Butterworth's Fortnightly Notes.

"The arduous struggles, the blows given and received, the exultation of victory, the sting of defeat, which are our daily experience, far from breeding division and ill-will, only bind us more closely together by the ties of a comradeship for which you would look in vain in any other arena of the ambitions and the rivalries of men."

—Asquith.

TUESDAY, MARCH 15, 1927.

THE STATUTE OF FRAUDS.

"Every line is worth a subsidy," said Lord Nottingham of the Statute of Frauds, for which Statute he prided himself upon being primarily responsible. "Every line has cost a subsidy" was the comment of Lord St. Leonards. Three days ago, namely the twelfth of March, the Statute of Frauds enjoyed its two hundred and fiftieth anniversary, it having been enacted in 1677.

The Act was passed with the object of preventing frauds, by compelling the parties to contracts to which the Act applied, to evidence their bargains in writing. The operation of the Statute has, in the main, given dishonest men a back-door advantage whereby to avoid their obligations to their more trusting or more legally ignorant fellows. How many wrongs would have been righted had the Statute not been enacted is a subject for conjectural speculations. The many facilities for avoidance of obligation which the Act affords is evidenced by the many cases which still are brought for the elucidation of its provisions. The number of occasions which are not litigated must be of that quantity of which it was said that no man could number.

The suggestion has been advanced on more than one occasion that the Statute of Frauds, or more correctly speaking, the re-enacted provisions in the Sale of Goods Act should be abolished. Should this step be taken little harm would flow from the change. More litigation might result, but if a barrier has been removed from impeding the flow of the stream of justice, increased litigation would indicate that the change had been justified. The Bench may view the change with some concern as to how the increased litigation would be dealt with, but such a viewpoint would not weigh heavily with the Bar for obvious reasons.

Should however, the spirit of compromise assert itself, as it frequently does, good work could be accomplished by having regard to the then monetary value of a ten pound note two hundred and fifty years ago, with its equivalent value to-day. This would result in a partial removal of the restrictions upon actions by virtue of the Act.

ONE IN THE EYE.

Lord Justice Scrutton in **Rex v. North,** 43 T.L.R. 60: "This is not an appeal from the Chancellor's decision, "and this decision here given has nothing to do with "the merits and it should not be received with cheers "by anybody either here or in the important town "of Eye."

THE TREE CASE.

As the recent case of **Noble v. Harrison** (1926, 2 K.B. 332; 95 L.J.K.B. 813), will probably become a leading case in the law of torts, we may be excused for noticing it at considerable length, stated the "Law Quarterly Review," October, 1926.

"A branch of a tree which grew on defendant's land but overhung the highway suddenly broke in fine weather and, falling upon a plaintiff's motor coach, which was then passing, caused damage. The County Court Judge found that the fracture was due to a latent defect not discoverable by any reasonable careful inspection. He held defendant liable, however, on two grounds: (1) for nuisance; and (2) upon the principle of **Rylands v. Fletcher** (L.R. 3 H.L. 330). On appeal the Divisional Court reversed this decision.

It is clear that **Rylands v. Fletcher** can have no application to the present case. A tree is not a dangerous thing. Perhaps the best statement as to dangerous character can be found in Charlesworth, "Liability for Dangerous Things," p. 10: "Fire and water never lose their dangerous character, but a lamp—not defective—is only dangerous when suspended. The point to which attention has to be directed is the nature of the article, viz., a lamp, and not the mode of user. Most things can be made potentially dangerous if required, as a piece of string stretched across a road." In other words, everything is potentially dangerous, but only certain things are inherently dangerous. The rule in **Rylands v. Fletcher** applies only to the latter, and it is clear that a tree cannot be included in this category.

The question of nuisance is hardly more difficult. The plaintiff relied on a dictum of Best J. in **Earl of Lonsdale v. Nelson** (2 B. & C. 306): "There is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhung a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred." Wright J., in his judgment in the principal case, points out that "Best J. must be contemplating branches which obstruct the highway or were an obvious source of danger." The public right in a highway is a right of passage only: Halsbury's "Laws of England," Vol. 16, p. 51. Hence the only public nuisance to a highway is an act which obstructs or renders dangerous this right of passage. An overhanging branch, far above the highway, cannot constitute such a nuisance.

Finally, it is necessary to refer to the case of **Tarry v. Ashton** (1 Q.B.D. 314), on which the plaintiff placed a great weight. In that case a large lamp suspended in front of defendant's house and overhanging the highway suddenly fell and injured a passer-by. Its fall was due to a defect which should have been observed if it had not been for the negligence of the defendant's servant employed to inspect it. Blackburn J. held that the defendant had been negligent. The plaintiff was entitled to judgment, therefore, on the ground of negligence. He was careful to point out that if there had been a latent defect he doubted whether the defendant would be liable.

Lush and Quain JJ. appear, however, to have held that there was an absolute duty on the defendant to keep the lamp in repair. Lush J.'s judgment, which is only ten lines in length, says in part: "A person who puts up or continues a lamp in that position puts the

public safety in peril, and it is his duty to keep it in such a state as not to be dangerous; and he cannot get rid of the liability for not having so kept it by saying he employed a proper person to put it in repair.

We feel that Mr. Justice Rowlatt in the present case has treated the judgments of Lush and Quain JJ. with more respect than they are entitled to receive. He suggests that a distinction can be made between an object supported by artificial means and the branch of a tree, because the owner cannot " become an insurer of nature." But the rusting of a chain is as much an act of nature as the decaying of the branch. Nor can a distinction in principle be made between an object overhanging the highway and a house so close to the highway that its fall is certain to injure passers-by. Is the rule in **Rylands v. Fletcher** to apply to the latter case? Mr. Justice Wright in his judgment definitely rejects the reasoning of Lush and Quain JJ. With all respect, we prefer his view."

It is noteable that no English statutes similar to Section 205 of The Municipal Corporations Act 1920, and Section 147 of The Public Works Act 1908 were cited, though the quotation from Brooke's Abridgement suggests that anyone has the right at common law to cut trees back when they overhang a road. The Legislature has assumed that an overhanging tree is not a nuisance, otherwise the sections would be unnecessary. It is noteable also that the power to cut trees is larger in counties than in boroughs—a curious accident of legislation. The branch in **Noble v. Harrison** could have been ordered to be cut if in a New Zealand County, but not in a Borough. The vesting of our roads in the Crown and Borough Councils may also make the case distinguishable in this jurisdiction.

GUARANTEES.

The troubles of the holder of a guarantee will not be decreased by the case of **Re Darwen and Pearce** (136 L.T. 124). Darwen and Pearce guaranteed the calls on certain shares. The calls were not paid and the company, acting within the articles of association, forfeited the shares. It was held that the guarantors had lost their security and their guarantee was therefore released. The case of **Pledge v. Buss** (John. 663) does not appear to have been cited in the argument but is to the same effect. The moral for the draftsman is that the drafting of a guarantee calls for more care than that of any other document.

CRIME WAVES.

The phsychology of crime waves is a subject of social importance to merit immediate investigation.

In a recent issue the sequence of crimes of like kind was remarked upon and the suggestion was put forward that undue prominence being given to unfortunate tragedies was one of the causes of emulation. Since then the cables have reported that there is a wave of student suicides passing through America. The first reported total of eleven has now grown to twenty. This melancholy testimony emphasises with awful eloquence the necessity for a study of this terrible social phenomena and the necessity for some prompt action.

SUPREME COURT.

Skerrett C.J. February 14, 22, 1927. Wellington.

GUARDIAN TRUST AND EXECUTORS COMPANY OF N.Z. v. RAMAGE AND OTHERS.

Trust—Construction—" Issue "—Original and not substitutionary Gift—Whether Children or Lineal Descendants—" Parent."

Originating summons for interpretation of a statutory trust created under the authority of " The Walsh and Others Pension Act 1869." The question was as to whether the word " issue " in the trust was restricted to children or had its wider meaning of lineal descendants.

In 1865 a Captain Hewett was murdered by Maori rebels near Wanganui, leaving Ellen Anne Hewett, his widow, and four children him surviving.

By section 13 of the Act, it was directed that there should be laid out and set apart for the purposes of the Act a block of land of four hundred acres and that a grant from the Crown of such land should be issued in the usual form to the trustees for the time being acting in the trusts, on the execution by such trustees of a deed declaring that the said land was held by them upon trusts to be in such deed declared, set out and defined, and approved by the Governor " for the benefit of the said Ellen Anne " Hewett for her maintenance and the maintenance education " and benefit of the said William Hewett, Ellen Maud Hewett, " Charles Robert Hewett, and George Basil Duff Hewett " (the four children of the widow) " during the life of the said Ellen " Anne Hewett and after the decease of the said Ellen Anne " Hewett for the benefit of the said William Hewett, Ellen " Maud Hewett, Charles Robert Hewett and George Basil Duff " Hewett, or such of them as shall be living and the issue (if any) " of such of them as may die in the lifetime of the said Ellen " Anne Hewett in equal shares but so that the issue of any one " of them who shall so die in the lifetime of the said Ellen Anne " Hewett shall take the share only to which the parent of such " issue if living would have been entitled."

