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

" In a profession where unbounded trust is necessarily imposed, there is nothing surprising that fools should neglect it in their idleness, and tricksters abuse it in their knowledge. But it is all the more to the honour of those, and I will vouch for many, who with integrity, with skill and attention, walk honourably upright where there are so many pitfalls and stumbling-blocks for those of a different character. To such men, their fellow-citizens may safely entrust the care of protecting their patrimonial rights, and this country the most sacred charge of her laws and privileges."

—Sir Walter Scott (in " The Antiquary ")

Vol. VIII. Tuesday, March 1, 1932. No. 3

The Notification of Motor Accidents.

The extent of the obligations of motorists to report accidents is not so generally understood as it ought to be. The obligation is two-fold: first, in respect of accidents which arise from the use of a motor vehicle occurring to any person or to any horse or vehicle in charge of any person; and, secondly, in respect of any such accident involving death, or injury. In the former case, the motorists' obligations are set out in subs. 1 of s. 31 of the Motor Vehicles Act, 1924; in the latter, subs. 2 of that section and s. 11 of the Motor Vehicles Insurance (Third-party Risks) Act, 1928, both impose serious obligations on driver and owner respectively. The provisions of s. 31 (*supra*) are not as clear as they might be; and the time-limit in that section and in the 1928 Act wherein notification of serious accidents must be given, is further subject to interpretation of the word " forthwith " which is used in both enactments.

Consideration of s. 31 of the Motor Vehicles Act, 1924, shows that it contemplates an accident, which, " arising directly or indirectly from the use of a motor-vehicle, occurs to any person or to any horse or vehicle in charge of any person." It will be noted that the accident can occur through the collision of the motor-vehicle and any other vehicle, inclusive of another motor-vehicle; and, further, that it may be such an accident that no actual injury occurs to any person involved. But in any circumstance of the kind, whether or not injury has been suffered either by the motorist (or motorists) or the horse or vehicle (including motor-vehicle) in charge of *any* person, then:

> " the driver of the motor-vehicle shall stop, and if required, shall give to any constable or person concerned, his name and address and also the name and address of the owner and the registered number and the distinguishing mark or marks of the motor-vehicle."

The question arises, whether, if owing to the presence of the motor-vehicle on the road, an accident occurs to the motor-vehicle itself,—no other person being involved other than the driver of the motor-vehicle,—the accident comes within the subsection. If literally construed it appears to do so; but the Courts would probably construe it as referable only to an accident occurring by the agency of the driver of the motor-vehicle to some other person or to a horse or to a vehicle in some other person's charge. In the event of a collision or occurrence in which two motor-vehicles are involved, the subsection appears to impose the stated obligations on both of them.

There is no definition, it should be noted, of " any person concerned," but these words would necessarily be given a generous and proper interpretation. (*Cf.* the English Road Traffic Act, 1930: " any person having reasonable grounds for so requiring "). A friend of the injured would come within their meaning; but a mere casual onlooker would not be able to enforce the promptings of mere curiosity by informing against the motor-driver for not supplying him with the particulars detailed in the subsection.

Subsection (2) is as follows:

> " In any such accident involving injury to any person it shall be the duty of the driver of the motor-vehicle to render all practicable assistance, and, if the accident has not already been reported to a constable, the driver shall forthwith report the same at the nearest police-station."

Was it the intention of the Legislature to limit the words " injury to any person " to physical injuries, or not? The parallel section in the English Road Traffic Act, 1930, speaks of " damage or injury to any person, vehicle or animal." Our Act limits the injury " to any person "; but, strictly speaking, damage to his vehicle or horse is " injury " to him, and could lead to the necessity for " practicable assistance " to be rendered by the driver of the motor vehicle. Does the section require a report to a constable or the nearest police station, not only when physical injury is caused to any person, but also if damage to any vehicle or property of any person results from an accident arising directly or indirectly from the use of a motor-vehicle? We think that only the former is contemplated by the subsection.

The obligation of the driver of the motor vehicle to report an accident involving injury appears to be absolute. Either he must report it, with all required detail, to a constable at the scene of the accident, or he must " forthwith " report it at the nearest police station: if he fails to do so, he " commits an offence and is liable to a fine of twenty pounds." (Subs. 3). And, it seems, such obligation is imposed on him if he himself is the only person injured by reason of the accident. If two motorists are concerned by reason of their vehicles colliding and injury results to one or both, or to any of their passengers or to outside parties, then obligation to report forthwith seems to devolve on them severally and equally.

Moreover, in terms of s. 11 of the Motor Vehicles Insurance (Third-party Risks) Act, 1928, " on the happening of any accident affecting a motor vehicle and resulting in the death or personal injury of any person," the owner must " forthwith " notify his insurance company of the fact of such accident with all relevant particulars.

It will be seen that the word " forthwith " provides a very important feature of both of these notifications. A consideration of its implications, will be discussed later, when we will seek to define it as it is used in the above-quoted enactments.

Supreme Court

Reed, J. November 27, December 5, 1931.
Wellington (in Chambers).

RE GEORGE CASTLE LTD., AND GEORGE CASTLE AND WILLIAMSON, LTD. (BOTH IN LIQUIDATION.)

Landlord and Tenant—Distress—Company Occupying Premises—Lease to Third Party without Sub-lease or Assignment to Company—Rent paid by Company—Distraint by Lessor on Company's Goods in Demised Premises after Passing of Resolution Winding-up Company—Whether Distress Valid—Also, in respect of other Premises similarly occupied: Distraint by Landlord on Company's Goods Prior to Passing of Winding-up Resolution—Whether Valid—Whether Failure of Bailiff to Complete Statutory Form and Bill of Charges rendered Distraint Unlawful and Void—Companies Act, 1908, S. 244—Distress and Replevin Act, 1908, Ss. 11,21.

Application, under S. 226 of the Companies Act, 1908, by the liquidator to determine certain questions arising in the matter of the winding-up of the above companies. The facts, briefly, are as follows:

George Castle Ltd. was a Private Company with a capital of £4,750, of which George Castle held 4,500 £1 shares, and had been formed to carry on the business of chemists and druggists formerly carried on by Castle at Vivian Street and Courtenay Place, Wellington. George Castle & Williamson Ltd., was a Private Company with a capital of £2,000, of which the £1 shares were held equally by Castle and one Williamson, and had been formed to carry on a similar business previously carried on under the style of Fletcher's Pharmacy (Castle and Williamson) at Lambton Quay, Wellington. All the shares in both Companies subsequently became vested in Castle and his wife. The accounts of each Company were separately kept, and separate balance-sheets prepared annually. Castle was Managing Director of both Companies. Two banking accounts were kept in the same bank both in the name of George Castle Ltd., No. 1 account being utilised for the transactions of George Castle, Ltd., and No. 2 account for those of George Castle and Williamson Ltd. On March 14, 1931, and on March 27, 1931, respectively, extraordinary resolutions in identical terms were passed to wind up George Castle and Williamson Ltd. and George Castle Ltd.

George Castle and Williamson Ltd. had carried on business as a retail chemist at No. 214 Lambton Quay, Wellington, under lease from H. C. Gibbons, the Guardian Trust and Executors Co. of N.Z. Ltd., and E. J. Teasdale, the owners of the premises. The lease was held in Castle's name under Deed of Lease of September 30, 1926, to terminate on July 25, 1931, at an annual rental of £936, payable by monthly instalments. The Company had occupied the premises for some years before the execution of the Lease which Castle took in his own name but for the benefit of the Company, and there was no suggestion to the contrary. No assignment or sublease to the Company took place, but the Company paid the rent. On the lintel of the doorway of these premises, there appeared the notification: "Registered Office of George Castle & Williamson Ltd.," and on the window and front of the premises in at least two places was the name "George Castle Ltd."

On March 16, 1931, subsequently to the passing of the extraordinary resolution for the winding-up of George Castle and Williamson Ltd., the lessors of the Lambton Quay premises, by their bailiff, purported to distrain the chattels therein under the Distress and Replevin Act, 1908, for the sum of £156 being the rent due on March 1, 1931.

On March 31, 1931, at a meeting of the creditors of George Castle & Williamson Ltd. and of George Castle Ltd., the question of the landlords' distress in connection with the Lambton Quay premises (and also the question of a landlord's distress in connection with one of the shops carried on by George Castle Ltd. as hereinafter mentioned) were discussed, and with the object of allowing the liquidation of each Company to proceed without having first to determine the question in dispute in the foregoing behalf, the following arrangement with the respective landlords was embodied in a resolution of the meeting and agreed to by the liquidator; namely, "That if the landlord withdraws his distress it is hereby resolved that the proceeds of the stock are to be retained by the liquidator and the landlord's claim and expenses given preference and paid thereout so soon as such proceeds are sufficient to do so. Provided however that if the liquidator within a reasonable time from the date hereof establishes that the landlord's distraint now in operation is an illegal one, then the landlord must rank equally with the other unsecured creditors."

The distress was accordingly withdrawn, and the liquidator asked in respect of No. 214 Lambton Quay as follows:—"Whether the landlords' distress levied by Harry Clifton Gibbons, the Guardian Trust and Executors Company of New Zealand Ltd., and Emma Jane Teasdale in respect of the premises occupied by George Castle and Williamson Limited at No. 214 Lambton Quay Wellington was a valid distress entitling the landlords to distrain upon the goods and chattels of the Company in the said premises."

Held: (1) **In respect of Lambton Quay premises**: There being no privity between the Company and the landlords, he could not prove for rent in the liquidation, nor had the Court jurisdiction to let him in to prove against the Company's assets. Distress valid, and Landlords entitled to distrain upon the Company's goods and chattels. **In re Traders North Staffordshire Carrying Company,** L.R. 19 Eq. 60, and other cases mentioned in the judgment followed.

(2) **In respect of the Courtenay Place premises**: Landlord who has levied distress before commencement of winding-up, entitled to be allowed to proceed to sale unless special reasons established rendering same inequitable, and no such special reasons in present case. Nor was this distress illegal, as Landlord here had lawfully entered upon distress and had taken no further steps after receiving notification that Company had gone into voluntary liquidation. **Hickey and Co. v. Sweetapple** (1926) G.L.R., considered and disapproved.

(3) Failure of bailiff to complete form in Third Schedule to Distress and Replevin Act, 1908, or deliver Bill of Charges, an irregularity which (the distraint not being an illegal one) could be waived, and it did not make the distraint unlawful.

Hay for the Liquidator.

Buxton for Gibbons and others.

Rothenberg for Hyams.

REED, J., said that it would be observed that in this case the landlords distrained two days subsequent to the passing of the extraordinary resolution for the winding-up of George Castle & Williamson Ltd. Under S. 244 (b) of the Companies Act, 1908, where an effective resolution had been passed fo winding up a company any execution thereafter put in force against the assets of a company was void. *Ex facie*, therefore, that execution was void. The facts above stated, however, showed one of two things: either that, although George Castle & Williamson Ltd. had preserved a separate entity, it had given up activity, and the chattels were the property of George Castle, or that the chattels were in fact the property of that company, which, however, was not the tenant of the premises, the lease being in the name of George Castle. His Honour said it was unnecessary to come to any conclusion on the first alternative for the question could be decided upon the second. Whatever arrangement had existed between Castle and the Company with regard to the occupation of the premises by the latter, it was clear that there was no privity between the company and the head landlord, consequently he could not prove for his rent in the liquidation. In those circumstances, the law was clear that the distress would not be restrained: **Re Lundy Granite Coy.,** 6 Ch. App. 462; **In re Regent United Service Stores,** 8 Ch. D. 616; **In re Carriage Co-operative Supply Association,** 23 Ch. D. 154; **In re Traders North Staffordshire Carrying Company,** L.R. 19 Eq. 60. Those decisions were under S. 87 and 163 of the English Companies Act, 1862, which were in effect the same as subss. (a) and (b) respectively of S. 244 of our Companies Act, 1908. As illustrating the basis of the decisions in these cases, His Honour quoted the observations of *Jessel*, M.R., in the last-cited case, at p. 68: "It would be monstrous to hold that this section (163 *cf.* s. 244 (b) of our Act of 1908) deprived the landlord of his right to take the goods of a stranger to him, simply because the stranger was a company in liquidation, without giving him the correlative right of proving against the company's assets, and being paid *pro rata* with the company's creditors." His Honour added that the Court had no jurisdiction to let him in to prove against the company's assets: **In re Regent United Service Stores** (*supra*).

