New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"I remember one fortnight [in the Privy Council] within which, towards the end of my time, beginning with a case of Buddhist law from Burmah, I went on to argue successively appeals concerned with the Maori law of New Zealand, the old French law of Quebec, the Roman-Dutch system of South Africa, the Mohammedan law and then the Hindu law from India, the custom of Normandy in a Jersey appeal, and Scottish law in a case from the North."

—*Haldane, L.C., (Autobiography).*

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Consolidation of Native Land Law.

When the late Sir John Salmond was appointed to the Supreme Court Bench, he remarked that not the least gratification afforded by his elevation to the Judiciary was the thought that he would not again be asked to consolidate the statutes relating to Native land. This task he had accomplished in 1909, with the care and lucidity for which he is remembered in all his achievements.

In the past twenty-one years, changing conditions affecting the Native race have necessitated at least one annual addition to the legislative enactments relating to Native land titles. There are twenty-seven of these covering the period mentioned. Recently, the whole of the law relating to Native land was consolidated afresh, and re-enacted during the last Session. The general principles of the Native Land Act, 1909, have been retained. But various sections, which have been found superfluous owing to changing times and circumstances, have been adjusted; and sections doubtful in their application, or disclosing repetitions and inconsistencies, have been omitted. Thus, the provisions for classifying land which is now affected by the Land Act have been rejected. Another omission is the non-inclusion of sections dealing with the Register of equitable titles, which was not brought into being: it could only have been a duplication of the Native Land Court files, where the information would necessarily be found in a more reliable and up-to-date form.

It was provided by the Amendment Act, 1913,—the most important of the amendments of the principal Act in regard to the law relating to Native Land,—that a register of freehold titles should be kept at the Head Office of the Native Affairs Department. The idea was a good one; but the expense of putting it into effect was not justified: one complete set of titles in a district office is better than two incomplete ones wherever they may be. Moreover, the Maoris use different names to indicate the same person. This arises from their relationship to different tribes, and from descriptive nomenclature. Even in their own locality, it is difficult to identify all the names by which individual Maoris are known. This would be almost impossible at a distance, and provides a further reason for dropping from the consolidation the sections relating to the freehold register.

Another omitted provision of the 1913 Amendment Act, is that dealing with General Succession Orders. Succession to a Maori depends on so many circumstances that no general rule can safely be applied. The Maori marries more frequently than does the European; and, at death, the families by the respective wives or husbands claim inheritance according to tribal custom. Where there is issue, succession passes to the children; but, where no issue survives, complications often arise. Thus, the question may have to be determined according to the derivation of title through the male or female parent. Where such a deceased person has derived his land through gift, the succession reverts to the original donor or his next of kin. Consequently, provision for General Succession Orders is unnecessary and impracticable.

The sections in the 1913 Act relating to the submission of Native land to auction, were not well received by the Maoris who, whenever possible, like to make their own dispositions. The authority for delegation to the European Land Board of the powers of a Maori Land Board over vested land, was never used, as there was no Native land to which it could suitably be applied. The provision for the Europeanising of Maoris is retained; but it is interesting to note that it becomes entirely retrospective in effect. Since only about four applications in this regard have been made annually, the provision is treated as having served its purpose.

What seems to us a strange feature in our Native Land legislation is the inclusion of the right to succession of a child who has been legally adopted by others. The natural parents renounce all claims to such children, and they become to all intents and purposes the members of the adopting family, to the exclusion of parental ties. As the law now stands, these children share equally in such inheritance as their true brothers and sisters acquire by succession. They are similarly entitled to succession to the land of their adopted parents. This seems anomalous, and we have yet to learn the purpose of their obtaining the dual right.

As the Act was originally drafted, it would have become effective as soon as it had received the Governor-General's assent. Parliament, however, wisely postponed its coming into operation until the beginning of the present year. This left little enough time to enable the Native race, its legal advisers, and the judges and the officials administering Native land law to absorb sufficiently the contents and the effect of an Act of 180 pages, which had emerged from the provisions of twenty-eight enactments containing upwards of 1,150 sections.

The new consolidating measure represents a great amount of detailed and very useful work. In moving its first reading, Sir Apirana Ngata said that the Native Affairs Department was responsible for its compilation. This was no simple task, and the Native Minister and his Department are to be congratulated on their success. Members of the legal profession who deal with the complexities of Native titles and Maori land generally, appreciate this commendable move to terminate the "legislation by amendment" that has been so marked a characteristic of Native land law in recent years.

Changes in Company Law.

Made by the Companies Act, 1929 (England).

By T. H. Wood, LL.M. (N.Z.) LL.M. (Lond.)*

In 1928, there was passed in England an Act of 118 sections which added some new provisions to the existing law of companies and made some important amendments. It was provided, however, that, with the exception of one section, that dealing with the hawking of shares from house to house and the offering of shares for subscription or sale, the Act should not come into operation until such time as was appointed by His Majesty by Order in Council. The section referred to was to come into operation immediately on the passing of the Act. It was the contemplation of the legislators that this Act should be a temporary Act only, while the Act incorporating its provisions and amendments and consolidating the law relating to companies was being drafted and passed through Parliament.

Accordingly, in 1929, The Companies Act, 1929, was passed and came into operation, by virtue of an Order in Council passed (in accordance with sub-s. 4 of S. 118 of the 1928 Act) in November, 1929. This Act was a complete statement of the existing law as to companies.

It is proposed to deal with the various amendments and new provisions in the order in which they appear in this Act.

Alteration of Objects of a Company: With regard to the alteration of the objects of a company as set out in the Memorandum, S. 5 adds two more provisions. The alteration may be made to enable a company:

(a) to sell or dispose of the whole or any part of the undertaking of the company, or

(b) to amalgamate with any other company or body of persons.

As it was expressed in the amending Act of 1928, this was done to remove any doubt that may have existed as to the right of a company to do this. This doubt arose out of the decision *In re John Walker and Sons Ltd.* [1914] S.C. 280, where it was held that under the provisions of the 1908 Act such an alteration could not be sanctioned.

To be read with this section is S. 22, which provides that no member of a company shall be bound by any alteration in the memorandum or articles after the date on which he became a member in so far as such alteration requires him to take or subscribe for more shares or in any way increases his liability as at that date or otherwise to pay money, unless the member has agreed in writing to be bound thereby. This does not alter the law; but the section was introduced following *Biddulph and District Agricultural Society Ltd. v. Agricultural Wholesale Society Ltd* [1927] A.C. 76, and *re Wilts and Somerset Farmers Ltd.* [1928] Ch. 809 (affecting societies under The Industrial and Provident Societies Act, 1893) to prevent these decisions being applied to companies under the 1929 Act.

Use of Names: Certain provisions relating to the use of names are contained in S. 17. The Companies Act, 1908, provided only that the word "limited" should be used, and that no company should be registered with a name identical with that by which an already existing company is registered. It was also recognised that no company could use the words "Royal" or "Imperial" except with the consent of the Board of Trade. This letter was part of the Common Law. These provisions are incorporated in S. 17. In addition, a company is prohibited from using the words "Chamber of Commerce," unless it is a society promoted for commerce, etc., and may, as such, be registered without the use of the word "limited": and, in certain circumstances, from using the words "Building Society," "Municipal," "Chartered" or "Co-operative." The restrictions as to identical names, Chamber of Commerce, and Building Society, are absolute; those with reference to Royal, Imperial, Municipal, Chartered and Co-operative, require the consent of the Board of Trade. A license to use a name without the word "limited" may be revoked at any time. It is further provided that where a company registered with a name using the words "Chamber of Commerce" has such license revoked, it must within six weeks from the date of such revocation change its name to one which does not contain those words. The penalty for default is a fine of £50 for each day the default continues.

Private Companies: S. 27 deals with private companies and provides that if a company being a private company alters its articles in such a manner that they no longer include the provisions required by S. 26 to be contained therein, the company shall, from the date of the alteration, cease to be a private company and shall within a period of fourteen days after that date deliver to the Registrar a prospectus or statement in lieu of a prospectus and containing the required particulars. A default fine of £50 is to be imposed for non-compliance with this section.

In addition, a private company need not hold a statutory meeting or file with the Registrar the Statutory report.

Prospectus: Several important alterations are made with regard to the prospectus.

Minimum Subscription. Originally, the amount of the minimum subscription was to be fixed by the articles and the company could not proceed to allotment unless this stated minimum had been subscribed, or, if no such minimum was stated, until all the shares had been subscribed for. The amount so fixed could be any amount and it was often the case that the minimum fixed was far too small for the purposes of the company and the company failed for lack of early capital with which to carry on. This is remedied by fixing a definite amount as the minimum subscription. Para. 5 of the Fourth Schedule to the Act provides that where shares are offered to the public for subscription there must be stated in the prospectus particulars as to:

(1) The minimum amount which in the opinion of the directors must be raised by the issue of those shares in order to provide the sums required to be provided in respect of the following matters:

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the issue;

* Mr. Wood obtained Honours in English Company Law at the University of London, last year. The article is intended as a guide to New Zealand practitioners as to the inapplicability of some recent English decisions to our existing Company law.

(b) any preliminary expenses payable by the company and any commission payable to any person for subscribing for shares ;
(c) the repayment of any moneys borrowed by the company in respect of any of the foregoing ;
(d) working capital.

It will thus be seen that adequate provisions must be made for the company to have sufficient capital with which to commence business and so put it on a sound footing at its commencement.

Additional reports required. In addition to the existing matters which must be disclosed, certain new matters are added. If a company has been carrying on business, or, if the business to be acquired has been carried on for less than three years, the length of time during which the company or the business has been carried on must be disclosed. Certain reports must be set out. These are :

1. A report by the auditors of a company with respect to each of the three financial years immediately preceding the issue of the prospectus, and, with respect to the rate of dividends paid on each class of share. And, if no accounts have been made up for any part of the period of three years ending three months before the issue of the prospectus, a statement to that effect.

2. If the proceeds of the issue are to be applied in the purchase of a business, a report by accountants named in the prospectus as to the profits of the business for each of the said three years. The provisions relating to particulars as to Memorandum of Association, qualification, remuneration and interest of directors, names, addresses and occupations of directors, and preliminary expenses, shall not apply in the case of a prospectus issued more than two years after the company is entitled to commence business ; and not one year, as in the 1908 Act.

Abridged prospectuses may now no longer be issued. S. 35 (3) makes it illegal to issue any form of application for shares or debentures unless the form is issued with a prospectus complying with the statutory requirements. This does not apply to a *bona fide* invitation to underwrite, or in relation to shares or debentures not offered to the public.

To the section relieving directors from liability for non-compliance with the requirements of the section, in addition to the two reasons already existing, *i.e.* that the director was not cognisant of the matter not disclosed and that the non-compliance arose through an honest mistake of fact, there is added this provision : that they shall not be liable in respect of matters which were immaterial or otherwise in the opinion of the Court ought reasonably to be excused.

Allotment. No allotment, of course, may be made until the minimum subscription, as already described, has been subscribed and the sum payable on application for the amount so stated has been paid to and received by the company. A new provision is added : that for the purposes of this subsection, a sum shall be deemed to have been paid to and received by the company if a cheque for that sum has been received in good faith and the directors have no reason for suspecting that the cheque will not be paid. (The decisions in *Mears v. Western Canada Pulp Co. Ltd.* [1905] 2 Ch. 353, and *Burton v. Bevan* [1908] 2 Ch. 240, where the Court held that the words " paid to and received by " are not satisfied by the giving of a cheque until the cheque has been honoured, are no longer applicable.)

(To be continued.)

An Interesting Libel Action.

Some Personalities at the Trial.

By Inner Templar.

There has been recently discussed and decided the highly interesting libel case, Mr. Chapman, the trainer, against the Jockey Club and the *Times* newspaper. Never was a case so brimful of interest, and so fit a subject to discuss with men of our profession in New Zealand, and (forgive the sly suspicion) sporting bent : as lawyers, interested in that most thorny of all matters of law, Defamation ; as professional brethren, deeply interested in the personalities of our Courts ; and, as human beings, I have ventured to assume that the Race Course and the Race Horse exercise in your Islands the same irresistible fascination which predominates, and forever will predominate, in England.

