Butterworth's Fortnightly Notes.

"The reigns of the Norman Kings were perhaps the most critical of all periods in the history of English law. It was then that it was settled that there should be a common law. It was then that some of its fundamental principles began to emerge."

—Holdsworth.

TUESDAY, NOVEMBER 8, 1927.

ANNUAL LAW CONFERENCE.

The suggestion that the Legal Profession of New Zealand should meet in annual conference is now before the District Societies. It is hoped that the suggestion will be well canvassed and given full consideration. The Societies of England meet in annual conference and find that by so doing much useful work can be accomplished. This work is not necessarily confined to those subjects of interest and profit to the profession, but extend to far wider fields. Who shall say where the limits of good shall extend to, as a result of the American Bar's visit to London as the guests of the English and Canadian Bars. The American Bar Association also finds it convenient to function for the promotion of International goodwill. The invitations extended and accepted by the leading lawyers of both countries to address the Law Conferences must add much to the appreciation of American and English viewpoints. The same happy results have attended the Annual Legal Conferences held by the three Scandinavian Countries, Norway, Sweden and Denmark. Within the Scandinavian Union many concrete achievements have been realised. The Congress of Northern Jurists have met regularly ever since 1872. Uniformity of law between the three countries has been aimed at to assist intercommunication. The laws in regard to trade has been made uniform. The **Law of Exchanges** was passed simultaneously on May 7, 1880, proving of immense advantage not only in their inter-relations but also with the outside world. Other Statutes common to the Scandinavian countries are the **Maritime Act** of 1892 ; the **Cheque Act** of 1897 ; the **Sale of Goods Act** of 1906, and in 1917 Acts on **Contracts** ; on **Commission** ; **Commercial Agencies** and **Commercial Travelling.** Quite recently a bill has been drawn up dealing with the question of Insurance Policies. Marriage and Divorce Law is uniform as is also the Law of Adoption. These achievements, the outcome of legal conference, should surely inspire the New Zealand legal profession to work for the opportunity to extend their functions and influence. That the time is opportune for the initial step to be taken namely the initiation of annual conferences cannot be gainsaid. The interest of the members of the profession in respect to purely professional concerns would be quickened. Their attention would be drawn to the tendencies in present-day developments both legal and legislative and the expression of opinion of the profession in conference would doubtless find echo in the Legislature. The further, and increasingly desirable, effort to seek and maintain uniformity of the law of New Zealand with that of the Australian States is also a field of opportunity which if entered into would increase the profession's utility to the Community and entitle it to an advance in public esteem. For these and the other reasons mentioned by Mr. Hunter in his letter published in this issue, support should be accorded to the proposal to inaugurate an annual legal conference.

COURT OF APPEAL.

The recent sittings of the Court of Appeal will probably be regarded as unique in several respects for a long time to come. Excluding the case of **Official Assignee v. Porritt,** which was struck out, it was the appellant who was successful in every case heard. In **Lysnar v. Barnard,** however, the point raised successfully on appeal was not brought before Ostler J. in the Supreme Court. In **Waitomo C.C. v. Miles,** the decision of **Rothery v. Waitomo C.C.** (1927) G.L.R. 24 was overruled. Miles case was first mentioned to the Court only four days before the conclusion of the sittings and the Court graciously permitted the case to be then set down for hearing. Another instance of what the trial judge termed "commendable promptitude" is the case of **Geange v. Mahood.** The contract was signed on June 9th, 1927 ; repudiated June 15th. An action for specific performance was commenced on June 28th. The case was set down for trial at the sittings commencing July 26th. The hearing occupied 15th, 16th and 17th September. Judgment was given on September 27th. Special Fixture in Appeal Court and hearing on October 12th, 13th, and 14th. Judgment given by Court of Appeal on October 21st. The cause of action arise on June 15th, and an Appeal Court decision was delivered on October 21st, the whole of the litigation taking but 128 days from the time of the cause of action arising.

The most interesting event was the overruling in **Pacey v. P.D.C.** of the long-standing decision of Edwards J. in **Ex parte Simson Bros. Ltd.,** 16 G.L.R. 159, a not unexpected result.

Another unique feature of the Sittings was of the applications for the revision of sentences, none were altered in any way. So in civil matters the appellants were consistently successful, but in criminal applications they were consistently the reverse.

JOHN FRIEND ANNOTATIONS.

Since imitation is the sincerest form of flattery, infringement of copyright must carry with it the compliment of acknowledgment of authority. The action mentioned in the Supreme Court, on October 21st, brought by the proprietor of the John Friend Annotations, against Harry Percy Brown, was the result of the second infringement by the defendant. Under such circumstances, the compliment of copying becomes an expensive one to the John Friend Annotations. The judgment of the Court, entered by consent, and the terms of settlement indicate the strength of the plaintiff's position. The Counsel concerned rightly laboured to effect a settlement, and are to be congratulated upon achieving it. The matter has cleared the air, and practitioners now have tangible evidence to guide them in their selection of which of the two competing annotators they will employ to annotate their Statutes.

RESTRICTIVE COVENANTS.

The case of **Achilli v. Tonell** (1927) W.N., p. 252 is a decision meriting the attention of Conveyancers. Plaintiff sold land in the town of Colchester, the conveyance containing a restrictive covenant that no building should be erected on the premises thereby assured which would materially restrict or interfere with the free access of light and air to the windows then existing in the vendor's adjoining house. By some misunderstanding defendants John Tonell Ltd., successors to Tonell, the purchaser, infringed this covenant, thinking that they had plaintiff's consent. The defendant company offered damages, which the plaintiff refused to take demanding an injunction. Astbury J. said that he was extremely loth to order a large and substantial wall to be pulled down. The cottage was of small value. The damages were easily ascertainable, or the owner, if willing, could be bought out. She was not, however, willing, and the Court could not compel her to accept damages. The Court had therefore no discretion to give damages in lieu of an injunction. His Lordship added that the Company's premises were large, important and expensive, and he could not help hoping that though the Company had no equity in their favour the plaintiff might still prove willing to accept full compensation. Execution was stayed for a month to see if any arrangement could be made.

AN ADVOCATE'S OPINION.

The speech made by Charles Phillips when defending Courvoisier for murder aroused widespread discussions, writes Professor Courtney Kenny, in the July issue of the "Law Quarterly." They elicited from lawyers a universal agreement upon two principles: the one, that in no proceedings, civil or criminal, ought you ever to express any personal opinion about your client's innocence; the other, that if he confess to you his guilt, your sole duty is to see that he is not convicted illegally. After discussing Palmer's case the following incident is given which has a particular interest to New Zealanders:—

"There is the converse case of the advocate who, either through an express confession to him or through some other cause, has become convinced of his client's guilt. What is his duty? I remember that in 1827, when leader of the Northern Circuit, Sir James Scarlett (afterwards Lord Abinger) had to defend Edward Gibbon Wakefield (afterwards prominent in the colonization of South Australia and New Zealand) for the abduction of Miss Turner. Scarlett was attended in consultation by Wakefield himself who was out on bail. On observing that Wakefield assumed a jaunty and confident air, Scarlett said to him: 'Mr. Wakefield, if you think that I am going to do anything more for you than to see that you are not convicted illegally, you are very much mistaken,' and convicted with strict legality Wakefield was. Townsend, in his account of Wakefield's case in his "Modern State Trials," records that at the trial Scarlett seemed impressed and annoyed by the hopelessness of his defence."

It is also a fact that Wakefield wrote out a detailed statement of the escapade, but Scarlett thought so little of it, that he refused to use it. It is well known, of course, that this affair prevented Wakefield entering the House of Commons. Had he done so it is possible that this part of the British Empire would have had a different history.

COURT OF APPEAL.

Sim A.C.J.
Herdman J.
Reed J.
Adams J.
Ostler J.

October 10, 18, 1927.
Wellington.

WAITOMO COUNTY v. MILES.

Rating—Mortgagee of Lease in Perpetuity—Liability for Rates Rating Act 1925, Section 70.

Case stated to determine a question of law before trial and removed into Court of Appeal. H. J. McPeak and P. G. McPeak were the occupiers of a piece of land held under a lease in perpetuity from H.M. the King in whom the land was vested. The defendant was the first mortgagee of the lease. The land was within the County of Waitomo and the system of rating on the unimproved value was in force in the County. The unimproved value of the property was £1,400, the lessee's interest being valued at £715, and the interest of the Crown at £685. Plaintiff Council demanded from the defendant £140 for rates due in respect of the property.

Mackersey for plaintiff.
Myers K.C. and **H. F. Johnston** for defendant.