The trusts expressed in the deed of trust subsequently executed were at variance in several respects with those expressed in the Act; but it was admitted that the question must be determined as if the trusts were expressed in the language of the Act.

Ellen Anne Hewett died on 14th February, 1926. Three of her children survived her and no question arose as to their respective interests under the trusts. One child, William Hewett, predeceased his mother leaving three children him surviving. One of his children predeceased Ellen Anne Hewett, leaving a child, Enid Hewett, who survived Ellen Anne Hewett. The surviving children of William Hewett claimed that the trusts in favour of the " issue " were restricted to " children " and therefore that Enid Hewett, the grand-child of William Hewett, could not participate in the share of William Hewett.

H. F. Johnston for plaintiff.
C. A. L. Treadwell for defendant Enid Hewett.
P. B. Cooke for defendants, the surviving children of William Hewett.

SKERRETT C.J., after pointing out that the shares of the four named children of Ellen Anne Hewett were contingent upon their surviving her, and that the gift to the " issue " of such children was original and not substitutionary said: It is contended that I am bound to follow what was said to be a general rule of construction laid down in **Sibley v. Perry** (7 Ves. 522) namely that where the parent of issue is spoken of the word " issue " is *prima facie* restricted to the children of the parent. See **Hawkins on Wills,** 3rd Edn. 114; per Lord Cozens-Hardy, in **In re Timson,** 1916, 2 Ch. 362, 365.

It is difficult to classify or reconcile the authorities which have discussed the decision in **Sibley v. Perry** and it would unduly lengthen this judgment if I were to embark upon an examination of them. In the circumstances, all I can do is to state the conclusions at which I have arrived from my examination of the authorities. They are:—

(1.) That **Sibley v. Perry** creates no definite *prima facie* rule of construction beyond this, that the word " issue " must have its ordinary meaning of *descendants* unless you find in the context of the instrument expressions which show that the word was used in its restricted sense.

(2.) That the so-called rule applies only where the word " issue " can be clearly referred to the issue of a parent who if living would be the first taker under the gift. This consideration has of course generally peculiar force where the gift to the issue is substitutionary.

(3.) In the case of an original gift to the "issue" of a person dying before a particular date taking equally with the survivors with a declaration that such issue should take the parent's share the better opinion is that *prima facie* the word is used in its ordinary sense and some reason must be found in the context of the gift to give it a restricted meaning.

I am aware that some text-writers and some Judges of distinction have treated the decision in **Sibley v. Perry** as laying down a *prima facie* rule of construction that where "issue" are declared in a gift to take the parent's share the word "issue" is *prima facie* restricted to children of the parent. Despite this, however, I am satisfied that the true rule is that the language of the gift to "issue" must be carefully examined and that the primary rule is that it should be given its ordinary meaning unless the context of the instrument shows that it must have been used with a restricted meaning.

In support of this view His Honour referred to **2 Jarman on Wills,** 6th Edn., 1597; **Ralph v. Carrick,** 11 Ch. D. 873, 882, 886; **Re Embury,** 109 L.T. 511, 513; **In re Birks** (1900), 1 Ch. 417, 418, 420, and continued: Upon a consideration of these authorities, I have come to the conclusion that the onus is not cast upon those who seek to attribute in this instrument the wider meaning of the term "issue" to show from the context that the word was used in the wider sense. The question must always be: Is there anything in the language of the instrument which indicates that the word was used in its restricted sense.... I think that to apply the principle of **Sibley v. Perry** you must be satisfied that the word "parent" when used in relation to "issue" must point to the first taker under the trust, or shortly put that the gift to issue is substantially substitutionary. In most cases of substitutionary gifts to issue there is no difficulty in arriving at the conclusion that children are intended. The simple case is of a gift to a named person if alive at a given date with a provision that if he should die before that date his issue should take the share which his her or their parent would have taken had he survived. Here children are distinctly pointed out and the rule in **Sibley v. Perry** is almost unnecessary. In other cases of substitutionary gifts the same meaning may clearly appear.

The view I am taking is emphasised by one important circumstance. The gift to "issue" in the present case is an original and not a substitutionary gift; and different considerations must necessarily apply. More than that it is a gift to the surviving children and the issue of deceased children in equal shares. The direction that issue should take their parent's share was necessary to provide against a per capita division and to make the gift to issue stirpital. The word "parent" in such a case loses significance as being applicable only to the first taker or the immediate ancestor of the child. The reference to "issue" taking the parent's share is in such a case intended only to provide that the division is to be *per stirpes* throughout and that the direction should be construed distributively in the sense that a grandchild shall take a child's share, and the great-grandchild take a grandchild's share. See **Ross v. Ross,** 20 Beav. 645, 650; **In re Timson** (1916), 1 Ch. 293, 298.

My conclusion therefore is that the words "So that the issue "of any one of them who shall so die in the lifetime of the said "Ellen Anne Hewett shall take the share only to which the parent "of such issue if living would have been entitled" do not clearly restrict the ordinary meaning of the word "issue" and do not clearly point to the parent of the "issue" being a child of Mrs. Hewett who died in her lifetime. I think the words are capable of being referred to a child of one of the four named children of Mrs. Hewett who might have died in her lifetime and who might have taken a share by reason of the original gift to the issue. I think it is not enough in order to restrict the meaning of the word "issue" to show that the language is equally susceptible of the ordinary or of the restricted meaning. It is essential to show that the words are plainly used in the restricted sense. In the present case I think that there are sufficient indications that the word "issue" was used in its ordinary meaning.

Dealing now with the present case, I have come to the conclusion that the word "issue" has its ordinary meaning of lineal descendants for the reasons which I propose to shortly summarise. They are:—

(1.) The legislature intended to provide for the maintenance of the family of Captain Hewett during the lifetime of his widow, and on her death intended to provide for the survivors of the children and the stocks of those children who had died in the lifetime of Mrs. Hewett; the stock to take the ancestor's share on a stirpital basis.

(2.) That there is no reason why the legislature should have excluded grandchildren of any of the named beneficiaries in favour of children. It may well be that all the children of Mrs. Hewett might have died in her lifetime leaving grandchildren, all of whom would be excluded and there would be a resulting trust or a reverter to the Crown by reason of that circumstance.

(3.) That in the present case there was an original gift to surviving children and the "issue" of deceased children in equal shares with a direction which was both appropriate and necessary for stirpital division.

(4.) I cannot find that the word "parent" is used as designating the immediate parent of the child but is equally consistent with an intended reference to a child of a deceased child who might have taken a share by reason of the original gift.

I confess to have had some difficulty in arriving at my conclusion. There is no decision exactly in point. **Ross v. Ross** is not on all fours because there was a gift over which according to the Master of the Rolls showed plainly that the expression "issue" was used in its wide sense. The case of **Re Embury** is in the same position. In that case there was also a gift over which was said to be of assistance in determining that the word "issue" was used in its wide sense.

In the case of **Smith v. Horsfall,** 25 Beav. 628, where the trusts at the first glance appear to be the same as in the present case, I think that the Master of the Rolls arrived at the conclusion that the word "parent" clearly referred to the five persons named and that the gift to issue was substantially substitutional. The word "issue" was therefore restricted to children.

Solicitors for plaintiff: **Fullerton-Smith & Co.,** Marton.
Solicitors for defendant Enid Hewett: **Treadwell & Sons,** Wellington.
Solicitors for other defendants: **Chapman, Tripp, Blair, Cooke & Watson,** Wellington.

Adams J. February 24, 25, 1927.
Christchurch.

IN RE APPLICATION No. 171–173 MADRAS STREET, CHRISTCHURCH.

Gaming Act—Section 14—Application by Inspector of Police—Common Gaming House—Ex parte Gleeson—In re Shanghai Club 1907 V.L.R. 463 followed.

This is an application made on the affidavit of the Inspector of Police under Section 14 of the Gaming Act 1908 for a declaration that certain premises being Numbers 171 and 173 Madras Street, Christchurch, be declared a common gaming house.

Donnelly in support.
Sargent to oppose.

ADAMS J.: This is the first application in New Zealand under the Section, but there are two decisions in Victoria on a similar section of the Victorian Act No. 2055 (Sec. 38). **Ex parte Gleeson,** 1907, V.L.R. 368; **Ex parte Gleeson; In re Shanghai Club,** 1907, V.L.R. 463. In the latter case the principles which ought to guide the Court were laid down by the Full Court of Victoria, and although the case is not binding upon this Court it is a decision of a Court of high authority and is entitled to great respect. For that reason, and because I fully agree with the principles laid down, I do not think it necessary to go over the same ground. What the Court has to do is to hear any person who is entitled to notice under Subsection- (3) and who may appear on the motion, and to determine whether there existed reasonable grounds for the suspicion of the Inspector that the premises were used as a common gaming house. If the Court is of opinion that there were such reasonable grounds, then the declaration may be made. If, however, sufficient cause has been shewn the Court may in its discretion refrain from making the declaration upon such terms as it thinks proper.