From my earliest pupilage I had it impressed upon me that, in deed and in truth, there is no matter of litigation more beset with dangers and difficulties than this " action on the case," which is nowadays known roughly as " libel," whether in technical fact it turns upon the written word or upon slander, by word of mouth.

Only this week, I have had occasion to give warning advice which every one of you must have had to give to your client at some time or other : that such is the tendency of the law and such the tendency of the usual tribunal that, in this dispute alone, the burden is for all practical purposes upon the Defendant. We all know, and the knowledge sometimes makes us sick with apprehension, that Justification is a terribly precarious line of defence to be pursued ; and we all know the limitations of the right to apologise and mitigate, and the complexities of that everlasting question of " malice," as affecting privilege. Indeed we all are only too aware of the troubles to which the plea of privilege may give rise ; and, in short and in sum, there is only one good thing for the defendant, in libel actions, and that is Mr. Justice McCardie's ingenious expedient (invented when he was the busiest junior of his, or any other, day) the " rolled-up plea."

But above and beyond all this is the worst trouble of all : that the heart of defamation is not what the man who uttered, intended, but is what the ordinarily intelligent man who reads, gathers. And, of the many interesting matters which the case (reported in this morning's newspapers) illustrates to lawyers, perhaps the most interesting is the startling example of this trouble.

I have heard at lunch, in Hall, that the damages were inflated (if inflation you should consider there has been) by the impression in the jury's mind from the start, that the loss of the trainer's license was attributable to the defamation, and was damages resulting therefrom and to be compensated in reference thereto. This, of course, is pure fallacy ; the truth of the situation is that the damages to be remedied were those resulting from the unfortunate method of communicating the loss of the license. I was told, what I was told, in context of appreciation of Patrick Hastings, whose triumph this case undoubtedly is. Stormy browed, parchment and almost foreign-looking of face, fairly

slight in build and terribly antagonistic in method and manner, Hastings was in his element here; and it is upon his opening speech that he is said, like Shearman, K.C., of the past, mainly to depend. His openings are not always borne out by the evidence, though I do not know that you can blame a man for that; the accurate appreciation of him, in this respect, is that he strains every iota of the evidence, in his proofs, to its very utmost capacity of first effect; and for that you certainly cannot blame a man's propriety, though, in less powerful handling, it may be a reason to blame a man's wisdom. Patrick Hastings is true to his origin, a hectically brisk practice, pre-war, in the County Courts. Here a man learns to fight, and fight incessantly and hard, dealing blows upon all opponents and not pausing to estimate their aptness of probable effect. If you are a witness on the side opposite to Hastings, you are in for a battering, any old how; and that, plus no mean acumen as a lawyer and some moderate acumen as a man of the world, is Patrick Hastings, K.C. His shortcomings, hinted at in the last foregoing sentence, were drastically illustrated in his earlier failure, disastrous to his party, as a House of Commons man.

Of D. N. Pritt, K.C., who was with him, little falls to be said in the context of this case; it was hardly his type of litigation, though he was, as you will remember, in the Lord Kylsant proceedings. A man of the most remarkably shrewd ability, and a pleasantly agreeable (even faintly jovial, of the gold-rimmed spectacles type of joviality) personality, Pritt appears most to recommend himself, and his case, to the Superior Tribunals; and the time will come (mark my words) when his business will be almost entirely limited to the Best Appellate, if ever such prosperity resumes as to enable such limitations of activity again. With the leaders was Harold Simmons, as Junior: an "old hand," if he will pardon the possibly slight but really generous tribute of that expression, as from one barrister to another. After all, there is something of a game of skill about the business of common law advocacy, is there not? And there are dark horses, which are dark in the sense less that they surprise you by a suddenly brilliant performance than that they move quietly and unobtrusively all the time but always with effective speed to their objective. If you call to mind your particular "fancies," in your own "ring," and select the type going grey above the temples and markedly short of speech, I think you can see H.S. for yourself, without further words from me.

For the Jockey Club, to my mind an unsuitable choice, was leading Norman Birkett. You all know about this wild haired, yellow haired genius of an orator by now, with his prominent eyes behind their *pince-nez* and his infinitely seductive skill behind his gentle speech. And, knowing so much, you probably feel with me that his reputation is now so much that of the star performer in the less aristocratic type of case that he is not the man to have chosen to defend so eminently *elite* an institution as the Jockey Club. With him, was the most suitable of all suitable K.C.'s, the Hon. Geoffrey Lawrence, K.C., D.S.O., no longer my stable companion (since I train now on my own) and therefore fair meat for any observations I care to make!

I should say that of all who took part in this case, being all of them men of known distinction, Lawrence was the only one who fought; I am not sure about Simmons, just mentioned, or about Murphy, to be mentioned. Of course, Lawrence, being son of Lord Trevethin and probably the ablest pupil Simon ever had, is no Common Law orator, and sob-stuff is entirely beyond his reach. But he is, and looks, and will ultimately develop himself to the fullest as, judicial; and if the Jockey Club, or its advisers, had had the sense to bank upon his immeasurably impressive appearance and style and calibre of wisdom, incarnate. I do not for a moment doubt they would have saved themselves a number of thousands of pounds. Very square built, very big-headed and very deliberate, almost too moderate, in expression, it is not to be wondered at that I, and many others, can thus speak of him, defying the whole of popular estimation and experience in our comparison of him with the giants; and it will come as no surprise to anyone to see him on the Bench at a year very early in his career, considering the length of it as curtailed by the war interval. I do not hesitate to say that of all the K.C.'s taking part, he was the soundest and the one who, with a responsibility of one's own pocket concerned, would have been selected as the safest of all, with the exception possibly of Stuart Bevan.

But we must just mention the quiet, very solemn-looking but highly humorously-disposed, Murphy, before we move away from the defendants' counsel. Harold Murphy is a man of fifty, a little less or (improbably) a little more; small; Irish; very able; very quiet; with no words to waste but with plenty and plenty of brain to spare. He has one of the best Junior practices at the Common Law Bar, and all the jealousy in the world does not enable me to say that he does not deserve it. We may fitly turn from him to the Junior for the *Times*, our old friend Wilfred Lewis, the large-bodied and large-natured Welshman who, not without assistance from his own ability, has managed to walk his professional course in the most pleasant avenues; having been in the most useful chambers from the first; having pleased the Treasury in the war period (as I believe); and having there and then established such a firm foot upon the ladder of Treasury employment that, unless Providence absolutely forbade by denying the opportunity, he was bound to achieve the very top rung of any ladder which the Treasury can afford a lawyer.

Providence made a very good attempt. Giveen, the Junior to the Treasury on the Common Law side, refused to budge in any direction, it is said: and he looked like going on for ever, or at least for a period long enough to compel Lewis to abandon the prospect of succeeding and to take silk, if he was to achieve the greatness, which the war period and his subsequent development of its proceeds promised. This, perhaps, was rough justice; for, however much to be praised and reckoned a man's cleverness in putting himself in the way where good things flow, the burly (and not overwhelmingly brilliant) Lewis had really had too easy a run, or would have had, had Giveen gone in due course up to the Bench and had the succession fallen vacant immediately, Lewis had consolidated his grasp upon it. We, for all that we like him so much and so understandably (for he is an exceptionally nice fellow), could not, in comparison to our own hard struggles, have borne it. So Providence took a certain, or an uncertain, course; it kept him hanging on, and incidently working like the devil himself, to earn *ex post facto* the hold he had gained so easily; and, when patience just about began to be exhausted and

it looked as if the inevitable was not to be, Providence let go; Giveen retired; and . . . well, there is Wilfred Lewis, enjoying not only the fat and pleasant proceeds of being junior counsel in all the King's Bench Division litigation of the Crown (and Privy Council, too) which has not its own standing Junior to handle it, but also the patronage of those eminent, slightly snobbish, firms of solicitors who have, always and traditionally, made it their custom to patronise, as Junior, him whom the Crown also patronises. Only in England could such snobbery be, and openly and avowedly be; but there it is and there, as we see, is Wilfred Lewis accordingly.

There remains, of the well known men in the case, only Stuart Bevan, K.C. to mention, as leading for the *Times*. But here again, I think you need no further description from me, than you have already had, of this giant and aesthetic man, who, to his own infinite profit, combines the two so profitable reputations, that of being a most-to-be-desired lawyer (to argue with My Lords) with that of being a most-to-be-desired advocate (to manage the jury). That the same man ever has in perfection combined, or ever will or ever can so combine the two abilities, I shall always refuse to believe, at least in the matter of absolute perfection; but there are those, who in their numbers believe that the combination is possible and even necessary; and so Bevan does a roaring trade before both types of tribunal. He is wonderfully engaging, wonderfully appealing and wonderfully learned; but I venture to fancy that, good as he is, he falls short of the very best and that this is the real reason why he has been able to combine the two reputations. If he was absolutely and utterly first class at either function, he could not possibly be utterly and absolutely first class at the other, in the very nature of things; for there are some qualities which a Judge must have and a jury cannot stand, which a Judge cannot stand but which a jury must have, if there is to be first class perfection.

And so Mr. Chapman gets his £16,000 or at least £500 down and the fair prospect of holding any judgment resulting from a trial presided over by that horse-sensible Judge, Horridge, J.

A new story of Want, Q.C.—Here is a story of "Jack" Want, Q.C., formerly Attorney-General of New South Wales, which is new to me. At 9.15 on a certain morning his clerk came to the office of a very well known Sydney attorney and said: "Jones and Brown will be on at ten o'clock, and Mr. Want told me to come to get the cheque for his fee." "Oh, that's all right, tell Mr. Want he needn't trouble about that—he knows me," replied the attorney. The clerk left but presently returned with the same message. "Didn't you tell him what I said—that the cheque will be all right and that he knows me well enough?" "Yes I did," said the clerk, "and he said that's why he wanted the cheque."

—W.B.

"I like to think that there is an appeal from my judgment to the Judicial Committee, because I know that if my judgment is wrong it can be set right and injustice will be averted."

—Sir William Mulock.

Remission of Rates.

Unoccupied Furnished Dwelling-houses.

By E. C. East, LL.M.

In times like the present when applications for remission of half rates under Section 69 of "The Rating Act 1925" are numerous, it is interesting to consider the meaning of "actually vacant and unoccupied" in that Section, especially as there is no reported decision of any New Zealand Court interpreting these words. The point under discussion, as well as several other matters arising out of the same Section, could be cleared up by a Declaratory Judgment, but, of course, the amount involved in an application for remission of rates in respect of an unoccupied dwelling-house is invariably too small to warrant a practitioner advising his client to incur the expense of Supreme Court proceedings.

In England, provision is made for the remission of rates by The Public Health Act (1875) 38 and 39 Vict. C. 55 Section 211 (2). The words there used are:

> "If at the time of making any general district rate any premises in respect of which the rate may be made are unoccupied."

When applying the English decisions to a New Zealand case, this difference in wording must be borne in mind. The words "actually vacant" in the New Zealand Act must be given some meaning. The definition given by the dictionary is "empty, not filled, void of contents." This raises the interesting question as to whether the Rating Act is intended to give no relief to the "occupier" of a furnished unoccupied house.

An early case dealing with "unoccupied premises" is *Staunton v. Powell* (1867) 15 W.R. 362 (Ir.). In this case, the owner of a house in Dublin City, furnished for letting purposes, was held liable for rates in respect thereof, as well for those periods during which it was unlet as for those during which it was let. Monahan, C.J., said: "It appears to me difficult to consider as unoccupied a house filled with furniture which is open to the inspection of anyone wishing to rent same as a furnished house. It appears to me that the house is benefically occupied by the furniture for the owner's benefit; and that a house so circumstanced may be much more beneficially occupied for the entire year, though several months unlet, than a house let for the whole year as an unfurnished house." Christian, J., summed up the position succinctly by stating: "The presence of furniture has its chief bearing on the case with reference to the *animus habitandi*. . . . If a man leaves furniture in a house, or sends furniture to a house, the presumption is in favour of the *animus revertendi* or *habitandi*."

It might well be argued that the remarks of Monahan, C.J., have no application to present-day conditions, when most people are now possessed of a certain amount of furniture even though often hired on the instalment plan at so many shillings per article per week.

