as a personal indulgence; every misadventure I suffer or misbehaviour I commit affords a useful lesson, less for my own moral regeneration than for my client's tactical advantage. No doubt you find the same? Mackinnon, J. told me recently that his only objection to going circuit was the long and monotonous list of motor-car accidents he had to adjudge; "running-down" proves to be a subject susceptible of infinite re-iteration, but capable of little if any, variation.

Except in the bigger capitals, such as Birmingham, our Autumn circuits, which in most assize towns are confined entirely to criminal causes, draw to a close. It is the least important circuit, of course: the Spring and Summer circuits, involving civil as well as criminal work, are of a greater size and scope. We even have no official Mess, on each first night at the Autumn assizes, on the Oxford Circuit. This time, however, we had a curious and happy revival of an ancient practice. Of old, we had two Judges for Stafford Assizes, and before the War they used, at their joint expense, to entertain the whole, present Bar, however strong, to dinner. This time we had only one Judge, Rigby Swift; notwithstanding his isolation, he invited us all to dine and we dined exceeding well. In the course of the afternoon, in Court, he sent an angry message to me, informing me that only eighteen members of the Bar had accepted his invitation, and that the number should be increased to at least twenty, to make a good table. Here was hospitality! It was, I say, a good dinner; but I must forget it, since, I suppose, it had little then and has less now to do with the Law.

I do not know whether I drew your attention to **Richardson v. Moncrieff,** decided, just before I wrote my last, to the effect that cheques drawn to pay for counters, the counters being used as currency at *chemin de fer*, suffer from the same disabilities as cheques drawn to pay the gaming losses themselves; or to **Harms Incorporated v. Martan's Club and Empress Club,** of about the same date, which deals with the performance, in a "high class" (I quote a report) Night Club, of a single number from a musical comedy, and deals with it in the copyright aspect and upon the question whether this constituted a performance of the copyright work and a performance in public. It did. Then there was, a day or two later, a "What is Charity?" decision of Rowlatt J. in the Revenue Paper: **Commissioners of Inland Revenue v. Trustees of Roberts Marine Mansions.** Trustees of a "home," which was supported by the income of their trust fund, by subscriptions from persons interested in the drapery business and by payments made by visitors, and was enjoyed by members of the drapery and other trades requiring recuperation or holiday, claimed the immunity of a charitable institution; Rowlatt J. finding no exclusive element of poverty or of sickness (of all the elements which produce the charitable character) and emphasising the element of holiday use, differed from the Special Commissioners and endorsed the Crown's view that here, technically speaking, was no "charity." The acquittal of Dr. Kingsbury, as a result of his appeal to the Court of Criminal Appeal from his conviction under our **Dangerous Drugs Act, 1920,** deserves your attention if you have similar legislation, inasmuch as it is highly desirable and may at any moment be your professional duty to establish a working and practical position for the medical practitioner in his handling, or supervision of the handling, of dangerous drugs.

There are a number of other decided cases in the Revenue paper, but I shall wait to see which of them select themselves, by the process of appeal, as being important. Together they constitute a long and gloomy list of defeated taxpayers, and I have not been able to discover one cheerful instance in which the taxing authority has been held to be wrong. I have this minute been talking to R. P. Hills, the junior to the Inland Revenue, and he tells me that the monotony of dismissed objections to taxation has been noticeable in the Court itself, and that Rowlatt J. has been almost obviously straining at the leash to discover some matter in which he may help the oppressed. To Hills' annoyance he has found his first opportunity in a case which, the Attorney-General being called elsewhere, Hills has had to conduct himself. Among other recent cases, **Riverside Mill Co. v. Hart** is perhaps worthy of remark; it deals with the Truck Acts, and it was decided by a majority of the Divisional Court finding no offence in the following circumstances:—A cloth weaver contracted for pay on a scheduled scale, payment being made less amount due from the employee to her employer in respect of damage done by her to the employer's cloth in the course of her weaving of it. I take it that she was one of those finishers whose function it is to remove blemishes from first-woven cloth and to repair, by her handiwork, the hole resulting. As you know, there are some twenty to thirty processes to be undergone by the better cloth, between its first production as a woven whole to its last delivery as a finished piece; extracting moisture, pressing, a sort of polishing, a removal of excess polish, a re-insertion of moisture, numerous re-pressings and, at one stage or other, a minute personal inspection and manual improvement of each piece, as to knots and other irregularities. (At one time the cloth is on "tenter-hooks"; whence the much used if little understood metaphor). In what was, no doubt, a test case, a girl, so working, was paid the schedule wage, less a sum due from her in respect of cloth damaged by her. Avory and Salter JJ. saw no deduction, herein, from her due wages, since the sum received by her was the full wages due under a contract which measured the wages by the difference between the schedule figure and the damages figure. It was to be expected that our liberal, not to say socialistic, Lord Chief Justice found himself unable to agree with, and bound to dissent from, a judgment which, however legally justifiable, had to be regarded as politically subversive by men so minded as he is minded.