I am satisfied that there were reasonable and ample grounds for the suspicion of the Inspector. The owner of the premises has appeared and has been cross-examined upon his affidavit. His demeanour under cross-examination was very unsatisfactory and I regret to say that his evidence is in my opinion absolutely unreliable. I have no doubt that he knew what was going on. and there appear to be grounds for the suspicion that he was actively concerned in the unlawful use of the premises. It would be unsafe to rely upon his proffered assurance against the further use of the premises for the same purpose. No valid reason having been shewn to the contrary, the declaration asked for is made.

Costs, £10 10s. and disbursements to be paid by Hulston.

Solicitors for the Police: **A. T. Donnelly,** Crown Prosecutor.
Solicitors for Hulston: **Slater, Sargent & Dale,** Christchurch.

MacGregor J. February 11, 12, 1927.
Palmerston North.

KERBONE LTD. v. PETER McVERRY.

Appeal—From Magistrate—on Fact and Law—Innocent misrepresentation—Heilbutt v. Buckleton (1913, A.C. pp. 48-49 followed).

Allen for appellant.
Cooper for respondent.

MACGREGOR J.: This is an appeal from a decision of the Magistrate's Court at Dannevirke. The appeal is on law and fact, and accordingly before I can differ from the learned Stipendiary Magistrate in the view taken by him, I must be satisfied affirmatively that he is wrong in the conclusions drawn by him from the facts of the case. It is common ground between the parties that the plaintiff intended to buy and the defendant intended to sell one hundred and twenty-one "empty" cows, *i.e.*, cows that were not in calf. The Magistrate has found on the whole of the facts that all that the defendant intended to sell were cows which so far as he knew were "empty." I think that there is evidence to support this view of the facts, and accordingly that the judgment of the Magistrate cannot now be reversed by this Court. It is clear law that an affirmation made at the time of sale is a warranty, provided it appear on evidence to be so intended. In the present case the Magistrate has found (and I think reasonably) that the representation that the cows were "empty" was not intended as a warranty that all the cows were in fact "empty." It accordingly remains what is called in law an "innocent" misrepresentation, giving rise to no right of action sounding in damages. (**Heilbutt v. Buckleton,** 1913, A.C. pp. 48-49). This action therefore cannot succeed.

The present appeal will be dismissed with costs (£10 10s. 0d.) and disbursements.

Solicitors for Appellant: **Allen, Needham & Morton,** Morrinsville.
Solicitors for respondent: **Cooper, Rapley & Rutherford,** Palmerston North.

Adams J. February 23, 25, 1927.
Christchurch.

JOHN BURNS & CO., LTD. v. LYTTELTON HARBOUR BOARD.

Submission—Action commenced in Magistrate's Court—Removed to Supreme Court—Section 5 Arbitration Act 1908—Whether deemed commenced in Supreme Court—Coleman v. Fitzherbert, (13 G.L.R. 244) followed.

Objection was taken by defendant on the ground that the action was commenced in the Magistrate's Court and removed to the Supreme Court. Section 5 of the Arbitration Act applied only to actions commenced in the Supreme Court *vide* section 2 *ibid.*

Donnelly for plaintiff.
Upham for defendant.

ADAMS J.: I think the first objection raised by Mr. Donnelly is fatal to the present application. It was pointed out by Edwards J. in **Coleman v. Fitzherbert,** 13 G.L.R., 244 that this Court cannot order a stay under the Section in cases where the action is commenced in the Magistrate's Court. In that case the action had not been removed into the Supreme Court, but I do not think a removed action can be said to have been "commenced" in this Court. That would be contrary to fact. Mr. Upham contends that the order asked for can be made under Rule 242. In this case, however, there is no reference pending, no step having been taken under the arbitration clause by either party; and in view of the fact that before the action was commenced the defendants were informed of the intention to sue, and in reply intimated that their solicitors would accept service of the summons on their behalf, it cannot be said that the action was brought contrary to good faith. It is also doubtful whether the claim for the deposit falls within the arbitration clause.

The application is therefore dismissed with costs, £3 3s.

Solicitor for plaintiff: **L. W. Gee,** Christchurch.
Solicitors for defendant: **Harper, Pascoe, Buchanan & Upham,** Christchurch.

Adams, J. Christchurch.

WILSON v. HOGARTH.

Contract—Gaming—Agreement to Train Racehorses and Share Winnings—Receipt of winnings by owner—Agreement to invest money on Totalisator and pay over Dividends—Validity of Agreement—Servability—Cheque—Account Stated—Appropriation of Payments.

Application by defendant under Rule 442 for the opinion of the Judge upon certain questions rising in the taking of accounts under an order made in the above action. The plaintiff, a horse-trainer, was engaged by the defendant to train his horses for trotting. The terms of the engagement, as found by the Registrar, were that the defendant was to pay the plaintiff £2 per week for each horse with one-fourth of the stakes won. A further term was that when a horse trained by the plaintiff was in a race and had, in the judgment of the parties, a reasonable chance of winning, the defendant would invest £5 on the Totalisator and pay over to the plaintiff any dividend received as a result of such investment. His Honour held that there was evidence to support the findings of the Registrar. The defendant gave the plaintiff a statement of account crediting plaintiff with a sum of approximately £385 for dividends and stakes, and at the same time gave the plaintiff a cheque for £229 4s. 10d. in settlement of the amount appearing by the account to be due. In the course of a few days the plaintiff returned the cheque to the defendant on the latter's representation that he was short of money. The questions arising appear sufficiently in the judgment.

Wanklyn for plaintiff.
K. M. Gresson for defendant.

ADAMS J.: "Counsel for the defendant contends that the agreement to pay one fourth of stakes won and to deposit sums on the totalisator is illegal and void; and that this illegality avoids the whole contract. The decision of Williams J., in **Mitchell v. Beck,** 32 N.Z.L.R. 1279, is a clear authority against the first of these contentions. And see **Sharp v. Taylor,** 2 Ph. 801. The first contention therefore fails and the defendant must account for one-fourth of all stakes received.

In my opinion the term of the contract relating to the transactions on the totalisator falls within Section 52 of The Gaming Act 1908, which renders liable to imprisonment or fine any person who "makes any contract or bargain of any kind to pay or receive money upon an event determined or to be determined by the result of the working of the totalisator on any horse-race." It is a promise to do an act which is unlawful by Statute and is therefore void. But it does not follow from this that the whole contract is unlawful or unenforceable." His Honour referred to **Pollock on Contracts,** 9th Edn., 442-444; **Pigot's Case,** 11 Co. Rep. 27b; **Bank of Australasia v. Breillat,** 6 Moo. P.C. 152, 201; **Pickering v. Ilfracombe Railway Co.,** L.R. 3 C.P. 235, 250.

"Counsel for the plaintiff contends that the statement of account amounts to a stated and settled account and is equivalent to payment, and also that the cheque must be regarded as payment of the balance shewn to be due, and that the return of it to the defendant was in fact a loan of the sum to the defendant. For the first of these contentions Counsel relied upon a paragraph in **Chitty on Contracts,** 17th Edn., 77, in which the author says it would seem that the statement of an account, in which she money due by the terms of the illegal contract is allowed, is equivalent to payment of that money. The authority cited for that statement is **Owens v. Denton,** 1 C.M. & R. 711; but the author goes on to say, p. 82, that where it can be shown that the original debt is absolutely void as being founded upon an illegal or immoral consideration—or where it is made void by Statute, as by the Statutes against gaming—then evidence is not admissible to prove an account stated. The case was explained by Lord Brougham in **Swan v. Bank of Scotland,** 10 Bli. N.S. 627, 637.

If the plaintiff had presented the cheque and so obtained payment of the amounts shewn in the account as due to him in respect of totalisator dividends included in the account the question of illegality could not now be raised as to any sums covered by such payment; the money having been paid could not be reclaimed, the parties being *in pari delicto* and the unlawful bargain having been carried into effect **Holman v. Johnson,** 1 Cowper 341; **Kearley v. Thomson,** 24 Q.B.D. 742; **Taylor v. Chester,** L.R. 4 Q.B. 309; **Pollock on Contracts,** 9th Edn., 455. A cheque, however, is only an order on a banker which may be countermanded and is revoked by the death of the drawer. If an action had been brought by the plaintiff upon this cheque it is clear that the illegality could have been successfully pleaded—**Robinson v. Bland,** 2 Burr. 1077.

Counsel for the plaintiff also contends that the defendant is estopped by the stated account; but I think the fact that the illegality appears upon the face of the account is a sufficient answer to that, and that in any case it is competent for the defendant to raise the question by way of defence—**Rose v. Savory,** 4 L.J.C.P. 275; **Kennedy v. Brown,** 13 C.B. (N.S.) 677.

In taking the account the Registrar should allow all express appropriations made by the defendant to stand, and where no such appropriations have been made he should follow the rule laid down in **Wright v. Laing,** 3 B. & C. 164, 171: "Where a person has two demands one recognised by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges and not to the demand which it prohibits." If at the time when any payment was made there remained a surplus after satisfying the lawful demands of the plaintiff, it must be assumed that this surplus was paid in respect of the totalisator dividends and it is to be credited accordingly."