A case relied upon by New Zealand rating authorities in support of the contention that no relief should be given in respect of furnished dwellings is *Reg. v. St. Pancras Assessment Committee*, (1877) 2 Q.B.D. 581. The question was whether the erection of advertising

hoardings on otherwise unoccupied land constituted "occupation." The Court held it did not. Lush, J., said: "The owner of a vacant house is in possession, and may maintain trespass against anyone who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year." However, it is not always realised that this dictum is *obiter*, and had no direct application to the facts of the case.

Perhaps the most helpful decision is *Southend-on-Sea Corporation v. White* (1900) 17 T.L.R. 5, 83 L.T. 408. Where a lessee for a term of years used a shop only during the summer months, and during the remainder of the year left in the shop all fixtures and other articles (except stock-in-trade) necessary to carry on the business, it was held that he was in occupation of the premises during the time they were closed, and was liable to rates accordingly. The *ratio decidendi* was the intention of the lessee—his *animus revertendi*—there was no subletting of the shop as business was only remunerative in the summer, and the shop was kept ready for re-occupation by the lessee when and as he desired.

This decision was followed in *Gage v. Wren* (1902) 18 T.L.R. 699, 87 L.T. 271. In the case of a tenant of a boarding-house which could only be carried on profitably for a short period in the year, and the tenant at the end of the season having withdrawn most though not all of the furniture, the Court allowed no exemption. Lord Alverstone, L.C.J., said: "If the evidence before the Magistrates had been that the fittings were left for the purpose of finding a purchaser, the inference would not be that there was any evidence of occupation. But the respondent admitted that she was going back next summer. I think she had the beneficial occupation of the house the whole time, and the Magistrates ought to have come to that conclusion, and she is, therefore, liable for the whole period."

In view of the two last cited decisions, it seems established definitely in relation to New Zealand claims that a city-dweller owning a seaside or country-house which he occupies for only a short period of the year cannot claim any remission of rates under Section 69. But why should not the owner of a block of furnished flats (separately assessed for rating purposes) be entitled to relief in respect of those flats which are unlet for not less than six months of the rating year? He may have himself no intention of residing in any of the flats, yet do the above decisions preclude his obtaining that relief which is granted to his more fortunate friend who owns unfurnished houses used solely for letting purposes? The object of Section 69 is to provide relief for the ratepayer who is *unable* to make any beneficial use of his premises, and apart from the moot point whether the words of the New Zealand Section, "actually vacant and unoccupied," must be strictly construed as relating to unfurnished houses only, it cannot be said that the English authorities alone take away the right to remission of half rates in the case of all unoccupied furnished houses.

"The layman thinks that he detects a certain quality, which he misnames arrogance, in lawyers, though at sundry times and in divers manners he summons them to his rescue."

—Lord Hewart, L.C.J.

Australian Notes.

WILFRED BLACKET, K.C.

Clancy, D.C.J.—Mr. J. S. Clancy of the N.S.W. Bar who has been appointed to the District Court Bench has had six years of experience in his profession, and, except for his appearance on several occasions in defence of Communists has not attained much prominence as an advocate; but the appointment would seem to show that the members of the Caucus responsible for his appointment are quite satisfied that he will make a very satisfactory judge capable of doing good work in the District Court and at Quarter Sessions. He must not be confused with Mr. Brian Clancy who is a barrister of considerable achievement. The Council of the Bar in a feeble resolution protested against the appointment, their lack of courage in this behalf being curiously in accordance with the general public apathy regarding the doings of the Communists. To this rule however there is at least one exception for the members of the "New Guard," said to be 30,000 strong, who assert that they are ready to do great things that cannot just yet be definitely stated, and in several country towns good citizens have joined in persuading bad Communists to leave the town, and the neighbourhood thereof, but in these proceedings there has been shown an intense desire to act wholly within the law—a restraint that may possibly be highly commendable.

"**Challenge**": In the Melbourne Central Criminal Court last month a juror asked to be excused from the panel on the ground that he was "hard of hearing"—a euphemism that elderly persons are accustomed to use when they really mean that they are too deaf to be annoyed by their neighbour's gramophone. He said that he had asked to be excused from sitting as a juror in another court but as his application was refused he had held out against the other eleven jurors who wanted to convict, because, as he had not heard a word of the evidence, he did not think he could in accordance with the dictates of his conscience send the prisoner to his possibly undeserved doom. And Mr. Justice McArthur, to whom the application for exemption was made, seemed to think that the applicant would be an admirable citizen, so long as he was kept out of the jury box.

"**Capital, 10/-**": In Victoria it seems that there are some "lewd persons of the baser sort" who will pay up 10/- or even £1 if necessary in order to register a company in a name resembling the name of some foreign Company intending to start business there. Then when the foreign Company comes and wants to register in its own name, the local 10/- company will say: "What abart it?" or words to that effect. The purpose of the Victorian Bill is to prevent registration in any name closely resembling the name of any foreign company; but whether the Victorian Parliament will think the Bill worthy of the compliment of enactment has not yet been determined.

His Home Port: On p. 139 *ante*, I mentioned the decision of Mr. Justice Pike at Sydney to the effect that a sailor on an Australian warship being obliged to go to, and remain at, any port his ship might visit, and to go abroad whenever so required, could not obtain a domicil of choice upon which to found jurisdiction in divorce. This decision, *Schache v. Schache*,

Streeter, Co-re. did not commend itself to the Full Court, the unanimous judgment on appeal being that the choice of a place of residence in one State was quite compatible with his liability to go elsewhere from time to time as ordered by the naval authorities. The principle of the decision may be of wider application than was necessary to be stated in the Court's opinion, for there are an infinite number of cases where a man's employment may necessitate involuntary and lengthy absences from his home, his place of residence being the place that he goes to when there is nothing else for him to do, and no other place where he is required to go.

The H.C.L. of an M.L.A.: In the Federal Bankruptcy Court, Lloyd, Official Receiver, moved to attach a portion of the salary of Mr. Stuart Robertson, M.L.A. of New South Wales (bankrupt), for the benefit of his creditors. When payment of members was first enacted in that State its amount, £300, was said to be an allowance "by way of reimbursement" of the expenses incurred by members for their attendance at the House, and when the amount was raised to £800 the same description of its nature and purpose was retained. For the bankrupt, it was contended that the salary which now stands at about £660 was not income or other money earned but simply a repayment of out of pocket expenses paid away by the Member. Judge Lukin in his reserved decision, after consideration of the matter and some relevant authorities, rejected the contention that the "allowance" was sacrosanct, and, finding also that it was more than was required to provide for the necessities of the bankrupt and his family, made an order for £4 a week to be paid to the estate.

The Path of Reform: That "you can't make a man moral by Act of Parliament" is generally accepted as a regrettable fact; but that is no reason why judicial officers should not endeavour to make up for this inefficiency of the law; and so it was that Mr. Stevenson, S.M., of Newcastle, N.S.W., tried what he could do. Nine boys before him charged with and convicted of a series of robberies were released on probation for a period of 12 months, it being a condition that they should not attend any picture-shows during that time. If seen at any picture-show they are to be immediately brought before the Court for punishment. They are also forbidden to speak to one another; but no restriction is placed on their allowance of meat. This seems rather a pity for all the vegetarians that I know assert that the whole difference between their virtue and other people's vice is the difference between two apples and a pound of steak, ignoring the fact that fruit only was served in Paradise. Judge White recently also tried his art as a social reformer. One Eileen Earle had been convicted of consorting and sentenced to two months' imprisonment, and His Honour, upholding the conviction, bound her over for 12 months, the conditions of the recognisance being that during that term she should not visit any of her friends residing within an area bounded by Forbes Street and three other streets in the Suburb of Woolloomooloo, and so in future they will have to call upon her on her at home days if they have any reverence for "Auld Lang Syne." Which reminds me that A. C. Wylie, barrister, was once, *Coram* Judge Forbes, cross-examining a witness very closely as to certain localities in the suburb aforesaid. "You seem to know Woolloomooloo very well, Mr. Wylie," interrupted the Judge. "Not so well as to have a street there named after me," was the retort. This was not quite fair, for the street had been named after the Judge's father, who was then Chief Justice, and the place I have already mentioned twice was a fashionable suburb.

Horne v. Horne: In this case tried by Edwards, J., at Sydney, the plaintiff sued his mother as executrix for money due to him by his father's Estate for work and labour done and performed in 1924-5. The widow set up the Statute of Limitations in defence; but the plaintiff contended that, as there had been twelve month's delay in obtaining probate, time did not run during that period, and that the action was, therefore, maintainable. His Honour rejected that contention and allowed the defence.

Bench and Bar.

Mr. Justice Macrossan, Senior Puisne Judge of Queensland, is a visitor to the Dominion.

Mr. V. G. Spiller has commenced practice as a Solicitor at Christchurch.

Mr. Thomas A. Kinmont has commenced practice as a solicitor at Dunedin.

Mr. M. R. Maude has commenced practice as a solicitor at Gisborne.

Mr. Maurice W. Simes has commenced practice as a Solicitor at Christchurch.

Mr. G. A. Pollock, who for the past six years has been on the staff of Messrs. Lee Grave & Grave, Oamaru, has commenced practice on his own account at Takaka.

The firm of Kinmont, Reeves & Edmondston, Hawera, has been dissolved. Mr. Edmondston will carry on the practice under the name of Kinmont & Edmondston.

Mr. L. Phillips, formerly of Mr. A. G. Quartley's office, Auckland, has commenced practice in the Colonial Mutual Life Buildings, Queen Street.

Messrs. McLeod and Clarke have dissolved partnership. Mr. McLeod has opened an office on his own account, and Mr. Clarke has been joined in partnership by Mr. J. R. Molloy, formerly on the staff of the late Mr. F. D. McLiver.

Mr. J. R. Ray has retired from the firm of Messrs. Ray and Oliphant.

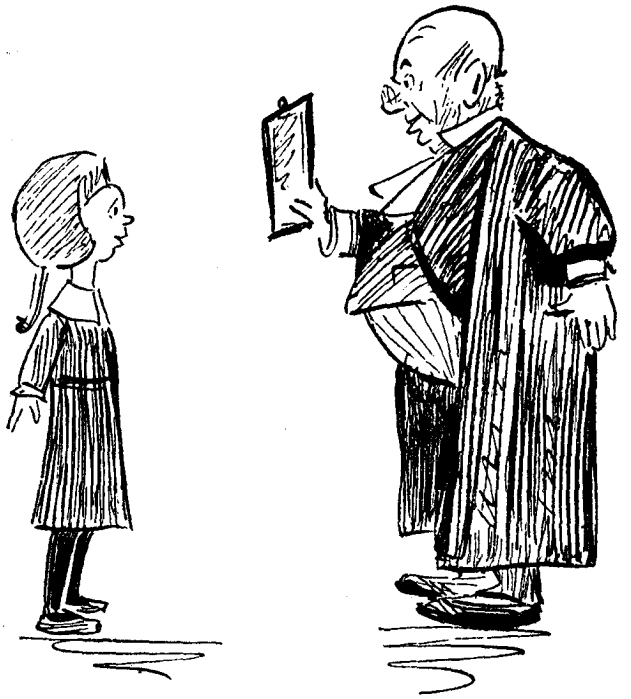
Mr. W. C. Deem has commenced practice at Inglewood in partnership with Mr. H. R. Billing, of New Plymouth, under the firm-name of Billing & Deem. For some years Mr. Deem has been Managing Clerk to the firm of Messrs. Weston & Billing, New Plymouth.

Mr. Norman F. Little, B.A., LL.M., has joined Mr. H. R. Billing, LL.B., of New Plymouth, in partnership, and their practice will be conducted in the offices hitherto occupied by Mr. Billing, who was, until lately, solicitor in the Public Trust Office for the South Canterbury District, stationed at Timaru.

Forensic Fables.

THE KINDLY JUDGE AND LITTLE EFFIE.