ADAMS J., in delivering the judgment of the Court, said that the question to be determined was whether the defendant was a first mortgagee of rateable property within the meaning of Section 70 of the Rating Act 1925, and as such liable for payment of the rates. The Court agreed with the contention of Counsel for the defendant that the "rateable property" in this case was the land and not the leasehold interest in the land. That was clearly the view taken by the Council since the rate was claimed in respect of the whole unimproved value of the land, and it followed from the decision in **Ellis and Burnand Ltd. v. Waitomo County Council** (1926) N.Z.L.R. 669. It was evident that the reason for the conclusion in that case was that the "rateable property" was not the limited interest of an occupier or lessee, but the land itself. Moreover, for the purposes of rating on the capital or unimproved value, the valuation rolls made under the Valuation of Land Act were to be used, and these rolls contained only the capital and unimproved values of the land as one entity. By section 60 of the Rating Act, for the purpose of recovery, all rates, levied on the unimproved value were to be deemed to be charged on the capital value of the land and not on the unimproved value or on the value of any limited estate or interest in the land. Where the system of rating on the annual value was in operation the annual value was based upon the rent at which the rateable property would let from year to year and must be not less than five per centum of the value of the fee simple thereof. Whatever system was adopted, it was the land that was rateable, and this was so whether the land is vested in the Crown or in a private person. In Section 70 of the Rating Act, it was, their Honours thought, plain that "the first mortgagee" referred to was the first mortgagee of the rateable property. The answer to the question would therefore be that the defendant was not a first mortgagee of the rateable property within the meaning of Section 70 of the Rating Act.

A different conclusion was arrived at in **Rothery v. Chairman, etc. Waitomo County Council** (1927) G.L.R. 24. That case, however, was an appeal from the decision of a Magistrate and the arguments which had satisfied the Court were not brought before the Court. The decision must now be overruled.

In the result it was not necessary to determine the other question which was argued. The Court, however, thought however, that there was considerable difficulty in supporting the view expressed by Cooper J. in **Auckland City Corporation v. Auckland Gas Co, Ltd.** (1918) N.Z.L.R. 1028, at p. 1032, and followed in **Rothery v. Chairman, etc. Waitomo County Council** (*supra*) that the definition of "land" in the Valuation of Land Act 1925 and the definition of "rateable property" in the Rating Act should be read together, in order to import into the word "land" in the expression "rateable property," the meaning given to "land" by definition in the Valuation of Land Act. The actual decision in **Auckland City Corporation v. Auckland Gas Co. Ltd.** (*supra* p. 1034) was that the Company was properly rateable as the owner of a tenement or hereditament in the land occupied by its pipes, and was seized, or possessed of, or entitled to, an estate or interest in the land occupied by them. There was thus no need to invoke the aid of the definition in the Valuation Act, and the passage referred to was therefore *obiter*. The decision was affirmed in the Court of

Appeal (1919) N.Z.L.R. 561. Mr. Justice Sim, in a passage at the end of his judgment, said: "in dealing with the matter "in the Court below Cooper J. treated the Valuation of Land "Act 1908, as *in pari materia* with the Rating Act 1908, and "used the definition in the Valuation Act for the purpose of "construing the Rating Act. This, if justified, seems to be "unnecessary, because there is no reason for limiting the term "'hereditaments' as used in the Rating Act to corporeal "hereditaments." It appeared to the Court that to read the definition of a word in a statute into the same word in the definition of an expression in another statute, and thus alter the meaning given to that expression in what was aptly called "the dictionary" of the statute, would, if permissible at all, require the strongest reasons.

The case would be remitted to the Supreme Court so that judgment might be entered there for the defendant.

Solicitors for plaintiff: **Broadfoot and Mackersey,** Te Kuiti.

Solicitors for defendant: **Johnston, Beere and Co.,** Wellington.

Sim A.C.J.
Herdman J.
Ostler J.

October 19, 1927.
Wellington.

STATE ADVANCES SUPERINTENDENT v. AOTEA DISTRICT MAORI LAND BOARD.

Native Land—Lease under Part XIV of Native Land Act 1909—Lease Mortgaged to Appellant—Re-entry by Lessor—Whether Arrears of Rent Have Priority to Mortgage—Native Land Amendment Act 1913 Section 97.

Appeal from decision of Reed J., reported in 3 B.F.N. 212. The respondent had granted a lease of native land under Part XIV of the Native Land Act 1909. Under the powers contained in Section 97 of the Native Land Amendment Act 1913 the appellant had taken a mortgage of the lease from the tenant. The tenant abandoned the land owing arrears of rent, and the respondent re-entered. Reed J. held that the respondent was entitled to a first charge on the amount payable for improvements by the new tenant, and that such charge took priority over the appellant's mortgage.

Fair K.C. (Solicitor-General) for appellant.

Izard for respondent.

SIM A.C.J. in an oral judgment in which the other members of the Court concurred, said that he would have been glad to arrive if possible at the same conclusion as that reached by the learned Judge in the Supreme Court, but he found it impossible to do so. The language of Section 97 of the Act was too clear, he thought, to admit of the interpretation put on it by Mr. Justice Reed. That section had declared with irresistible clearness the intention of the Legislature that the rights of the State Loan Department in connection with the compensation for improvements were paramount and must prevail over those of the lessors. The concluding words of clause ii of sub-section (c) "or to which such outgoing tenant is entitled," could not be construed in the way suggested by Mr. Izard and, in His Honour's opinion, the only interpretation of which Section 97 was reasonably capable was that contended for by the appellant. His Honour thought, therefore, that the appeal should be allowed, and for the answer given in the Court below to the questions asked, the following should be substituted: "Any "moneys received by the mortgagee in respect of the valued "improvements where the lessor has re-entered for non-payment "of rent shall be applied first in extinction of reduction, as the "case may be, of moneys owing in respect of the mortgage, "and, secondly, the balance (if any) is to be paid to the out-"going tenant. Section 97 (1) (c) (ii) must be complied with "in any new lease granted in the circumstances there men-"tioned, and the mortgagee is to apply the moneys received in "the manner hereinbefore set forth."

HERDMAN J. agreed. He was unable to accept the view that despite Section 97 of the Act of 1913 the mortgagee was bound to apply any moneys received by him for improvements primarily in payment of outstanding rent and of moneys payable under the lease. So clear and so definite was the language of the Statute that no other interpretation was possible than one which made the right of the mortgagee over moneys payable for compensation superior to any rights over that fund which the lessor might have or might have had under his lease or otherwise.

OSTLER J. concurred.

Solicitor for appellant: **W. H. Cunningham,** Wanganui.

Solicitors for respondent: **Marshall, Izard and Barton,** Wanganui.

Sim A.C J.
Herdman J.
Reed J.
Adams J.

October 12, 13, 14, 21, 1927
Wellington.

GEANGE v. MAHOOD.

Principal and Agent—"Irrevocable Option" for Sale Given to Land Agent—Subsequent Revocation of Same—Sale of Property by Agent in Terms of Option—Whether Authority Revocable—Option not Expressing True Terms of Authority—Estoppel—Sale by Agent a Breach of His Duty to Principal.

Appeal from a judgment of Ostler J. decreeing specific performance against the appellant. The appellant on 17th May, 1927, gave a firm of land agents a document in the following form: "In consideration of the payment to me of the sum of "one shilling receipt of which is hereby acknowledged, I give "you an irrevocable option for sale for a period of one month "from date of my Trentham property of 100¼ acres more or less "situate and fronting Main Road, Whakatiki Road and River, "together with all buildings thereon and following stock and "plant 45 cows (winter milkers), 1 bull, 2 horses, tip dray and "spring dray, ploughs, harrows, discs, milking machine and "engine, standing crops, 20 tons hay. Winter guarantee of "55 gallons per day." Here followed particulars of price, terms, etc., and the signature of the appellant. The agents interested the respondents in the property as prospective purchasers and took them to inspect it on 21st, 28th, and 30th May, and on 1st June. They were, however, unable to obtain inspection of the cows, and on the last-mentioned date the agent showed them the written authority for sale and said he had an irrevocable power to sell the property on its terms. On the same day the appellant's solicitor told the agent that the appellants would not sell on those terms and suggested a conference. The Court found that on 8th June the agent had definite notice of the revocation of his authority, assuming it to have been revocable. On 9th June the respondents gave the agent an authority in writing to purchase the property at the price and in accordance with the terms of the authority of 17th May, and the agent purported to accept that offer as agent for the appellant.

Before the appellant signed the authority he objected to the statement that the cows were to be winter milkers, and the agent told the appellant not to take any notice of that as long as he put in 45 cows which would include sufficient winter cows to give the 55 gallons per day in winter.

Mazengarb and Spratt for appellant.

Myers K.C. and Wiren for respondents.