A friend of mine, and a promising junior, Archie Cockburn in Micklethwaite's chambers, calls my attention to a case of his, on a practice point, which may well be of first-class importance to you in your daily round of interlocutory work: **Ideal Films Ltd. v. Richards and Others,** reported in the week's number of the **Solicitor's Journal** and decided about a month ago. An unregistered association of workpeople, not being (it is to be particularly noted) a Trade's Union, maintained a hall and entered into contracts as to the provision of films for their cinematographic theatre therein. It was desired to sue, by the contractors and in respect of the contracts. I recommend to your attention a study of the differences and difficulties which arose and the manner in which they were settled or solved, first as to the parties to be joined and second as to the remedy to be claimed. You will find, in the case, a very instructive Statement of Claim worked out for you before your eyes; having found it, I think you will note it in your book of precedents, against the day when you have to sue an association of persons not having a legal identity and not being subject to such statutory definitions as apply to Trades Unions. There is a further case, which I have not I think mentioned but should mention: **Scott v. L.N.E. Ry. Company,** decided by the House of Lords some weeks ago, on a Workman's Compensation point and excluding, from the list of possible beneficiaries of the law's protection, the illegitimate children of the wife of the workman killed in the accident, at any rate in the circumstances of that particular case.

I have no domestic news for you, and only this much gossip that I observe a portrait of Scrutton L.J. in the current **Law Journal** and some account of him and that I wish that the accounts, on these occasions, would set out to be as veracious as the portraits. This modern and dreadful habit of being sugary at all costs results in there being no sort of salt in our literary fare: a great deal could be said about Scrutton, which would be far from sweet and yet would go to flavour most effectively a very palatable dish. To treat, as this article incidentally does, Scrutton, Mackinnon and Porter as being as much a succession of like personalities as in fact theirs have been a succession of like practices in the same Chambers, is to deprive the article of any conviction and to give to the true records and observations in it an ineffectiveness they do not deserve. The three men are as different from each other, as can be: Scrutton, at the Bar and on the Bench, could and can be, has been and still occasionally is, a holy terror. And now if you read the **Law Journal** article, the encomiums of which he quite deserves, you will be nearer a real understanding. To appreciate adequately, however, this outstanding man, a good deal more in detail should be written in disparagement of him. Indeed, I doubt if, but for the reactive effect of his vicious propensities (speaking technically of a human character) his virtues would never have achieved anything exceeding mediocrity.

We draw a little, but not much, nearer to the hearing of the three New Zealand appeals, of which **Distributors** is the last in the list. A Canadian case starts to-morrow, and should occupy Friday and Monday and possibly Tuesday of next week. The Australian will take another day or two, so that, on the whole, the week beginning 6th December is most likely to be ours, yours and mine. Terrible confusion is said to threaten, as to all our English leaders on both sides of **Distributors,** and on my side in the Native Land case, by reason of the Northcliffe Will case, due to start a-hearing on November 29, and, once started, never, or hardly ever, likely to stop. All our leaders, and many more, are involved. . . . But I have little doubt that it will all come all right at the last minute, as these threatening disasters most often do in our profession. Financially speaking, I shall not mind if it does not quite come all right; but that, perhaps, is another story, which it would be indecent to tell in pages devoted to the Law and read by men wholly indifferent to the profits.