A Kindly Judge (of the Chancery Division) Found himself Confronted by a Difficult Problem. Was Little Effie (a Ward of Court) to go to School, or Not ? Counsel Representing Little Effie's Grandmother Contended that Little Effie, by Reason of her Nervous Temperament, was not Fitted for Contact with the Rough Companions whom she would Doubtless Encounter at the Proposed Educational Establishment. The Advocate Voicing the Opinions of the Maiden Aunt Took the Line that Little Effie was a Perfectly Normal and Healthy Child who would Derive Immense Benefit from the Discipline and Gaiety of School Life. The Kindly Judge Wisely Suggested that before Reading



the Affidavits he should Interview Little Effie in his Private Room. When Little Effie Presented herself the Kindly Judge (who was a Family Man) Found himself Attracted by her Cropped Head and her large Blue Eyes. To Put Little Effie Completely at her Ease the Kindly Judge Invited her to Try on his Wig and to Observe the Effect in his Looking-Glass. After a Pleasant Little Chat the Kindly Judge Resumed his Wig and Returned to Court. Counsel Thereupon Set to Work. "A Month Ago," ran Paragraph One of the Grandmother's Affidavit, "Effie Suffered from a Bad Attack of Ring-Worm and her Head had to be Shaved." The Kindly Judge forthwith Adjourned the Proceedings *Sine Die*, and Sent his Clerk Out for a Bottle (Large Size) of Condy's Fluid.

MORAL: *Read the Affidavits First.*

To a tedious member of the Bar who said that he would "cite only one more case and sit down," Lord Justice Mathew promptly retorted: "Good! That's a bargain!"

The Perfect Judge.

Replying to the toast of "Bench and Bar," at the Law Society's Banquet in England, recently, Lord Russell of Killowen, said that he had often been asked the most essential attribute of a member of the Bench. Was it knowledge of law ? Was it patience ? Was it a power of sifting truth from falsehood ? Was it a power of applying accurately law to facts ? These were admirable qualities, and happy was the nation whose judges possessed them all, but the one attribute which he had valued above all others was a power in the judge to send away the defeated litigant with a sense of satisfaction that his case had been heard and that his arguments had been appreciated. It was a tragedy that the defeated litigant should leave the court smarting under a sense of injustice that his case had not been properly considered and that he had been made the flint upon which to strike the feeble sparks of judicial humour.

The late Mr. Justice North, a Chancery Judge who was the embodiment of patience and accuracy, had, related Lord Russell, once delivered a closely reasoned and accurately argued judgment dismissing a plaintiff's action with costs. The plaintiff, on leaving court, had said to his solicitor, "I commenced these proceedings convinced that I was right, and determined, if necessary, to take the matter up to the highest tribunal, but that old gentleman up there has convinced me that I am wrong!" Lord Russell could imagine, he said, no higher tribute to a judge.

Correspondence.

The Editor,
"N.Z. LAW JOURNAL."

Sir,

With reference to the note in a recent issue of the JOURNAL, asking for suggested amendments, we note that the same applies to Rules and Regulations, but we would wish to draw your attention to Section 72 (5) of "The Justices of the Peace Act 1927," which provides that—

> "The informant shall not be entitled to make any observations in reply upon the evidence given by the defendant, nor shall the defendant be entitled to make any observations in reply upon the evidence given by the informant in reply as aforesaid."

It would appear to us that this provision very considerably restricts Counsel and does not enable them to place before the Court their own views of the whole case, the aspect of which may be materially changed in view of the evidence given by the Defendant and his witnesses. It is suggested that the addresses and replies should be based upon the procedure adopted in criminal trials before the Supreme Court.

Yours faithfully,

WEBSTER & KING,
per W. W. King.

Court of Appeal.

Myers, C.J.
Reed, J.
Adams, J.
Ostler, J.
Smith, J.

October 7; December 4, 1931.
Wellington.

GILMER v. ROSS.

Vendor and Purchaser—Contract for Sale with limited Guarantee of Balance of Purchase Money—Vendor entitled to exercise Remedies on Default "Without any Notice to the Purchaser or Tender of any Assurance to or Demand upon the Purchaser"—Default made in Payment of Interest and Part of Balance of Purchase Money then due—Whether Guarantor Liable for such Balance Before Proof of Vendor's readiness to make Title.

By agreement dated May 28, 1929, made between the respondent and H. J. H. Gilmer, the respondent agreed to sell and the purchaser agreed to purchase certain lands at the price of £12,084 11s. 10d., payable in three sums of £500 on the signing of the contract, £2,000 on 1st July, 1929, and the balance, amounting to £9,584 11s. 10d., on June 2, 1933. The lands were with certain other lands subject to certain mortgages to secure sums amounting to £23,350, and the contract provided that the vendor should be wholly responsible for the payment of the moneys secured by these mortgages and would indemnify the purchaser against the same. Cl. 2 of the contract stipulated that the whole balance of the purchase money should be paid on June 2, 1933. Under Cl. 4 possession was to be given and taken on July 1, 1929. Cl. 6 provided that on payment of the balance of the moneys owing on June 2, 1933, the vendor would execute in favour of the purchaser a memorandum of transfer of the lands free of all encumbrances and that a draft memorandum of transfer should be submitted to the vendor's solicitors at least 14 days before June 2, 1933.

Cls. 8 and 18 were as follows:

"8. If the Purchaser hereunder and all the Purchasers of the balance of the lands comprised in the said mortgages shall before the said Second day of June One thousand nine hundred and thirty-three pay to the Vendor all the balance of their respective purchase moneys and if at the same time the Mortgagees under the said Memorandum of Mortgage No. 117034 shall be agreeable to accept repayment of their mortgage moneys without requiring payment of any penal interest or other penalty then and in such case the Purchaser shall thereupon be entitled to the Memorandum of Transfer referred to in clause No. 6 hereof."

"18. In case the Purchaser shall make default in payment of any purchase moneys interest and other moneys payable hereunder or in the observance or performance of any of the Purchaser's obligations under this Agreement the Vendor may without any notice to the Purchaser or tender of any assurance to or demand upon the Purchaser exercise such one or more of the following remedies as the Vendor at his discretion shall think fit:

"(a) Enforce specific performance of this Agreement.

"(b) Enforce payment of all unpaid purchase money (which upon such default shall immediately become due and payable notwithstanding the due date may not have arrived).

"(c) Rescind this contract in which case the said deposit and all other moneys paid hereunder shall be absolutely forfeited as and for liquidated damages.

"(d) Rescind this contract and resell the said property either in lots or otherwise in such manner and on such terms as the Vendor shall think fit and recover from the Purchaser as liquidated damages any deficiency arising on such resale together with all costs and expenses any increase in price on such resale belonging to the Vendor. The provisions of this Clause shall also apply to the sale of the said live and dead stock and plant. If default as aforesaid shall be made in respect of either the said lands or the said live and dead stock and plant the Vendor shall also be entitled (if he shall so think fit) to exercise his aforesaid rights and remedies in respect of both the said lands and the said live and dead stock."

In consideration of the respondent having entered into the contract of sale and purchase at his request, the appellant gave to the respondent a guarantee in writing, the relevant part of which read thus: "the guarantor doth hereby guarantee to the vendor the due and punctual observance and performance of all the purchaser's agreements and conditions under the said annexed agreement" (the agreement of sale and purchase) "and the due and punctual payment of all purchase moneys under such agreement and also the payment of all losses damages expenses and costs to which the vendor may be entitled in the event of the purchaser making default under such agreement provided that the liability of the guarantor his executors and administrators hereunder shall not exceed the sum of £1,500 . . ."

Default was made in payment of the interest payable on December 2, 1930, under the contract of sale and purchase; and the respondent thereupon brought his action against the appellant to recover £1,500. At the hearing, the respondent contended that he was entitled to recover under the guarantee the whole sum of £1,500 and the defendant contended that he was liable to a demand for the interest in arrear only. It was agreed that no question of tender arose, and that the appellant was to be regarded as if he had paid into Court all interest in arrear. Mr. Justice MacGregor delivered an oral judgment against the appellant for the amount claimed with costs. This appeal is from that judgment.

Having obtained this judgment against the appellant as guarantor for the full sum for which he was liable under this guarantee, the respondent commenced another action against the purchaser for £9,094 11s. 10d., being the balance of the purchase money still unpaid. In this second action, it was arranged that the question of law: "Whether, without proof of his readiness and willingness to make title, the plaintiff can succeed?" should be argued before trial. It was so argued before Mr. Justice Blair and on July 31, was answered by the learned Judge in the negative. (See his judgment, Vol. 7, p. 259). There were thus two separate decisions by different Judges on the construction of the same contract which were in direct conflict. The judgment in the first case having been given orally, Mr. Justice Blair had not the advantage of considering the reasons on which it was based. On the other hand, the question of law decided in the second case was not argued before Mr. Justice MacGregor. The two decisions could not stand together.

Held: (dismissing appeal; Ostler, J., dissenting): *Per* Myers, C.J., Reed and Adams, JJ.: Purchaser not entitled to obtain a transfer in any event before June 2, 1933, and had no right to complain when the vendor had held him to his contract, and his agreement was within the terms of the guarantee. Appellant was to be deemed for all purposes as a principal debtor and not as a surety, subject to the limitation of the amount expressed in his guarantee, and was liable for the amount claimed. **Bank of New Zealand v. Baker** (1926) N.Z.L.R. 462, followed.

Per Smith, J.: (1) Terms of Cl. 18 effectually made unpaid purchase money due and payable immediately on any default of purchaser. Tender of transfer to be made not by vendor but by purchaser; consequently, vendor not required to execute assurance if he chose, on default, to proceed under Cl. 18 (b). Purchaser, having made default, must pay balance of purchase money and await the due date for completion provided in the contract, before he is entitled to ask for his title. (2) Guarantor liable to pay balance of purchase money immediately upon purchaser's default, independently of assurance, because under his guarantee, the Guarantor, to the extent of his liability thereunder, was a principal debtor.

Per Ostler, J., *dissentiente*: Provision that in case of purchaser's default the vendor might without tendering any assurance enforce payment of all unpaid purchase money, was insufficient to constitute an express agreement that vendor should be entitled, on purchaser's default, to recover balance of purchase-money without being able to produce a title. There were no express words in the contract indicating any agreement that purchase money should become due as a debt. Appellant was, as between himself and the vendor, a principal debtor; but, as vendor could not produce a title, he could not enforce payment of purchase money against purchaser, nor could he recover any part thereof from the guarantor. In Cl. 18, the

purchaser had merely agreed to the vendor's exercising certain powers in the event of default being made: this could not enlarge the ambit of appellant's guarantee whereby he only guaranteed the due and punctual observance and performance of the agreements and conditions to be observed or performed by the purchaser. **Parker v. Bayly** (1927) G.L.R. 265, applied; **Bank of New Zealand v. Baker** (*supra*) considered.

S. A. Wiren for appellant.

Hadfield for respondent.

MYERS, C.J., REED and ADAMS, JJ., in a judgment delivered by Adams, J., said that in their opinion the judgment of Mr. Justice MacGregor was right. The respective rights and obligations of the parties to the contract were to be determined upon the true construction of the contract of sale and the guarantee. The liability of the appellant depended upon the terms of the respective contracts, but it would be convenient to consider the contract of sale and purchase in the first place. On the construction of that contract as of all contracts, the first duty of the Court was to ascertain the intention of the parties from the words they have used. Regarding the contract as a whole and giving effect to all its provisions, it was, their Honours thought, plain that the intention of the parties was that the balance of the purchase money and the moneys secured by the mortgages mentioned in cl. 7 should become payable on the same day, and that, as the mortgages were to fall due on June 2, 1933, and this date was beyond the control of the contracting parties, the same date had been also fixed for the payment of the balance of the purchase money and completion of the transaction. This was clearly shown by the express terms of cls. 2, 6, 7, and 8. This particular date was no doubt stipulated in order to enable the respondent to avoid the expense and trouble of rearranging his mortgages or obtaining discharges on such terms as he might be able to make with his mortgagees, which might, if any other date had been selected, have involved payment of a substantial sum as a premium to each mortgagee.

In order to give full effect to this intention, cl. 18 of the contract of sale and purchase expressly provided that if the purchaser made default the respondent, "*without any notice to the purchaser or tender of any assurance to or demand upon the purchaser*," might among other things, enforce payment of all unpaid purchase money notwithstanding that the due date might not have arrived. If the provision which their Honours had just quoted had not been inserted in the contract, it might have been argued that the purchaser had the right to insist upon the completion of his title free from encumbrances contemporaneously with the payment of the purchase money; but, as it stood, any such right was negatived by the express agreement of the parties.