ADAMS J., in delivering the judgment of the Court, said that before referring further to the facts it would be convenient to consider the question of law raised by the appellants, that the authority upon which Rutter assumed to act, although expressed to be irrevocable, was nevertheless in law revocable; that it was revoked not later than 8th June, and accordingly that Rutter had no authority to enter into a contract as agent on behalf of the appellants on 9th June. Their Honours paused to say that in their opinion the expression "option of sale" in the authority meant "authority to sell." Now it was well settled that an authority given to such an agent was in general revocable at any time before it was executed; and this even when the authority was by deed. So an authority given by deed or Power of Attorney might be revoked by verbal notice. Moreover, all

contracts of hiring and service for definite terms were based upon valuable consideration there being mutual promises. But this did not give them the quality of irrevocability, even where a premium or money consideration had been given by the servant. In all such cases the employment or agency might be determined, or, in other words, the authority might be revoked, by the principal at any time subject only to an action for damages if the determination or revocation amounted to a breach of contract. This applied to agencies of the nature of the agency in the present case: **Toppin v. Healey** (1863) 11 W.R. 466. The Court could not enforce performance of such contracts, and the agent was left to his remedy at law. There were, however, cases in which the agent acquired under the contract an interest in, or security over, the subject-matter to be dealt with under the authority, and in such cases, if the interest was separable, the Court could enforce it, and the authority could not be revoked until the benefit intended to be conferred by the authority was reaped. Their Honours examined the cases of **Smart v. Sandars** (1848) 5 C.B. 895; **Clerk v. Lawrie** (1857) 2 H. & N. 159; and **Carmichael's case** (1896) 2 Ch. 643, and said that it was plain that if, as contended by counsel for the respondents, the fact that the authority given by Kenneth Geange to Rutter was for valuable consideration and was expressed to be irrevocable were sufficient to make the authority irrevocable in law, the similar facts in **Carmichael's case** would have led to the same results without considering whether it was an authority coupled with an interest within the meaning of the rule. **Carmichael's case** was explained and approved by the Judicial Committee in **Frith v. Frith** (1906) A.C. 254, 260, where the facts of **Carmichael's case** were stated to have been that the donor of the power, for valuable consideration, conferred upon the donee authority to do a particular act in which the latter had an interest, namely, to apply for the shares of the company which the donee was promoting for the purpose of purchasing his own property from him, and the donor sought to revoke that authority before the benefit was reaped The effect of the authorities on the question of irrevocability of authority in cases such as the present was, their Honours thought, correctly stated in Bowstead on Agency, 7th Edn., p. 156, Art. 138.

On the authorities their Honours were therefore of opinion that the authority given by Kenneth Geange to Messrs. Rutter and Coy. was revocable. On the evidence they were satisfied that it was in fact revoked before the alleged contract upon which these proceedings are based was signed.

The judgment from which the appeal was brought was however, based upon estoppel by conduct. Mr. Justice Ostler thought that by signing and leaving in the hands of the agent the authority to sell purporting to be irrevocable, and so enabling the agent to produce it to the respondents as he did on the 1st June, the appellants had held out the agent as clothed with irrevocable authority to sell the property on its terms, or had authorised or permitted him to produce that authority to them, and to represent to them that it was still effective, and that this created an estoppel. For this **ex parte Harrison re Bentley** (1893) 69 L.T. 204 was relied upon. In that case, however, the underwriting agreement was addressed to the representative of the promoters of the proposed company and was intended to be, and in fact was, sent to him, and by him presented to the directors of the company after the company had been registered. That was no doubt in pursuance of his duty, and must have been the intention of Harrison when he gave it to the sub-agent. Harrison therefore directly authorised what was done. The same course was adopted in **Carmichael's case** (1896) 2 Ch. 643. Without that the underwriting agreement would never reach the company which was to act upon it.

Their Honours examined the evidence in which Malcolm Mahood said: "We intended to act on the option and get "the place and deal with the question of the cows afterwards. "Rutter had made it perfectly plain to us that we were not to "get 45 milkers and farm. Actually what he had quoted to us "was 45 cows with a fair percentage of milkers." As the learned Judge who tried the case said, it was clear on Rutter's own admission that the option did not contain the exact terms upon which he was authorised to sell. The proper inference to be drawn from this evidence, in their Honour's opinion was that the production of the "option" authority alone was in fact a breach of the agent's duty to the appellants and in pursuance of a scheme to force the appellants into a contract to which he knew the appellants had never assented. He had already told the respondents what the real authority was, but induced the respondents to join in this scheme in view of the apparent reluctance of the appellants to facilitate a sale on the terms of the real authority. The Court's conclusion therefore was that the alleged representation was made by Rutter without authority and in breach of his duty to the appellants.

Appeal allowed.

Solicitors for appellants: **Mazengarb, Hay and Macalister,** Wellington.
Solicitors for respondents: **Wylie and Wiren,** Wellington.

Sim A.C.J.
Herdman J.
Reed J.
Adams J.

October 17, 21 1927.
Wellington.

PACEY v. PREMIER DRAPERY CO., LTD.

Company—Resolution of Private Company—Whether Entry in Minute Book Signed by three-fourths of Members Holding Three-fourths of Shares Necessary—Companies Act 1908, Sections 91, 168 (6).

Originating Summons to determine validity of defendant company's Articles dealing with voting power of shareholders.

Gray K.C. and Clere for plaintiffs.
Cooper for defendant.

REED J. in delivering the judgment of the Court said that the questions for determination called for a consideration of the judgment of the late Mr. Justice Edwards in **Ex parte, Simson Brothers Ltd.,** 16 G.L.R. 159. In a question of construction there was always room for a difference of opinion and were the Court not assured that the learned Judge had erred in that case, and, in doing so, had occasioned much unnecessary inconvenience in the administration of private companies, it should have had considerable hesitation in disagreeing with one who had been responsible for many valuable and illuminating judgments on the construction of our statutes. The question was a narrow one, and, to use Mr. Justice Edward's words, was "Whether the provisions of sub-section 6 of section "168 (of the Companies Act 1908) are alternative to those "of section 91, existing collaterally with these, or whether "they are substitutional and exclusive?" Edwards J. held that these provisions were exclusive, and that it was not open to a private company to adopt the procedure provided by section 91 of passing resolutions on a vote by the members present at a meeting. It was quite clear that the wording of the subsection did not of itself suggest that the procedure was exclusive. Its wording was permissive, and enabling, and its general effect that of providing a substitutional method of indicating the wishes of the shareholders in the company. Edwards J. did not deal with this aspect of the question but based his judgment on a general review of the Statute. He declined to hold that sub-section 4 of section 168 was exhaustive in its enumeration of the general sections of the Act that did not apply to private companies, and held that: "Sub-section 1 of section 168 necessarily renders the provision of sections 22 "and 23 inapplicable to private companies: So also sub-"section 5 excludes the application of sections 74 to 81 to such "companies." No doubt the latter observation was justified, but section 168 must be read as a whole and sub-section 5 could not be treated as limiting the effect of sub-section 4. To include in sub-section 4 sections 74 to 81 would have left it open for a private company to issue a prospectus and it was therefore necessary to specially negative the right to do so. Sub-section 4 standing alone was clearly not exhaustive, but section 168 as a whole appeared to be, but it was not necessary to express any definite conclusion upon that point. The Court must, however, express its dissent from the statement that subsection 1 rendered the provisions of section 22 and 23 inapplicable to private companies. It could not be inferred that the sub-section meant anything more than it said which was that a private company need not register its Articles of Association. This was in no way inconsistent with sections 22 and 23, which provided for the form of articles, and that Table A should apply when there were none. The Court thought that these sections undoubtedly applied to private companies. It was fortified in this view by the judgment of Stout C.J. in **re Dannevirke Motor Co., Ltd.** (1920) G.L.R. 266, who at the same time hinted his doubt of correctness of the decision generally in **Ex parte Simson.**

Based upon the general view that private companies were a thing apart Mr. Justice Edwards appeared to have regarded Part V of the Companies Act as an exhaustive code for private companies and from that point of view had interpreted subsection 6 as substitutional and exclusive. With that view the Court disagreed and held that, on the contrary, the provisions were alternative to those of section 91.

Solicitors for plaintiffs: **Gray and Sladden,** Wellington.
Solicitors for defendant: **Cooper, Rapley and Rutherford,** Palmerston North.

SUPREME COURT.

MacGregor J. October 14, 21, 1927.
Wellington.

JACKSON v. JACKSON.

Divorce and Matrimonial Causes—Deed of Separation Providing for Maintenance of Wife for Life—Subsequent Divorce—Petition for Variation of "Settlement"—Divorce and Matrimonial Causes Act 1908 Section 48.

Husband's petition under Section 48 of the Divorce and Matrimonial Causes Act 1908 for an order to set aside or vary a post-nuptial settlement. The petitioner and respondent were married on 4th January, 1921. A daughter was born to them on 27th April, 1922, who was still alive and in her mother's custody. On 12th September, 1923 the petitioner and respondent entered into a Deed of Separation. The parties lived apart under this Deed of Separation for more than three years, when on 15th September, 1926, the petitioner filed his petition for dissolution of marriage under Section 4 of the Divorce Amendment Act 1920. The respondent did not appear, and a decree nisi was granted on 28th October, 1926, which was made absolute on 1st February, 1927. On 14th March, 1927, the petitioner married again. There was no child of this marriage; but on 13th May, 1927, the petitioner and his second wife adopted a male child aged two years under the provisions of "The Infants Act 1908." On 28th June, 1927, the petitioner filed the present petition praying the Court to set aside or vary the separation Deed, alleging that he was financially unable properly to support his wife and adopted child and at the same time to pay to his former wife the sums payable to her under the Deed of Separation. By that Deed the petitioner covenanted to pay to his then wife during her life the weekly sum of 30/- for her own maintenance, and also the weekly sum of 10/- for the support of their infant daughter. The petitioner did not seek to cancel or vary the weekly payments of 10/- for his daughter's support.