To the question asked, His Honour answered, therefore, that it was a valid distress entitling the landlords to distrain upon the goods and chattels of the Company in 214 Lambton Quay, Wellington.

It next became necessary to consider the distraint on the premises of George Castle Ltd., situated in Cambridge Terrace, Wellington. In addition to the general facts above stated the special facts applicable were as follows: George Castle Ltd. carried on the business of a Retail Chemist in three separate places of busines, namely at No. 9A Courtenay Place, Wellington, at Cambridge Terrace, Wellington, and at Vivian Street, Wellington. The premises at Cambridge Terrace were held under an Agreement to lease dated February 25, 1929, between Anthony Harper as landlord and George Castle of Wellington Chemist as tenant for a period of ten years from February 25, 1929, at a rental of £6 10s. 0d. per week increasing to £8 10s. 0d. per week as from the opening of the new Post Office Building in Cambridge Terrace, the said rental being payable by equal fortnightly payments on each second Monday. No assignment or sub-lease from Castle to George Castle Ltd. ever took place; but, from the inception of the said last-named agreement to lease, the said Company paid the rent of the said premises and the business carried on in the premises was that of the Company. The name of the Company did not appear upon the said premises in Cambridge Terrace, but the name "Boulevard Chemists" appeared thereon. On March 27, 1931, the then owner of the said premises in Cambridge Terrace namely Elias Jos. Hyams of Wellington, Merchant (being the successor in title to the said Anthony Harper) by his Bailiff T. H. Johnson purported to distrain upon the chattels in and upon the said premises for £160 3s. 0d. being the amount of rent due as on March 27, 1931. This distraint was made on the same day upon which the aforesaid extraordinary resolution for the winding up of George Castle Ltd. was passed, but was earlier in point of time than the passing of such resolution. On March 31, 1931, Hyams withdrew his distress on the footing of the arrangement before referred to.

In respect of those facts, the liquidator asked for directions as follows: "Whether the landlord's distress levied by Elias Jos. Hyams in respect of the premises occupied by George Castle Limited at Harper's Buildings Cambridge Terrace Wellington was a valid distress entitling the landlord to distrain upon the goods and chattels of George Castle Limited in the said premises.',

His Honour said it was admitted that the distress had been put in before the resolution to wind up was passed. Since 1897, the text books, 11 **Halsbury,** 178; **Foa** (6th Ed.) 587; **Redman** (8th Ed.) 504; **2 Stiebel's Company Law** (2nd Ed.) 1021; and others, have quoted as law the ruling of *Stirling*, J., in **In re Redwood Colliery Co.** (1897) 1 Ch. 373, 381, "that a creditor who has issued execution, or a landlord who has levied a distress, before the commencement of a winding-up will be allowed to proceed to sale unless there is established the existence of special reasons rendering it inequitable that he should be permitted to do so." The case went to appeal and the judgment was reversed upon another ground, but in the various judgments delivered in the Court of Appeal the above statement of the law appeared to have been accepted without question. Moreover, the Court of Appeal in **Venner's Flectrical Cooking and Heating Appliances Limited v. Thorpe** (1915) 2 Ch. 404, affirmed the decision of *Neville*, J., who, adopting the ruling of *Stirling*, J., held that the fact that the distress put in was for rent payable in advance did not render it inequitable for a landlord to proceed with a distress levied for such rent before the commencement of the winding-up. His Honour then referred to the direction of Lord *Cozens-Hardy*, M.R., in the Court of Appeal, at p. 407, with which Lords Justices *Pickford* and *Warrington* agreed. In the present case, there was no special reason rendering it inequitable that the landlord should be allowed to proceed to enforce his legal right.

The law on the matter would, therefore, appear to be clear, and this was hardly contested by Counsel for the liquidator, who, however, had stated that the liquidator found himself embarrassed by the ruling of *Alpers*, J., in **Hickey and Co. v. Sweetapple** (1926) G.L.R. 30, in which that learned Judge had held a landlord liable in damages who, after a company had gone into liquidation, sold the chattels seized under a distress without the leave of the Court being first obtained. The damages allowed would appear to have been the whole amount realised by the sale. The ground upon which the judgment was based was that, the leave of the Court not having been first obtained to the sale, it constituted an illegal distress. An illegal distress was one which is wrongful in the very commencement, that was to say, either where there had been no right to distrain, or where a wrongful act was committed at the beginning of the levy, invalidating all subsequent proceedings, **Redman Landlord and Tenant,** 535, where instances were given of what constituted an illegal distress. In **Hickey and Co. v. Sweetapple** (*supra*) with all respect for the learned Judge, the facts stated did not, in His Honour's opinion, constitute an illegal distress.

In the present case, the landlord on March 27 had lawfully entered on the distress. On the 28th, formal notice was given to the landlord by the liquidator that the company had gone into voluntary liquidation. The legal position then was that the landlord had to determine whether he would withdraw the distress or apply to the Court for leave to proceed; S. 244 (a) Companies Act, 1908. "Proceeding" included a distress: **Foa on Landlord and Tenant,** 586. He was not entitled to take any further step in enforcing the distress, but was entitled to let matters remain *in statu quo* for such reasonable time as would be required to take the necessary steps to obtain the leave of the Court, which leave, upon the authorities already cited, he would be entitled to obtain. He took no further step before withdrawing his bailiff under the arrangement before set out, which was the outcome of negotiations between the parties. At the date of such withdrawal, the landlord's distraint was not an illegal one.

The liquidator raised a further point. It appeared that the bailiff, who on going into possession had been supplied with the necessary form under the Third Schedule to comply with s. 11 of the Distress and Replevin Act, 1908, failed to complete the form or deliver an inventory or Bill of Charges, and it was claimed that this rendered the distraint unlawful and void. No doubt this was an irregularity, but that did not make the distress unlawful; s. 21, Distress and Replevin Act, 1908. It must be further noted that the furnishing of such inventory and Bill of Charges might well be held to be proceeding with the distress, which would be in breach of the statute. As already stated, the landlord was entitled to leave matters *in statu quo* in view of his right to obtain the leave of the Court to proceed. Any irregularities had been waived by the memorandum above-mentioned, the distraint not being an illegal one.

Those were the only points in question, and His Honour therefore answered to the second question that it was a valid distress entitling the landlord to distrain upon the goods and chattels of the company in the premises at Cambridge Terrace, Wellington.

Order made for costs: £7 7s. 0d. and disbursements allowed to H. C. Gibbons and his co-owners, payable out of the assets of George Castle & Williamson Ltd.; £7 7s. 0d. and disbursements to E. J. Hyams, payable out of the assets of George Castle Ltd.; liquidator's costs out of the assets of the two companies.

Solicitors for the Liquidator: **Mazengarb, Hay and Macalister,** Wellington.

Solicitors for Gibbons and Others: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Solicitors for Hyams: **W. L. Rothenberg,** Wellington.

Kennedy, J. September 22; October 15, 1931.
Christchurch.

N.Z. FARMERS' CO-OP. ASSN. OF CANTERBURY LTD. v. CANTERBURY FROZEN MEAT AND DAIRY PRODUCE EXPORT CO. LTD.

Chattels Transfer—Security over Stock—Construction—Sale Appointment of Grantee as sole and exclusive Selling Agent—Sale of Natural Increase by Grantor in Ordinary Course of Business—Whether Purchaser from Grantor acquired Good Title—Chattels Transfer Act, 1924-25, Ss. 28, 29, 50, 54; Fourth Sched., Cl. 9.

Claim for recovery of possession of certain lambs or the payment of £80 9s. 5d. in case possession cannot be had.

The grantor of an instrument by way of security affecting stock sold the natural increase thereof in the ordinary way of business to the defendant. Plaintiff, the grantee, claimed that the sale was a conversion of the stock included in its security and that the defendant acquired no title to the lambs purchased. By the instrument by way of security, the grantor assigned to the plaintiff: (a) stock and chattels mentioned in

the first schedule to the instrument—ewes, rams and wethers; (b) all stock which should at any time thereafter during the continuance of the security be depasturing or kept on the land mentioned in the schedule or any other lands during the continuance of the security belonging to, used or occupied by the grantor; and (c) all stock which at the date of the execution of the instrument or thereafter should during the continuance of the security belong to the grantor wherever the same might be depasturing or kept and all the natural increase of such stock; and (d) all the wool which should during the continuance of the security grow upon any sheep comprised or bound by the security. The security was executed on November 7, 1928, and registered on November 15, 1928.

Held: Giving judgment for defendant: That the lambs, being the natural increase of the sheep described in the Bill of Sale, were stock subject to the security. The covenant implied by Cl. 9 of the Fourth Schedule empowered the grantor to sell surplus stock in the ordinary course of business, but he was not authorised to make any other sale without the grantee's consent. By the terms of the instrument, the grantee was appointed sole agent to sell almost everything saleable on the grantor's farm: this did not negative the grantor's implied power of sale but regulated the mode of sale on which the grantor could (by virtue of the implied covenant) insist in respect of surplus stock. Although the instrument restricted the grantor by giving the grantee the exclusive right to sell, the purchaser from the grantor would get a good title. The sole agent's remedy was against the grantor for damages for breach of contract.

Gresson for plaintiff.

Loughnan for defendant.

KENNEDY, J., said that the Chattels Transfer Act, 1924-25 (Reprint) s. 29 provided that an instrument comprising stock should, unless the contrary be expressed therein, be deemed to include (a) stock comprised therein as provided by s. 28, that is stock described or referred to therein or in the schedule thereto by some brand, ear-mark or other marks or so referred to by sex, age, name, colour or other mode of description as to be reasonably capable of identification; (b) the natural increase of such stock; and (c) all stock of the class or classes comprised in the instrument the property of the grantor branded, ear-marked, or marked as specified in the instrument or which the grantor has covenanted or agreed by such instrument to so brand, ear-mark, or mark and which after the execution of such instrument are depasturing or are at, in, or upon any lands or premises mentioned in the instrument, or the schedule thereto or any land and premises used and worked as part of the said land and premises. The grantee has the same legal property and right in all stock which by virtue of the section are deemed to be included in the instrument as he has in the stock described in the instrument or in the schedule thereto.

His Honour proceeded to say that there was no expression in the instrument that it was not to include what was referred to in s. 29. The specification that the instrument covered the natural increase of "all stock which at the date of execution of the instrument or thereafter shall during the continuance of the security belong to the grantor wherever the same may be depasturing or kept and all the natural increase of such stock" was not an expression to the contrary, negativing inclusion in the instrument of the natural increase of stock expressed to be subject to the security and referred to in paragraphs (a) and (b) firstly in this judgment mentioned. If then, as admitted, the lambs sold were the natural increase of the sheep, described in the schedule, in his judgment, they were stock subject to the security.

The instrument provided that all covenants, powers, provisions, conditions and agreements set forth in the Fourth Schedule in the Chattels Transfer Act, 1924, should be therein implied subject to such alterations and modifications thereof as were therein contained. By s. 50 of the Act it was provided that there should be implied in every instrument by way of security the covenants, provisoes, agreements, and powers set out in the Fourth Schedule thereto, or such of them as were applicable; and such implied covenants, provisoes, agreements, and powers should, subject to any modification of the same expressed in the instrument, have the same effect as if the same had been respectively set out therein at length. S. 54 of the Act provided that all or any of the covenants, provisoes, conditions, agreements, or powers set forth in the Third, Fourth, and Fifth Schedules thereto might be negatived, modified, or altered, or others might be added to them, by express words in the instrument. Clause 9 in the Fourth Schedule, which appeared under the heading "*Powers*, Covenants, *Provisions* to be implied in Instruments by way of Security over Stock," was in the following terms, namely: "That there are now depasturing on the said lands and premises all the stock herein respectively mentioned as depasturing thereon. And that the grantor will not, during the continuance of this security, without first obtaining the grantee's consent in writing, further encumber the stock for the time being subject to this security, or change the general quality, character, or description of the same, or remove the same or any part thereof from the said lands or premises, sell the same or any part thereof except in the ordinary course of business, but no sale shall be made so as to reduce the number of the stock stated in this security." In His Honour's opinion, there was power in cl. 9 for the grantor to sell surplus stock in the ordinary course of business provided that the sale did not reduce the number of stock stated in the security, but the grantor was not authorised to make any other sale except with the consent in writing of the grantee. The Bill of Sale considered by a Full Court in South Australia in **Drew and Crewes Proprietary Limited v. Bennett and Fisher Limited** (1923) 5 A.S.R. 292, was in similar terms. His Honour did not doubt that the effect of the above clause was substantially the same as that of the provision considered by the Court of Appeal in **National Bank v. Dalgety and Co.** (1925) N.Z.L.R. 250, although the wording of the implied cl. 9 was different in form from the clause there referred to. In that case *Sim*, J., delivering the judgment of the Court, said: "That power has been conferred for the purpose of enabling the mortgagor to carry on his business and to pay debts incurred in the course of carrying on that business. If in every case he had to pay the proceeds to the mortgagee it would mean a realisation of the mortgagee's security, and would put an end very soon to the mortgagor's business."