If that be the true construction of the contract, it was a complete answer to the argument of counsel for the purchaser in the second action that it was incumbent on the vendor to allege and prove that he was ready and willing to complete the transaction and give the purchaser a title to the lands; but as, in the second action brought by the vendor against the purchaser to recover the balance of the purchase money under the power in subclause (b) of Cl. 18 it had been held by Mr. Justice Blair in a considered judgment that the vendor was under that obligation, it was desirable to consider the grounds upon which that judgment was founded. The learned Judge had held that the plaintiff's claim for the balance of purchase money amounted to a claim for specific performance against the defendant because "the payment of the balance of purchase money would fulfil the whole of the purchaser's obligations under the contract upon the fulfilment of which he is entitled to a transfer of the property free from encumbrances." On what their Honours considered to be the true construction of the contract, however, the purchaser was not entitled to obtain a transfer in any event prior to June 2, 1933. Mr. Justice Blair said in the course of his judgment that "it is clear that an agreement for sale and purchase could be so framed as to entitle a vendor to obtain payment of the whole of the purchase money without being required to produce any title to the property he is selling, and that nowhere in the document is it expressly stated that the purchaser must pay the purchase money without any right to call for title." Further on he said: "The matter therefore resolves itself into the question whether clause (b) of the default clause . . . puts the vendor in the position that he cannot be called upon for a title till 2nd June 1933 but is nevertheless entitled to the immediate payment of the whole of the purchase money. If clause (b) had expressly stipulated that the defendant's liability immediately to pay the whole purchase money did not give to the defendant any right to call for title before 2nd June 1933, then, whatever opinion one might have of the wisdom of a purchaser's accepting such a stipulation, the point now taken by the defendant would not have been available to him."

With respect, their Honours thought that the learned Judge had failed to give any effect to the words "without any notice to the purchaser or tender of any assurance" in the first paragraph of Cl. 18 which, as they had already observed, when read, as they should be, with clauses 6 and 8, did expressly provide that, in the events which have happened, the purchaser must pay the balance of purchase money without the right on his part to call for title and he had no right to complain when the vendor held him to his contract.

Returning now to the present case, and referring to the terms of the guarantee, there could, in their Honours' opinion, be no doubt that the appellant had bound himself to "duly and punctually" pay all purchase moneys payable under the contract of sale and purchase as and when they became payable, and had guaranteed the due and punctual observance and performance of the purchaser's agreements, subject only to the stipulation that his total liability was not to exceed £1,500. Cl. 18 of the contract of sale was part of the agreement of the parties, and the words in subclause (b) "which upon such default shall immediately become due and payable, notwithstanding the due date may not have arrived"—imported an agreement by the purchaser to pay the unpaid purchase money on default, and that could be enforced by action. That agreement was clearly within the terms of the guarantee. Moreover, the appellant had agreed that, as between himself and the respondent, his position, rights and liabilities, should be those of a principal debtor in all respects. In **Bank of New Zealand v. Baker** (1926) N.Z.L.R. 462, it was held by this Court that where a guarantee provided that the relation constituted by the guarantor as between the guarantor and the creditor was to be deemed for all purposes that of a principal obligant, and not that of a surety, and that the creditor might grant time or other indulgence without affecting the security, the effect of that provision was to deprive the guarantor of all the rights. The Court went on to say that the effect of clause 6 was "to deprive him" (the guarantor) "of all the rights which as a surety he otherwise would have had. . . . That clause declared that the relation constituted between the respondent and the appellant was to be deemed for all purposes that of a principal obligant and not that of a surety. It is true that the clause then proceeded to state some of the rights of a surety which were to be excluded; but this statement, in our opinion, did not limit or control the generality of the earlier words. . . ." This decision was directly applicable to the present case, and it followed that in the present action the appellant must be regarded as a principal debtor and not as a surety, but subject of course to the terms of the guarantee itself.

In their Honours' opinion, the appellant was liable on the terms of the guarantee for the amount claimed, and the appeal should, therefore, be dismissed.

SMITH, J., said that two questions of construction were raised for decision upon this appeal. They were: (1) whether, without executing a conveyance to the purchaser, the respondent (as vendor) could enforce payment of all unpaid purchase money which became due and payable upon default by the purchaser under and by virtue of cl. 18 (b) of the agreement for sale and purchase; and (2), if so, whether the instrument of guarantee between the appellant (as guarantor) and the respondent (as vendor) included within its scope a guarantee of the purchaser's payment of such purchase money.

With regard to the first question the rule was conveniently stated by Salmond J. in **Ruddenklau v. Charlesworth** (1925) N.Z.L.R. 161 at p. 164: in these words . . . "The general rule, that in an executory contract for the sale of land, the vendor cannot sue for the price is excluded whenever a contrary intention is shown by the express terms of the contact. And it seems established by authority that a contrary intention is sufficiently shown in all cases in which by the express terms of the contract the purchase money or any part thereof is made payable on a fixed day, not being the agreed day for the completion of the contract by conveyance. In all such cases, the purchase money or such part thereof becomes, on the day so fixed for its payment, a debt immediately recoverable by the vendor irrespective of the question whether a conveyance has been executed and notwithstanding the fact that the purchaser may have repudiated his contract."

After setting out Cl. 18 of the agreement, His Honour said this clause was a stringent one. But the vendor was wholly responsible for the principal moneys secured by two mortgages

over the land agreed to be sold under this agreement and over other lands. The first of these mortgages secured the sum of £10,000 and the second the sum of £13,350 and both fell due on June 2, 1933. That was the due date for completion under the agreement (Cl. 6). But the vendor had sold or intended to sell other lands comprised in the aforesaid mortgages (see cls. 7 and 8) and it was, therefore, important for the vendor to secure that all purchase moneys should be duly paid by all the purchasers in order that he might give title to each by June 2, 1933. If some purchasers paid but not others, he might be unable to give title to those who had paid. The stringency of Clause 18 could, therefore, be understood from the vendor's point of view.

In His Honour's opinion, cl. 18 (b) effectually made the unpaid purchase moneys become due and payable upon any default by the purchaser. The time that they become so due and payable was "immediately" upon such default. This provision fixed a precise date for payment, and it was clear that such a date need not coincide with the due date for completion; because it arose "notwithstanding the due date may not have arrived." The "due date" there distinguished must be the due date for completion under the agreement, viz., June 2, 1933, (cl. 6). The agreement, therefore, expressly provided that the purchase money should become due and payable upon an event (default) which was in the sole control of the purchaser. This provision might, as the purchaser permitted, result in a fixed day for payment of the purchase money which might not be the due date for completion. When the purchaser allowed this to occur, the vendor might, in His Honour's opinion, recover the purchase money as a debt without executing a conveyance. This conclusion might be strengthened by the words "without tender of any assurance." But he doubted whether those words bore the weight attributed to them in the judgment of the majority of the Court prepared by Mr. Justice Adams which he had had the advantage of reading. It was not the vendor who was bound to tender an assurance to the purchaser upon payment of the purchase money. It was the purchaser who must tender it to the vendor. Moreover, those words could not apply to the first remedy in the same sense attributed to them by the majority of the Court. Obviously, if the vendor desires specific performance of the agreement, he must execute a conveyance. It seems to His Honour that the group of words used, viz., "without any notice to the purchaser or tender of any assurance to or demand upon the purchaser" protected the vendor in the commencement of his remedies; but if, pursuing those remedies, he ought to execute an assurance, he must do it. He would be required to execute a conveyance if he chose to proceed under cl. 18 (a), though he would not need to tender any assurance before commencing his action. He would not be required to execute a conveyance if he chose to proceed under cl. 18 (b); but His Honour had reached that conclusion because the clause itself showed that the unpaid purchase money might be recovered from the purchaser when it became due under that claim on a date other than the due date for completion, and, when such was the case, authority showed that the purchase money might be recovered without the execution of a conveyance. The purchaser in the present case having made default, must pay (if he could) and then wait for his title until the due date for completion under clause 6 or until a date for completion was reached under clause 8.

The second question was whether the instrument of guarantee made the guarantor liable for such a payment of purchase money when it became due and payable under cl. 18 (b).

Under cl. 2 (d) of the agreement for sale and purchase it was provided that the payment of £2,000 on July 1, 1929, and the whole balance of the purchase money on June 2, 1933 and the observance and performance of *the purchaser's agreements* under the said agreement for sale and purchase should be guaranteed by the appellant provided that his guarantee should not extend beyond the sum of £1,500; and also that the guarantee should be in the form attached. The guarantee in its attached form witnessed (*inter alia*) "that in consideration of the vendor entering into the annexed agreement for sale and purchase with Hamilton John Herbert Gilmer of Wellington Sheepfarmer as purchaser at the request of the guarantor, the guarantor doth hereby guarantee to the vendor the due and punctual observance and performance of all the purchaser's agreements and conditions under the said annexed agreement and the due and punctual payment of all purchase money under such agreement and also the payment of all losses damages expenses and costs to which the vendor may be entitled in the event of the purchaser making default under such agreement."

His Honour's view of cl. 18 (b) of the agreement was that it contained one of the purchaser's agreements in the sense in which the word "agreements" is used in clause 2 (d) of the agreement for sale and purchase and also in the clause which he had quoted from the guarantee, although this particular agreement only becomes operative through the action or inaction of the purchaser in making or permitting a default. This characteristic added an additional sense in which this particular agreement was one of "the purchaser's agreements" because its operation was conditional, upon the purchaser's action or inaction. This view might give some meaning to the word "conditions" occurring in the guarantee.

Having regard to the dependence of the agreement for sale and purchase on the guarantee, His Honour thought the guarantee of "all the purchaser's agreements and conditions under the said annexed agreement" included the agreement under cl. 18 (b) to pay the balance of the purchase money immediately upon default independently of conveyance. The words just quoted were not, he thought, synonymous with the words: "In case the purchaser shall make default . . . in any of the purchaser's obligations," occurring at the beginning of cl. 18. The word "obligations" there referred to the purchaser's liabilities prior to default. Similarly, he thought the guarantee of "the due and punctual payment of all purchase money" was not limited to the payment of purchase money falling due under the agreement apart from default, likewise referred to at the beginning of cl. 18. That construction was in harmony with the provision of cl. 2 (d) of the agreement for sale and purchase (annexed to the guarantee) which provided for a guarantee not only of the payment of purchase money on fixed days, but also of the observance and performance of *the purchaser's agreements* under the agreement for sale and purchase. He thought no reliance could be placed upon the words "due and punctual" occurring in the guarantee as indicating a limitation of the guarantor's liability to obligations arising apart from default. The point was not taken in argument. He thought that those words were necessarily controlled by the subject matter to which they referred. They, therefore, meant in relation to cl. 18 (b) that the guarantor guarantees that the purchaser would duly and punctually pay the purchase moneys which immediately became due and payable upon default. Such payment would constitute due and punctual observance and performance of one of the purchaser's agreements, or would constitute the due and punctual payment of purchase money and so discharge the obligation of the guarantor in that respect.

What then was to be said of the last clause of the guarantee, viz., "the payment of all losses damages expenses and costs to which the vendor may be entitled in the event of the purchaser making default," His Honour asked. Ought it to be construed so as to express the only liability of the guarantor in the event of default by the purchaser and so modify the construction of the preceding clauses of the guarantee. He thought not. The words of the last clause cannot include purchase moneys, but it is clear that the purchaser was not limited to his remedy under cl. 18 (b). "Damages" arose, in terms, if the remedy under cl. 18 (d) were pursued. "Losses" is a general word. It might apply to the consequences of various defaults, e.g., the failure to insure, cl. 14. No difficulty could arise with regard to the words "expenses and costs." Without in any way purporting to state the extent of the application of the words "losses damages expenses and costs," it was clear that they can have a definite application to circumstances arising upon default, without limiting what was, he thought, the natural construction of the first two clauses of guarantee as clauses including within their scope purchase moneys which become payable upon default. Effect must then be given to that construction. To the extent of his liability the appellant was liable as a principal debtor. The appellant was, therefore, liable as a principal debtor to the respondent, as vendor, to the extent of £1,500, in respect of the purchase moneys falling due upon default. The vendor was bound to apply the moneys received as purchase money, and the purchaser's interest in the property would be increased thereby.

In His Honour's opinion, the appeal must be dismissed.