Keesing for petitioner.
Blair for respondent.

MacGREGOR J. read Section 48 of the Divorce and Matrimonial Causes Act 1908 and said that the Section was adopted bodily from Section 5 of the Matrimonial Causes Act 1859, which had been the subject of numerous decisions in England. The latest of these cases was **Bosworthick v. Bosworthick** (1926) p. 159, and on Appeal (1927) p. 64. His Honour referred to the judgment of Lord Merrivale at p. 163 and p. 171, and to **Benyon v. Benyon** (15 P.D. 54), and said that it would seem that the time in relation to which the Court should make the necessary inquiries and order was at or immediately after the decree absolute for dissolution of the marriage, and accordingly that it should not consider extraneous events subsequent to the dissolution as good ground for varying a settlement. This view of the law was confirmed in a practical way by the fact that under the 1924 Divorce Rules in England a petition to vary a settlement must be filed after, but within one calendar month of, decree absolute, unless the time for filing was extended by a Judge. It appeared to His Honour that he should accept and follow this view of the matter in the present case. The petitioner prayed the Court to set aside a Deed of Separation executed by his making provision for his wife and child. On 1st February, 1927, the marriage was dissolved at the suit of the petitioner himself based on this very Deed of Separation, which he some months later claimed to have set aside or varied on the ground (as stated in his petition) that "Since the date "of the said Deed material changes have occurred in the petitioner's circumstances rendering him to a very considerable extent "less able to pay the amounts due and to fall due by him under "the said Deed." What were these "material changes" in his circumstances, and who was responsible for them? Was it not abundantly clear from the evidence that they were entirely due to the shortsighted and yet deliberate conduct of the petitioner himself? He it was who got his marriage dissolved by the Court. Six weeks after his first marriage was thus ended he chose to marry a second wife. Within two months of his second marriage he adopted a male child of tender years. Having voluntarily incurred these additional responsibilities, he asked the Court to deprive his former wife of the thirty shillings per week which he contracted to pay her. The petitioner sought to transfer the benefit of a marriage settlement from his first wife to a second one, who was (in the language of Lord Merrivale) a mere "stranger to the marriage contract" in question. In view of the cases cited, His Honour doubted very much whether he had any jurisdiction so to vary this marriage settlement in these unusual circumstances. If there was jurisdiction to make such an order as asked for, he certainly did not think fit to make it on the evidence in the present case.

It was further contended (in the alternative) that, apart altogether from the special circumstances arising out of his second marriage, the petitioner might be entitled to an order varying this settlement in view of the respective financial positions of himself and of his first wife. That question was not the substantial issue between the parties brought before the Court by the petition; nor did His Honour think in any event that the evidence would justify him in reducing the allowance payable to Mrs. Jackson under the Deed of Separation. That allowance was certainly not too much to support her in her station of life. It was fixed by agreement between the parties themselves in 1923. There was of course no question here of guilt or innocence, in the technical sense of these terms, but it was impossible to shut one's eyes to the fact that the petitioner here was the active party in the breaking up of the marriage in question.

Petition dismissed.

Solicitor for petitioner: **P. Keesing,** Wellington.
Solicitor for respondent: **Chapman, Tripp, Blair, Cooke and Watson,** Wellington.

COURT OF ARBITRATION.

October 12, 19; 1927.
Auckland.

BAKER v. MASTERS.

Worker's Compensation—Minor—Basis of Assessment—Notional Earnings—Workers' Compensation Act 1922, Section 9.

Claim for compensation in respect of an injury by accident suffered by plaintiff.

Butler for plaintiff.
West for defendant.

FRAZER J., in delivering the Court's judgment, said that the plaintiff, at the time of the accident, was 19 years of age, and was employed by the defendant as a farm-labourer at a wage of 30s. per week and found. The accident admittedly arose out of and in the course of his employment. Counsel agreed on the percentage of compensation payable, and the only matter on which the judgment of the Court was sought was the basis on which the average weekly earnings of the plaintiff were to be assessed. The plaintiff was employed from February, 1925, to October, 1926, as a junior warehouseman in the wholesale soft-goods trade. Owing to trade depression his employers reduced their staff in October, 1926, and terminated the plaintiff's engagement. He endeavoured, without success, to obtain employment in the wholesale and retail soft-goods trade, and in May, 1927, after he had been employed for some weeks at hop-picking in the Nelson district, he was engaged by the defendant as a farm-labourer. The plaintiff stated that his intention was to go back to his own trade as soon as an opening presented itself, and that it was not his intention to continue as a farm-labourer. The plaintiff claimed that at the age of 21 years he could expect to receive £5 per week as a warehouseman, and asked that compensation for permanent partial incapacity should be assessed on a notional earning capacity of £5 per week. The defendant argued that as the wages of an adult farm-labourer did not exceed £3 or £3 5s. per week, including allowance for board and lodging, the notional earning capacity of the plaintiff should be assessed at not more than £3 5s. per week.

The only reported case on the subject was **Wood v. Wood** (1921) N.Z.L.R., p. 979. In that case, the plaintiff had been employed in a whitebait canning factory, and the Court was informed that an adult would have received £2 to £2 10s. per week as a worker in the factory. The Court decided to ignore extremes, and to award compensation on the basis of the rate of wages usually awarded by the Court to adult workers in unskilled occupations. The extremely low wage of £2 to £2 10s. for adult canners was probably explainable on the ground that whitebait canning was a seasonal occupation, and one for which adult labour was not generally employed. There were a number of occupations in which juvenile labour predominated, and in which there existed no recognised rate of remuneration for adult labour, for the adults employed therein were either supervisors or were men who by reason of age or infirmity were unable to find employment elsewhere at the current rates of wages for unskilled labourers. It was in cases such as these that the Court assessed the notional earnings of a minor at the rate usually fixed by it for adult unskilled workers. In the case of farm-labourers, however,

there was a recognised class of workers, whose earnings as youths and as adults were definitely ascertainable. There was no question of able-bodied adults not being generally employed as farm-labourers, and the Court had never in practice regarded farm-labourers as being covered by the principle set out in the judgment in **Wood v. Wood,** but had assessed the notional earnings of an injured minor in accordance with the rates of wages prevailing for farm-labourers in the district from which the claim for compensation emanated. In the present case, the Court was prepared to accept the statement of the plaintiff that he did not intend to remain a farm-labourer, but that he intended to return to his former occupation as a warehouseman as soon as possible. This circumstance did not, however, entitled him to a higher rate of compensation than if he had intended to remain on the farm, for Section 9 fixed his notional earning capacity at the weekly sum which he would probably have been able to earn if he had "then" (i.e., at the time of the happening of the accident) attained the age of 21 years. The section limited him to the earnings of the occupation at which he was employed at the time of the accident, unless the occupation was one of the class covered by the judgment in **Wood v. Wood.**

Judgment would be for the plaintiff for compensation based on a notional earning capacity of £3 5s. per week.

Solicitor for plaintiff: **J. J. Butler,** Auckland.
Solicitors for defendant: **Jackson, Russell, Tunks and West,** Auckland.

AN INFRINGEMENT.

JOHN FRIEND ANNOTATIONS.

In a matter mentioned in the Supreme Court on October 21st, relative to the annotation of statutes, in which Ethel Holmwood Hayes, of Wanganui, was the plaintiff, and Harry Percy Brown, of Wellington, was the defendant, Mr. Myers K.C., who appeared for the plaintiff, said that no doubt his Honour (Mr. Justice Ostler) had read the statement of claim. Mr. Myers said he was fortunately in a position to state that an arrangement had been arrived at which would save the time of the Court. The plaintiff was the widow of the late Mr. John Friend, who was well-known to his Honour, and to all dealing with the law, as having initiated a system of annotation of statutes, which had been very useful to the profession, the Government Departments, and others interested in the interpretation of our statute law. Since the death of Mr. Friend in 1924 the business had been carried on in precisely the same way by his widow. In 1925, owing to certain actions on the part of the defendant, which apparently constituted infringement of the copyright of the plaintiff and her late husband, an action was brought against the defendant, and an interlocutary injunction was obtained. Subsequently the parties arrived at a settlement. One of the terms of the settlement was that the previous action be discontinued. Later, it appeared that infringements very much on the same lines as the previous infringements had taken place, and the present action was commenced by the plaintiff. Counsel for the defendant (Mr. P. B. Cooke), after the issue of the writ, had gone into the matter, and Mr. Myers said he desired to say that the position had been met fairly, with the result that a settlement had been arrived at. He proposed to ask his Honour to enter judgment in terms of the settlement.

Mr. Cooke stated that Brown found himself in an unfortunate position, for which he in no way was morally responsible. The whole of the work of which the plaintiff complained, and in respect of which the action was brought, was, he was instructed, done for Brown by a third party, who was paid by Brown to prepare the annotations. Brown also spent substantial sums in printing them, and it was not till he made an investigation after the commencement of this action the he discovered that any infringement had taken place. As a result, negotiations ensued between the parties and the present settlement was arrived at. For what had occurred, however, no moral blame attached to Brown. Till he made the investigation after the commencement of the present action he was wholly unaware that any infringement had occurred. Moreover, he had incurred substantial financial loss in printing the annotations.