Solicitors for plaintiff: **Lane, Neave & Wanklyn,** Christchurch.
Solicitors for defendant: **Papprill, Salter & Gresson,** Christchurch.

MacGregor J. December 17, 1926; March 3, 1927. Christchurch.

IN RE PORTER (DECEASED): LONG AND OTHERS v. BALLAGH AND OTHERS.

Will—Construction—Vesting—Devise of Realty to Daughter—"Absolutely on her Attaining Twenty-one"—Rents and Profits to be applied for benefit of Devise During Minority—Gift of Personalty—"To be given on her Attaining Twenty-one"—Whether Interest Vested Absolutely or Defeasibly.

Originating summons for interpretation of will. The first clause in question reads as follows:—

"I give to my daughter Gladys Alma Porter my freehold "property situated at Papanui . . . absolutely on her attaining "twenty-one years of age also my piano also photos of myself "also one oak chest of drawers also my sewing machine also "my cabinet trunk with the contents thereof also my best "brooch also my watch and chain the watch and chain to be "given to my said daughter Gladys Alma Porter on her at-"taining twenty-one years of age."

The other clause provided:—

"I declare that the property at Papanui hereinbefore given "to my said daughter Alma Porter shall be held by my said "daughter Sarah Ballagh and she shall receive the rents "and profits for the same and shall apply them towards the "maintenance of my said daughter Gladys Alma Porter "till my said daughter Alma Porter shall attain twenty-one "years of age."

Gladys Alma Porter was merely the foster-child of the testatrix. The testatrix died in 1919. Gladys Alma Porter survived her but died in 1926 aged eighteen years. The questions asked in the originating summons appear in the judgment.

Haslam for plaintiffs, the executors.
Lockwood for defendant A. E. Porter one of surviving children of testatrix.
Cuthbert for defendant the Public Trustee representing next of kin of Gladys Alma Porter.

C.A.V.

MACGREGOR J., after referring to the fact that the will contained no general residuary clause and that the interest of Gladys Alma Porter if not absolutely vested in her would go as on an intestacy, said: The first question to be answered is whether the interest of Gladys Alma Porter in the real property at Papanui vested in her on the death of the testatrix. I think this question must be answered in the affirmative. The law is said to favour the vesting of estates. In the present case the land is given to Gladys Alma Porter "on her attaining twenty-one years of "age," but as we have seen a subsequent provision is made whereby she is in the meantime to receive the rents and profits of the land for her maintenance until she attains her majority. In these circumstances it seems to me that the case is governed by the rule in **Boraston's case,** 3 Co. Rep. 19A, which has been followed in numerous later decisions. These cases all proceed on the ground that the estate given to the devisee on attaining the age of twenty-one is only a remainder, taking effect in its natural order on the determination of the preceding estates. In other words, I think that attaining the prescribed age in this case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates. In the result, accordingly, in my opinion the real property at Papanui vested in Gladys Alma Porter on the death of the testatrix, and was not divested on her failing to attain the age of twenty-one years.

The remaining question relates to the gift of personal property. I do not think there is any real ambiguity in the will regarding this gift. A number of chattels are given to Gladys Alma Porter. No condition is imposed by the Will in respect of any of these chattels except a watch and chain, which are only to be given to Gladys Alma Porter "on her attaining the age of twenty-one "years." It appears to me that on the true construction of the Will all the personal property specifically bequested to Gladys Alma Porter vested in her on the death of the testatrix, but that her interest in the watch and chain was divested on her failing to attain the age of twenty-one years.

Solicitor for plaintiffs: **C. S. Thomas,** Christchurch.
Solicitors for Public Trustee: **Garrick Cowlishaw & Co.** Christchurch.
Solicitor for A. E. Porter: **G. G. Lockwood,** Christchurch.

MacGregor J. February 22, 1927. Wanganui.

HUGHES v. DUBELLI.

Vendor and Purchaser—Indemnity against first mortgage—Payment by Purchaser—No right to stand in place of first mortgagee.

In September 1920 A sold a farm to B subject to a mortgage for £600. B became subject to the implied covenant of indemnity under Section 88 of the Land Transfer Act 1915, and also gave a second mortgage for £510 containing an express covenant of indemnity against the first mortgage. In December, 1920, B resold to C and gave a transfer, took a third mortgage. In 1923 B paid the first mortgage and took a transfer. In this action A claimed judgment for £510 under the second mortgage and an order that B execute stamp and register a release of the first mortgage.

Held that the covenant to pay was absolute and B had no right to stand in the place of the first mortgagee. Judgment for the amount of the second mortgage and an order for the execution of a release of the first mortgage.

A. A. Barton for plaintiff cited Hals. Vol. 13, p. 147. **Otter v. Lord Vaux,** 6 de G.M. & G. 638; Williams V. & P. p. 457.
C. P. Brown for defendant cited Land Transfer Act 1915, s. 35 (4), 58, 59, 68; Hals. Vol. 21, par. 568 and 569, 576; **Gifford v. Fitzhardinge,** 1899, 2 Ch. 32; **Whiteley v. Delaney,** 1914, A.C. 132 at p. 151; Wms. V. & P. 457 note; **Thorne v. Cairne,** 1895, A.C. 11.

He distinguished **Otter v. Lord Vaux** (supra) on the ground that Dubelli was not the creator of the first mortgage and that he was not the owner of the freehold when he paid it off.

MacGREGOR J. (orally): (After referring to the express and implied indemnity)—What is the meaning of the covenant to pay? Does it mean pay off altogether or pay off and take a transfer? I think it means pay off altogether and to read it otherwise is to do violence to the terms of the covenant; to do what Lord Cranworth said in **Otter v. Lord Vaux** (supra) was sacrificing the substance to the form. I am confirmed in my view of the matter by the terms of the agreement for resale between Dubelli and Oxley which provides for adding the amount paid for the first mortgage to Dubelli's third mortgage.

Solicitors for plaintiff: **Armstrong & Barton,** Wanganui.
Solicitors for defendant: **C. P. & C. S. Brown,** Wanganui.
(Reported by C. Palmer Brown).

COURT OF ARBITRATION.

The Court of Arbitration has arranged the following fixtures:—

Wanganui	..	1st April, 1927, at 10 a.m.
Palmerston North		5th April, 1927, at 10 a.m.
Napier ..	..	7th April, 1927, at 10 a.m.
Gisborne	..	12th April, 1927, at 10 a.m.

THE N.Z. CONVEYANCER.

(Conducted by C. PALMER BROWN).

AGREEMENT FOR SUPPLY OF CINEMATOGRAPH FILM.

NOTE.—A film is a chattel and the general law relating to the hiring of chattels applies to this contract. The special statutes dealing with the subject are the Cinematograph-film Censorship Act 1916 and the Copyright Act 1913, under which a film is classified as a dramatic work "where the arrangement or acting-form or the combination of incidents represented gives the work an original character."

AGREEMENT made the day of One thousand nine hundred and twenty BETWEEN (hereinafter called "the distributor") of the one part and operating the theatre at (hereinafter called "the exhibitor") of the other part WHEREBY IT IS AGREED between the parties hereto that the distributor shall during the term hereinafter specified select and supply and the exhibitor shall take and exhibit in the abovenamed theatre motion picture productions together with certain "short subjects" as hereinafter referred to on the following terms and conditions:

1. The term of this agreement shall commence on the day of 192 and shall terminate on the day of 192 .

2. The distributor shall supply one motion picture production during the first week of the term of this agreement and shall during the currency hereof supply one motion picture production each alternate week thereafter and shall supply two motion picture productions during each remaining week of the said term.

3. The distributor shall select and supply "short subjects" each and every week during the currency of this agreement.

4. Each and every motion picture production and/or short subject shall be exhibited for six (6) consecutive nights only, namely, from Friday to Thursday inclusive during the week in which the same are supplied.

5. The word "film" when used hereunder shall be deemed to include each and every motion picture production and/or "short subject" to be supplied by the distributor by virtue hereof.

6. The exhibitor shall pay as the license fee for the right to exhibit the motion picture production and "short subjects" above referred to (insert terms of bargain often based on a percentage of takings over a certain amount) provided that the total amount charged as license fee over the term of this agreement shall not be less than per week and shall not exceed an average license fee of per week.

7. The license fee for the exhibition of each and every motion picture production and short subjects shall be paid (plus Bank exchange) during the week of the authorised exhibition thereof, and should the exhibitor make default in payment of any such license fee in accordance with the provisions hereof the distributor may at its option terminate this agreement and suspend the delivery of further film hereunder until such default shall have been remedied without being liable to any action for any loss or damage which the exhibitor may sustain by reason of such recission or suspension but such termination or suspension shall be without prejudice to its right to take action against the exhibitor in respect of the damage sustained by the distributor by reason of the nonperformance by the exhibitor of this agreement.

8. The exhibitor shall avoid advertising each and every film supplied hereunder in such manner to avoid objections by the censor or other Government authority and in the event of any final penalty imposed in respect of any such advertising such final penalty shall be borne in its entirety by the exhibitor.