OSTLER, J., for reasons summarised in note of judgment (*supra*) considered the appeal should be allowed.

Appeal dismissed.

Solicitors for appellant: **Wylie and Wiren**, Wellington.

Solicitors for respondent: **Hadfield and Peacock**, Wellington, agents for **Carlile, McLean, Scannell and Wood**, Napier.

Supreme Court.

Reed, J. November 11; December 7, 1931.
Wanganui.

C. P. AND C. S. BROWN v. ASSOCIATED BRITISH N.Z. MOTORS LTD. AND N.Z. GUARANTEE CORPORATION LTD.

Solicitor—Costs—Claim for Lien on Bearer Debenture in favour of Client Company held by Solicitors—Later Debenture prepared by them to give Third Party a floating charge covering (*inter alia*) former Bearer Debenture—Whether Professional Lien thereby waived—In Liquidation Proceedings of Client Company, Solicitors put in Proof of Debt for costs—Whether Lien Thereupon Lost—Bankruptcy Act, Ss. 204, 246,—Winding-up Rules 23-31.

Action brought by the plaintiff solicitors praying a declaration that they are entitled to a lien for the amount of their Bill of Costs over a certain debenture in their hands as solicitors for the first-named defendant company. That company, being in liquidation, and having no assets, did not defend, but the second-named defendant company, claiming that it was entitled to the benefit of the said debenture, disputed the right of the plaintiffs to any lien thereon. The facts were somewhat complicated owing to the financial expedients adopted by a succession of companies, coupled with various changes in the names of those companies, and are referred to in the judgment.

Held: (a) Debenture given to client Company was not in nature of a deed of mortgage prepared by Solicitors for mortgagor and mortgagee and retained in mortgagee solicitors' possession, thereby preventing lien against deed for mortgagor's costs owing. Debenture given by Company, being in nature of floating-charge, would not prevent realisation of debenture given to and held on behalf of client Company at any time in ordinary course of that Company's business. On this ground lien not waived; (b) On facts, no election by Solicitors to take benefit of liquidation to exclusion of right of lien, by delivery of bill of costs to liquidator in response to his advertisement; (c) Plaintiffs did not lose lien by having taken an unenforceable "security" for costs from client Company; on facts, the security taken was not inconsistent with their general lien. Judgment accordingly, declaring Plaintiffs entitled to a lien as against debenture given to client Company, to secure costs to such sum as should be found on taxation to represent professional charges properly chargeable against client Company.

W. J. Treadwell and **Haggitt** for plaintiffs.
Bain for the Guarantee Corporation.

REED, J., said that in all the transactions, the first-named plaintiff, Mr. C. P. Brown, had been a prominent participant. The story started with the formation of a company named "The Chrysler Sales and Service Station (Wanganui) Limited." The plaintiffs were solicitors to the company, the capital of which was £20,000 in £1 shares of which C. P. Brown held 19,999, the other share being held by one Nairn. The shares in Brown's name were held in trust for three persons, D'Arcy, Phillips, and McNab, Brown having an inappreciable interest. This company on August 26, 1927, borrowed from the second-named defendant the sum of £3,000 for which it gave as security six £1,000 bearer debentures, which were prepared by the plaintiffs in their capacity as solicitors to the company. The resolution to borrow this money and to give those debentures was duly entered in the minute book of the company and was signed by the only two registered shareholders, C. P. Brown and Nairn. Those debentures are also signed by the same persons. The company purported to charge with the payments "its undertaking and all its property whatsoever and wheresoever situate both present and future including any uncalled capital and goodwill."

On August 28, 1927, the abovenamed D'Arcy and Phillips entered into a Deed guaranteeing to the second defendant the due payment of the moneys secured by those debentures. The plaintiffs acted as solicitors for D'Arcy and Phillips. In the following year, that is to say on May 11, 1928, the Chrysler Company changed its name to "Arcade Motors Ltd." (by which name His Honour hereinafter referred to it). This company towards the end of 1929 sold or transferred the greater part of its undertaking to a company called Kingsway (Wanganui) Limited, a company for which the plaintiffs also acted as solicitors. This company by resolution of September 9, 1930, changed its name to "Associated British N.Z. Motors Ltd." (the first-named defendant) for which the plaintiffs continued to act as solicitors. For brevity, His Honour proposed to refer to that company as the first-named defendant. The Arcade Motors Ltd. having parted, as he had said, with the greater part of its undertaking, pressure was brought to bear, by the second-named defendant, upon Arcade Motors Limited, and the beforementioned guarantors D'Arcy and Phillips, to obtain security from the company that had acquired those assets and apparently had not paid for them. As had been previously stated, D'Arcy and Phillips were beneficial owners of the largest proportion of the shares in Arcade Motors Ltd., but their names did not appear on the register. On the other hand, both in Kingsway (Wanganui) Ltd. and in the first-named defendant company they were directors, D'Arcy being chairman. It is perfectly clear that a debenture which had been given by the first-named defendant in favour of Arcade Motors Ltd. for £3,000 was for the express purpose of securing the amount owing to the second defendant by Arcade Motors Ltd., and which had been guaranteed by D'Arcy and Phillips. The plaintiffs acted throughout in all these transactions, including the preparation of the £3,000 debenture. This debenture was executed on December 16, 1930, and purported to be secured by way of a floating charge on the company's undertaking, excluding land and buildings and uncalled capital. Included, therefore, in the security was a bearer debenture for £1,444 executed on November 3, 1930, by a firm named W. B. Alexander & Co. Ltd. and delivered to the first-named defendant in respect of the purchase of certain electrical equipment. The plaintiffs had the custody of this last-mentioned debenture as solicitors for the first-named defendant, and it was in respect of that debenture that a lien was claimed by the plaintiffs for costs owing to them by the first-named defendant. His Honour said he had recited these facts at length as one of the defences of the claim of a lien was that the conduct of the plaintiffs and their connection with these various transactions prevented a lien attaching; that in law there had been a waiver.

No doubt the plaintiffs had been fully conversant with all the circumstances of these various transactions but there was no suggestion of any improper conduct in the legal assistance given in carrying out these involved financial transactions. The only point really made was that in preparing the £3,000 debenture of December 16, in favour of the second defendant and which was a floating charge covering *inter alia* the £1,444 debenture, then in the hands of the plaintiffs, they had thereby waived any lien they had on the last-named debenture. If a solicitor acted for both mortgagor and mortgagee in the preparation of a mortgage deed and retained the deed in his possession, he had no lien on the deed, as against the mortgagee, for costs owing to him by the mortgagor. **In re Snell,** L.R. 6 Ch. D. 105. If in the present case the plaintiffs had prepared a debenture or mortgage specifically pledging this debenture, His Honour thought that no lien would attach for costs owing to them by their client the first-named company, but the position here was different. The £3,000 debenture was a general floating charge which would not have prevented the realisation in the ordinary course of business by the first-named defendant at any time of this £1,444 debenture any more than it would have prevented the realisation of any other asset: **Brunton v. Electrical Engineering Corporation** (1892) 1 Ch. 434. In those circumstances His Honour thought that the lien had not been waived.

It was further contended that the lien has been lost by the plaintiffs' putting in a proof for their bill of costs in the liquidation proceedings of the first-named defendant. That company went into voluntary liquidation on February 2, 1931, and Mr. R. M. Finlayson was appointed liquidator. He caused to be published an advertisement requiring the company's creditors by a specified date to "send their names and addresses and particulars of their debts or claims" to him as the liquidator of the said company, "or if required by notice in writing from the liquidator, to come in and prove such debts or claims, or in default thereof they will be excluded from the benefit of any distribution made before such debts are proved." In response to that advertisement, the plaintiffs delivered their Bill of Costs to the liquidator. It was claimed by the second defendant that that constituted a proof of debt in the liquidation and that thereby any lien that might have existed was waived.

In the first instance, the advertisement distinguished between sending in a claim and proving the claim. The latter is a formal proceeding for which provision is made by rules 23 to 31 of the Winding-up Rules. To constitute a waiver of the right of lien there must be an election by the creditor to take the benefit

of the liquidation to the exclusion of his right of lien. Such an election was established by a proof of debt *simpliciter* in the liquidation, no reference being made to any security or claim of lien. In **Ex parte Hornby,** 1 Buck's Bankruptcy Cases 354, it was held that "where a solicitor who has papers in his hands relating to the bankrupt's estate, upon which he claims a lien for his bill of costs, comes in under the commission and proves his debt, such proof is equivalent to payment, and he must deliver up the papers to the Assignee." In **Ex parte Solomon,** 1 G. & J. 25, a solicitor proved in a bankrupt estate, voted in the choice of Assignee, and signed the bankrupt's certificate. Leach, V.C., ruled that the lien was gone, and he would not allow the solicitor to retract his proof because the signing of the certificate may have influenced others to sign. These were the only authorities cited in 26 **Halsbury** 820 for the proposition that a lien is discharged by proving in bankruptcy for the amount of the costs. The Court of Appeal in **West Coast Gold Fields, in re Salaman,** 75 L.J. Ch. 23, per Sterling, L.J., referring to these two cases, said: "No doubt it is true that proof deprives the creditor of any other remedy against the debtor or his estate, and in that sense proof is payment."

It was submitted by counsel for the second defendant that S. 99 of the Bankruptcy Act, 1908, applied. That section provided: "The proving or *claiming* of a debt or demand under this Act shall be deemed an election by the creditor to take the benefit of the bankruptcy with respect to that debt or demand, and any action, suit or proceedings by the creditor to recover such debt or enforce such demand shall be *ipso facto* restrained." It was sought to make that section applicable by reason of the provisions of S. 246 of the Companies Act, 1908, which provided that on the winding-up of a company "the same rules shall prevail and be observed" with regard to certain matters there set out "as are in force under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." The matters set out were: (a) the respective rights of secured and unsecured creditors; (b) as to debts and liabilities; (c) as to the valuation of annuities and of future and contingent liabilities respectively. None of these included the matter dealt with in S. 99. Moreover the Companies Act itself by S. 204 and the Rules, regulated the proof of debt in a winding-up.

It had been held that a claim, if properly made is, for certain purposes, equivalent to proof: **Forwood's Claim,** 5 Ch. App. 18. But it had never been held that for the purpose of destroying a lien the mere delivery of a Bill of Costs to a liquidator in response to an advertisement constituted an election to abandon a lien. His Honour did not think that the facts proved showed any waiver of the lien.

It was further contended by the second defendant that the plaintiffs' lien had been lost by their having taken security for their costs from the first defendant. The law on the matter was clear and might be stated in the words of the head note to **In re Morris** (1908) 1 K.B. 473. It became, therefore, a question of fact whether or not in the present case the plaintiffs had taken a security for their costs inconsistent with their general lien. The first defendant amongst its activities had dealt in Nash motor cars which they obtained from Nash N.Z. Motors Ltd., upon credit. These cars were retailed by the first defendant to purchasers who bought, *inter alia*, on hire purchase agreements supported by Promissory Notes. In or about the month of April, 1930, there being a debt of about £2,000 owing by the first defendant to the Nash Company, a certain arrangement was made between the two companies in furtherance of which a resolution was passed by the Directors of the first-named defendant company on April 14, 1930, in the following terms: "It was resolved that Mr. N. H. D'Arcy's action in discounting £993 2s. 3d. of P.Ns. with the N.Z. Guarantee Corporation and also the depositing with Mr. C. P. Brown of £2,044 of hire purchase agreements and P.Ns. as security for the Nash N.Z. Motors Ltd. car account be confirmed." Those documents were accordingly deposited with the plaintiff firm and moneys collected by them in respect of the P.N.'s were accounted for to the Nash Company. In December, 1930, the first defendant proceeded to raise new capital but abandoned the effort and paid back the capital subscribed. This was in the hands of the plaintiff firm and represented a substantial sum out of which the plaintiffs had expected to be able to obtain their costs which at that time exceeded £300. It had been so arranged. Upon it becoming necessary to return the subscribed capital the plaintiffs informed Mr. D'Arcy that they would hold the P.Ns. and proceeds after payment of the Nash Account on account of their costs. Mr. C. P. Brown said: "I claimed a lien on any moneys that came in after payment of Nash Motors." It was the arrangements then made that the second defendant claimed to constitute the taking of security by the plaintiffs, and the waiving of any lien upon the debenture for £1,444. It was contended that it was more than a lien upon the moneys that had been arranged, and reference was made to certain correspondence, which, it was claimed, proved that security had been taken.