Judgment was entered by Consent:—

(1) That the defendant be restrained by Injunction of the Court from using in the annotation of the Statutes of New Zealand any matter which has been prepared for the purposes of annotation of the Statutes of New Zealand and in which the plaintiff now has copyright.

(2) That the defendant deliver up to the plaintiff all printed typewritten or written matter in his possession or under his control infringing any matter which has been prepared for the purposes of annotation of the Statutes of New Zealand and in which the plaintiff now has copyright.

The Memorandum of Terms of Settlement included the two further terms that the defendant should pay £100 damages and 30 guineas costs, with disbursements, and that the defendant should forthwith abandon the use of the word "Annotation" as his telegraphic code address and (so long as the plaintiff remains registered in respect of the code address "Annotator") should not use any telegraphic code address so nearly resembling the plaintiff's code address "Annotator' as to be calculated to deceive.

LIENS

Mr. McVeagh's note amplifying that contributed by Mr. Barnett is instructive as indicating the cleavage between the policy of the law in England and that in Australia.

I have no hesitation in declaring my adherence to the English policy.

It is pointed out in **Robins v. Gray** (1895) 2 Q.B. 501, that the innkeepers' lien is one hoary in its antiquity; but a distinguishing element in the innkeepers' lien as compared with a modern garage-keeper's lien may be found in the fact that the ancient innkeeper was compellable by the common law of the realm to take in the luggage as well as the person of the traveller. No obligation attaches to the garage-owner to do repairs to any car.

Usage, however, gave to the packer, the labourer who packed goods for transit, a lien on the cased goods for not only the cost of packing the goods held by virtue of the lien, but also for the whole balance of accounts, monies owed by the owner of the goods.

Warehousemen and auctioneers likewise have in course of time become entitled to a lien upon goods passing through their hands. And closely akin to the lien claimed for the motor garage men is the solicitor's lien. In the language of the old text-books this lien arises "*proprio vigore*" which may be paraphrased thus: "Because it is his labour that has created the "object held by virtue of the lien." At bottom, it does not appear that matters of "authority" or "title" were ever considered in giving the holder of goods his lien. The primary motive seems to have been the desire to recognise "That the labourer is worthy of his "hire."

And there seems to be no good reason for departing from this primary motive. The man who repairs the car is still as a rule the man of no great substance, and who depends upon the vigour of his right-arm for his livlihood. He generally possesses no car save perhaps an ancient Ford bought for a pound or two, and repaired in his off-time. If he be defeated in his lien, the hardship thrust upon him will comparatively be much greater than that borne by the man of substance who, perchance, has left his car in such a position that a joy-rider has been able to filch it. I apprehend that some may say that the garage-worker should refuse to take any car save with a letter of authority from the owner. One can at once visualise the fraud that that policy would create. At rockbottom the enquiry is: "Who shall pay for the repairs?" The worker has expended labour and material. The joy-rider or bailee is usually not worth powder and shot. The car has been repaired. In nine cases out of ten the owner would be under the necessity of paying someone. Why should not a rule be adopted of making the whole ten fall into line, and although there may be some hardship inflicted on the tenth man, it is desirable that the law should be definite.

—"STUDEBAKER."

THE N.Z. CONVEYANCER.

(Conducted by C. PALMER BROWN).

LICENSE TO USE INVENTION.

THIS INDENTURE made the day of BETWEEN A.B. (hereinafter called "the lisensor") of the one part and C.D. and E.F. (who and their assigns are hereinafter called "the licensees") of the other part WHEREAS the licensor has applied for and has obtained provisional protection for in respect of an invention for AND WHEREAS the complete specification has been duly filed by the licensor and his application has been accepted but the Letters Patent in respect thereof have not yet been issued AND WHEREAS the licensor has agreed to grant to the licensees a license to use the said patent when granted for the period to the extent and upon the terms and conditions hereinafter mentioned NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the royalties hereinafter reserved and made payable to the licensor and the covenants on the part of the licensees hereinafter contained the licensor doth hereby grant unto the licensees the sole and full liberty license power and authority within the to use and exercise the said invention so far as the same related to the manufacture of (hereinafter called "the licensed articles") from the date hereof during the term for which the said letters patent shall be granted and if the term of the said letters patent is extended during such extended term and within the limits aforesaid (but not elsewhere) to sell and dispose of the licensed articles upon and subject to the terms and conditions hereinafter expressed and PROVIDED ALWAYS that nothing herein contained shall be deemed to extend the license hereby granted to the manufacture use or sale of .

And it is hereby mutually covenanted agreed and declared between and by the parties hereto (and so that the obligations on the part of the licensees shall be several as well as joint) as follows, namely :—

1. The licensees shall and will pay to the licensor during the continuance of this license royalties in respect of all licensed articles sold or otherwise disposed of by the licensees under the powers hereby granted at the rates hereinafter mentioned that is to say :

(a) Until the day of One thousand nine hundred and royalties at the rates defined in the first second and third columns of the Schedule hereto.

(b) During the next succeeding three years of the term of this license royalties at the rates twenty-five per centum in excess of the royalties specified in the said schedule and .

(c) During the remainder of the term of this license royalties at rates fifty per centum in excess of the royalties specified in the said Schedule hereto.

2. The said royalties payable by the licensees hereunder shall be paid without any deduction whatsoever except that in the case of goods returned and not resold and also in the case of debts proved to be irrecoverable any royalties paid by the licensees shall be deducted from the next quarterly account provided that in case the licensees shall afterwards recover any portion of a bad debt the licensees shall pay royalty *pro rata* on the amount recovered.

3. The prices set forth in the fourth column of the Schedule hereto are the prices at which the licensees are now prepared to sell the licensed articles made of if ordered in quantities of and upwards and such prices include the manufacturers' profit but do not include the amount of the royalty payable under this license. The licencees shall not during the continuance of this license increase the selling prices of the licensed articles if ordered in quantities of and upwards above the prices fixed by the said Schedule plus the amount of the royalty for the time being payable hereunder except by any amount necessitated by the increased cost of labour or materials and a sum equal to any additional royalty payable by the licensees beyond the original royalty payable hereunder it being the intention of the parties that the licensees shall not be entitled during the continuance of this license to raise the selling prices of the licensed articles if ordered in such quantities as aforesaid so as to increase their own profits by an amount greater than the increase in the royalties payable to the licensor hereunder. The licensees shall not increase the selling price of the licensed articles if ordered in quantities of less than above the selling prices fixed by the said Schedule plus the amount of royalty for the time being payable hereunder by a greater amount than an amount proportionate to the increase in the licensees catalogued selling prices for the time being of of the same quality if ordered in similar quantities above the catalogued selling prices for the time being of of the same quality if sold in quantities of e.g. If the prices per dozen of and of the licensed article if ordered in quantities of are and respectively and if the catalogued selling price of the former for a smaller quantity is per dozen the selling price of the latter may be increased to and per dozen. The said sale prices in the fourth column of the Schedule hereto are applicable only to of material and it is agreed that if the licensees shall manufacture of any material other than the selling prices shall not be greater than such selling prices as may be agreed upon between the licensor and the licensees and in default of agreement such selling prices shall be fixed by arbitration under the provisions contained in this license.

4. If the licensees shall not before the day of have paid royalty hereunder on at least of the licensed articles or if the licensees shall not during the period of months ending on the day of have paid royalty hereunder on at least of licensed articles or if in any months thereafter ending on the day of in any year the licensees shall not have paid royalty on at least of the licensed articles more than the minimum number on which royalty has to be paid during the previous year under the provisions of this clause in order to ensure the continuance of the license then and in any such case the licensor shall have power by written notice to the licensees to determine this license and on service of such notice this license shall determine accordingly. It is understood that there is no obligation on the part of the licensees to pay the minimum royalties hereinbefore provided for except for the purpose of securing the continuance of this license.

5. The licensees will cause all articles manufactured or sold by them under the provisions of this license to be stamped or impressed in a permanent legible and visible manner and place with the following words : "Made under Patent No. " and any other words which the licensees may consider necessary and which may from time to time be required by law.

6. The licensees shall keep separate and in separate books particulars of all orders and information relating to the manufacture or sale of articles manufactured by them under these presents and such orders and all invoices and other documents relating to the manufacture or sale of such licensed articles shall at all reasonable times during ordinary business hours be open to the inspection at the licensees' place of business of the licensor or his accountants who shall be at liberty to take copies or extracts therefrom and the licensees shall at their own expense give to the licensor or his accountant all such information as may reasonably be required in relation to the number of licensed articles manufactured and sold and the prices at which such articles shall have been sold provided that neither the licensor nor his accountants shall be entitled to enquire as to the licensees method of manufacture or to take away any list of or other information relating to the licensees' customers.