The plaintiff's contention was that this power of sale did not now exist by virtue of the operation of cls. 9 and 10 of the instrument. Those clauses in form were expressed to be covenants by the grantor with the grantee although the drafting was not wholly consistent and did not in form relate to the grant of powers by the grantee. Cl. 9 of the instrument appointed the grantee, and the grantee agreed to act as the sole agent of the grantor to effect all sales of produce and of all live and dead stock and chattels which the grantor might require or desire to sell and "all such sales shall at all times hereafter be made exclusively through the agency of the Grantee until such agency shall be determined as hereinafter provided and notwithstanding that the security intended to be hereby given shall have been released or discharged." Cl. 10 provided that the grantee might charge the grantor with all usual and customary commissions and charges upon all sales of produce and of live and dead stock and chattels "whether such sales are made as Agent of the Grantor or under the powers herein contained," and that the grantee "shall also be entitled to charge the same commissions and charges on any such sales as are made by the Grantor or by any person firm or company other than the Grantee on behalf of the Grantor as the Grantee would have been entitled to charge if such produce and live and dead stock and chattels had been sold through the Grantee as Agent for the Grantor in accordance with the provisions contained in the last-preceding Clause hereof." Then followed further provisions as to the determination of what was called "the said Agency" and "the said Agency shall not be determined by the death of the Grantor or otherwise than as expressly provided by these presents." It would be observed that cl. 9 in terms appointed the grantee of the instrument sole agent to sell almost everything saleable upon the farm although not subject to the security, as well as, in His Honour's view, natural increase of stock subject to the security, and did not appear to be exclusively or even primarily directed to the implied power of sale. Cls. 9 and 10 did not negative a power of sale, but they regulated the mode of sale. They pre-suppose a power of sale which independently the grantor covenanted should be exercised only by and through the grantee as sole agent. The implied covenant gave the grantor a right to insist on a sale of surplus stock and that right was not taken away by Cls. 9 and 10. Were the position otherwise, it might well be oppressive on the grantor and, if the grantee intended such a result—and His Honour could not, construing the instrument, think it did—one would have expected the grantee, as both the grantor and persons doing business with farmers were affected, to have provided explicitly in its instrument and not to have left it to be matter of inference. The power of sale was not conditional upon observance of the restrictions provided in cl. 9 of the instrument. Although cl. 9 of the instrument restricted the grantor just as an owner of chattels might restrict himself contractually by giving another the sole right of selling chattels—*Cf.*, **Bentall, Horsley and Baldry v. Vicary,** 47 T.L.R., 99,—yet, in either case,

if a sale were made by the grantor or owner, in breach of covenant, the purchaser would get a good title and the remedy of the sole agent was for damages for breach of contract.

It followed that in the circumstances the defendant obtained a good title to the lambs. The plaintiff's claim failed. Judgment for defendant accordingly.

Solicitors for plaintiff: **Helmore, Van Asch and Walton,** Christchurch.
Solicitors for defendant: **Izard and Loughnan,** Christchurch.

Smith, J. July 20; November 19, 1931. Auckland.

LUNDON v. AUCKLAND CITY CORPORATION.

Domain Board—No Bylaw Made, Approved or Published in respect of Depasturing of Stock and fixing Charges therefor—Contract Charging Fees for Grazing—Whether *intra vires*—**Board's Powers of Beneficial Management and Restrictive Nature of its Bylaw-making Power Discussed—Public Reserves, Domains and National Parks Act, 1928, Ss. 35, 43, 51, 52, 55, 56.**

Appeal upon a point of law from the determination of the Magistrates' Court sitting at Auckland in an action commenced by the respondent claiming the sum of £14 4s. 0d. (amended sum) due by appellant for grazing. On or about August 3, 1926, the appellant orally agreed with the respondent by its authorised agent, the caretaker of a Domain, to pay for grazing on certain land at the rate of 3s. per week in respect of a horse, and 1s. per week in respect of a pony. On or about October 28, 1928, the charge in respect of the horse was reduced to 2s. per week by agreement between the respondent (by its said agent) and the appellant. The appellant paid for the said grazing until May 28, 1929; but since that date he had paid nothing. The Magistrate found, and it was not disputed, that the amounts charged for grazing were reasonable. The piece of land over which the grazing rights were to operate pursuant to the aforesaid agreement comprises 36 ac. 1 r. 19.4 p. Of this area 23 ac. 1 r. is the Mt. Hobson Domain. The balance of 13 a. 19.4 p. is the property in fee simple of the Auckland City Council. The area of 23 ac. constitutes the Mt. Hobson Domain in respect of which the Auckland City Council was appointed, in July, 1915, by the Governor-General in Council to be the Mt. Hobson Domain Board with control of the Domain. Such area is subject to Part II of The Public Reserves Domains and National Parks Act, 1928. It was admitted that the Auckland City Council, being the Mt. Hobson Domain Board, had not made any bylaws with respect to the Mt. Hobson Domain pursuant to S. 55 and 56 of that Act.

In the Magistrates' Court, one action was brought by The Body Corporate of the Mayor, Councillors, and Citizens of the City of Auckland against the appellant to recover one sum of £14 4s. 0d. alleged to be due for the grazing of the horse and pony upon (a) land vested in the Corporation in fee simple as a Municipal Corporation, and (b) land under the control of the Auckland City Council in its capacity as the Mt. Hobson Domain Board. No technical objections to the procedure were taken in the Supreme Court.

Counsel for appellant submitted an argument which applied only to the 23 acres of Domain. He did not contest the right of the City Corporation to let the grazing on the 13 acres held by the Corporation in fee simple, and to recover amounts due to it for such grazing. The question which he raised was whether the Auckland City Council in its capacity as the Domain Board controlling the 23 acres had the power to make a contract for grazing involving the charging of fees, irrespective of its power to make a bylaw for the depasturing of stock and the fixing of charges in respect thereof.

Held: Domain Board has no power to make contract for grazing involving charging of fees, except pursuant to a bylaw made by Board, approved by Minister, and published as provided by Act. General power of beneficial management cannot include matters reserved as subjects of bylaws, and the bylaw-making power of the Board is consequently restrictive of its general powers. Accordingly, the Corporation could not recover fees charged over lands controlled by it as a Domain Board, as contract *ultra vires* as regards charging of fees in respect of same.

Sullivan for appellant.

Stanton for respondent.

SMITH, J., after relating the above facts, said that grazing contracts might or might not confer an interest in land: see **Richards v. Davies** (1921) 1 Ch. 90, 94. The contract set up in the present case appeared to be, as had been assumed in argument, an ordinary contract for agistment not conferring an interest in land. This was clearly to the advantage of the respondent, because the property in the Domain was in the Crown and the power of leasing the land comprised in the Domain rested with the Governor-General: Ss. 35 and 43 of the Act. But even in respect of a contract for grazing not involving an interest in land, a Domain Board had, in His Honour's opinion, no power to make such a contract involving the charging of fees except pursuant to a bylaw made by the Board and approved by the Minister, and published pursuant to Ss. 55 and 56 of the Act. The particular power to make such a bylaw was conferred by S. 55 (1) (d). It was not in dispute before His Honour that the words "the depasturing of stock" were sufficient to describe the grazing of horses and he accepted as correct, the view that they did.

Now, it might be conceded in favour of the respondent that the powers of management and control of the Domain conferred by Ss. 51 and 52 of the Act would give a Domain Board—apart from the express provisions of S. 55—a power to make grazing contracts not involving an interest in land, but involving the payment of a fee upon a line of reasoning similar to that followed by the Court of Appeal in **Knight and McLennan v. The National Mortgage and Agency Co. Ltd. and Ashton** (1920) N.Z.L.R. 748, provided that the Board did not so deal with the Domain as to exclude the public from the free access thereto which is secured by S. 52 (2) applying S. 22 to a Domain. But the distinction between **Knight and McLennan's case** and the present was that a specific power was here given to the Domain Board to make a bylaw for the depasturing of stock upon the Domain and the fixing of charges in respect thereof—S. 55 (1) (d)—which bylaw had no force or effect until approved by the Minister and published as provided by S. 56. No specific power was elsewhere given in the Act to the Board to depasture stock and to fix charges in respect thereof. The Board could rely only upon the general power of beneficial management conferred by S. 52 (1) (i).

In those circumstances, the control vested in the Minister showed, in His Honour's opinion, that the power to depasture stock and to fix charges in respect thereof was not comprised in the general power of beneficial management conferred upon the Board itself by S. 52 (1) (i). If it were, there would have been no object in imposing the restriction of the Minister's control. In His Honour's opinion, the general power of beneficial management could not include particular matters which were stated to be the subject of bylaws, and, as such, subject to the control of the Minister. He did not include in such particular matters the general power to provide for the preservation of order. It followed that in respect of such particular matters, the bylaw-making power of the Board was restrictive of its general powers. Such a bylaw-making power differed in its nature from a bylaw-making power which could be described as auxiliary to and in extension of the rights of a corporation as an owner, as in the case of the bylaw dealt with by *Denniston*, J., in **Mayor of Christchurch v. Shah,** 21 N.Z.L.R. 578, 583. The restrictive nature of the bylaw-making power of a Domain Board, in the respect which he had mentioned, was supported, he thought, by the authority of Lord Justice *Lindley* in his judgment in the **London Assn. of Shipowners v. London and India Docks Joint Committee** (1892) 3 Ch. 242. In that case, the defendant docks committee was, by statute, given powers of ownership in respect of certain docks. It was also given certain statutory powers including a power to make bylaws. In particular (for the purposes of the present argument) the power to make bylaws conferred by S. 83 of the General Harbours Docks and Piers Act, 1847, was incorporated in the powers of the defendant Docks Committee. By S. 85 of that Act no bylaws made under the authority of the Act except those relating to the undertakers (the defendants) or their officers or servants, could come into operation unless confirmed in the prescribed manner and if no manner were prescribed, then, until they were allowed by a judge of one of the superior Courts. *Lindley*, L.J., refers at p. 252 to the bylaw powers, but he states the general position at pp. 250 and 251 (*q.v.*).

In His Honour's opinion, the principle expressed by Lord Justice *Lindley* applied to the present case. A Domain Board might or might not be a corporation, but it was the creature of statute. It was a public body, but not a trading body. It had a general statutory power of management which would, *ex concesso*, give it the power of depasturing stock in return for fees: but the Legislature had expressly stated that the depasturing of stock and the fixing of charges in respect thereof was one of the purposes of bylaws which had no force or effect until approved by the Minister and published. The Board's power to depasture stock and charge fees in respect thereof must be referred to a bylaw made in that behalf pursuant to Ss. 55 and 56 of the Act.

It was true that S. 55 provided only that the Board "may . . . make bylaws" for the purposes specified, but that was the case with the bylaw-making power in the **London Assn. of Shipowners Case** (*supra*). S. 83 of the Act of 1847, com,menced "The undertakers may from time to time make such bylaws as they shall think fit for all or any of the following purposes." The view of the majority of the Court of Appeal in **Patterson v. The Canterbury Jockey Club,** 19 N.Z.L.R. 861, as to the discretionary power of the Trustees of the Racecourse to make regulations applied, His Honour thought in principle, to the power of a Domain Board to make bylaws. The Board had a discretion as to whether it would or would not make bylaws; but, if the Board desired to make contracts for depasturing stock and charging fees in respect thereof, it must make a bylaw stating the conditions and have it approved and published. If it made no such bylaw then, in his opinion, it was unable to recover any charge for the depasturing of stock, because the making of such a charge was beyond the powers of the Board itself.