The first question was whether or not the plaintiffs did in fact take any security for their costs. The Directors' resolution above quoted shows the purpose for which the Promissory Notes were deposited with the plaintiffs. No intention to give them as security for the plaintiffs' costs could be inferred from that resolution. It was clear that if the realisation of the Promissory Notes produced more than sufficient to settle the Nash N.Z. Motors Ltd. car account the balance would be the property of the first-named defendant, and upon that the plaintiffs would have a lien for their costs. It is true that Mr. C. P. Brown in a letter of March 3, 1931, written nearly a year after the deposit of the Promissory Notes, claimed that they were handed to his firm as security for their bill of costs. The resolution of the Directors showed the contrary. No doubt it was understood or even arranged that the plaintiffs should be entitled to retain any balance coming to the first-named defendant after satisfying the Nash Company's debt; but this was no more than the plaintiffs had the right to do without any arrangement. But to call such a transaction the taking of security was a misnomer. An examination of the cases cited in support of the statement in 26 **Halsbury** 820, paragraph 1341 that a solicitor waives his lien "where he takes a security for his costs," showed that in each case there was a definite enforceable security given. There was nothing in the general circumstances of the present case to support an inference that anything that had been done gave the plaintiffs "some special advantage which the enforcement of the payment of his costs by the exercise of his right of lien would not give." His Honour did not think, in spite of what Mr. Brown chose to call it in his correspondence, that any such security as is contemplated by the law as negativing a lien was taken in this case. On the whole, therefore, His Honour thought the plaintiffs were entitled to the declaration sought.

Judgment declaring that on August 14, 1931, the plaintiffs were entitled to a lien as against the defendants over the Debenture for £1,444 to secure the plaintiffs' Bill of Costs to such sum as should be found upon taxation to represent professional charges properly chargeable by the plaintiffs to the first-named defendant. The plaintiffs were allowed costs against the second defendant according to scale on the amount found to be due upon taxation, with disbursements, costs of interlocutory matters, and witnesses' expenses to be ascertained by the Registrar.

Solicitors for plaintiffs: **C. P. and C. S. Brown,** Wanganui.
Solicitors for defendant, The New Zealand Guarantee Corporation Ltd.: **Bain and Fleming,** Wanganui.

Ostler, J. November 18, 1931.
Napier.

HERETAUNGA DAIRY COMPANY LIMITED v. BROWNLEE.

Practice—General Appeal from Magistrate's Court—"Amount of the Claim"—Whether value of chattels and amount of damages claimed could be aggregated in estimating amount to give appellant right to appeal on fact as well as on law—Magistrate's Court Act, 1928, Ss. 2, 164.

This was a preliminary objection to an appeal on fact and law from a decision of the Stipendiary Magistrate at Hastings.

By S. 164 of The Magistrate's Court Act, 1928, it was provided that either party might appeal to the Supreme Court from a determination of the Magistrate on any matter of fact only where the amount of the claim exceeded £50. In this case, the respondent had sued the appellant for the return of 15 cows which, he claimed, had been wrongfully converted by the appellant and also for £20 damages suffered by reason of the wrongful conversion. The value of the cows as is shown in the evidence must have been at any rate more than £30, and if the value of the cows were included in the amount of the claim then the amount of the claim exceeded £50, which would give the appellant the right to appeal on fact as well as on law.

Held: "Claim" includes demand, in this case the cattle valued at more than £30 and £20 damages. Appellant entitled to appeal on matters of fact as well as on matters of law, as "amount of claim" exceeded £50.

Scannell for appellant.
Duff for respondent.

OSTLER, J., in an oral judgment, asked what was the meaning of "the amount of the claim." He saw that the word "claim" was defined in section 2 of the Act as including debt, demand, claim or damage. It therefore included a demand. What was it that respondent had demanded from appellant? Surely what he had demanded was the cattle and the £20 damages. In commencing his action by virtue of s. 68 of The Magistrate's Court Act, 1928, his first step was to fill in and lodge a plaint note, and the forms of plaint notes provided in the appendix to the Act were three. There was first of all the plaint note appropriate to the recovery of sums of money only; there was, secondly, a plaint note appropriate only to a claim for possession of premises; and, thirdly, a plaint note appropriate to the recovery of chattels, and that plaint note provided that the value of those chattels was to be included. Whether the respondent had done so or not in the present case, at any rate he ought to have done so; and, if he had done, it would have been found that he had valued the cattle at more than £30. His Honour was satisfied that the "amount of the claim" in s. 64 meant the amount of the value of the chattels which were claimed added to the amount of the damages which were also claimed. Therefore, in his opinion, the appellant had the right in the present case to appeal on matters of fact as well as on matters of law.

Solicitors for appellant: **Carlile, Maclean, Scannell and Wood,** Napier and Hastings.
Solicitors for respondent: **Duff and Averill,** Hastings.

Ostler, J. November 26; 29, 1931. Wellington.

IN RE HANNAH (DECEASED): PUBLIC TRUSTEE v. HANNAH AND OTHERS.

Will—Power of Appointment—Trust for Sale and Conversion of Defined Class of Assets with Power of Appointment Over Same to Children Exercisable by Trustees with Approval of named Counsel within Specifically Limited Time—In Default of such Appointment, the named Counsel to Appoint at Discretion and Failing such Appointment or in Event of Partial Appointment by Trustees or Counsel, the Trustees to Hold such Assets or Unappointed Part thereof in Trust for Testator's Children in Equal Shares—Counsel's Decision on all matters of Dispute or Difference to be Conclusive and Binding—Counsel Predeceasing Testator—Whether Power of Appointment now Exercisable—Whether "my estate at the date of my will" could by Republication of Will By Codicil Mean Whole of Testator's Property Acquired Down to Date of Last Codicil.

Originating summons issued by the Public Trustee as administrator of the will of Robert Hannah decd. for the determination of certain questions arising out of and for the interpretation of certain words in the will and codicils of the deceased.

The testator was an extremely wealthy man who died on June 14, 1930. He made a will on May 15, 1925, and four codicils dated respectively September 17, 1925, April 26, 1926, September 5, 1928, and September 6, 1929. His wife predeceased him, but his seven children, three sons and four daughters, all survived him, though a son and a daughter have died since. He appointed a son and two daughters his executors and trustees, but with the consent of a Judge of this Court his executors in pursuance of S. 13 of The Public Trust Office Act, 1908, appointed the Public Trustee executor, and probate of the will and codicils had been granted to the Public Trustee, who, by virtue of the Public Trust Office Amendment Act, 1913, has become the sole trustee.

The scheme of the will was, after giving certain legacies and an annuity, to devise all the residue of the estate of which the testator might die possessed and which he referred to as "my total estate" to his trustees upon trust for sale conversion and investment, and the trustees were to pay the income arising from the total estate to his wife during her life. Subject to this trust (which failed owing to his wife dying before him), the testator directed that his trustees should stand possessed of all his estate of which he should be possessed at the time of his will (which he referred to as "my estate at the date of my will" upon the like trusts for sale conversion and investment, and upon trust, after payment thereout of all mortgages and liabilities charged on or payable in respect thereof, and of the debts expenses and duties mentioned, to divide among his three sons and four daughters in the shares mentioned. J. A. Hannah was to receive only a two-thousandth part of this fund; G. A. Hannah, a one hundred and sixty-four one-thousandth part; R. W. Hannah, a one hundred and eighty-three one-thousandth part; Lilian Johnson, a one hundred and thirty-nine one-thousandth part; Kathleen Liddle, a one hundred and eleven one-thousandth part; Edith May Wiggins, a one hundred and twenty-four one-thousandth part; and Jessie Haslam, a two hundred and seventy-four one-thousandth part. It was explained at the Bar that the reason for the difference made between the children was that they had all received gifts from their father at that time of varying amounts, and that this was an attempt to treat them all equally by bringing those gifts as it were into hotchpot.

Cl. 9 of the will was in the following words: "I propose to leave signed by me a list of the assets and properties which I own at the date hereof but such list shall not form any part of this my will and shall be regarded as only for the information of my trustees *and I expressly declare* that the failure on my part to leave such list or an omission from the list of any asset or property owned by me at the date of this my will shall in no way affect my will or the construction or dispositions thereof." The testator did leave a list which showed a surplus of assets over liabilities amounting to £493,226 5s. 10d.

The will then went on to direct that the trustees should stand possessed of all property which the testator might acquire after the date of the will and of which he should die possessed (referred to as "my after acquired estate") upon the like trusts for sale and conversion and upon trust "for such of my children both sons and daughters living at my death and the children of any child of mine who shall have died in my lifetime leaving children who shall survive me as my trustees shall within eighteen calendar months from the date of my death by writing under their hands with the written approval of Charles Perrin Skerrett of Wellington one of His Majesty's Counsel, if then living, unanimously appoint in such shares and proportions and for such interests and subject to such conditions as my trustees with such approval may appoint and so that on any exercise of such power one or more of the objects of the power may be wholly or partially excluded from the appointment. *And* if no appointment shall be made under the preceding power then upon trust for such of my children both sons and daughters living at my death and the children of any child of mine who shall have died in my lifetime leaving children who shall survive me as the said Charles Perrin Skerrett shall within twenty-four calendar months from the date of my death by writing under his hand appoint in such shares and subject to such conditions as he may appoint and so that in any exercise of such power one or more of the objects of the power may be wholly or partially excluded.

"*And* if no appointment shall be made under the preceding power either by my trustees with the aforesaid approval or by the said Charles Perrin Skerrett, or if no valid appointment has been or can be made under such power then in default of appointment and so far as any such appointment shall not extend my trustees shall hold 'my after acquired estate' or the unappointed part thereof (subject to the aforesaid life interest) UPON TRUST for all my children who shall survive me in equal shares," etc.

Cl. 20 of the will provided: "*I declare* that if any dispute or difference shall arise between my trustees or between my trustees and any beneficiary under this my will as to the construction operation or effect of any of the provisions of this my will or as to any matters arising out of my will such dispute or difference shall be referred to Charles Perrin Skerrett one of His Majesty's Counsel for determination and the decision of the said Charles Perrin Skerrett in respect of any such dispute or difference shall be final and conclusive and shall be absolutely binding upon my trustees and the beneficiaries under this my will and shall not be questioned in any Court or otherwise howsoever."

Charles Perrin Skerrett, K.C., afterwards Sir Charles Skerrett, Chief Justice of New Zealand, predeceased the testator. The total estate was sworn at £557,028 3s. 2d. In all the codicils (except the second, which merely revokes a legacy), the distinction was preserved between "my estate at the date of my will" and "my after acquired estate." These were all the facts which it is necessary to mention in order to understand the questions raised in the originating summons.

An agreement has been reached on most of the questions raised, but as the interests of infants were concerned the approval of the Court was desired by the Public Trustee.

Held: Testator's reasoned intention was that the approval of the late Sir Charles Skerrett should be a condition precedent

to the validity of any appointment by the Trustees, and, consequently, the power of appointment is not now exercisable.

Rejecting a submission that the words in the will "my Estate at the date of my will" must be read to mean all the property of testator at the date of his last codicil: The doctrine of republication was not applicable, as testator had clearly indicated his intention that those words should apply to a set of circumstances existing at the date of the will, and had definitely negatived any contrary intention by retaining the scheme of the will after the date of its execution by his continuing distinct separation of assets acquired before the execution of his will from those subsequently acquired.

Rose for plaintiff.

Watson and **James** for James Alexander Hannah, Lilian Johnson, Catherine Liddle, and Edith May Wiggins.

Evans for infants and next-of-kin.

Ward for executor of Mrs. Haslam.

Parry for Jessie Hannah and her daughter.

Leary for Robert William Hannah.

OSTLER, J., said that the first question (No. 14) put to the Court in the originating summons was as follows: "Do the words 'my estate at the date of my will' as used in the will and codicils mean a sum of £493,226 5s. 10d. being the sum at which the testator in the list already referred to estimated the value of the assets owned by him at the date of the will?"