7. An account of the number of licensed articles manufactured and sold during the preceding quarter and also the description and size and all other particulars of such articles as may be necessary or proper for the purpose of showing the amount of the royalties payable hereunder shall be sent to the licensor within fourteen days from the expiration of each quarter that is to say within fourteen days after the thirty-first day of March, the 30th day of June the 30th day of September and the 31st day of December in every year and payment of the royalties as aforesaid reckoned on the number of licensed articles so manufactured and sold during the preceding quarter shall be made by the licensees to the licensor within four weeks of each such quarter day. The first account shall be rendered up to the day of and shall cover the period from the date hereof and the licensees shall produce to the licensor or his accountants all books accounts and documents necessary to support and establish the accuracy of such account Such accounts shall if required by the licensor be verified by the Statutory Declarations of the licensees.

8. The licensor shall pay all renewal fees which may be necessary or proper for keeping in force the said letters patent and neither party shall do or omit to do anything whereby the said letters patent may become void or revocable.

9. The licensees shall not at any time during the continuance of the said letters patent dispute the validity of the said letters patent or the title of the licensor thereto and the licensees shall forthwith give to the licensor notice of any action or proceedings brought or threatened or of any infringement which shall come to their knowledge.

10. In case the said letters patent or any extension or renewal thereof shall at any time during the continuance of this license be infringed the licensees shall forthwith give to the licensor notice of such infringement on the same coming to their knowledge and such particulars thereof as the licensees shall be able to obtain and if the licensor shall not within twelve calendar months from the receipt of such notice commence and thereafter continue all necessary legal proceedings for effectually protecting and defending the said letters patent and invention the licensees may by written notice to the licensor determine this license and on the service of such notice this license shall determine accordingly without prejudice however to the liability of the licensees for any royalty unpaid at the date of such determination or for breach of any covenant or agreement herein contained prior to or upon such determination. In the event of the licensor taking proceedings for the purpose of protecting the said letters patent from infringement the licensees will without any payment (other than out-of-pocket expenses) afford to the licensor all such information and assistance in relation to such proceedings as the licensor may reasonably require.

11. The licensees shall not without the written consent of the licensor first had and obtained assign mortgage or grant sub-licenses in respect of or otherwise deal with or part with the possession or control of this license or the rights hereby granted or attempt to do so but such consent to assign this license shall not be unreasonably withheld in the case of a responsible person taking over the licensees' business as a going concern.

12. The licensees shall from time to time during the continuance of this license use their utmost endeavours to promote the sale of the licensed articles but it shall not be incumbent on the licensees to advertise except at their discretion.

13. The licensor shall take all further steps which may be necessary to obtain if possible the complete grant of the said letters patent.

14. If the said letters patent shall on the final hearing of any action for infringement or proceedings for revocation be declared to be invalid on any ground whatsoever the licensees shall be at liberty by notice in writing to the licensor to determine this license and all royalties payable hereunder shall forthwith cease to be payable but the powers and provisions of this clause shall not arise or be exercised pending the hearing of any appeal which the licensor may desire to be brought against any judgment or decision in any such action or proceedings.

15. If the licensees shall make default in payment of any royalty payable to the licensor as aforesaid on the days and in manner aforesaid or shall fail to observe and perform the provisions and agreements on their part herein contained or if the licensees or either of them shall become bankrupt or shall make any arrangement with or assignment for the benefit of their his or her creditors or shall take the benefit of any Act for the time being in force for the relief of insolvent debtors then and in any such case it shall be lawful for the licensor by notice in writing to the licensees to determine these presents and the rights of the licensees hereunder but without prejudice to the liability of the licensees for any royalty unpaid at the date of such determination or for breach of any covenant or agreement herein contained prior to or upon such determination.

16. If the licensees or either of them shall at any time while the said letters patent No. of remain in force obtain letters patent or other protection in respect of any improvement or improvements in the said invention they shall pay to the licensor in respect of all articles manufactured and sold in accordance with such improvement or improvements during the whole period for which the said letters patent or other protection in respect of the same shall remain in force the following royalties (only) viz :—Royalties at a rate equal to two-thirds of the then current royalties payable hereunder for all articles so manufactured and sold up to the number of one-half of the minimum number to be manufactured by the licensees under Clause 4 hereof and the licensees shall pay royalties at a rate equal to the full royalties for the time being payable hereunder on all articles manufactured and sold in excess of that number. The licensees shall have the right to manufacture and sell and so long as they shall continue to manufacture and sell shall pay to the licensor royalty hereunder the rates aforesaid in respect of all articles manufactured and sold in accordance with any such improvements

for the whole period for which the patent or other protection in respect of such improvement remains in force even though the said letters patent No. of of the licensor shall have lapsed been revoked or expired or have come to an end for any other reason.

17. In case any dispute question or difference shall arise between the parties hereto touching the construction of these presents or the rights duties or liabilities of either party hereunder or the meaning of anything herein contained the same shall be referred to the decision of a single arbitrator to be nominated in case of difference between the parties by the president for the time being of the Law Society at the instance of the party first applying to him and such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1908 or any subsisting statutory modification thereof.

18. Any notice to be given hereunder shall be deemed to be duly served if the same is sent through the general post by registered letter addressed to the party for whom the same is intended in the case of the licensor at his usual or last-known address and in the case of the licensees at their place of business for the time being. Any notice so posted shall be deemed to be served at the expiration of the time when in the ordinary course of post it would reach the address to which it was sent and in proving the service of such notice it shall be sufficient to prove that the same was properly addressed and posted as aforesaid.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written.

THE SCHEDULE hereinbefore referred to :

CORRESPONDENCE.

PROPOSED ANNUAL CONFERENCE.

Sir, To the Editor.

I desire to commend to members of the District Law Societies the proposal which I made at the last meeting of The New Zealand Law Society to the effect that an Annual Conference of members of the profession should be held, the first conference to take place early next year. The matter will come before general meetings of the members of the District Law Societies to be held shortly and will be finally dealt with at a meeting of their delegates to be held at Wellington on December 2nd.

It seems to me that the system which at present exists for the government of the profession and the shaping of its policy is no longer adequate. There are about 1,700 practising Solicitors in New Zealand. The District Societies meet, no doubt, as often as the business to come before them requires, but their powers are limited and they deal, for the most part, with professional matters of only local interest. The New Zealand Society meets only three times a year and its meetings take place at 4 p.m., and usually occupy only about two hours. Moreover it is usually impracticable for the districts which are far distant from Wellington to send their own members as delegates, so that a number of District Societies are usually represented by Wellington practitioners acting as proxies who, however willing and able, cannot be closely in touch with the districts which they represent.

I would suggest to practitioners that an Annual Conference would be a valuable addition to the existing machinery for the government of the profession and would give us an opportunity of getting closely into touch with one another and help to develop a professional outlook which would be national instead of local. The papers read would also be of great value from an educational point of view, and the gathering together of large numbers of our profession would help to impress the public (and possibly even our rulers in Parliament) with the value to the State of an efficient legal profession.

So far as the financial aspect is concerned, practitioners who attend the Conferences would, of course, pay their own travelling and hotel expenses, and the only expense which would fall upon local practitioners in the cities or towns where the Conferences are held would be that of any hospitality to visitors which they might think fit to offer.

Yours etc.,

Christchurch, 25th October, 1927. W. J. HUNTER.

PACEY AND OTHERS v. THE PREMIER DRAPERY COMPANY LTD.

(D. S. SMITH).

The judgment of the Court of Appeal in this case removes a stumbling-block from the path of lawyers, in providing certain legal machinery for private companies. In particular it will clearly enable the creation of preference shares with limited voting rights, which was the very question which came before the Court of Appeal. Whether the decision will ultimately make for the safety and security of private companies is another matter. The writer is aware that accountants of experience view the result of the decision with something more than regret.

The Legal Profession will generally agree with the result of the judgment. The judgment overrules the decision of the late Mr. Justice Edwards in **ex parte Simson Bros., Ltd.,** 16 G.L.R. 159. In that case the Judge held that section 168 (4) of the Act was not exhaustive in its enumeration of the sections of the Act that do not apply to private companies, and he instanced firstly, sub-section 1 (providing that "it shall not be "obligatory upon a private company to register its Articles of Association, if any, or its regulations . . .") as preventing sections 23 and 24 from applying to private companies; and secondly, sub-section 5 (providing that "it shall not be lawful for a private company, or for the directors thereof, to issue any prospectus inviting subscriptions for shares in its capital") as preventing the application of sections 74 to 81, relating to prospectuses. Fortified by these conclusions, which he regarded as plain, the Judge held that section 165 (providing that "except as in this part of this Act "mentioned, all the provisions of this Act applicable "to companies whose liability is limited by shares or "by guarantee shall apply to private companies accord-"ing to the nature thereof") did not mean "Except as to "the sections mentioned by number in this part of this "Act" or any similar meaning. He held that the concluding words of section 165 "according to the nature "thereof" governed the position. He described a private company as really a partnership with limited liability, subject to certain statutory regulations, and held that section 165 made applicable to these private companies, according to their nature, the powers given to public companies—such as, powers to increase and reduce capital; and powers to change the name and objects of the company. He therefore held that by virtue of section 168 (6), the nature of a private company is such as to require that what may be done by public companies, by resolution, special resolution, or extraordinary resolution, must be done by private companies in the manner prescribed by section 168 (6). The learned Judge reinforced this legal construction by reference to what he considered were the business advantages and disadvantages thereof.