Counsel for the respondent contended that the making of special contracts for grazing involving payment of charges to the Board was a method of carrying out the policy of the Board to keep down grass upon the Domain, and that the Board could make such a contract irrespective of the right to make charges pursuant to a bylaw. Although there was evidence in the present case that the Council as a matter of policy kept down the grass by grazing instead of by using mowers, there was no evidence to show that the contract with the appellant was entered into for that purpose. Assuming, however, that it was, His Honour was unable to see that the Board's policy of management could alter the legal position. It might well be the case that in the absence of a bylaw, stock could be used for the purpose of keeping down the grass. He should not be prepared to say, without cogent argument, that that was "the depasturing of stock" in the sense in which the words are used in S. 55 (1) (d). His view was that the depasturing there mentioned, was depasturing for which the Board proposed to make a charge payable to itself. If the Board desired to do that, it must in his opinion rely upon a bylaw made in that behalf.

In addition to the grounds of construction already stated, His Honour did not think that it was the intention of the legislature that the Board should have power to seek out certain persons and make such grazing arrangements with them at such pecuniary rates as the Board itself thought fit for the purpose of keeping down the grass, and, at the same time, that the Board should only depasture stock at the request of other persons at rates fixed by a bylaw approved by the Minister. The object of the legislature was to ensure, he thought, that all members of the public were treated fairly with regard to grazing on land, the property of the Crown, and, accordingly, pursuant to a bylaw approved by the Minister and publicly notified.

Counsel for the respondent contended further that, as the appellant had dealt with the person in possession, he could not now dispute the respondent's right to charge for the grazing. This argument could not apply to the 23 acres. His Honour did not see how the respondent could be in legal possession of open Domain land within the meaning of the doctrine invoked, as against a member of the public who had a right of free access; but assuming the Board to be in legal possession, then if he were right in his view that it was *ultra vires* of the Board to make a charge for depasturing stock except pursuant to a bylaw duly made and published, the appellant could not be prevented from pleading that the Domain Board had no jurisdiction to make the charge.

Counsel for the respondent further contended that, even if the contract were unenforceable by reason of the lack of formality, it was nevertheless enforceable if executed and he cited the **Mayor of Stafford v. Till,** 5 L.J.C.P. 77, in support of that submission. In that case, the question was whether a corporation aggregate could maintain an action of assumpsit for use and occupation against a party who had occupied premises under them and which were their property. The contract was executed, but was informal. The Court held that, as the consideration was executed, no mutuality of contract was requisite. In that case, the contract was *intra vires* in respect of property owned by the corporation. Here the alleged contract was *ultra vires* as regards the charging of fees, and the property itself is vested not in the Domain Board but in the Crown: S. 35 of the Act. In his opinion, the case cited had no application to the present case. The position simply was that the appellant's horse and pony had eaten a certain quantity of grass upon the Domain, and the Board was unable in the absence of a bylaw to make a charge in respect thereof.

His Honour was of opinion, therefore, that the respondent could not recover any charge for grazing in respect of the 23 acres. That conclusion did not affect the rights of the respondent, whatever they might be, in respect of the 13 acres. The respondent had framed its case to recover only one sum in respect of both pieces of land. The appeal was on a point of law only. The only course open to the Court appeared to be to allow the appeal and to direct judgment to be entered for the appellant (defendant) in the Magistrates' Court with such costs in that Court as might be fixed by the Magistrates' Court, and he gave judgment accordingly. He stated, however, that nothing had been decided between the parties to prevent the respondent from bringing a fresh action to recover such amount for grazing as it might be found entitled to in respect of the 13 acres of freehold property.

Solicitor for the appellant: **J. J. Sullivan,** Auckland.

Solicitor for the respondent: **Stanton, Johnstone and Spence,** Auckland.

Kennedy, J. November 11, 24, 1931.
Invercargill.

LILLICRAP v. MAYOR, &c. OF INVERCARGILL.

Municipal Corporation—Subdivisional Plan of Land in Borough—Whether Corporation may refuse Approval until Owner has Dedicated without Compensation Portion of Subdivision for widening existing Street to full required width—Municipal Corporations Act, 1920, S. 335 (2).

Originating summons to determine whether the defendant corporation is entitled under sub-s. 2 of s. 335 of the Municipal Corporations Act, 1920, to refuse to approve of a plan of subdivision of land situated in the City of Invercargill until the plaintiff, the owner of the land, has dedicated without compensation a portion of the same for the purpose of widening an existing street as defined by s. 171 of the said Act of the full width required by law.

The plaintiff owns land fronting both Kelvin Street and Victoria Avenue, two streets each of the width of sixty-six feet. A plan of subdivision, involving no lay-out of streets, was submitted for the approval of the City Council under s. 335. The City Council intimated that it approved of the plan of subdivision on condition that the corner of the section fronting Kelvin Street and Victoria Avenue was cut off and dedicated for street purposes. This was done pursuant to a policy recorded in a resolution passed by the City Council which ran: "That in all cases where new subdivisions of corner sections, which are not already built upon, are submitted for approval that it be made a condition of consent, for the purpose of rounding off the corner that a triangular piece of land must be dedicated for street purposes by cutting off to a distance of not less than ten links from the corner."

Held: The terms "construction of streets" and "the making of reserves" referred to the lay-out of same upon subdivisional plan, and not to their actual construction on the land itself. Corporation entitled to insist on alteration to plan, but has not power to insist as a condition of approval on the prior dedication by the owner of part of his land. **Casey v. Mayor, &c., of Palmerston North** (1925) N.Z.L.R. 876 followed; **Mowbray v. Mayor, &c., of Takapuna** (1929) N.Z.L.R. 335, applied.

Stout for plaintiff.

Longuet for defendant.

KENNEDY, J., after setting out the provisions of s. 335 (1) and (2) of the Municipal Corporations Act, 1920, said that the latter subsection gave power in respect of a plan of subdivision and enabled the City Corporation to insist, as a condition of approval, upon alterations to the plan in the way of: (a) further provision for the construction of streets or (b) the making of reserves, or (c) of such other alterations as it thought proper. It was clear that the further provision for the construction of streets and the making of reserves referred to in subs. (2) would involve an alteration of the plan, and from the whole context it was manifest that the terms "construction of streets" and "the making of reserves" had reference to the lay-out of the same upon the plan and not to their actual construction or making upon the land itself. That this was the proper interpretation of the subsection was settled by the judgments of *Sim, Herdman* and *MacGregor, JJ.*, in **Casey v. Mayor, &c. of Palmerston North** (1925) N.Z.L.R. 876.

Subs. 6 of s. 335 of the Municipal Corporations Act, 1920, made it an offence to dispose of any land to which the section applied or to advertise or offer for disposition any such land otherwise than according to the plan of subdivision approved by the Council. It might happen that an owner was unable to find a purchaser for any part of the land which he proposed to subdivide, and that the owner consequently abandoned his scheme of subdivision. In such a case, if the answer to the question asked in the summons were in the affirmative, the owner would suffer the loss of a portion of his land without compensation, merely for the privilege legally of offering part of his own land for sale. S. 335 necessitated no such result. The City Council might, under s. 335, insist upon alterations to the plan: **Mowbray v. Mayor, &c., of Takapuna** (1929) N.Z.L.R. 99; but it had no power, under that section, to insist as a condition of its approval, on the prior dedication by the owner of part of his own land. That was an extraneous condition in no wise warranted by subs. (2).

Upon this view, section 335 of the Municipal Corporations Act, 1920, did not involve a greater interference with the rights of an owner than similar sections in the Public Works Act, 1928. Thus, the requirements of s. 125 of that statute were satisfied if the dedication were made and if the instrument of dedication were registered after sale and before registration of any transfer was made: see **York Bay Land Co. v. Barr,** 7 G.L.R. 590. Lands were not dedicated under s. 125 of the Public Works Act, 1928, until registration had been effected: **Cooper v. Karori Borough Council,** 30 N.Z.L.R. 273. The question asked must, therefore, be answered "No."

The City Council might, however, achieve its purpose by exercising its powers of widening streets and of taking land therefor, subject to the payment of compensation; but it might not use s. 335 to achieve that purpose, in the way apparently at first attempted, without the payment of compensation.

Solicitors for plaintiff: **Stout, Lillicrap and Hewat,** Invercargill.

Solicitors for defendant: **Longuet and Robertson,** Invercargill.

Reed, J. November 27, December 5, 1931. (In Chambers), Wellington.

HONE v. THORPE: EX PARTE EDILSON.

Landlord and Tenant—Distraint—Chattels under distraint bought at auction by Landlord and retained by him on the premises—Judgment Creditor of Tenant subsequently seizing such chattels under Writ of Sale—Whether ownership of the Chattels passed to landlord-purchaser at auction or remained property of tenant—Distress and Replevin Act, 1908, S. 18—Statute of Distress, (1689) (2 W. and M. Sess. 1, c. 5) S. 2.

Interpleader Summons. On October 21, the claimant distrained for rent on certain goods and chattels the property of the defendant, and these were sold by auction on October 27, and bought by the claimant for £10. He retained the goods on the premises—a dance hall—in which he proposed to carry on the business formerly carried on by the defendant. On October 27 the plaintiff recovered judgment in the Supreme Court against the defendant for (*inter alia*) £200 and costs, and, under a Writ of Sale, the Sheriff's Bailiff entered into possession of the premises and seized the said goods and chattels. By arrangement between the plaintiff and claimant the Bailiff had not been required to remain in possession until the hearing of this Interpleader Summons. The short point in the case was as to whether the ownership in the goods and chattels passed to the claimant upon the auction sale, or whether they still remained the property of the defendant. The goods were valued at between £86 and £90.

Held: Sale to landlord no sale, and property in chattels did not pass to him, as he could acquire no title to chattels purchased in ordinary course of the enforcement by him of a distress warrant by sale. **Moore Nettleford and Co. v. Singer Mfg. Coy.** (1904) 1 K.B. 820 (C.A.), followed.

J. A. Scott for plaintiff.

Douglas Jackson with **Dalgleish** for claimant.

REED, J., said that under S. 18 of the Distress and Replevin Act, 1908, where chattels were distrained and the tenant or person in possession did not within five days replevy the same, the person distraining might, after the expiration of the said five days cause such chattels to be sold by auction. Apparently in England there was no statutory provision that they should be sold by auction. They might be sold by private contract; but, by statute, it was provided that they must be sold at the best price "that can be gotten for the same."

This difference in the statutes did not, in His Honour's opinion, affect the rule, laid down in a series of decisions in England, that a sale to the landlord distraining was no sale and the property in the goods did not pass. In **Moore Nettlefold and Co. v. Singer Manufacturing Coy.** (1903) 2 K.B. 168, the landlord by his agent bought in at the auction sale of the distrained chattels a sewing-machine held under a hire-purchase agreement by the tenant. The question was as to whether the property passed. Lord Alverstone, C. J., approved of the dictum of Blackburn, J., in **King v. England,** 4 B. & S. 782, as follows: "I think the sale in pursuance of Statute 2 Will. & M. Sess. 1 c. 5, s. 2, must be a sale to a third person. Otherwise many abuses might arise." The learned Chief Justice continued: "I quite agree that that dictum of Blackburn, J., was not necessary to the decision in **King v. England,** which only decided that in order to pass the property there must be a sale to somebody; but I think on the principle of that decision a sale by the landlord to himself is really no sale at all, and does not pass the property." Wills, J., said: "I think a sale to the landlord himself was no sale at all, and that if such a thing were to be allowed it would open the door to every sort of evil. It would be contrary to all principles of justice to allow a man, who ought to endeavour to make the best price possible for the goods which he is selling, to be in a position in which it is to his interest that they should be sold for as little as possible." Channell, J., agreed. The case went to the Court of Appeal, and is reported at (1904) 1 K.B. 820. The decision of the Divisional Court was upheld. Collins, M.R., in answer to the contention that the sale being by auction, the principle enunciated in **King v. England** (*supra*) did not apply said: "The difference between the cases is that here there was the formality of a sale by auction; but the substance of the cases is the same, namely, a sale by a landlord to himself. It is true, as has been suggested, that the auctioneer may be for some purposes the agent of both parties; but in selling he is the agent of the landlord who sold, though later on he might become for some purposes the agent of the buyer. It appears then that the same mischief arises in such a case as the present as would arise in a case like **King v. England** by the landlord being himself both buyer and seller. As was pointed out by Blackburn, J., in that case and by Wills, J., in the present one, to hold that a landlord might sell to himself would open the door to abuses.' Mathew, L.J., said: "It is clear that where a landlord, empowered to sell, himself buys the goods it is not a proper description of the transaction to call it a sale. It is suggested that in this case there was a sale by the auctioneer. He, however, was not an independent vendor; he was the agent of the landlord for the purposes of selling, but with a superadded authority as agent for the purchaser to make a binding record of the sale to him." The principle established by this case has never been questioned, and is quoted as being the law in the text-books. See **Redman on Landlord and Tenant,** 8th Ed., 524; **Foa on Landlord and Tenant,** 6th Ed., 609; **Woodfall's Landlord and Tenant,** 22nd Ed., 609. It was applied by Stout, C.J., in **Butterfield v. Davis,** 14 G.L.R. 279.