Yours ever,

INNER TEMPLAR.

A MAN AN APPURTENANCE.

Can a "mobile human element" to wit a man, pass as an appurtenance to a lease by virtue of the general words together with all rights liberties privileges and appurtenances, etc.? That was the knotty question that the Court of Appeal of Northern Ireland (generally called Ulster) had to solve the other day. It arose thus: Patrick and Francis McGlade who under a lease for 21 years from 1899 were tenants of the Queen's Cafe in the Queen's Arcade, Belfast, kept a man with a board about ten feet square (the board, not the man) advertising the cafe, standing at the entrance of the Arcade in an area of about ten feet square. In 1912, when structural alterations were made in the Arcade, it was arranged with the owner that the McGlades could always advertise their premises by means of the man with the board. In 1921, Henry Limited, which had acquired the property let the cafe to Patrick McGlade for 100 years at a pepper-corn rent in consideration of a fine of £12,000. The lease made no specific mention of the man with the board on his chest and no doubt a bored expression on his face, but contained the usual general words above-mentioned. Bye-and-bye the owners or the other tenants of premises in the Arcade regarded this partly human and partly inanimate advertisement as an impertinence rather than an appurtenance, and in consequence Henry Limited brought an action against McGlade for a declaration that he was not entitled to advertise his premises by the man with the board. No one suggested that the tenant and the man were "*Dicadesambo*," but there was much learned argument about rights known to the law. For the landlord it was maintained that the right claimed by the tenant was a *jus spatiandi*, a right of walking about or spreading yourself, a right not known to the law that there was no instance in the books where a right had been established to have a man either standing in a fixed spot or walking in a circumscribed space. One learned judge however declared that the right claimed was a *locus morandi* or a *jus morendi*, so limited was the area in which the sandwich-man—for it must have been a sandwich-man to advertise a restaurant—could perambulate. Another judge declared it to be a *locus standi*, and the Court decided that the right to the man with the board was a legal one, that it passed to the lessee by virtue of the general words. So the *locus standi* of the man with the board was fully established and he is no doubt now *amicus curiae*.

H. v. H.

THE SALE OF STANDING TIMBER

(By H. F. Von Haast).

The sale of standing timber with its notional conversion of an incorporeal hereditament into a chattel has raised some nice problems that have been discussed in a series of cases of which the following are the principal :—

James Jones & Sons, Ltd. v. Earl of Tankerville (1909, 2 Ch. at p. 445).

Morison v. Lockhart (1912, S.C. 1017).

Macklow v. Frear (1913, 33 N.Z.L.R. at p. 271).

Egmont Box Co. v. Registrar General of Lands (1920, N.Z.L.R. 741).

Waimiha Sawmilling Co. v. Howe (1920, N.Z.L.R. 681).

Kursell v. Timber Operators and Contractors Ltd. (42 T.L.R. 435).

In these cases the following questions have been propounded, if not completely solved.

1. How far is such conversion effective not only as against the vendor and his representatives but against the world ?

2. What constitutes a sale of goods ?

3. When does the property in the timber pass to the purchaser ?

The purpose of this article is to analyse the decisions in the cases cited and to endeavour to extract the principles and rules of law laid down therein.

In order that readers may follow the reasoning, a short summary of the law on the subject prior to the Sale of Goods Act will be advisable. Trees are part of the land on which they grow and a conveyance of the land passes the trees upon it. Thus growing trees are part of the land, but the cut logs are goods. It is when the owner of the land sells the standing timber to another that difficulty arises.