9. Should any customs duty or other imposition or charge be imposed by the Dominion Government in addition to that payable at the date hereof on any film supplied or agreed to be supplied by the Distributor to the Exhibitor or if any export or excise duties or charges are imposed by the Government of the country of origin in addition to those at present payable (if any) then such extra customs, impositions, export or excise duties or charges shall be paid proportionately by the exhibitors having agreements with the distributor in any charges in respect thereof shall be payable by the exhibitor as additional license fee due under this agreement.

10. When exhibiting any film supplied by the distributor by virtue hereof the exhibitor shall charge an actual minimum admission price of plus any tax Government or Municipal now or hereafter imposed for admission to picture theatres.

11. The exhibitor shall purchase or lease from the distributor at the distributor's current prices all lithographs, posters, photographs, slides, lobby displays and other advertising accessories and shall post and distribute the same. The exhibitor shall not use any advertising accessories in connection with any film supplied by the distributor unless leased from sold by or approved by the distributor neither shall the exhibitor sell lease rent loan or give away any advertising accessories leased or purchased from the distributor under any circumstances whatsoever and upon the breach or attempted breach of this provision by the exhibitor the right and title to the immediate possession of such advertising accessories shall revert to the distributor who may take possession of the same wherever found.

12. All advertising newspaper or otherwise shall be subject to the approval of the distributor. And in any case no motion picture production supplied by the distributor shall be advertised in such manner as to infer that the same is supporting a motion picture production not supplied by the distributor.

13. The distributor shall use its best efforts to have the several films to be exhibited by the exhibitor available at such of the distributor's branch offices as may be deemed by the distributor to be most convenient for the purpose of facilitating delivery of said films to the exhibitor in time for the authorised exhibition on the exhibition date in said theatre provided that the distributor shall not be liable in any way for failure or delay in making delivery of any film or films by reason of the elements accidents labour troubles fires orders of court ruling of censors delays of any common carriers non-fulfilment of contracts by artists or manufacturers or the failure or delay of any prior exhibitor in returning any film concerned to the distributor or in forwarding it to a subsequent exhibitor or by reason of any other delay accident hindrance of what kind soever beyond the control of the distributor whether of a similar or any other nature.

14. The exhibitor shall insure and keep insured in an Insurance Company approved by the distributor each and every film supplied by the distributor for an amount agreed upon by the distributor the premium to be payable by the exhibitor provided that nothing in this clause shall relieve the exhibitor from any liability under this agreement should he for any reason omit to comply with this condition.

15. Should the exhibitor retain any film delivered hereunder beyond the authorised exhibition thereof or should any such film be exhibited at any theatre other than the one named herein while in the possession of the exhibitor except as specifically authorised in writing by the distributor then the distributor may forthwith revoke and terminate the license to exhibit any further films under this agreement and the exhibitor shall forthwith pay to the distributor for each day of such exhibition or retention four times the license fee charged for the authorised exhibition thereof PROVIDED THAT the termination of the license as herein provided shall in no way relieve the exhibitor from the performance of any obligation hereunder nor shall a waiver by the distributor of a breach of the agreement to return a film constitute a waiver of the condition not to exhibit a film at any theatre other than the one named herein nor shall any waiver be construed to be a continuing waiver or a waiver of another or subsequent breach of the above-named or any other condition of this agreement.

16. The distributor reserves the right to supply the same films on the same night to other exhibitors (hereinafter called " switching ") and in the cases of switching the exhibitor undertakes to exhibit each and every film at hours fixed by the distributor so as to facilitate delivery to some other exhibitor or exhibitors and return in due course.

17. The exhibitor shall exhibit each and every film as delivered without alteration or cutting with all titles subtitles leaders and trailers as delivered to the exhibitor and shall advertise and announce each and every such film as presented by the distributor and not otherwise.

18. The exhibitor shall return to the nearest branch of the distributor or to any other place named by the distributor in writing by the fastest realiable means of transportation with the container properly addressed each and every film supplied by the distributor in the same condition as it was when delivered to the exhibitor together with all appurtenances supplied therewith immediately upon the termination of the authorised exhibition of the respective films. The exhibitor shall pay all delivery charges both ways. For the purpose of this clause each and every film shall be deemed to be in the possession and at the risk of the exhibitor from the time when such film has been delivered to the representative of the exhibitor or delivered at the office of or placed on board any conveyance for transmission to the exhibitor until the time when the same is delivered to the office of the distributor or at a place named by the distributor in writing and the onus of proof that the terms of this clause have been complied with shall lie upon the exhibitor. The exhibitor shall pay to the distributor as ascertained and liquidated damages eightpence per lineal foot of film as the cost of replacement of each lineal foot of film lost stolen destroyed or injured in any way while the same is in possession of the exhibitor. Such payment however shall not transfer title to or any interest in any film to the exhibitor or any other party nor release the exhibitor from liability arising out of any other breach of this agreement.

19. The exhibitor shall immediately notify the distributor by urgent telegram of the loss theft destruction of or injury to any film delivered hereunder. If any film shall be received from the exhibitor by the distributor or any subsequent exhibitor in a damaged or partly destroyed condition it shall be deemed to have been so damaged or destroyed by the exhibitor unless the latter on the day of receipt of such film shall have given to the distributor written notice that such film was received by him in a damaged or partly destroyed condition and setting forth fully the nature of such damage and the amount of footage as damaged or destroyed.

20. If this agreement calls for payments computed upon the gross receipts of the theatres named above the exhibitor shall furnish to the distributor each and every week a correct itemised statement on the day following the last relative exhibition night of the gross receipts of the said theatre for admission thereto upon the exhibition dates in which the distributor is concerned upon forms supplied by the distributor and the distributor or its authorised representative shall have access at all reasonable times to all books papers and records (including copies of returns furnished to the entertainment tax authorities if any) relating to the admission receipts of said theatre during the period of exhibition of said films or any of them.

21. The distributor reserves the right to suspend supply of film under this agreement in the event of any previous film having been damaged or mutilated by reason of defective projection machine or faulty operating pending the adjustment or rectification of such trouble as the case may be to the satisfaction of the distributor.

22. This agreement shall constitute the entire contract between the parties and no oral representations or agreements with respect to the subject matter hereof shall be binding on the parties hereto.

23. This agreement is declared to be personal in respect to each of the parties and may not be assigned or otherwise dealt with without the written consent of the other party.

24. Should the exhibitor make default under or fail to carry out all or any of the terms and conditions on his part to be observed and performed under this agreement the distributors shall be at liberty immediately to give the exhibitor notice suspending or cancelling this agreement without being liable to any action or any loss or damage which the exhibitor may sustain by reason of such suspension or cancellation and without prejudice to any claims which the distributors may have against the exhibitor hereunder.

25. Any waiver of the rights of the distributors under any of the terms of this agreement shall be deemed to apply to the occasion of such waiver only and shall be without prejudice to the distributor's right in case of any further breach on the part of the exhibitor.

26. Nothing herein contained shall create a partnership between the parties hereto.

27. This agreement shall be deemed to have been made at the registered office of the distributor in .

MISSED 70 TIMES.

Sir William oynson-Hicks, the Home Secretary, when visiting prison recently was conversing with a resident who was doing penal servitude for burglary for the seventh time complained th t his last sentence was wrong.

" I didn't get inside the house," he explained. " They 'nabbed' me before I got there."

" And how m ny times did you get away after a burglary when you ought to have been 'nabbed'?" asked Sir William.

" Well, over 70 " was the reply.

THE SALE OF STANDING TIMBER

(By H. F. Von Haast).

(*Concluded*)

If the timber sold is to be all the kauri trees as in **Macklow v. Frear,** or all the totara, rimu, matai and kakikatea as in **Waimiha Sawmilling Co. Ltd. v. Howe,** but without any minimum diameter, are the trees "Specified or ascertained" goods, identified and agreed on at the time the sale is made?

I think that in such a case the trees would be held to be specified and ascertained, that is if any standing timber can be held to be specified and ascertained before severance. It cannot be intended that the parties should before felling go on the ground and mark and identify all the kauri trees for instance as distinguished from all the other trees.

But the decisions in **Morison v. Lockhart and Kursell v. Timber Operators and Contractors Ltd.** seem to go to this length that in the case of a sale of growing timber, the timber is not ascertained, certainly that it is not in a deliverable state, until severed.

In **Morison v. Lockhart** all the growing trees in a certain wood were sold, and yet Lord Johnston held that they were not specified or ascertained until severed and that even if they were, the property could not be transferred and the contract become a sale until the timber was severed from the ground and therefore deliverable, although in that case he admitted that it was clear that the parties intended the property to pass from the date of the contract or at any rate on payment of the first half of the price.

But, as already pointed out, it does not seem necessary where the goods are specific and ascertained that they should be in a deliverable state if the intention of the parties is clear that they intended the property to pass at the date of the contract.