It was said on behalf of the claimant that in all the cases the chattels, seized under distress, and purchased by the landlord, were not the absolute property of the tenant or person in possession, e.g., in **King v. England** (*supra*) they were under a Bill of Sale, and in the **Singer case** (*supra*) were under a hire-

purchase agreement. The statement was not quite correct, for in **Plasycoed Collieries Company Ltd. v. Partridge Jones and Co. Ltd.** (1912) 2 K.B. 345, the ponies seized were the absolute property of the tenant in possession, as were the chattels in **Butterfield v. Davis** (*supra*).

But even if it were so, it did not affect the principle that the landlord could acquire no title to chattels purchased in the ordinary course of the enforcement of a distress warrant by sale. Of course there was nothing to prevent a tenant, who is the absolute owner of chattels, making an arrangement with the landlord to take the chattels in satisfaction of the rent owing, **King v. England** (*supra*), but, as pointed out by Dennis-ton, J., in **Manning v. Jonas,** 14 N.Z.T.L.R. 53, 54, "it is obviously not because it made such a transaction a sale, or made it a proper step in a distraint, but because an owner could acquiesce in any disposition of the property he chose."

There was no evidence in the present case that the defendant acquiesced in the sale to the claimant; as a matter of fact the defendant had disappeared before the distress was put in and has not since been heard of.

Judgment for plaintiff with costs against the claimant.

Solicitor for plaintiff: **J. A. Scott,** Wellington.
Solicitor for defendant: **Douglas Jackson,** Wellington.

Ostler, J. November 27, December 1, 1931. Wellington.

JONES v. NATIONAL INSURANCE COMPANY OF NEW ZEALAND LTD.

Insurance—Third Party Risk—Claim under Statutory Contract of Indemnity for (*inter alia*) **proved damages suffered by master of injured person through loss of latter's services—"Inability"—Whether statutory indemnity extends to master's loss in respect of services through injury of servant—Comprehensive Policy held by injured servant—Whether he also indemnified against same claim in respect of loss of his services—Motor Vehicles (Third Party Risks) Act, 1928, S. 6.**

Two questions of law arising in an action, and argued by consent of the parties.

Plaintiff while driving a motor car belonging to his wife on October 15, 1930, negligently collided with a motor car owned by the Todd Motor Company Ltd., damaging the car and severely injuring one Cordery, a passenger. Cordery was the Manager of the Hawera Branch of the Todd Motor Company, which was deprived of his services for thirteen weeks, during which it had under its contract to pay his salary and to pay another manager. It sued plaintiff for damages including a sum of £220 6s. 5d. in respect of the loss of Cordery's services. Plaintiff's wife's car was insured with defendant company both under the Motor Vehicles Insurance (Third Party Risks) Act, 1928, and under a comprehensive policy covering (*inter alia*) third party risks. Defendant company agreed with plaintiff that there was no defence to the Todd Motor Company's claim, and judgment was entered in the action by consent against the plaintiff for the total sum of £540 6s. 5d., which included the sum of £220 6s. 5d. in respect of loss of services, and £60 for costs. Plaintiff was the holder of a driver's license and was driving his wife's car with her authority at the date of the accident, and was therefore entitled under both the Act and the policy to be indemnified to the same extent as the owner of the car. In the subjoined judgment he is, for the sake of convenience, referred to as the owner. Defendant company has paid so much of the Todd Motor Company's claim as related to damages to its car, but it has declined to pay the £220 6s. 5d. and £28 of the total costs (in all a sum of £248 6s. 5d.), claiming that it is not liable for this amount, either under the Act or under the policy. Plaintiff accordingly sued the defendant company for this sum, and, as the claim depended entirely on questions of law, the parties agreed that those questions should be argued before trial.

Held: "Liability" means all and every liability of plaintiff, including payment of damages to person injured through negligent use of motor-car, and also damages to his master if master can prove he has suffered damages through loss of services of servant so injured. Defendant company had contracted to indemnify plaintiff from liability to pay all such claims. (2) Statutory contract of indemnity against liability to master (*supra*), it was not liable under plaintiff's Comprehensive Policy to indemnify him against such claims.

Moss and **Heine** for plaintiff.
Leicester and **Wilson** for defendant.

OSTLER, J., said that the first question of law for decision was whether, under the statutory contract of indemnity created by the Motor Vehicles Insurance (Third Party Risks) Act, 1928, defendant company was liable to indemnify plaintiff for his liability to pay damages to the Todd Motor Company in respect of its claim for loss of services. The answer to that question depended upon the construction of the words used in S. 6 of the Act, the section which creates the contract between the parties, which His Honour quoted.

It was admitted by both sides, and His Honour thought, properly, that the words "on account of" meant "because of" or "by reason of." What the defendant company had contracted to do, therefore, was to indemnify plaintiff from liability to pay damages by reason of bodily injury to any person, which was the result of an accident caused by the use of plaintiff's motor car. The word "liability" in the section must mean the whole liability, or all and every liability of the plaintiff. His liability was not only to pay damages to a person injured and to the representative of a person killed by his negligent use of his motor car, but also to pay damages to the master of any person so injured or killed, if that master could prove that he had suffered damages through loss of service of the person injured or killed. Therefore, in His Honour's opinion, the Legislature had clearly shewn its intention by the words used in section 6 to provide that the statutory indemnity should include an indemnity against plaintiff's liability to pay such damages to a master if those damages arise because of the death or bodily injury of a servant caused by plaintiff's negligent use of his motor car. There was an indication in subs. 4, par. (b) that the Legislature had in mind the liability to pay damages to a master for the loss of services of his servant, because by that paragraph it provided that the liability of an insurance company should not extend to indemnify the car owner against "any claim made in respect of the death of or of injury suffered by any person in the service of the owner at the time of the "accident." In His Honour's opinion, those words indicated a deliberate intention by the Legislature to include in the indemnity all claims made in respect of the death of or of injury suffered by any person in the service of any other master. The plain meaning of the words of S. 6 was that, where by an owner's negligence in the use of his car death or injury was caused to any person, the whole of the owner's liability either to the person injured or to his representatives if killed, or to his master if damnified by loss of services, was to be included in the indemnity. That seemed to him to be the natural meaning of the words used, without the necessity of straining their meaning or putting a forced construction on them, and therefore it was the duty of the Court to adopt that meaning. Nowhere in any other part of the Act, were any words used which would indicate any other intention. If it had been intended that the indemnity was to extend only to claims by injured persons or the representatives of persons killed, it would have been easy to say so in plain terms. But the Act provided that the indemnity was to extend to the whole liability of the owner except in the four cases specified in S. 6, subs. (4). Both sides relied on the title to the Act in support of their respective contentions. There was no need to consider either the long or the short title to the Act, because the words of section 6 were clear and unambiguous, and there was nothing in either title to indicate that this plain language should be restricted in any way. It was contended that plaintiff's liability in this case for loss of services was not on account of or because of the bodily injury of the servant, but because of the master's loss of his services. It was true that the gist of the master's action was damage caused by loss of service. It was true that this was an injury to the master's pocket, to his property and not to his person. If a master could show damages for such an injury that was not caused by the death or bodily injury of his servant, that would be a liability of the car-owner not included in the indemnity. But wherever the damage to the master is caused by reason of bodily injury done to the servant or by reason of the servant being killed by the negligent use of a motor car, the liability of the owner to the master was included in the indemnity. His Honour said he realised that the effect of this decision was to include in the indemnity a liability for damage to property. But that in his opinion was the plain meaning of the words used, and therefore must be held to have been the intention of the Legislature.

The second question of law for decision was whether plaintiff was indemnified against this claim in respect of loss of services under the terms of the policy issued by defendant company. By its terms, the company agreed to indemnify the assured (*inter alia*) against "third party property risk," which is de-

fined in the policy as being "liability at law for damage (including law costs of any claimant) to property (including animals) other than property of the assured or in his custody or control caused by the use of the said motor-vehicle," etc. The question turned on the meaning of the word "property" in that clause, i.e. whether it meant property of all classes including choses in action, or whether its meaning was confined to tangible property. There was a clause endorsed by rubber stamp on the policy providing that the company should not be liable under the policy to indemnify the assured against any liability which was covered both by the policy and by the Motor Vehicles Insurance Act. As His Honour had held that defendant company was liable under the Act to indemnify plaintiff against that liability for loss of services, it was clear that, whatever the word "property" might mean, the company was not liable to indemnify the plaintiff against this claim under the policy. Consequently, the construction of the clause in the present case became a matter of merely academic interest, and of no value in determining the rights of the parties. Any decision on the point would be merely *obiter*, and therefore His Honour did not feel called upon to decide the question.

Solicitor for plaintiff: **W. Heine,** Wellington, agent for **Young and Moss,** Stratford.

Solicitors for defendant: **Leicester, Jowett and Rainey,** Wellington.

MacGregor, J. December 15, 18, 1931. Wellington.

GADSBY v. GADSBY.

Divorce—Practice—Alimony *Pendente Lite*—**Order over Ten Years in Existence—Respondent's Application for Leave to Issue Writ of Attachment for Arrears—Cross-Motion for Order Diminishing Amount Payable and for Suspending Original Order for Payment—Changed Circumstances of Pefitioner—Divorce and Matrimonial Causes Act, 1928, S. 41.**

Motion by the respondent in divorce suit for leave to issue a writ of attachment against the petitioner for non-payment of instalments of alimony *pendente lite*. Also a cross-motion by the petitioner for an order diminishing the amount of alimony payable and for further order suspending the original order for payment of alimony.

The petitioner is now 76 years of age, and his wife the respondent 66 years of age. The petition for divorce was filed in December, 1920. An answer and cross-petition for divorce were thereupon filed by the respondent. On April 8, 1921, an order was made by Stout, C.J., ordering the petitioner to pay to the respondent alimony *pendente lite* at the rate of £3 per week from December 17, 1920. Alimony was regularly paid in terms of that order until May 8, 1931, when the payments came to an end. The respondent sought to enforce by writ of attachment payment of the arrears of alimony unpaid since that date. Neither petition nor cross-petition for divorce has been brought to a hearing, and no step towards judgment in the suit appears to have been taken for more than ten years. The Court was told that the parties have been living separate and apart for over thirty years. The respondent is in bad health, and the petitioner himself is seemingly past active work. When the order for alimony was made in 1921, the petitioner was comparatively wealthy, having an estate of about £30,000 in value, producing an income of about £2,000 a year. Owing to unfortunate speculations, and the recent decrease in land values, he is now practically penniless, all his available assets being mortgaged to a bank, whose securities apparently would not at present realise the amount due thereon. Until May 8, 1931, the bank advanced the periodical payments made to the respondent by way of alimony, but since that date it has stopped these payments, allowing to the petitioner only a small sum for his own subsistence. The respondent in her turn appeared to be in an impecunious state, and alleged that she has in the past relied mainly on the alimony for her support and maintenance.

Held: Dismissing Respondent's motion for leave to issue Writ of Attachment, as Petitioner's non-payment due to inability not to ontuma iousness: future operation of Order suspended until further Order of Court, thus preventing Petitioner from making further use of original Order for Alimony *pendente lite* as permanent provision for her maintenance.

Barrett in support of Motion.

Sievwright to oppose, *et e contra.*

MacGREGOR, J., after detailing the above facts, said that in those extraordinary circumstances it appeared clear to him after consideration that he should not in his discretion grant leave at that time to issue a writ of attachment against the petitioner, who, he was satisfied, at present was unable to pay the arrears of alimony, and that his neglect or refusal to pay during the last few months had not been contumacious on his part. The respondent's motion was therefore dismissed, without costs.