Prior to the Sale of Goods Act, on such a sale the question of whether the standing trees were to be considered land within the meaning of the 4th or goods within the meaning of the 17th section of the Statute of Frauds depended on subtle considerations as to whether they were to be severed by the buyer or seller, and whether they were to get any benefit from remaining attached to the land before severance. The cases were conflicting and eventually it was laid down in Marshall v. Green (1 C.P.D. 35) that " when the subject matter of the contract is something affixed to the land, the question is whether the contract is intended to be for the purchase of the thing affixed only or of an interest in the land as well as the thing affixed."

In that case the defendant by word of mouth purchased certain growing trees for £26 of the plaintiff on the terms that the defendant should remove them as soon as possible. It was held that the case was within the 17th section, " the land being considered as a mere warehouse of the trees sold."

Subsequently to Marshall v. Green Chitty J. in Lavery v. Pursell (39 Ch. D. 508 at p. 516)—(a contract for the sale of the building materials of a house for removal, which he held came within section 4) thought that it was a point that required a good deal of attention, whether a standing tree could be made by any act of the parties a chattel.

The definition however of goods in the Sale of Goods Act and the subsequent decisions on that definition gave legislative sanction to the doctrine in Marshall v. Green, that the mere agreement of the parties could convert an hereditament into a chattel and extended that doctrine to contracts where severance was contemplated. **Macklow Brothers v. Frear** (33 N.Z.L.R. 264 at p. 270). **Egmont Box Co. Ltd. v. Registrar General of Lands** (1920, N.Z.L.R. 741, at p. 743). The subtleties that had previously to be considered have been swept away and " under the Act the sole test appears to be whether the thing attached to this land has become by agreement goods, by reason of the contemplation of its severance from the soil." (Halsbury, Volume 25, page 113, paragraph 222 note (n). In that Act " goods " includes " emblements, growing crops, and **things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.**" Standing timber has been held to come within that definition.

In **James Jones & Sons Ltd. v. Earl of Tankerville** (1909, 2 Ch. p. 440) Parker J. said (at page 442) : A contract for the sale of specific timber growing on the vendors' property on the terms that such timber is cut and carried away by the purchaser certainly confers on the purchaser a licence to enter and cut the timber sold, and at any rate as soon as the purchaser has severed the timber, the legal property in the severed trees vests in him," and (at page 445) " In determining the effect of such a contract at law the effect of the Sale of Goods Act 1893 has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale, whether by the vendor or purchaser, and S. 52 of the Act seems to confer on the Court a statutory power of enforcing at the instance of a purchaser specific performance of a contract for the sale of ascertained goods, whether or not the property has passed by the contract."

It is therefore settled law that growing timber which is agreed to be severed under a contract of sale is goods within the meaning of the Sale of Goods Act 1908.

Before considering the cases specified and the questions arising thereout it will be convenient to set out those sections of The Sale of Goods Act that have to be considered.

Sections 18, 19 and 20 Rule 1 are as follows :—

18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

19. (1.) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

20. Unless a different intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed.

Rule 2. Where there is a contract for the sale of the specific goods and the seller is bound to do something for the purpose of putting them into a deliverable state,

the property does not pass until such thing is done, and the buyer has notice thereof.

"Delivery" means voluntary transfer of possession from one person to another.

"Specific goods" means goods identified and agreed on at the time a contract of sale is made.

Goods are in "a deliverable state" within the meaning of the Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

Section 60. The rules of the common law save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud . . . or other invalidating cause, shall continue to apply to contracts for the sale of goods.

It will be seen therefore that in solving the problem of whether the property in the timber passes or not, we have to enquire whether the timber agreed to be sold is "specific," "ascertained," "identified," "in a deliverable state."

In **Macklow v. Frear** (33 N.Z.L.R. at p. 271) Cooper J. held that an agreement for the sale and purchase of all the kauri trees growing upon a certain block of land was an agreement for the sale of "goods" under the sale of Goods Act, and that, the goods being specific and ascertained and the whole of the purchase money having been paid at the time the agreement was signed, the property passed to the purchaser "if not at the time when the money was paid, certainly when the trees were severed from the ground and became logs."