The judgment of the Court of Appeal meets this argument by holding :—

(1) That the language of section 168 (6) is permissive and enabling.

(2) That section 168 (1) does not render sections 23 and 24 inapplicable.

(3) That section 168 (5) cannot be treated as limiting 168 (4), but instead, specially negatives the right of a private company to issue a prospectus.

From these considerations, the Court of Appeal con-

cludes that section 168 (6) is alternative to and not exclusive of section 91.

As to the first reason given, it is clear, of course, that the language of sub-section (6) is permissive and enabling, and not exclusive. As to the second reason, it is submitted with great respect that the inference from section 168 (1) is that a private company may or may not have Articles of Association, and that these may or may not be registered. On the other hand, section 23, taken in conjunction with section 24, appears to contemplate that every public company shall have registered Articles of Association—either Table A or its own registered Articles applying, modifying, or excluding Table A. Section 23 was taken from section 15 of the English Act of 1862. The phrasing has been altered in the English Act of 1908, which makes it clear that public companies must have registered Articles of Association. The same wording was followed in the proposed new Companies Act (N.Z.), prepared by Sir Frederick Chapman. No doubt it was this point which caused Edwards J. to make the definite statement that it was plain that sections 23 and 24 did not apply to private companies. Section 24, however, seems to be capable of application to a private company. It provides for the form of the Articles of Association, and for the effect thereof, " when registered "—section 24 (4). The effect of the unregistered Articles of Association of a private company is, however, a matter which cannot be dealt with here.

With regard to the third argument of the Court of Appeal, the Court holds that " to include in sub-section " (4) sections 74 to 81 would have left it open for a " private company to issue a prospectus, and it was " therefore necessary to specially negative the right " to do so." With great respect, it is submitted that this is not the case. It is submitted that section 168 (6) neither excludes the application of sections 74 to 81 to private companies, as stated by Edwards J., nor negatives the right of a private company to issue a prospectus as stated by the Court of Appeal. It merely renders it unlawful for a private company to issue a prospectus of a particular kind, viz.: a prospectus inviting subscriptions for shares in its capital. As defined in section 2 " prospectus " means any prospectus, etc., " offering to the public for subscription or purchase " any shares or debentures of a company." A private company is not prevented from issuing a prospectus inviting subscriptions for its debentures. It is prevented only from raising from the public that capital which is last repayable in a winding-up, namely, share capital. If it issues a prospectus for debenture capital, as has been done by Forestry Companies, then sections 74 to 81 ought to apply " according to the nature " of the company, i.e., as to a company entitled to issue a prospectus inviting subscriptions for debentures, but not for shares; and it would have been inconsistent with this right to exclude sections 74 to 81 by section 168 (4). The position is clearer by contrast with the English section (121 of 1908) which prohibits a private company from issuing a prospectus for shares **or debentures.**

From the foregoing considerations, it is clear that some provisions of the Act apply to private companies, notwithstanding the fact that these matters are dealt with in sub-sections 1 and 5 of section 168. The argument is that the nature of private companies is not such as to exclude them. There are, however, it seems, other reasons than those set out in the judgment of the Court of Appeal for the conclusion that section 168 (6) does not exclude the procedure of section 91. It is of the nature of a private company that it should have annual meetings. Section 101 must apply to private companies—see sub-sections (1) and (3) of section 168. Section 101 definitely contemplates an annual general meeting. The Act itself provides for an annual general meeting every year, for extraordinary general meetings to be called on requisition, for the votes of members, for a chairman, for notices and minutes (see sections 88 to 90 and sections 151 to 154 of the Act). In view of these provisions, and of the fact that a private company may have as many as 25 members, it is difficult to suppose that a private company can only pass resolutions at its meetings pursuant to section 168 (6). It is surely of the nature of a private company that, being entitled to hold meetings, it is entitled to pass resolutions in the way in which they are ordinarily passed at meetings. There seems every reason, therefore, why sections 91 and 92, which deal with the resolutions passed by companies at meetings, and which immediately follow sections 88 to 90, should apply to private companies, on the ground (as required by section 165) that it is of the nature of a private company that they should apply. It is submitted, with great respect, that considerations such as these are the most relevant in determining whether the procedure of section 168 (6) is exclusive of the procedure of sections 91 or 92 in that they comply with the standard required by section 165.

RULES AND REGULATIONS.

Regulations as hereinafter mentioned appeared in Gazette No. 72, issued on 20th October, 1927:—

Regulations No. 74, under heading " Illegal or Improper Use of Telephone " amended by addition of following clause: (1A) " A subscriber shall not, without the authority of the Minister use his telephone, or permit the same to be used, for the purpose of transmitting musical items, whether they be received by him by way of radio-broadcast reception or derived from mechanically operated musical instruments or otherwise."—Post and Telegraph Act 1908.

List of Class-Books for Primary Schools (Section 56 (5) of Act) which teachers are authorised to require their pupils to purchase for school use.—Education Act 1914.

Regulations as hereinafter mentioned appeared in Gazette No. 73, issued on 21st October, 1927:—

Land Tax to be paid in one sum on Monday, 7th November, 1927. Additional tax to accrue if tax not paid on or before 28th November, 1927—Land and Income Tax (Annual) Act 1927.

In Gazette No. 75, issued on 27th October, 1927:—

Regulation providing for appeals under sections 308 and 312 of the Municipal Corporations Act 1920, in respect of Buildings for Public Meetings, etc.

Report of Actuary as to division of net surplus of profits, to be made annually in lieu of triennially—Government Life Insurance Act 1908.

British Preferential Tariff applied to wheat and wheat-flour, including wheat-meal and similar preparations of wheat, the produce or manufacture of the Commonwealth of Australia, and imported into New Zealand or entered for home consumption therein after 31st October, 1927—Customs Act 1913. Customs Amendment Act 1927.

THE SACCO-VANZETTI AFFAIR.

The following is the comment of the Law Journal of August 20th, on the case of Sacco and Vanzetti. The world-wide interest in the case merits the publication of this comment from a legal aspect :—

We referred last week to a suggested appeal in the Sacco and Vanzetti Case to the U.S. Supreme Court, and we doubted whether such a appeal was possible. The doubt seems to have been justified, for in criminal matters, not raising any question of Federal law, the jurisdiction of each State is final. The present appeal, the hearing of which began on Tuesday, is to the Massachusetts Supreme Court, but that Court has no power to decide on questions of fact, only on points of law, and it would seem that the only outcome which could be favourable to the prisoners would be the ordering of a new trial. In New York it is different, and the Court of Appeal can pass upon the evidence in the case, as well as on the law. Correspondents have been good enough to send us the " New York Times " of August 4, containing the full text of Governor Fuller's statement of his reasons for not interfering in the case. It recapitulates the crime—the robbery and murder on April 15, 1920, of a paymaster and his guard at Braintree, Mass.—for which Sacco and Vanzetti were tried and of which they were found guilty, and it recognises that " many sober-minded and conscientious men and women were genuinely troubled as to the guilt of the accused, and the fairness of their trial," and since the Governor felt that his own personal investigation of the case would not satisfy such persons, he appointed the committee to which we referred last week. That committee consisted of President Abbott Lowell, of Harvard University, former Judge Robert Grant, and President Samuel Stratton, of Massachusetts Institute of Technology. This committee laboured continuously through June and July—it should be stated that the case did not come before the Governor officially until an appeal for reconsideration was made on May 3 of the present year—and they came to the same conclusion as the Governor, namely, that the trial had been fairly conducted, and that there was no newly discovered evidence of such merit as to warrant a new trial. Accordingly the order for execution was given and would have been carried out last week, but for the eleventh hour respite to allow of a further application to the Supreme Judicial Court.

It appears from Governor Fuller's statement that, after the verdict, seven distinct supplementary motions for a new trial were agreed before the trial judge, Judge Thayer, six of them on the ground of newly discovered evidence. All were refused. Appeals on four of the motions were brought to the Supreme Judicial Court and these also failed. As we said last week, we have no means of forming an independent view on the evidence, but it must be noted that Governor Fuller went into the affidavits on which the motions were made, and interviewed the witnesses as far as they were available. He himself is not a lawyer, but presumably he would have the assistance of the State Attorney-General. When, however, all allowance has been made for his endeavour, and the endeavour of the committee, to arrive at a just decision, the impression remains that there was no such certainty in the evidence as to justify the carrying out of the capital sentence. For that the evidence must leave no possibility of doubt. And apart from this there is the six years' delay ; it may be due to the efforts of the prisoners' lawyers, but still the State system which allows this cannot shift the blame. Whichever way the balance on the evidence may ultimately be found to go, it will shock the world if this prolonged legal contest is closed by the infliction of the last penalty.