It remained to consider the motion by the petitioner for an order diminishing the amount of alimony payable, and for a further order suspending the original order for payment of alimony *pendente lite* made in 1921. By S. 41 of the Divorce and Matrimonial Causes Act, 1928, it appeared that the Court had jurisdiction to make such orders (in these respects) "as the Court thinks just." It should further be noted that the plain object of an order for payment of alimony *pendente lite* is "to provide maintenance for the wife while the suit is pending. The very term *pendente lite* implies, I think, that it is subject to the control of the Court in which the suit is commenced, which may set aside, vary, or introduce new terms in it" (see per Grove, J., in **Bailey v. Bailey,** 13 Q.B.D. at p. 857. If this power to vary such an order were ever to be exercised, it is obvious, His Honour thought, that it should be done in the present case. The suit was not "pending" in any real sense. It had long been moribund, if not technically dead. No step towards a final decree had been taken in it for more than ten years. Either party could, it would appear, long since have had it dismissed for want of prosecution. The circumstances of the parties also had entirely changed since the order for alimony pending suit was made on April 8, 1921. To enforce such an order at this time in its integrity would be in effect an abuse of the process of the Court. It was at present, indeed, being used not as a temporary order for alimony *pendente lite*, but as an order for permanent maintenance, which should lawfully be made and enforced only after a decree for divorce.

His Honour thought, therefore, that an order should now be made suspending the future operation of the order of April 8, 1921, as from the date of this judgment until the further order of the Court, as was done in **Hooper v. Hooper** (1919) P. 153. That would not release the petitioner from payment of the arrears of alimony from May 8, 1931, until December 18, 1931, in pursuance of the original order of the Court. It would, however, prevent the respondent for the future from making use of that order as a permanent provision for her maintenance, which of course had not been contemplated when it was made over ten years since. Should the parties be unable to come to terms with regard to the maintenance of the respondent, it would be open to her to take proceedings against the petitioner for maintenance under the relevant provisions of The Destitute Persons Act, 1910.

Respective orders of the Court accordingly: (1) Respondent's motion for leave to issue writ of attachment dismissed without costs. (2) On petitioner's motion, order that the future operation of the order made on April 8, 1921, be suspended as from December 18, 1931, until the further order of the Court. No costs.

Solicitors for petitioner: **Bunny and Barrett,** Wellington.
Solicitor for respondent: **A. B. Sievwright,** Wellington.

Where Parliament is Not Supreme: In New Zealand, it appears, as in the U.S.A. and elsewhere, the Courts have power to determine whether an Act of Parliament is *ultra vires* as being contrary to the Constitution or repugnant (as was alleged in *Worth v. Worth* in which the question of domicil arose) to the principle of private international law. In England the Legislature is supreme. What the Act says, that is Law, and the Court's only function is to interpret and to apply. I was therefore somewhat puzzled by that part of the judgment of MacGregor, J., which cited the famous words of Lord Macnaghten, of and concerning an English Act, in *Vacher and Sons, Ltd. v. London Society of Compositors* (1913) A.C., at p. 118: "The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, as to pass a covert censure on the Legislature."

English judges do not always show this self-restraint. But New Zealand judges need not. They can, in proper cases, declare an Act to be bad and refuse to be bound thereby.

—"OUTLAW" in the *Law Journal* (London).

Company Debentures.

And The Mortgagors Relief Act, 1931.*

By A. M. Goulding, LL.B.

Mr. Mackenzie Douglas deserves the thanks of the profession for drawing attention to this matter. In his concluding article, he has invited criticism and it is in that spirit that the following comments are made.

If Mr. Douglas's views be sound, then the ordinary floating charge debenture given by a Company, and which by its terms constitutes the receiver on his appointment the agent of the Company, is not within The Mortgagors Relief Act at all. No Company could obtain relief against action by the debenture holder under such a debenture.

Surely the Legislature could not have contemplated refusing relief to companies in respect of action by debenture holders.

Let us assume the Company owns both land and chattels and gives a floating charge debenture. Most Companies do own either land or chattels when they give such a security. Appointment of the receiver crystallises the security in respect of reality and chattels owned by the Company at the time of appointment.

It appears that the true construction to place upon the statute in the case of a floating charge debenture is this:

The definition of mortgage in the act is: "Any . . . instrument . . . whereby *security for payment of moneys* is granted over land or chattels or any interest therein." It cannot be doubted that even before the floating charge crystallises the debenture is "security for payment of moneys" in respect of whatever assets the company may from time to time possess. When the security crystallises by appointment of a receiver, the security has not become in any sense a different security. It merely, to use the expression from *Illingworth v. Houldsworth and Another*, [1904] A.C. 355, "settles or fastens on the subject of the charge." Therefore, it is suggested that a debenture does fall within the definition of a mortgage in The Mortgagors Relief Act.

However, reading Section 4 of The Mortgagors Relief Act strictly, it would appear that the mere appointment of a receiver is not one of the acts forbidden by that section. It is possible for a debenture holder who is the Mortgagee to appoint a receiver without the receiver entering into possession or for the time being exercising any of the powers forbidden by s. 4. His mere appointment however crystallises and fixes the security on the Company's assets. From the moment of appointment, therefore, is not the receiver before he exercise any of the powers forbidden by section 4 of the Act bound to adopt the procedure laid down by the Act preliminary to the exercise of those powers?

The other aspect of Mr. Douglas's contention is founded on argument that the receiver is the agent of the Company upon his appointment. Though it is true that the cases have laid down that in the absence of a provision in the debenture making the receiver the agent of the Company he will be the agent of the Mortgagee, and have also established that where by the terms of the debenture the receiver is on appointment made the agent of the Company, then the Mortgagees (or the Trustees for them in the case of a Trust Deed) are not liable for the acts or defaults of the receiver, all those cases appear to be confined to matters arising out of contracts entered into by a receiver after his appointment, or deal with the receiver's right to remuneration from either the Company or the Trustees of the Debenture Deed.

The Courts do not appear ever to have laid it down that the receiver is in no sense an agent for the Mortgagees. It would appear that for some purposes he must be the agent of the Mortgagee. Surely he continues to be the agent and Trustee for the Mortgagee in respect of any moneys he receives and which it is his duty to collect and apply in reduction of the debenture? After all, his principal duty is to protect the Mortgagee. In many acts connected with his appointment, he must continue to act as agent for the Mortgagee; though he cannot commit the Mortgagee to liability on contracts entered into by him. See the observations of Warrington, J., in *Robinson Printing Co. v. Chic Limited* [1905] 2 Ch. 123, which were approved by the Court of Appeal in *Deyes v. Wood* [1911] 1 K.B. 806 at p. 821.

It is true that in both the above cases the Court came to the conclusion on the construction of the particular debenture that the receiver was the agent of the Mortgagees; but, whether he be the agent of the Mortgagee or of the Company, the remarks of Warrington, J., as to his agency for the Mortgagee in some respects seem to apply in every case of the appointment of a receiver.

If this be the true position, it is suggested that the latter part of Mr. Douglas's argument would scarcely hold.

* * * * *

Since writing the above, I have had my attention drawn to Order-in-Council of December 15, which exempts from the operation of The Mortgagors Relief Act, Debentures, Debenture Trust Deeds or other Instruments creating a floating charge whether or not such charge has become or at any time hereafter may become a fixed charge.

This Order-in-Council, of course, makes the position perfectly clear; but the issue of it appears to support my view that floating charge Debentures were within the Act.

As to the wisdom of exempting this large class of securities from the operation of the Act, there may well be some doubt; and, had the matter been ventilated at the time the legislation was before Parliament, it probably would not have made the exemption.

However, that is not an aspect of the matter that merits discussion from the legal viewpoint except in so far as it furnishes another example of the danger of legislation by Order-in-Council.

* *See* articles on the same subject by H. Mackenzie Douglas, Esq., N.Z.L.J. vol. vii, pp. 319, 339.

The Art of Debate.

Sir John Simon's Views.

Proposing the toast of the Hardwicke Society at its recent annual dinner, Sir John Simon, K.C., described it as the most famous debating society in the legal profession.

The art of debate was essentially a British art, he said, and was the art of keeping to the point, keeping the temper, and addressing oneself to the actual issues which arose in the course of discussion rather than to any prearranged lines of argument. In the United States a prepared oration was more usual, and the speech could often be handed to the reporters in type beforehand, while, in the Supreme Court, counsel handed his brief to the judge to study after he had delivered his speech. There could be no doubt that upon the cultivation of the art of debate depended the British method of hand to mouth, face to face, each riposte suggested by the latest stroke of the adversary.

Nothing, said Sir John Simon, interested him more than to look back upon an experience of the House of Commons lasting over a quarter of a century and observe the practice of that noble art by some of its most famous exponents. In his early days a distinguished ex-President of the Society, Sir Edward Clarke, had given him a piece of advice that he had treasured all his life. The advice was: "First, never speak on a lawyer's subject; secondly, do not suppose that you can take part in a House of Commons debate by merely coming in just before your name is called and making such observations as occur to you —you must accommodate yourself to the current of the moment like rowing on tidal water; thirdly, unless the debate has taken that turn which enables you to feel that what you had in mind to say really fits, do not say it." The public did not appreciate the degree and strength of the influence exerted in the House of Commons by men who effectively used the art of debate. The effective presentation at the right moment of an argument which came from the heart and hit the point profoundly influenced public judgment and the ultimate action of the Government. The best speeches were not delivered impromptu, but when the speaker transfused a carefully thought-out speech under the heat and temper of the controversy of the moment. Sir John Simon illustrated his point by many anecdotes of famous speakers; he cited Mr. Winston Churchill as an example of a man who devoted immense care to preparation when this was possible, yet could speak eloquently without preparation when necessary.

The art of debate was an effective retort at the point when the opponent thought he had scored, and the debater must listen to what the other man was saying rather than recite to himself what he was going to say. A member of the House of Commons might do much to help his country by cultivating, using and believing in the art of debate. We did not live under a fixed cast-iron constitutional plan, but were all part of an immense growth and development. To this lawyers made an important contribution, no part of which was more important than the practice and preservation of the essentials of the art of debate.

A Question of Evidence.

Deceased Persons' Declarations.

By A. L. Haslam, B.C.L., D.Phil. (Oxon), LL.M. (N.Z.).

In a recent issue of the N.Z. Law Journal (vol. 7, p. 272) a learned correspondent refers to the article, *Deceased Persons' Declarations as to Symptoms* (Page 216 *ibid*), and adds: "I am at a loss . . . to understand why letters . . . by deceased persons are admissible, when other communications by the same persons are treated as hearsay. . . ."

With diffidence, it is suggested that the learned correspondent was misled by the title itself, as it makes no difference whether a declaration as to symptoms is made by a deceased or by a living person.

Statements of this type fall into a broad category, the limits of which are thus defined by Phipson (*Law of Evidence*, 7th Edition, Page 60):

> "Whenever the bodily or mental feelings of a person are material to be proved the usual expression of such feelings made at or about the time in question may be given in evidence. . . . Such expressions are sometimes considered to fall within the *res gesta* principle and sometimes to form a special category of their own."

During the trial of Mrs. Hearn at Bodmin Assizes on a charge of murdering Mrs. Thomas, Roche, J., rejected as evidence the diary of one Mrs. Everard. A learned writer in the *Law Journal* states: "If the indictment charging the death of Mrs. Everard had been proceeded with, it would seem on principle that the diary could have been used in evidence."

With all respect it is submitted that the admissibility of such evidence would depend on the contents of the diary. If Mrs. Everard had made an entry that on that particular day she felt unwell and added details of her indisposition, then such declarations by her would be accepted as evidence of her state of health at the time. (*Aveson v. Kinnaird*, 6 East 188). If, however, she added that a certain person had attempted to poison her, her statement would fall under the ban of hearsay and would be rejected. (*Reg. v. Gloster*, 16 Cox 471; *Gilbey v. Great Western Railway*, 102 L.T., 202). Such a declaration would be more than original evidence of Mrs Everard's bodily condition or mental apprehension; it would be an assertion of the cause of her illness. As Charles, J., observed in a much quoted dictum in *Reg. v. Gloster* (*supra*):

> "The statements must be confined to contemporaneous symptoms and nothing in the nature of a narrative is admissible as to who caused them or how they were caused."

Statements made by the declarant out of Court as to his own feelings, intentions or other attributes of consciousness have been regarded in America as exceptions to the hearsay rule. In the famous *Hillmon case* (145 U.S., 285), the principle was extended to admit a declaration of intention as corroboration of other evidence that the intention was actually fulfilled. In British jurisdiction, the doctrine has been confined within narrower limits and the declaration is regarded as furnishing nothing more than original evidence of the mental or bodily state of the party. Furthermore, little weight is ever attached to evidence of this type. (Per Lord Selborne the *Aylesford Peerage*, 11 A.C., at p. 16).