In **Egmont Box Co. Ltd. v. Registrar General of Lands** (1920 N.Z.L.R. 741 at p. 743) Sim J. said: "Now the mere agreement of the parties may convert an hereditament into a chattel." In that case he held that as the grants in question gave the plaintiff the right to cut and remove the timber, but imposed on it no obligation to cut any timber, there was no agreement for the sale of "goods," there being no agreement that the trees should be severed.

In **Waimiha Sawmilling Co. Ltd. v. Howe** (1920 N.Z. L.R. 681) in which the appellant and respondent entered into an agreement by which the latter agreed to purchase all the millable timber on certain land and to remove the timber within a certain time, the Court of Appeal held that the agreement was a sale of "goods" within the meaning of the Sale of Goods Act with a licence to go on to the land for the purpose of cutting and removing the timber, and could not be construed as a lease. Cooper J. whose decision on this point was affirmed held that the goods were "specific" although "millable timber" was defined to mean "all totara, rimu, matai and kahikatea timber, trees and logs, measuring 3 ft. or more by log measurement now or hereafter during the continuance of this agreement growing, standing or being upon the land described in the schedule hereto." The point does not seem to have been taken as it was in **Kursell v. Timber Operators and Contractors Ltd.** (42 T.L.R. 435) that the timber was in consequence of the definition not "specific and ascertained."

In none of these tree cases was it material to consider when the property in the standing timber passed to the purchaser. That question was however of vital importance in the Scotch case of **Morison v. Lockhart** (1912, S.C. 1017) and in the English case of **Kursell v. Timber Operators and Contractors Ltd.** (42 T.L.R. 435).

(To be continued)

THE EXECUTIVE COUNCIL.

The following is the new scale of fees in respect to proceedings before Justices (Gazette No. 2, Jan. 20, 1927) and allowances to witnesses (Gazette No. 4, Jan. 27):—

FEES.

Proceedings before Justices.

	s.	d.
Information or complaint, and summons or warrant (if any) to include one name, and service within one mile	7	0
For every additional name and service within one mile	3	0
For every summons to a witness, to include one name only, and service within one mile	3	0
Service by registered letter if any summons upon an information for a matter determinable summarily where the person to be served resides more than one mile from the Courthouse or police-station from which service is to be effected, in respect of each person to be served	2	0
Hearing or rehearing any information or complaint	3	0
Conviction or order (when drawn in proper form)	5	0
For every warrant of distress upon conviction for a fine or upon an order for the payment of money	5	0
For every warrant of commitment	5	0
Recognizance with or without sureties	5	0
For every enlargement or renewal thereof	3	0
Mileage for service of any summons or process, or execution of any warrant: For the first eight miles beyond one mile from the Courthouse or police-station from which service is to be effected, 1s. per mile and for each additional mile 6d. per mile to the residence of the party or place where the service or execution takes place; or such sum as may be fixed by the Magistrate in any exceptional case.		
Certificate of dismissal of information or complaint	2	0
For any document required in the discharge of the duties of Justices not enumerated in this Schedule, for each folio of ninety words or fractional part thereof	0	6
Copy of any proceedings, for every folio of ninety words or fractional part thereof	0	6
Certified copy of entry in Criminal Record Book	2	0

Appeals from Justices.

	£	s.	d.
For drawing case and copy, where the case does not exceed five folios of ninety words each	10	0	
Where the case exceeds five folios, then for any additional folio	1	0	
For recognizance on appeal	5	0	
For every enlargement or renewal thereof	3	0	
For certificate of refusal of case	2	0	

Note.—The foregoing fees are not to be taken in proceedings under the Destitute Persons Act 1910, nor in cases of indictable offences, whether dealt with summarily or not.

ALLOWANCES TO WITNESSES.