If therefore the goods are specific or ascertained as Cooper J. held the kauri trees to be, in **Macklow Brothers v. Frear,** then it is submitted, if the parties make their intention clear, that the property in them is to pass at once, it will pass, whether the trees are in a deliverable state or not. Apparently the *ratio decidendi* for the conclusion that the trees are not specific or ascertained or in a deliverable state is that as Lord Johnston says in **Morison v. Lockhart** (p. 1024): "The purchaser is to be at the whole expense of 'cutting off root and removing the timber' and 'the goods' in a deliverable state are not ascertained until cut, for the quantity in each log, more or less depends on the views or methods of the woodman"; or as Lord Justice Scrutton puts it in **Kursell v. Timber Operators and Contractors Ltd.** (p. 438): "How much of each tree passed depended on where it was cut, how far from the ground."

If this is the correct interpretation of the Act then there can be no sale, but only an agreement to sell, which has not yet developed into a sale, of growing timber until severance and this is what Lord Johnston says (p. 1024): "Turning now to the Act, I think it will be found that its provisions quite recognize the possibility of a contract of sale of growing timber but regard such as an agreement to sell, and not as a sale, at least so long as the timber remains standing or is *pars soli*."

It is of course obvious that no one can say beforehand how much of each tree is to be cut down, but hitherto in New Zealand the point has never been taken that in consequence the trees sold are not specific or ascertained. In **Macklow v. Frear** Cooper J. held that the kauri trees on a certain block of land were "Specific and ascertained" goods, although the point taken by the judges in **Morison v. Lockhart** and **Kursell v. Timber Operators and Contractors, Ltd.** applied equally to New Zealand and in **Waimiha Sawmilling Co. Ltd. v. Howe** he said (p. 691) that it appeared in **Jones & Son v. Tankerville** that the learned judge considered that the uncut growing timber, as well as those trees which had been severed from the land, were "specific" or "ascertained" goods.

It is submitted that the fact that a certain varying portion of each tree will be left standing in the ground after the timber is severed will not in New Zealand be considered ground for holding that the timber is not specific or ascertained until severed, but that if necessary the Court will apply the maxim *De minimis non curat lex.* The purchaser is entitled to all he can cut and what is left is of no use to anyone. If the decision in **Morison v. Lockhart** on that point is sound then the property in a thing attached to the ground can never pass before severance unless the whole of it can be completely taken away, which is almost equivalent to saying that the property in a thing attached to the soil can never pass before severance. But Blackburn on Sale, 3rd Ed., page 6, says "That so long as the contract provides for the severance from the soil of the things sold, even though it is the buyer who is to effect the severance or the property has passed before severance, it is a contract for the sale of goods." The learned authors therefore clearly contemplate cases in which the property passes before severance.

Is the decision sound that the standing timber cannot be in a deliverable state until severed? Lord Johnston in **Morison v. Lockhart** says (p. 1023) that till severed growing trees are not in a "deliverable state" within the meaning of the Act, for they are not "in such a state that the buyer would, under the contract, be bound to take delivery of them" for "physically he could not do so." But is not the buyer bound to take delivery of them by himself entering and cutting them down? If he agrees to buy a thing attached to the soil, whether a growing tree, a house, or a machine for removal and to pay the price and remove it forthwith, is it not in such a state that he is bound to take delivery of it? Is not the test whether **the seller** is bound to do something to the goods for the purpose of putting them into a deliverable state? If he is, then, unless a different intention appears, the buyer is not under his contract bound to take delivery of them. Contrast Rules 1 and 2 of section 20 of the Act. But if there is nothing for the vendor to do to the goods, is not then the buyer bound to take delivery of them by entering and severing them from the soil? "Delivery" means voluntary transfer of possession from one person to another. Where the vendor sells the standing timber to the purchaser, gives him an irrevocable licence to enter and to cut, does he not voluntarily transfer the possession of the timber to the purchaser and is not the purchaser bound to take delivery of the timber according to the terms of the contract. If he and the vendor agree that the property therein is to pass at the date of the sale, will it not pass accordingly?

In **Underwood Ltd. v. Burgh Castle Brick and Cement Syndicate** (1922 1 K.B. 343), it was held that, as the vendors had to detach and dismantle the engine sold which was affixed to the land and deliver it on rail, it was not in a "deliverable state." The question did not arise as to what the position would have been

had the parties agreed that the buyer was to remove the engine and that the property in it was to pass at the date of the contract.

The decisions in **Morison v. Lockhart** and **Kursell v. Timber Operators and Contractors Ltd.** need careful consideration, for they seem to go this length that, no matter what the agreement of the parties may be, the property in standing timber sold for severance by the buyer cannot pass until severance, for this reason, that even if the vendor sells all the trees on a certain block of land, the tree sold will differ from the tree felled and so until felled can neither be specific or ascertained nor in a deliverable state.

The two different points of view taken by **Lord Kinnear** and **Lord Johnston** as to the effect of the Sale of Goods Act on things attached to the soil and agreed to be severed under the contract of sale as against third persons also call for consideration. Does the sale of a thing attached to the soil but agreed to be severed under the contract and the property in which the parties agree shall pass at the date of the contract, the purchaser having an irrevocable right to enter on the vendor's land and remove it, make the thing goods and give the purchaser a right to it not only against the seller and his representatives but against the world? For instance if A sells a house for immediate removal to B on those terms, and then sells the land on which the house stands to C, is the house goods only as between A and B and land as between A and C and B and C, or is it goods as against both A and C?

Whatever may be the ultimate effect of these decisions and although Mr. Justice Parker held in **Jones and Sons v. Earl of Tankerville** that a contract for the sale of specific timber growing on the vendor's land on the terms that such timber is to be cut and carried away by the purchaser confers upon the purchaser an irrevocable licence to enter and remove the timber because it is coupled with and granted in aid of the legal property in the timber which the contract of sale confers on the purchaser, one course seems advisable, and that is that the purchaser should see that his contract is so framed as to give him a registrable title to enter upon the lands and carry out the operations for felling and removing the timber and should register that contract without delay.

PHILOSOPHER OF THE CELLS.

The Home Secretary, Sir William Joynson-Hicks, disclosed recently that on his periodic visits to the prisons he converses with many of the inmates out of the hearing of warders and other officials. Some of the prisoners were "quite charming," he said.

For the edification of his audience at Sir Philip Sassoon's residence in Park-lane, W., Sir William related some of his amusing experiences.

The gem of them all was gathered in a friendly chat with a man who had spent 40 years of his life in prison. This was the dialogue :—

Home Secretary: H'm! Forty years. Quite a long experience. Any complaints?

Prisoner: No.

Home Secretary: Food all right?

Prisoner: Yes. None too rich, of course.

Home Secretary: Are you sure there is nothing wrong?

Prisoner: Well, look here, gov'nor. The prison library is rotten. There isn't a single book on German philosophy in it.

THE EXECUTIVE COUNCIL.

Regulations as hereinafter mentioned appeared in Gazette No. 2 published on 20th January, 1927 :—

1. Amending the regulations as to the export of honey from New Zealand, made 13th February, 1922, and gazetted 16th February, 1922, by substituting "New Plymouth" for "Wanganui" in clause 3—Apiaries Amendment Act 1913.
2. Regulations as to fair packing of fruit and vegetables—revoking the regulations as to the packing of strawberries, loganberries, raspberries and cherries, made 9th September, 1924 and gazetted 11th September 1924—Orchard and Garden Diseases Act 1908 as amended by section 4 of The Orchard and Garden Diseases Amendment Act 1914.

In Gazette No. 4, published on the 27th January, 1927, the following appeared :—

1. Amended regulations under the Fruit Control Act 1924.
2. Amended regulation under the Health Act 1920 as to payment of fee to local authority upon issue of certificate of registration under Hairdressers (Health) Regulations.
3. Regulation under Customs Amendment Act 1926 re Duty on motor vehicles, etc., manufactured in Australia.

In Gazette No. 7 published on the 3rd February, 1927, the following appeared :—

1. Order-in-Council declaring provisions of the Mining Act 1926, to apply to prospecting and mining for and the storage of petroleum and other mineral oils and of natural gas in Survey Districts of Mahanga and Nuhaka (in the Hawke's Bay Land District) and the Survey District of Nuhaka North (in the Hawke's Bay and Gisborne Land Districts).
2. Waste Land Development: regulations governing the disposal and administration of land set apart under section 223 of Land Act 1924.
3. Deer to cease to be Imported Game in the Nelson Acclimatization District—Animals Protection and Game Act 1921-22.
4. Importations of Flour: "Dumping Duty" to be charged in certain cases—Customs Amendment Act 1921.

In Gazette No. 8 published on 10th February, 1927, the following appeared :—

1. Regulation 20 of General Harbour Regulations dated 30th August, 1926, amended to provide that the regulations, in so far as they relate to fibre ropes, but not further or otherwise, shall come into operation on the 1st April, 1927—Harbours Act 1923.
2. Regulations relating to National Research Scholarships—Scientific and Industrial Research Act 1926.
3. Constitution and Establishment of New Zealand Army Legal Department—Defence Act 1909.
4. Open Season for Deer-shooting in certain Acclimatization Districts—Animals Protection and Game Act 1921-22.

In Gazette No. 9 published on the 17th February, 1927, the following appeared :—

1. Order-in-Council varying notification dated 22nd November, 1926, declaring an Open Season for Deer-shooting in the Westland Acclimatization District—Restriction on number of licenses which may be issued—Animals Protection and Game Act 1921-22.
2. Open Season for Deer-shooting in certain areas in the Rotorua Acclimatization District—Animals Protection and Game Act 1921-22.