The distinction between declarations which may be admitted within the above principle and those which are inadmissible as hearsay, is illustrated in *Lloyd v. Powell Duffryn Steam Coal Co.*, [1914] A.C. 733. A posthumous illegitimate child claimed as the dependent of its putative father who had been killed by accident arising out of and in the course of his employment within the terms of the Workers' Compensation Act, 1906. Dependency therefore was a vital issue. The deceased had made statement acknowledging the child as his own and had professed the intention to marry its mother before it was born. The Court of Appeal, ([1913] 2 K.B. 130) held that these statements did not fall within the exception to the hearsay rule relating to declarations by a deceased person against his pecuniary interest, that there was consequently no evidence on the issue of dependency, and that the claim failed. The House of Lords reversed this decision, and considered that the promise by the deceased to marry the child's mother was evidence of his mental attitude towards the claimant. As Lord Loreburn said :

> " A legal duty upon the deceased workman to maintain wife or child out of his earnings, where such duty exists is not conclusive proof of dependency but it is a strong element and in my opinion may be of itself sufficient."

Similarly in the *Aylesford Peerage* (*supra*), where the question in issue was the legitimacy of a child born in wedlock, the letters of both the mother of the child and of her paramour were accepted as evidence that they both regarded and treated the child as their own. Consequently the presumption of legitimacy was rebutted, although Lady Aylesford would have been precluded, by the well known rule as to non-access, from giving evidence in the box to support the contents of her correspondence.

Mortgagors' Relief Applications.

A Question for Parliament.

Several correspondents have written to the JOURNAL in reference to the hearing in open Court of applications by mortgagors for relief in pursuance of the provisions of last year's enactments.

Though it was understood that the hearing in the Supreme and Magistrate's Courts of such applications would be taken in private, the practice obtains, we are told, in some Magistrate's Courts of placing unfortunate mortgagors in the witness-box for the exposition of the reasons of hardship put forward in support of their claims for relief. Mortgagors have similarly to set out the circumstances of their need for fulfilment of the mortgagor's obligations.

It is quite unnecessary to detail the objections to this practice as set out by the JOURNAL'S correspondents. But it seems to have the two-fold primary effect of preventing deserving but sensitive applicants from seeking relief, and of exposing to the public at large circumstances of both parties that would inevitably attract the attention of everyone interested in the parties' credit.

We hope Parliament will incorporate the necessary change in the pending extension of the Mortgagors' Relief Act and its Amendment.

Changes in Company Law.

Made by the Companies Act, 1929 (England).

By T. H. WOOD LL.M. (N.Z.) LL.M. (Lond..)

III.

SUBSIDIARY COMPANIES : Where any assets of a company consist in shares or amounts owing from a subsidiary company, the aggregate amount of those assets shall be set out in the balance sheet separately from the other assets, and, if the company is indebted to a subsidiary company, the aggregate amount of the indebtedness shall be shown. If a company holds shares in a subsidiary company, there shall be annexed to the balance sheet a statement duly signed stating how the profits and losses of the subsidiary company have, so far as they concern the holding company, been dealt with in and for the purposes of the holding company.

A subsidiary company is defined as one where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of the Act or not, and

(a) the amount of the shares so held at the time when the accounts are made up is more than 50% of the issued capital of that other company, or,

(b) the company has power directly or indirectly to appoint the majority of the directors of that other company.

AUDITORS : Special provisions relating to auditors are contained in Ss. 132-134. The following are, by S. 133, not qualified for appointment as auditors : (a) Directors or officers ; (b) Partners of or persons employed by officers ; and (c) Bodies corporate.

The first auditors may be appointed by the directors at any time before the general meeting, and may hold office until that meeting when their appointment is confirmed or new auditors appointed. The auditors are entitled to attend any general meeting of the company at which accounts examined or reported on by them are laid before the company. The auditors' report must be attached to the balance sheet.

No auditor may take advantage of any provision in the articles of a company or in any contract with the company exempting him from liability in respect of negligence, default, or breach of trust in relation to the company or indemnifying him against the same. This Section overrules the decisions *In re City Equitable Fire Insurance Co.* [1925] Ch. 407, and *re Brazilian Rubber Plantations and Estate* [1911] 1 Ch. 425. But this does not prevent a company indemnifying an auditor against liability incurred in the successful defence of any proceedings, civil or criminal, or a successful application for relief under S. 372. This latter section provides that in proceedings against an auditor for breach of duty where it appears that he is or may be liable, but that he has acted honestly and reasonably and that he ought to be excused, the Court may relieve him wholly or in part from liability.

DIRECTORS: The requirements as to the qualification of directors are added to with reference to the holding of qualification shares by S. 140 as follows: He can take from the company and pay or agree to pay for his qualification shares, or he can make and deliver to the Registrar a statutory declaration that a number of shares not less than his qualification are registered in his name.

S. 142 is important in that it imposes a penalty on any person who, being an undischarged bankrupt, acts as a director of, or directly or indirectly takes part in or is concerned in the management of any company, except with the leave of the Court by which he was adjudged bankrupt.

Certain companies, namely, those registered after November 23, 1916; those incorporated outside Great Britain having established a place of business in Great Britain; and every company licensed under The Moneylenders Act, 1927, whenever established, must state in all trade catalogues, circulars, showcards and business letters particulars with regard to the names and nationality of the directors.

S. 148 provides that on demand made in writing by members entitled to not less than one-fourth of the aggregate number of votes to which all the members are entitled, the directors shall furnish within one month, a statement certified as correct by the auditors of the company, showing as respects each of the last three preceding years the aggregate amount received by directors in each year by way of remuneration or other emoluments: Provided however that a demand under this section shall be of no effect if the company within one month resolve that the statement be not furnished.

By S. 150, it is unlawful in connection with the transfer of the whole or any part of the undertaking of a company for any payment to be made to any director by way of compensation for loss of office or as a consideration for his retirement from office, unless particulars of such amount have been disclosed to the members of the company and approved by the company. Any such illegal payment made shall be deemed to have been received by the director in trust for the company.

Assignments of office made under these provisions are void unless approved by a special resolution.

Provisions in the articles or in any contract exempting any director or other officer from or indemnifying him against liability for negligence, breach of duty or trust, are void. This is a similar provision to that respecting auditors.

SCHEMES OF ARRANGEMENT: Ss. 153-155 deal with arrangements and reconstructions and give power to compromise with creditors and members.

In order to meet the requirements of the judgments in *re Palace Hotel* [1912] 2 Ch. 438, and *re J. A. Nordberg* [1915] 2 Ch. 439 (where it was stated that the scheme of arrangement under S. 120 of the 1908 Act was not available in the two cases mentioned in S. 45 of that Act, *i.e.* re-organisation of share capital by consolidation of shares of different classes or by division of shares into different classes). S. 153 (5) of the 1929 Act has been expressly framed to include both these operations.

By S. 154, where a compromise or arrangement is made for the purposes of or in connection with the reconstruction or amalgamation of companies, the Court may by the sanctioning order or any subsequent order make provision for the transfer of liabilities, allotting of shares, continuation of legal proceedings, dissolution or winding-up of the original company, provisions for dissentients, etc. An office copy of this order must be delivered to the Registrar within seven days from the date thereof.

Where the scheme or contract involving the transfer of shares to another company has within four months been approved by the holders of not less than nine-tenths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said period of four months, give notice to any dissentient shareholder that it desires to acquire his shares and the transferee company shall, unless the shareholder within one month from the date of the notice applies to the Court and the Court orders otherwise, be entitled and bound to acquire those shares.

(To be Continued)

Bench and Bar.

Mr. J. D. Paterson has commenced practice as a Solicitor at Gore.

Mr. R. J. O'Dea, LL.M., has commenced practice on his own account as Barrister and Solicitor at Hawera.

Mr. W. P. Rollings has commenced practice as a Barrister and Solicitor at 100, Lambton Quay, Wellington.

Mr. B. O'R. Cahill, B.A., LL.M., recently of the staff of Messrs. Devine and Crombie, has commenced practice in the A.M.P. Buildings, Wellington.

Mr. A. C. Jessop, M.A., LL.B., lately of the staff of Messrs. Young, White and Courtenay, has opened an office on his own account at Wellington.

Mr. W. T. Roots, a member of the staff of Messrs. Hankins, Fitzherbert and Abraham, of Palmerston North, was recently admitted as a Solicitor, by His Honour Mr. Justice Ostler.

Messrs. J. B. Corbett and J. R. Hampton, of Christchurch, have recently been admitted as Barristers. The latter is practising on his own account, and the former is a member of the firm of Messrs. Hobbs and Corbett.

The following members of the profession have been appointed to Mortgage Adjustment Commissions for the districts named: Messrs. S. Buttle (Auckland), R. F. Gambrill (Gisborne), A. Coleman (Taranaki), H. McIntyre (Wellington) and J. R. Cunningham (Canterbury).

The partnership heretofore existing between Messrs. L. M. Moss, G. M. Spence, and A. G. Anderson, under the style of "Moss and Spence," Barristers and Solicitors, New Plymouth, has been dissolved. Mr. Moss will continue the practice in his own name and on his own account, and Mr. Anderson will, in future, be associated with him in the business.

Australian Notes.

WILFRED BLACKET, K.C.

May it Please Your Majesty: The New Guard was organised in Sydney to defend the State against the revolutionary designs of the Communists, and the murderous enterprises of the Red Army. It had been intended by the enthusiasts of Communism that the Revolution should begin on April 6, 1931, and a resolution to that effect was carried on Easter Sunday last, but it was found that the Red Army had not found its Napoleon nor any army for him to lead, and so the resolution was rescinded in favour of a Fabian policy of preparation for revolutionism, a policy that will enable some of the political leaders of the Communists to invest some of their wealth safely in countries beyond the seas before all property in New South Wales shall become the property of the local Soviet. As the New Guard was not able (for want of an opponent) to take its place on the field of battle, it quite naturally turned to politics and sent a memorial to Sir Philip Game, Governor, asking him to dissolve Parliament. As he had quite recently at the request of John Lang swamped the Legislative Council, His Excellency was naturally averse from taking this course, and told the New Guard that its letter required nothing more than formal acknowledgment. Then the New Guard prepared a petition to the King praying that he would be graciously pleased to cause the dissolution of the present Legislative Assembly of New South Wales, etc., etc., and this is being eagerly signed by thousands of people. There are a great number of lawyers in the New Guard and, therefore, it is astounding that such a prayer should be offered, for it is obvious that the King has no right or power to do what is asked of him. The request really is that he should violate the Constitution granted to this Colony and State with the advice and assent of the Parliament of Great Britain in 1854.

A Sea of Troubles: Mr. Noble Kerby of Victoria had quite a busy time during the Election Campaign, for after he had been nominated as an Independent Candidate for Melbourne Port, he was arrested for non-payment of fines totalling more than £1,000 imposed upon him for running a motor-bus without a license, and so his dual ambition was to get out of gaol and get into Parliament. An application for his release was made to the High Court; but Mr. Justice Rice was unable to discover any grounds upon which he could make the desired order, and so Mr. Kerby, who only polled 131 votes besides being kept out of the place where he wanted to go, and being kept in the place where he did not want to stay, will also lose his £25 deposit. It is "only noble to be good," but recently it does not seem to have been good to be Noble.

A Race Course Without Races: The long line of cases headed by *Taylor v. Caldwell* received an interesting addition in the decision of *Equity Trustees E. and A. Coy. Ltd. v. Considine and Andrews*. The defendants were lessees from the Company for a period of ten years of Sandown Park Racecourse at a rental of £1,500 a year, and had covenanted that they would use the land exclusively for racing and grazing, and not for cultivation or any other purpose. Thereafter, the Police Offences (Race Meeting) Act was passed prohibiting racing on that and some other courses. A dispute as to the rent having arisen, the Company took out a summons under the local Property Law Act for a rent reserved notwithstanding the Parliamentary prohibition of racing on the land leased. The defendants contended that the lease was avoided by the prohibition; but this contention found no favour with Sir Leo Cussen, Acting-Chief Justice of Victoria, who decided that the defendants still remained liable to pay the rent under their covenant, although they, when paying a visit to their property on any Saturday like Tom Moore's sad survivor will "feel like one that treads alone some racecourse all deserted."