The world-wide interest taken in the case is our justification for commenting on American procedure. And now a word as to the Supreme Judicial Court of Massachusetts. As we have said, its power is limited, and it may not be able effectively to interfere. Of that Court no one acquainted with its history would speak save with profound respect. The claim has been made that it is the oldest court in the United States. In the Province of Massachusetts Bay it had existed as the " Superior Court of Judicature, Court of Assize, and General Gaol Delivery." After the Declaration of Independence and the conversion of the Province into the State of Massachusetts, it became the Supreme Judicial Court, and its records contain the names of many distinguished judges. Its first Chief Justice was John Adams, who subsequently became the second President of the United States, and in that capacity had the honour of appointing the great John Marshall to be Chief Justice of the U.S. Supreme Court. Mr. Justice Holmes—than whom no American Judge is held here in higher respect—was Chief Justice of the Court before he was transferred to the Supreme Court of the United States, and in 1891, speaking on the occasion of the death of one of its members, he paid the highest tribute which could be paid to any Court :—

> " Great places make great men. The electric current of large affairs turns even common mould to diamonds, and traditions of ancient honour impart something of their dignity to those who inherit them. No man of any loftiness of soul could be long a justice of this Court without rising to his full height."

The passage is given as a preface to " The Constitutional History of the Supreme Judicial Court of Massachusetts," in the " Massachusetts Law Quarterly "—one of the most interesting of legal journals—for May, 1917. From the same source we find that the Massachusetts Constitution—or rather its Bill of Rights—distinguishes with an exactness hardly to be found elsewhere between the legislative, and judicial powers, concluding " to the end it may be a government of laws and not of men." But exactly because the government of the State is a government of laws, it may be impossible for the Supreme Judicial Court, however distinguished it may be, to satisfy the conscience of the world in the Sacco and Vanzetti Case.

LORD COLERIDGE.

Lord Coleridge was everywhere and by all respected and approved. So many obituartists have recently written of him, at his death, that " perhaps he was " never a great Judge," that I will spare you this fatuity. He was, in the King's Bench Division, as great a Judge as any other of his time ; as long as a man is a sound lawyer, a sensible and civil fellow, decently humane but capable of firmness, he can be all that is required of him as a Puisne Judge at Common Law. Lord Coleridge was all these ; and since he never arrived at, nor so far as I am aware ever aspired to, the Court of Appeal, I see no point in depreciating his merits unless it be to satisfy the author's desire to show in discussing the son that he is thoroughly aware of the existence and achievements of the father. To his judicial capabilities the late Judge added an attractive, if apparently very particular and ascetic, personality ; he made a great business and some notable success of speaking the best English ; and he was a man whose dignity was as inevitable as his kindness was always available.—INNER TEMPLAR.

WELLINGTON LAW STUDENTS' SOCIETY

The Wellington Law Students' Society held a moot on September 22nd, when the following Case Stated was argued :—

" Miss Tango on her twenty-first birthday became apprenticed for five years ending December 31st, 1926, to one Madame Charleston, the proprietress of an old-established dancing academy carried on at Elysium. No premium was paid and no remuneration was payable. Miss Tango had covenanted not to carry on the profession of dancing mistress within five miles of Elysium for two years after the expiry of her apprenticeship. In 1925 Mr. Tango died in poor circumstances, leaving Miss Tango the sole supporter of his widow. On December 31st, 1925, Miss Tango left Madame Charleston's academy, and (instead of returning) next day opened an academy at Illyria, four miles from Elysium. Without being solicited many of Madame Charleston's pupils flocked to Miss Tango's academy thereby causing financial loss to Madame Charleston.

Madame Charleston claims from Miss Tango :—

(a) An Injunction restraining Miss Tango from carrying on the profession of dancing mistress within the limits imposed by the apprenticeship agreement until the 31st December, 1928.

(b) Five hundred pounds (£500) damages assessed as :—

(a) £200, Special, Loss of Pupils ;
(b) £300 General.

Judge : P. B. Cooke, Esq.

Rogers for plaintiff.

There is some consideration for Miss Tango's covenant. The law does not enquire into the adequacy of the consideration. **Morris v. Saxelby** (1914) 1 A.C. 688 at p. 707 ; **Attwood v. Lamont** (1920) 3 K.B. 571 at p. 589.

The Court must consider the question of reasonableness as at the time the agreement was entered into and disregard subsequent events : **Putsman v. Taylor** (1927) 1 K.B. 741.

Hay in support :

The test of reasonableness is laid down in **Horner v. Groves,** 7 Bing 735. The restraint is no larger than is necessary for the protection of the trade connection of the plaintiff : **Dewes v. Fitch** (1920) 2 Ch.D. 159.

There was no oppression of the defendant as she was not in need of the position at the time of entering into the covenant.

The claim for special damages was at this stage abandoned by counsel for plaintiff.

Dalgish for defendant :

No question of trade secrets is involved in this case.

The plaintiff was not entitled to ask for more than that her old customers should not be enticed away by the defendant.

This restraint is unreasonable in respect of distance.

An employer cannot enforce a covenant which will prevent the employee from earning a livelihood after leaving the employ. **Attwood v. Lamont.**

Todd in support :

A covenant to restrain an employee is *prima facie* invalid. Kerr on Injunctions p. 433.

There can be no infringement of proprietary rights unless the clients are being enticed away : **Morris v. Saxelby.**

Rogers in reply :

JUDGMENT : The mutual obligations in this contract of apprenticeship—on the part of the apprentice to serve and on the part of the master to teach—are sufficient consideration for the promises of the parties.

No objection can therefore be made on ground of want of consideration.

By opening the academy Miss Tango clearly committed a breach of the covenant if the covenant was a valid one and the sole question is whether the covenant is invalid as being in unreasonable restraint of trade.

The great landmark is Lord Macnaghten's judgment in **Maxim-Nordenfelt Co. v. Nordenfelt** (1894) A.C. 535, the effect of which is that a restraint to be good must be : (a) Reasonable in the interests of both parties ; (b) Reasonable in the interests of the public. In applying these tests there is a most important distinction between covenants in contracts made on the sale of the goodwill of a business and covenants in contracts of service. This distinction is emphasised by the House of Lords in **Maxim's case** and in **Morris v. Saxelby.** The distinction is very clearly put by Younger L.J. in **Dewes v. Fitch** (1920) 2 Ch. 159 at pp. 185-186 which afterwards went to the House of Lords. It is necessary to consider the whole of the circumstances of the case including the nature of the occupations the area in which the customers of the plaintiff are to be found, the space of the restriction and the time of the restriction. Considering all the circumstances this covenant is reasonable in the interests of the parties and of the public.

Injunction granted and plaintiff awarded £25 general damages with costs on the lowest scale. Claim for special damages abandoned.

Judge's remarks : The arguments of counsel were based on the principles established by the cases and were clearly and concisely presented. Counsel had obviously devoted considerable time and thought to the matter.

Mr. Scott, who acted as Registrar for the evening, proposed a hearty vote of thanks to Mr. Cook.

BENCH AND BAR.

FAREWELL TO MR. JUSTICE STRINGER.

Probably the largest gathering of the Bar that has been seen in Auckland was witnessed at the Supreme Court on Thursday last, when the members of the legal profession attended to bid farewell to His Honour Mr. Justice Stringer on his approaching retirement from the Bench. So large was the attendance that not merely the body of the Court, but jury bench, press desk, and even the dock was filled with barristers in wig and gown.

Mr. J. B. Johnston, President of the Auckland District Law Society, spoke on behalf of the members.

They had gathered there to meet His Honour, in what they could not regard in any sense as a happy occasion, to say goodbye. At the same time they wished to express regret that the time had arrived for the termination of his office and to pay a tribute to the valued services His Honour had rendered during the time he had held the position of a Judge of that Court.

Appointed to the Supreme Court Bench in 1914, His Honour had come to Auckland in 1921, little known to many of them, but after some six or seven years among them they felt that in his going they were parting with an old and revered friend.

" When you came to the Bench," continued Mr. Johnson, " you brought with you a rich experience in the practice of the law and what was equally, if not more important, a keen knowledge of human nature and an understanding of human life. Upon these qualities you brought to bear an essentially logical and judicial mind. Your judgments have been marked by strict impartiality, careful thought, and," he added, " when the law would permit, sound common sense."

In dealing with the criminal class both as a judge and as Chairman of the Prisons Board, His Honour had ever tempered justice with mercy.

His Honour had endeared himself to the members of the Bar, and had gained the confidence not only of them, but also of the community at large.

Their kindest thoughts and memories would go with him, their confidence and esteem would remain and their fervent wish that God in His mercy might grant him many years of life, full of health and happiness and that peace of mind that comes from duty nobly done.

His Honour, who was deeply moved, said he found it difficult to express his thanks for the kindly words. Their appreciation was very gratifying to him. Although he was within a few days of the retiring age, it appeared to be the opinion of the members of the Bar that he had not lagged superfluous on the judicial stage, but could still perform the duties of his high office with faculties, such as they were, unimpaired.

He would like to say that to a large extent the success he had had as a Judge in deciding important civil cases had been largely the result of the assistance he had received from the Members of the Bar. If a case was well presented, and well argued, as it usually was here, it was an immense assistance to the Judge. He had done his best to live up to the standard of his judicial oath—to do right to all manner of people according to the law of the land.

In wishing them farewell, he hoped that though he may cease to be a Judge he would ever continue a member of the legal profession. He would always take the deepest interest in their welfare and he wished them every happiness and prosperity.