(a.) Allowances will be made to prosecutors and witnesses for the Crown as follows:—

	£	s.	d.
To persons giving evidence, strictly as experts, for every day's attendance at Court or necessary absence from usual place of abode	1	1	0
Except as above, to every prosecutor and witness for every day's attendance at Court or necessary absence from usual place of abode	0	10	0
And in addition thereto, for every night's necessary absence from such place of abode	0	4	0

(b.) Provided that persons in receipt of salary or wages from the General Government will only be entitled to such allowances if necessarily absent at night from their usual place of abode. If not so absent such persons will be allowed their actual personal expenses only.

(c.) Witnesses residing beyond three miles from the town or city in which the Court is held will also be allowed their coach, railway, or steamboat fares. Second-class fares will be allowed to mechanics, labourers, and persons of similar rank, and first-class fares to others. Receipts must be furnished for coach and steamer fares over 5s.

When there is no public conveyance witnesses will be allowed a mileage rate of 9d. per mile one way.

(d.) Medical practitioners using their own motor-cars, or motor-cars hired for their personal use, whether public conveyances are available or not, will be allowed mileage at the rate of one shilling per mile one way for every mile between their place of residence and the place at which evidence is required to be given · provided, however, that in no case will mileage be paid for a greater distance than fifty miles.

LEGAL LITERATURE.

THE LAW RELATING TO PRIVATE TRUSTS AND TRUSTEES.

By Sir Arthur Underhill, LL.D.; Eighth Edition. Butterworth and Co., 1926. Price in New Zealand, 50/-.

To have reduced the curious law of private trusts and trustees into one hundred propositions (the exact number has varied slightly in different editions), and in these and the commentaries thereon to have covered with logical completeness and practical balance the whole of his subject, is a task by which Sir Arthur Underhill, had he done nothing else, must surely have deserved well of his fellow-men. The particular merit of "Underhill" is that a wise student can acquire it and work from it in his first year of study, and continue to rely upon it during the whole of his professional career. Few are the topics on which a text-book of this kind is available. "Lewin" is invaluable to the practitioner, but hopeless for the student; "Snell" is the reverse. In Company Law, both Topham and the smaller Palmer are on one side of the fence, and mightier Palmer on the other. Anyone who takes his profession seriously becomes grounded in a certain way of attacking difficulties, and many a mature practitioner sneaks back occasionally to Snell and Williams in time of trouble; but generally in vain. Underhill, however, with its large type for the principle and its small type for the illustration from relevant case-law, serves alike the need of the student, the scholar, and the practising lawyer. There is a time to condense, and a time to expatiate, and this book knows them both. In the esteem of many people it ranks with Sugden and Dart, Woodfall and Scrutton, as one of the really great text-books of the later law.

A New Zealand reader's first impression is one of relief to find that despite the much-discussed "new conveyancing" of the Mother Country the book is as useful as ever it was for New Zealand practitioners; the learned author has decided in our favour the nice question of what, though obsolete in England, is nevertheless not so obsolete as to warrant its total disregard; and a statement of changes made in 1925 is generally accompanied by a statement of the previous law.

The next impression is one of regret that the Dominion, claiming to be advanced in legislation, should lag so far behind Great Britain in the amelioration of trustees' liabilities, and extension to modern requirements of trustees' powers. Except for a few additions, of debatable propriety, to the permitted range of trust investments, and for the slight improvements made in 1904, 1907 and 1924, our trust law stands substantially where it did in 1901. The way in which the English legislation has proceeded, however, and more particularly the way in which it is handled in the text, make it easy for anyone with a working knowledge of our Trustee Act, such as it is, to see how far Underhill must be qualified in its application to the Dominion. After all, the law of equity is still to be found chiefly in the cases; and these, whether strictly binding upon us or not, are collected with very few omissions; moreover—a great virtue—this is one of those books that use, whenever they are concise enough for quotation, the ipsissima verba of the deciding judge.