Police Reports. Privileged: In *Gibbons v. Duffell* the Full Court at Sydney decided on demurrer a point upon which no earlier decision could be found. The plaintiff, a constable stationed at Redfern, applied for a transfer and the defendant in charge of the station there reported to his superior officer, the Metropolitan Superintendent, that Gibbons was not "amenable to discipline and was untruthful." Gibbons sued in libel on this report: the defendant pleaded that it was absolutely privileged, and the Court so held. Mr. Justice Harvey, delivering the unanimous decision of the Bench, described the State police as "a body organised on a semi-military basis for preservation of the safety of the community from internal enemies, as the army and navy were for its preservation from external enemies." Disputes between members of the force could best be dealt with as in the military and naval forces by regulations and inquiry thereunder and not by the law courts. Regulations providing for such inquiries had been made under the Police Act, and the Court was of opinion that these statutory tribunals afforded the only remedy available to the plaintiff.

The Power of Suppress: Recent and somewhat grotesque and ludicrous happenings in the Dominion remind me of similar strategic occurrences here. Forty years ago, the *Sydney Daily Telegraph* thought it was not getting its proper share of probate advertisements in the column headed "Legal Notices,"—a title which would seem to cast an undeserved imputation of illegality upon advertisements appearing in other columns,—and notified some solicitors that unless they sent along their ads. their names would not appear in the reports of cases. The response was not as desired; and so, in these reports, it was made to appear that barristers appeared without anyone to instruct them and pay their refreshers. These reports were the joke of the town for some days, but the paper ultimately returned to the regions of common sense: "and so," as Carlyle almost says in the *Thirty Years War*, "and so at last this most ludicrous business was got winded-up."

Cave Canem!—*Simpson v. Bannerman*, the Alsatian dog case mentioned in previous Notes, was before the Full Court Sydney on appeal. The plaintiff looked over a 5 ft. 6 in. fence with a wire 6 ins. above to see whether some timber ordered from him had been delivered to the defendant. To see over the fence properly, he put his hand on the top of the palings and an Alsation dog sprang up and bit his hand—as is said to be the custom among Alsatians. Mr. Justice Harvey and Mr. Justice Davidson thought that the plaintiff was a trespasser and deserved all he got. Mr. Justice Halse Rogers thought that the plaintiff was making a reasonable use of the highway and that the defendant was liable because he maintained a fierce animal close to the highway to the danger of persons lawfully using the highway. I confess that the dissenting judgment is to me the more convincing opinion.

Wellington District Law Society.

Annual Meeting.

The Annual Meeting of the Wellington District Law Society was held in the Supreme Court Buildings, Wellington, on February 22, 1932. There was a large attendance of members of the Society.

The retiring President, Mr. H. E. Anderson, took the Chair until the election of his successor, Mr. G. G. G. Watson.

Election of Officers: The following officers of the Society were elected:

President: Mr. G. G. G. Watson

Vice-President: Mr. E. P. Hay

Treasurer: Mr. David Perry

Auditor: Mr. J. S. Hanna.

Ordinary Members of Council: Messrs. H. E. Anderson, A. M. Cousins, W. H. Cunningham, A. T. Duncan, M. M. F. Luckie, P. Levi, D. R. Richmond, and A. A. Wylie.

The following members of the Law Society were elected to be the Society's representatives on the Council of the New Zealand Law Society: Messrs. A. Gray, K.C., C. H. Treadwell and G. G. G. Watson.

The Wellington representatives elected to the Council of Law Reporting of New Zealand were Messrs. C. H. Treadwell and H. F. O'Leary.

The Annual Report: The Annual Report and Balance Sheet for the year ended December 31, 1931, were adopted.

The Report indicated that the practitioners' certificates in the district totalled 378, and of that number 284 covered certificates in the city and suburbs and 94 in the country towns, showing an increase of seven compared with last year in the city, and a decrease of three in the country.

Reference was made to the loss sustained by the deaths of the Hon. T. Shailer Weston, and Messrs. O. E. Bowling, L. B. Dinniss and F. E. Kelly.

The Profession and the Press: Other matters of interest to the profession were discussed including reference to the policy adopted by the newspapers of not publishing the names of counsel appearing in the Courts of the Dominion. The following resolution was carried unanimously:

> "That this meeting of the members of the Law Society fully approves the attitude taken by the New Zealand Law Society in connection with the action of the Newspaper Proprietors' Association in adopting a policy of not publishing the names of counsel appearing in Court proceedings."

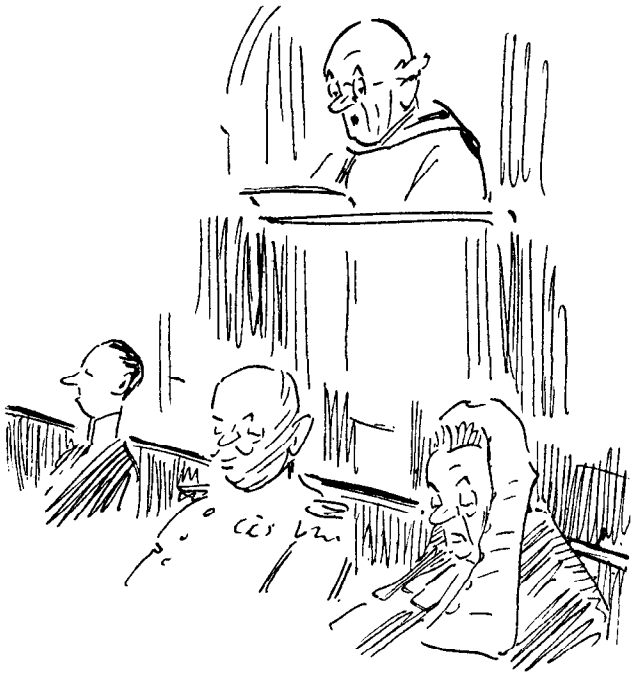
Easter Holidays: The question of the Easter holidays to be observed was considered and it was decided that the period during which law offices in the city should be closed at Easter should extend from 5 p.m. on Thursday, March 24, 1932, until the usual opening hour on Monday, April 4, 1932.

The annual meeting was an evening one. It was probably the largest and most enthusiastic ever held by the District Society.

Forensic Fables.

THE HIGH SHERIFF'S CHAPLAIN AND THE ASSIZE SERMON WHICH GAVE UNIVERSAL SATISFACTION.

A High Sheriff's Chaplain, whose Sermons on Various Occasions were Greatly Admired, Determined that when he Preached before the Judge of Assize his Lordship should not be disappointed. He accordingly Composed with the Utmost Care a Dignified Dissertation in which Scholarship, Dogma, and Respect for the Judicial Office were Suitably Blended. In Due Course the High Sheriff's Chaplain Climbed into the Pulpit, and the Judge of Assize, with a Sinking Heart, Prepared for the Worst. When he Opened his Manuscript the High Sheriff's Chaplain had the Shock of His Life. He Realised with Horror that his Wife had Furnished him with an Address which he had Intended for the



Annual Parochial Outing of the Boy Scouts and Girl Guides. There was Only One Thing to be Done. The High Sheriff's Chaplain Mumbled through the First Page, which Dealt with the Evils of Cigarette Smoking (Boy Scouts) and the Evils of Gossip (Girl Guides), and Tottered into the Vestry. The Whole Thing was Over in Three Minutes. Was the Sermon a Success? It was. The Same Evening the Judge of Assize Told the High Sheriff's Chaplain at the Bishop's Dinner-Table that he had Never Enjoyed a Sermon so Much, and that he Should Certainly Mention the Name of the High Sherriff's Chaplain to the Prime Minister in Connection with the Vacant Deanery of Porchester.

MORAL: *It Doesn't Matter.*

Arbitration Court Sittings: Palmerston North, March 16; Napier, March 18th; Wellington, April 1.

Lawyer as Citizen of the World.

Changing Conditions.

In the course of a very interesting address, delivered recently before the University of London Law Society, Sir Frederick Pollock discussed the increasing advantages of the study of Roman Law owing to present international conditions. He said that when he had been called to the Bar, sixty years ago, most of the profession had looked upon the study of Roman law and jurisprudence as an academic fad. Questions of foreign law, when they arose, could be mugged up with the help of an affidavit or two made by experts who emerged from their usual obscurity for the occasion. A specialist in one branch of the law might know little of any other branch. There had been illustrious exceptions, but such had been the general tone down to the last quarter of the nineteenth century. A curious result of this insularity had been that English lawyers had professed to be minutely critical in dealing with their own authorities, but had had no sense of general historical evidence.

Nowadays, nearly all this was changed. The world-wide development of modern commerce and travel had brought different systems of law into such frequent contact that almost every issue of the law reports bore witness to it. Moreover, the sequels of the war had brought international law to the front, and no man who aimed at being an accomplished lawyer could succeed without making himself a citizen in the commonwealth of cosmopolitan jurisprudence. This demanded an acquaintance with the principles and outline of classical and modern Roman law, which required an adequate knowledge of Latin and would be all the better for ability to consult the leading Continental commentators. A general understanding of Roman law was the key to modern Continental systems and Continental lawyers' way of thinking. Thus, to be at his ease in cases involving the conflict of laws, the lawyer should know French. German and Italian were also useful. To a man reasonably well acquainted with the terms and the classical scheme of Roman jurisprudence and with at least one modern language besides his own, there was no mystery about the study of international law. Common sense was much more important than extensive reading.

Americans were much nearer to the Continental point of view than to the insular one which prevailed in England—though not in Scotland. This caution was very necessary for the avoidance of misunderstanding. There was within the domains of the common law a wide field for the expansion of ideas and for the discipline of comparative study. The law of England might not have been adopted as a whole, but the materials of the criminal, commercial and general civil law were in substance English in India, the Malay States, the Pacific, Australia, New Zealand and most parts of North America.

Sir Frederick went on to say that the Bar, in general, and even the Bench, hardly seemed to be aware that on more than one point of pure common law the American leading cases gave fuller and more satisfactory expositions than anything in our own reports, while, on other points, they brought valuable and instructive confirmation. It was no credit to this country that American lawyers knew much more of what our House of Lords, Judicial Committee and Court of Appeal were doing than we did of the judgments rendered at Washington, Boston and New York.

Most English lawyers were still in a state of profound ignorance about the law of Scotland, a highly interesting and often practically important subject, the speaker added. Insufficient acquaintance with the principles and methods of Roman law was at the root of this ignorance.

While, doubtless, it was possible to earn a living in the profession of the law without burdening oneself with these extra subjects, Sir Frederick Pollock concluded, he had been addressing himself to those who aimed higher.

Rules and Regulations.

Animals Protection and Game Act, 1921-22. Special provision with respect to deer in portion of certain acclimatization districts.—*Gazette* No. 7, January 28, 1932.

Animals Protection and Game Act, 1921-22. Open seasons for red deer shooting in portions of North Canterbury, Southland, Wellington and Westland Acclimatization Districts.—*Gazette* No. 7, January 28, 1932.

Cinematograph Films Act, 1928. The Cinematograph Films (Censorship of Posters) Regulations, Amendment No. 1.—*Gazette* No. 8, February 4, 1932.

The Cinematograph Films (Censorship and Registration) Regulations, Amendment No. 1.—*Gazette* No. 8, February 4, 1932.

Health Act, 1920. Regulations for the Control of Hairdressers' Shops applied to the Borough of Winton as from January 31, 1932.—*Gazette* No. 8, February 4, 1932.

Native Purposes Act, 1931. Regulations as to the constitution of the Maori Arts and Crafts Board and matters relevant thereto.—*Gazette* No. 8, February 4, 1932.

Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1910. The Selwyn Plantation Board Regulations, 1931.—*Gazette* No. 8, February 4, 1932.

Animals Protection and Game Act, 1921-22. Open season for Wapiti shooting in the Southland Acclimatization District.—*Gazette* No. 8, February 4, 1932.

Animals Protection and Game Act, 1921-22. Open season for Moose shooting in the Southland Acclimatization District.—*Gazette* No. 8, February 4, 1932.

Fisheries Act, 1908. Revoking regulations relating to use of nets, and making others in lieu thereof.—*Gazette* No. 1, January 8, 1932.

Sharebrokers Act, 1908. Rules of the Stock Exchange Corporation of New Zealand Limited.—*Gazette* No. 1, January 8, 1932.

Government Railways Act, 1926. Amended regulations *re* apprentices, meal allowances, hours of duty, holidays, overtime, and Sunday work.—*Gazette* No. 1, January 8, 1932.

Masseurs Registration Act, 1920. Amended regulations.—*Gazette* No. 3, January 14, 1932.

Customs Amendment Act, 1931. Duty on leaf tobacco used in manufacture of cigars.—*Gazette* No. 3, January 14, 1932.