Regulations as hereinafter mentioned appeared in Gazette No. 10, published on 24th February, 1927 :—

1. Samoa Customs Consolidation Amendment Order 1927 Second Schedule (Export Duties) amended by provision of duty of 1d. per lb. on rubber goods—Samoa Act 1921.
2. Amended Regulations under the Sale of Food and Drugs Act 1908.
3. Amended Regulations re issue of permits and certificates of registration under Immigration Restriction Acts.
4. Additional Regulation for Trout-fishing, Taupo District—Fisheries Act 1908, and Native Land Amendment and Native Land Claims Adjustment Act 1926.
5. Regulations for election of Members of Harbour Boards—Harbours Act 1923.
6. Regulations as to importation of hay, straw, or chaff from Great Britain, Ireland, any part of the Continent of Europe, Argentine, Uruguay, Paraguay, Brazil and Chili.—Stock Act 1908.
7. Sharp-tailed Grouse (Pedioecetus phasianellus) declared to be Imported Game.—Animals Protection and Game Act 1921-22.

LONDON LETTER.

Temple, London,
6th January, 1927.

My Dear N.Z.,—

In exchanging with you the compliments and best wishes of the New Year, which I do with my hand on my heart, I refer in the first place to the season's List of Honours. Your eminent and learned Chief Justice, whose distinction I can readily appreciate even from a perusal of his observations and especially of his argument in the **Crown Milling** case, must in your view be deservedly honoured and is in my view most happily honoured in that he appears in the same list as Viscount Sumner. It may be, for all I know, that his argument in the foregoing case was only one of many brilliant expositions, but it happens to be the only one I have had the pleasure of reading *verbatim*; moreover the shorthand note faithfully recorded the interventions he had to make from time to time at other stages of the proceedings, and one of these displayed, to my thinking, a very attractive and, I hazard, a characteristic **trait.** It would be impertinent on my part to elaborate this theme; but my compliment is intended to be far-reaching, inasmuch as I have ever regarded Lord Sumner, as you know, as perhaps the most admirable lawyer of my day. I regret that he, and Lord Birkenhead, fortuitously were omitted from the long line of modern Authorities who, in one appeal or another, have recently dealt with your New Zealand cases in the Privy Council. In dearth of other subject matter, at this quiet time of the legal year, I propose to review them briefly, intending thus to round off neatly an episode of common interest which has involved many valuable contacts quite apart from the discussion of points of no inconsiderable importance.

"Evil communications" (I write with my tongue in my cheek) "corrupt good manners," and after an appreciable association with Michael Myers K.C. which has but recently terminated, I am left in England, half solitary but wholly argumentative. Not forgetting Gresson also, I declare a *casus belli* forthwith, in order to resume battle. They will tell you that our Boards have consisted of men too old for their job; and, haply, they may quote the instance of a not-too-pleased Attorney-General, coming from, and since returned to, another Dominion than yours, who found himself developing an argument to five Lordships, three of whom slept meanwhile! Interrogated on oath, we might be forced to an admission that there is some degree of antiquity, even of somnolence at Downing Street and some spirit of criticism at the back of the mind of our Bar; for my own small part, there was a moment when, during the argument of a point, I saw more of the inside of Lord Shaw of Dumfermline's yawning mouth than was either apposite or relevant. But you and I belong to an old *regime*; we are not yet so Americanized that we can bring ourselves to concentrate on the young and brisk to the exclusion of all old institutions, even when the latter tend to fossilization. We cannot readily scrap our old, Wise Men. I will cut short the argument by saying that we share the desire to import some new young blood into the House of Lords and the Privy Council; it is not impossible that an agitation is afoot to improve the position; but I trust that you are with me in hoping that the enterprise may be not too drastic and may even be severely moderate. And so to the review of our particular personnel:—

Lord Dunedin presided over the hearing of the first two appeals, and showed himself to be rugged but sympathetic, fierce but eminently alive, a determined but a discerning legal mind. You would label him, I think, outspoken but just, slightly cantankerous but profoundly wise. Lord Atkinson, I am afraid, is past his best age, and though, I am sure, intending still to be just he hardly shows signs to-day of that wisdom which might be called profound. Lord Phillimore, benevolent in his very nearly mutton-chop whiskers and in his immediate (almost innocent) delight in any mention of agricultural matters or metaphors, was always an efficient and reliable *nisi prius* Judge and showed no signs of any change for better or worse in his dealing with your appeals. Lord Carson, fine and virile personality that he is, at once made no pretence of any outstanding legal genius and yet betrayed, in spite of his jolly attitude, an acumen in appellate work which, if not subtle, was surprisingly sound. He was so quickly on to the outstanding point of **Wilkinson v. Bisset** that I remain convinced that the other points were never properly considered by the Board, a defect which, I suppose, is only academic. Lord Merivale, temporarily transposed from his regular first-instance functions to his very occasional appellate, struggled manfully, courteously and not wholly ineffectively to adapt himself to the unusual atmosphere; if he had not occasionally gone wrong on side issues, he might have been very helpful in the main. Indeed, though I appear to make a weak apology for this first Board, I think on the whole they were as good as you are likely to find anywhere (outside a golden age) and only disappointing to anyone who came to Downing Street, London, under the illusion that he was about to see at work the Judgment of Heaven, or the Next Best Thing.

Over the next Board the Lord Chancellor presided, and as to him I will throw overboard all good manners to dispute the least word of criticism. If it is said to you that Viscount Cave is disappointing as a Judge, then any man who says it takes as his criterion glittering display and a loud noise. I am prepared to offer him as perfection; judicially perfect, mentally perfect. It should not, surely, affect our appreciation, that he conceals the nice working of his own mind in the admirable purpose and apt process of bringing out the workings of Counsel's. Lord Shaw of Dumfermline, on his right hand, showed some ferocity, some impatience, but a point of view as sound as it was pertinacious. Whether or not he has influenced a right decision (according to my view) of that very moot Revenue appeal, his weight certainly steadied a tribunal which was rendered prone to a too hasty adjudication by the uncontrollable and super-vital brilliance of Lord Blanesborough (a charming man and mind, however vivacious and dangerous) operating in the resistless atmosphere afforded by Lord Wrenbury's antiquity, Lord Phillimore's pleasant excursions and that deliberate quiescense innate in the presiding genius. It is disagreeable to have to say of so dignified, and once strong, a character as Lord Wrenbury that he is getting past his best work; but so it is. Otherwise I consider this Board, taken again as a whole, to be a tribunal of which no Empire need be ashamed. This may not be an estimate which would be universally and immediately agreed, especially by partisans; but it is one which any of you, had you watched the tribunal impartially, would, I think, be ready to argue with conviction. For the next appeal, the Lord Chancellor was not available; all the others moved up a place, and Sir John Wallace was added. A dark horse: I cannot, nor can anyone else, say more,

For the **Crown Milling** appeal, we had the large, the spacious, the slow stirring but quite incomprenhensible intellect of Viscount Haldane to address. He, undoubtedly, closes an eye now and then and shows many signs of being, spiritually, elsewhere, not the most touching of these being his utter immobility and indifference when his own luminous observations are read to him by counsel, with flattering comment, from the Law Reports. It may be that he is not asleep; it may be that his mind is so immediately appreciative, even appreciative in advance, that he has the margin of time in which to dream. However it may be, I do not intend to venture for my part, and I caution you to disregard from any other part, an adjustment of a man and a mind as to which the whole of England went blindly, madly and devastatingly wrong at the outbreak of the Great War, though it had the evidence of an invaluable achievment in its own interest to guide it and though, in insisting upon its outcry, it deprived itself of services which might have saved it immeasurable expenditure of men and money in the end. On Lord Haldane's right was that veteran Lord Finlay, whose physical activity and energy may now be impaired by old age but whose eye is no less dim and his brain (I protest) no less able than ever it was. Disregard hostile criticism of him, and remember the attributes of the mills of God! Free from the disturbing element of Lord Blanesborough (who did not sit with this Board) Lord Wrenbury was able, ultimately, to achieve something nearer a display of his former abilities; and Lord Darling, whom this atmosphere somewhat chastens but does not wholly cure of his jocosity, manifested no little of that intensity and perspicacity which, being wholly good and entirely surprising when his unusual career is recalled, makes him far from unworthy of the title of lawyer. The Privy Councillor, imported into this jurisdiction from the Indian, still remained the dark horse. If I must hazard a guess as to his development, my guess is favourable. May it prove correct. It is good that we should have these importations from without; it widens our outlook and, moreover, it affords us the opportunity of replying upon you, when criticism is current.

I stand four-square for our Judicial Committee, and am ready to deal in due time with its imports from New Zealand. May they come in numbers, and soon!

Yours ever,

INNER TEMPLAR.

THE TWO GREAT PERILS AT THE BAR.