All parties agreed that this question should be answered "Yes," but that answer was subject to a submission made by counsel for some of the parties to the effect that each new codicil constituted a republication of the will as from the date of that codicil, and that, consequently, the words "my estate at the date of my will" meant the whole of the property acquired by the testator down to September 6, 1929, the date on which the last codicil was executed.

That point was argued and His Honour had considered it. For the reasons which he gave later, in his opinion this submission failed. In that case, all parties agreed to the question being answered in the affirmative, subject to the approval of the Court. In His Honour's opinion the agreement was not only a fair compromise, but it expressed the intention of the testator. His very object in preparing the list had been to fix the value of his estate at the date of his will so that he could make a fair distribution of his estate amongst his children. Question No. 1 (a) answered accordingly: "Yes."

(The answers to Questions No. 1 (b) and 4 were agreed upon by the parties and approved by the Court. Question No. 3 required no answer as a consequence of the answer to Question 1 being an affirmative one).

The second question was: "If the answers to the questions raised in clauses (a) and (b) of paragraph 1 above are in the affirmative, is the Public Trustee entitled to appropriate out of the estate of which the said deceased died possessed assets to the value as at the date of death of the said deceased of £493,226 5s. 10d. in satisfaction of the said sum of £493,226 5s. 10d.?"

The parties had all agreed that the Public Trustee should in order to constitute the estate at the date of the will first appropriate those assets which still existed in the same form as at the date of the will; next, appropriate those assets which could be traced in a commuted form; and, finally, appropriate such further assets as might be necessary to make up the total sum of £493,226 5s. 10d. In all cases, the Public Trustee was to take the value of each asset appropriated at its value as shown in the Stamp Accounts. Question answered accordingly.

The fifth question was: "Is the power of appointment mentioned in clause 10 of the will of the said deceased now exercisable?"

The parties were unable to agree on this question, and it was argued. For that reason His Honour set out in full the relevant words of Cl. 10. He was clearly of opinion that it had been the intention of the testator that the approval of the late Sir Charles Skerrett should be a condition precedent to the validity of any appointment made by the trustees. There was a good reason for such an intention, in that the trustees were three only of the seven children and the objects of the power were any one or more of the seven children including the three trustees. The testator had evidently intended, in order to prevent any suggestion of unfairness, to provide that no appointment should be valid unless first approved of by Sir Charles Skerrett, or made by him in the event of the trustees being unable to agree. He had expressed that intention in clear and unambiguous language. Were it not for the second part of Cl. 10 the matter would not be free from doubt; but the wording of the second paragraph of that clause put it beyond doubt. It provided: "If no appointment shall be made under the preceding power *either by my trustees with the aforesaid approval or by the said Charles Perrin Skerrett*," *etc.*

Those words clearly showed that there were only two alternatives in the testator's mind: (1) an appointment by the trustees with the approval; (2) an appointment by the late Sir Charles Skerrett. There was no third alternative for an appointment by the trustees without the approval referred to. The testator went on to say: "or if no valid appointment has been or can be made under such power," thus shewing that he contemplated circumstances under which the appointment could not be made. It would seem that by these words he was referring to the circumstance that Sir Charles Skerrett might not be alive to make the appointment valid. For those reasons, the answer to the fifth question was "No."

His Honour then stated his reasons for rejecting the submission that the words in the will "my estate at the date of my will" must be read as meaning all the property owned by the testator at the date of his last codicil. Counsel who argued this point relied on the doctrine of republication. The doctrine of republication of a will by a subsequent codicil was thus stated in **Theobald on Wills** (8th edn., 157): "The effect of a codicil confirming the will is, in *the absence of contrary intention*, to bring the will down to the date of the codicil and effect the same disposition of the testator's estate as if the testator had at that date made a new will, but with the alterations introduced by the codicil." There are numerous cases illustrating the principle, both before and after the Wills Act, 1837; see **Doe d. York v. Walker,** 12 M. & W. 591; **Langdale v. Briggs,** 3 Sm. & G. 346; **In re Champion** (1893) 1 Ch. 101; **In re Rayner** (1903) 1 Ch. 685; **In re Fraser** (1904) 1 Ch. 726; **In re Smith** (1916) 1 Ch. 523; **In re Reeves** (1926) 1 Ch. 351. There are also numerous cases which showed that the doctrine did not apply if the will indicated a contrary intention on the part of the testator: see **Bowes v. Bowes,** 2 Deg. & Pu. 500; **Biddulph v. Kole,** 15 C.B. 848; **Stilwell v. Mellersh,** 20 L.J. Ch. 356; **Mounteashell v. Smyth,** (1895) 1 Ir. R. 346; **In re Park** (1910) 2 Ch. 322; **In re Taylor,** 57 L.J. Ch. 430; **In re Biernstein** (1925) 2 Ch. 12. In **Jarman on Wills** (7th edn. vol. I, page 190) it was said: "And although it is true that a codicil affirming a will makes the will for many purposes to bear the date of the codicil, yet this rule is subject to the limitation that the intention of the testator be not defeated thereby. If, therefore, the testator, in making his will, obviously means its provisions to apply to a state of circumstances existing at its date, republication will not make its provisions apply to the state of circumstances existing at the date of the codicil." There was ample authority in the cases already cited to support this statement. In His Honour's opinion the testator had shown in the clearest manner that he intended the expression "my estate at the date of my will" to apply to the state of circumstances existing at the date of the will. The whole scheme of the will was based on that intention. He obviously intended to calculate the value of the property he then owned and to distribute it among his children in such a way as to give them together with what they had received approximately equal shares. He had prepared his list for that purpose. Throughout the whole will the same purpose was apparent. In every codicil (except one of no importance), he referred to the division of his estate which he had made in the will, and showed his intention to adhere to it and to make all subsequent devises in reference to it. To allow the contention would be to destroy the whole scheme of the will and to frustrate the clear intention of the testator.

His Honour thought it should be put on record that Mrs. Jessie Haslam, one of the testator's children, and a defendant in the present proceedings, having died before the hearing, an order was made by consent at the hearing joining her husband Albert Llewellen Haslam as a defendant. He was the executor and sole beneficiary under her will. He was separately represented at the hearing.

Solicitor for the plaintiff: **Solicitor to the Public Trust Office,** Wellington.

Solicitors for J. A. Hannah and others: **Chapman, Tripp, Cooke and Watson,** Wellington.

Solicitors for infants and next-of-kin: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Solicitors for Executor of Mrs. Haslam: **Brandon, Ward and Hislop,** Wellington.

Solicitors for Jessie Hannah and daughter: **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.

Solicitors for R. W. Hannah: **Bamford, Brown and Leary,** Auckland.

Legal Literature.

Supplement No. 3, 1931: Butterworth's Annotations of New Zealand Statutes.

Butterworth & Co. (Aus.) Ltd., pp. 581 + xxxviii.)

Awaiting practitioners on their resumption of work after the annual vacation was the Third Annual Supplement to the useful volumes of *Butterworth's Annotations of the New Zealand Statutes*. This commendable promptitude is all the more noteworthy from the fact that it contains annotations of Acts assented to in November 1931, and cases reported in the last week of that month.

The 1931 Volume contains just on a hundred more pages than its predecessor. A new feature has been the inclusion of references to cases noted or reported in the seven volumes of the N.Z. LAW JOURNAL, and to which no reference has been made in the other Reports. These, with the other cases referable to sections of the New Zealand Statutes decided in the period October, 1930 to October–November, 1931, have increased the index pages of the volume from twenty-six to thirty-eight, and the other pages accordingly. This addition of otherwise unreported cases is a step in the right direction and enhances the already proved value of the work.

It is interesting to examine the method employed in the *Supplement*. Volumes I and II of the *Annotations* form the basis of its utility: in the "Cases" volume, all cases reported from 1861 to 1928 are displayed under the particular section or subsection of the Statute to which they specifically refer. The *Supplement* under review is the third of its series, and it contains the cases included in its predecessor supplements as reported in the years 1929, 1930, and 1931. Herein, not only are the name of the case and its references given, but the analysis from the head-note is also set out. The references take the user of the *Supplement* directly to the N.Z. Law Reports, the Gazette Law Reports, and the N.Z. LAW JOURNAL, and, where applicable, to the Appeal Cases volume of the English Reports.

With the Statutes (1841-1928) Volume as its ground work, the *Supplement* provides a detailed summary of the enactments of the 1931 Session and the Regulations gazetted to mid-November of that year. These Acts are dealt with in an Historical Table of Sections and Rules, and by Alphabetical and Chronological Tables of General Acts and Ordinances, 1841 to 1931, as well as an alphabetical Table of Local, Personal, and Private Acts, and lists of Imperial Acts in force or Repealed and of the present position of the various Provincial Ordinances. By these means, it can at once be found whether any particular section of an Act has been repealed or re-enacted, and where, in the latter event, it may now be found.

The Reprint of the Public Acts of the Dominion, which is now passing through the hands of the Government Printer, will provide a further function for coming *Supplements* to undertake. It has been decided to keep the *Reprint* fully annotated in up-to-date manner through the pages of the annual *Supplement's* pages, including the full text of all amending legislation. Meanwhile, the 1931 *Supplement* is bigger and more useful than even its predecessors were: that alone describes its indispensability to the busy practitioner.

Rules and Regulations.

Hawke's Bay Earthquake Act, 1931. Regulations making provision regarding the contributions to be levied by the Wairoa Hospital Board from Contributory Local Authorities for the year 1931-32.—*Gazette* No. 92, December 10, 1931.

Motor Vehicles Act, 1924. Approving of a Rear Red Reflector in terms of the Motor-vehicle (Supplementary) Regulations, 1928.—*Gazette* No. 92, December 10, 1931.

Maintenance Orders (Facilities for Enforcement) Ordinance, 1923-28. Extending the provisions of the Ordinance of the Territory of Norfolk Island, to New Zealand.—*Gazette* No. 92, December 10, 1931.

Fire Brigades Act, 1926. Fixing date on which certain returns under the Act are to be furnished.—*Gazette* No. 92, December 10, 1931.

Transport Licensing Act, 1931. Orders-in-Council constituting Transport Districts in terms of the Act.—*Gazette* No. 94, December 17, 1931.

Unemployment Act, 1930. Regulations as to allowances to Members of the Unemployment Board.—*Gazette* No. 94, December 17, 1931.

Transport Licensing Act, 1931. Regulations relating to Passenger Services.—*Gazette* No. 94, December 17, 1931.

Transport Licensing Act, 1931. Declaring the "Appointed Day" for purposes of the Act.—*Gazette* No. 94, December 17, 1931.

Government Railways Act, 1926. Bylaw regulating vehicular traffic at Auckland Railway Station.—*Gazette* No. 94, December 17, 1931.

Customs Act, 1913; Board of Trade Act, 1919. Regulations relating to Export Licenses.—*Gazette* No. 95, December 22, 1931.

Customs Act, 1913. Customs (Sugar-manufacturing) Regulations, 1931.—*Gazette* No. 96, December 24, 1931.

Customs Acts Amendment Act, 1930. Altering rules of surtax on cartridges, traction-engines, and tractors.—*Gazette* No. 96, December 24, 1931.

Customs Acts Amendment Act, 1931. Applying the duties and exemptions from duty provided for in the Act, to the Cook Islands.—*Gazette* No. 96, December 24, 1931.

Public Trust Office Act, 1908. Amended Regulations.—*Gazette* No. 96, December 24, 1931.

Customs Acts Amendment Act, 1931. Exempting certain goods from Primage Duty.—*Gazette* No. 96, December 24, 1931.

New Books and Publications.

Encyclopaedia of Local Government, 1930. (Butterworth & Co. (Pub.) Ltd.). Price 57/6.

Principles of Local Government Law. By W. Ivor Jennings, M.A., LL.B. (Univ. London Press). Price 7/6.

Notable Trials Series—Court Martial of Bounty Mutineers. Edited by Owen Rutter. (Butterworth & Co. (Pub.) Ltd.). Price 9/6.

The Needs Test for Unemployment Insurance, Transitional Payment and Public Assistance. By J. H. Dearnley. (Shaw & Sons). Price 3/-.

Palmer's Company Precedents, subject to Companies Act, Part I, General Forms. Fourteenth Edition. By A. F. Topham, A. R. Taylor, M.A., and A. N. R. Topham. (Stevens & Sons Ltd.). Price 85/-.