It is matter for comment, however, that the learned author does not share the opinion that Dominion cases are worth noting. The actual labour of considering them would have been made light, as far as Australasian cases are concerned, by the special Australasian notes of Mr. H. S. Nicholas in one of the issues of the last edition. One may be pardoned for thinking that now and then an Australasian judge may have made a real contribution to the elucidation of the law, or furnished an apt illustration of established principles. For instance, In re Walsh, Keenan v. Brown, (1911) 30 N.Z.L.R. 1166, comes to mind as a particularly neat example of the working of the doctrine of resulting trusts. We may console ourselves by observing that even Scottish cases are very sparingly cited. In fact, to United States decisions, not merely those of the Supreme Court, more attention seems to be paid than to those of any British jurisdiction but England—always excepting the courts of Dublin (before the disunion).

Every work of this kind tends to deteriorate in points of detail, more than it improves by the correction of the errors unavoidable in the first issue of a work of such magnitude. It is inevitable that after the effort of accomplishing the original undertaking is achieved, the monotony of re-treading beaten tracks should lead an author to rely on ghosts and devils for matters of minor importance. In the present case, it may be assumed that the learned author's attention has been chiefly bent on the alterations caused by the Trustee Act 1925 and its companion statutes, which, of course, constitute the principal importance of the edition to English readers. Accordingly, we find it still stated (on p. 331) that "under no circumstances can an active trustee....purchase trust property....Nor, is it apprehended, could he sell to his wife or child." On the question of sale to a trustee's wife, Burrell v. Burrell, 1915 S.C. 333, contains the considered opinions to the contrary of Lord Hunter in the Outer House, and Lord Dundas and Lord MacKenzie on appeal; opinions which are not expressed to be based on any differentiation of Scots law, and which at least deserve the courtesy of consideration.

Again, it is hardly correct to say (p. 151, note (q)) that in Re British Red Cross Balkan Fund, L.R. (1914), 2 Ch. 419, a resulting trust was upheld; apparently from the reports the existence of such a trust was admitted by all parties and never put in issue, and the only point on which the court was invited to give a decision was the applicability of the rule in Clayton's case. On the same page, Smith v. Cooke, L.R. (1891), A.C. 297 (as to which the learned author finds it necessary to gloss the late Lord Halsbury's phraseology), receives rather unnecessary attention in connection with a rule to which it is probably an extreme and rare exception. The Law Quarterly reviewer of the last edition noted a couple of cases which he thought should have been included; they are still missing.

That the author adopts for himself the up-to-date plural form "cestuis que trusts," and introduces it as early as the fifth line of his next, is no doubt gratifying to folk who are sensitive about the accuracy of their Anglo-Norman-French grammar; but whether it was proper to alter in this respect the words of the old reports and of the old judges who spoke them is another matter.

However, these are trifles. In matters of principle, perhaps the only thing one could have wished treated differently is purchase by a trustee from a beneficiary, which is treated as a topic independent of the general validity of a beneficiary's concurrence in or release from a breach of trust, of which it seems more properly to be merely a particular instance.

It is unfortunate that the typography (of the Ballantyne press) is not altogether worthy of the subject-matter. Apparently the book was set in the first place with blanks for the reference-letters connecting text and footnote, and these, inserted later, have in many cases failed to take the ink. It is a melancholy indication of changed times that the last edition, occupying about thirty pages less, could be put on the market at nearly half the price of the new edition.

A. WATT.

BENCH AND BAR.

Mr. M. Myers K.C., has returned to New Zealand and has resumed practice at his Chambers in Wellington.

Mr. B. J. Dolan who was briefed by Mr. G. Winder to conduct the defence of Sloman for murdering his wife at Levin, had to return the brief at the last moment. He continues to suffer from a serious indisposition and has only recently passed out of a critical condition.

Mr. E. Bell, of the legal firm of Bell, Gully, Mackenzie, and O'Leary, who has been undergoing medical treatment in Sydney for the last six months, returned by the Ulimaroa this week, greatly improved in health.

Mr. M. H. Oram who successfully conducted the defence of Sloman was not briefed until a late hour. The opinion is generally expressed that the able manner in which Mr. Oram conducted the case proved that the defence was not at a disadvantage through counsel being so lately instructed, a high compliment to both counsel who conducted the case and the solicitor who prepared it.