The Lord Chancellor responding to the toast of "The Bench and Bar" at the annual dinner of the Hardwicke Society believed that its debates taught members of the Bar to avoid two great evils from which he and others had suffered, in the habit which some experienced people had of taking every point, even the bad ones, and of quoting every case even those which were irrelevant.

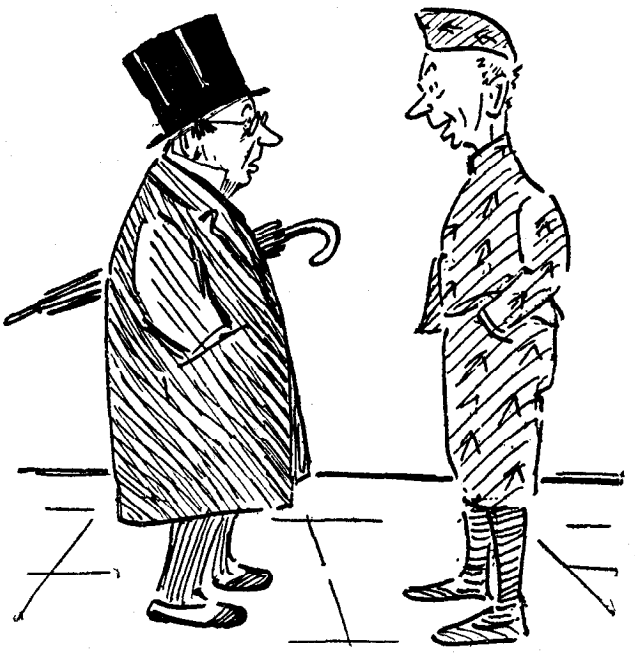
He knew nothing which was more desirable in the advocate than that he should throw away all the points which were really not quite good, sound points, and take those which were good and stick to them.

FORENSIC FABLES

No. 34.

THE JUDGE OF ASSIZE AND HIS OLD SCHOOL FRIEND.

A Judge of Assize, when his Circuit Labours were Concluded, Asked the Governor of the Prison to Show him over his Establishment. When they got to the Exercise Yard the Judge of Assize, rather to his Dismay, Recognised an Old School Friend. The Old School Friend had been a Financier and was now Taking the Consequences. Having Obtained Permission to do so, the Judge of Assize Addressed the Old School Friend. Assuming an Expression of Melancholy Sympathy he Expressed a Hope that the Old School Friend was



Bearing Up. The Old School Friend Assured him that he was Exceedingly Well. In fact, he had Never been so Well in his Life. He had Done Five Years, and so would be Out in a Few Months. His Future was Assured, as he had Taken the Precaution of Making a Handsome Settlement on his Wife before the Crash Came. He Hoped the Judge of Assize would Visit them at their Villa in the Riviera if he Happened to be There in the Winter. The Old School Friend then Begged to be Informed as to the Health and Happiness of the Judge of Assize. The Latter Sadly Replied that he was Gouty and Rheumatic, Overworked, and still Separated from his Pension by a Period of Nine Years. His Children, he Added, had Given him a Great Deal of Trouble and Anxiety, and he hadn't Saved a Bob. The Old School Friend said it was Too Bad, and Added that there was a Great Deal to be said for a Financial Career.

Moral: There are Two Sides to Every Question.

O.

BENCH AND BAR.

Sir Francis Bell, P.C., has returned to Wellington after his visit to Europe and attendance at the Imperial Conference.

Mr. B. J. Dolan, who recently underwent an operation, is making a good recovery. He is still in Bowen Street Hospital, Wellington.

Mr. C. C. Marsack, formerly of the firm of Harris & Marsack, Taumaranui, has joined in practice with Mr. R. McKenzie, Masterton. The firm name formerly Pragnell & McKenzie now becomes McKenzie & Marsack. Mr. Marsack is contributing an article entitled "The Protection of Native Debtors: A Criticism," to an early issue of the "Fortnightly Notes."

Mr. C. H. Massey-Wills has joined in partnership with Mr. William C. Hewitt, of Putaruru and Auckland. Mr. Massey-Wills is conducting the Auckland office. Mr. Wills is an old Nelson College boy, and was for some time in the Stamp Duties Office, Wellington. He graduated at Auckland University College, where three years ago he won the Bowen Prize.

Mr. Justice MacGregor admitted the following as solicitors of the Supreme Court during last week: Messrs. James Murdock Mason (Feilding), William Donald Goodwin, and William Hay (Wellington).

Mr. James D. Brosnan, LL.B., solicitor in the Public Works Department, was on 1st March admitted as a barrister by Mr. Justice MacGregor, on the application of Mr. A. E. Currie.

CORRESPONDENCE.

To the Editor,
"Butterworth's Fortnightly Notes,"
Wellington.

Sir,—

The Baume-Mackay Enquiry.

The portion of the Prison's Board report interesting to members of the profession is that part in which it is said that the Board does not hold itself bound to furnish reports to Parliament like those given in these cases. True, the Board admits that the Governor-General may call for reports for his own personal use.

In my opinion, the assumption of power to withhold from Parliament the details of cases cuts at the constitutional principle that Parliament is supreme. A Parliamentary enactment brought the Prisons' Board into being. The same Parliament gives the Board authority and the logical conclusion of the pretension of the Board is that the child is greater than the parent. This assumption is the nearest approach to bureaucratic government that this country has seen. Of the evils of such a system, little need be said. It is obvious that they are directly opposed to the spirit and genius of British legislation.

The Board defends the position taken up by them on the grounds that the publication of details would hurt the offenders in their charge. But would there be publication? I doubt it. The spirit both of the public and of Parliament is sane and fair enough to cry down any attempt to hurt a man or woman making an honest attempt to replace himself or herself in the esteem of the community.—I am, etc.,

L. A. TAYLOR.

Hawera, 25th February, 1927.

A noted Judge was having lunch in a restaurant one hot day, when a friend stopped at his table. Said the friend: "Judge, I see you're drinking coffee. That's a heating drink. Did you ever try gin and ale?" The Judge replied: "No, but I've tried a good many fellows who have."

LEGAL LITERATURE.

WORKERS' COMPENSATION.

The Second Edition of The New Zealand Workers' Compensation Acts has been prepared by Mr. J. W. Macdonald, Barrister-at-Law, Public Trustee of New Zealand.

The advance proofs reveal that the work has been entirely re-written and dealt with in a most exhaustive and comprehensive manner. Not only is the statutory law and the cases decided thereunder dealt with, but also the rights of workers, their legal representatives, or dependents independently of the Workers Compensation Act. The liability in case of accident of a master to his servant at Common Law and under The Death by Accidents Compensation Act 1908 are also fully considered.

The work is far more extensive than has ever before been attempted in this branch of legal literature. New Zealand, English, American, and Australian decisions being cited.

The selection of the illustrations has been well made and the quality of the authorship is of a high standard.

The work will be published by Butterworth & Co., who will shortly announce the date of publication.

TREATIES.

By the agreement signed at Paris on June 19, 1926, the United Kingdom and the Netherlands Government, recognising that the treatment of pilgrims travelling to the Hejas from the South of Kamarau Quarantine is their common concern, have established provisions for its efficacious administration. The measures include those to be applied on pilgrim ships (which includes the carrying of medical remedies and disinfectants) and at the quarantine station internal organization of the station, the supply of epidemiological intelligence to the Bureau at Singapore, the dues of 10 Rs. in respect to each pilgrim; financial responsibility; adjustment of disputes arising out of the interpretation of the agreement in regard to which it is provided that in the event of the representatives of the two Governments failing to agree the President of the Permanent Court of International Justice shall be requested to appoint a third member and the Commission thus constituted shall determine the dispute.

There is some humour in the situation that the Infidel should be concerned as to the physical welfare of the Pilgrims of the Faithful, prescribing medicine, vaccine sera and sanitation. Prior to the time of Mohamet the Arabs attained to considerable skill in the art of medicine. This skill was lost, however, after the accession to power by the Prophet of God, who forbade the use of medicine. It would be interesting to hear a Mohamedan apologist justifying the journey to Mecca which depended upon immunity from disease or if it be the will of Allah that sickness should befall one then the breach of a tenet of the Faith.

ELICITING THE FACTS.

The Administration of Justice is susceptible of division into two general branches: one having to do with the determination of the facts, the other, with the application to the determined facts of legal precepts.

The facilities of administration in the jural field have reached a state of high development. In the class-room and the seminary, the attention of the student of law is concentrated upon mastery of legal principles as applied to determined facts; he is educated in legal bibliography and precedent. In practice, legal erudition earns signal commendation and oft-times lucrative reward.

Legal principles have been formulated into rules, doctrines and statutes, and have been harmonized and codified. The legal practitioner, therefore, usually approaches his task proficient in the knowledge of legal science.

But there is the other branch of the administration of justice which is no less important than the jural. It has to do with the domain of facts which holds the dramatic episodes of every controversy between man and man or man and state. For the tasks here the lawyer is not usually well prepared. The ability to discern the facts which control the application of legal principles is not methodically developed. The education and training of a lawyer for eliciting the facts are more or less adventitious.—CHARLES S. WHITMAN, Ex-Governor of New York; formerly District Attorney of New York County.