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

"I would, however, remind you that it is not possible to legislate ahead of public opinion, nor is it wise to pull down a house till you are quite sure you have got a better one to live in. It is to be hoped that outspoken criticisms will continue, for there are some of us to whom it is really helpful: but it is one thing to criticise and another to create. If to do were as easy as to know what were good to do, chapels had been churches and poor men's cottages princes' palaces." —LORD SANKEY, L.C.

Vol. VIII. Tuesday, November 1, 1932 No. 19

The Local Situation of a Debt.

A question that has often exercised the minds of the Courts is whether—apart from cases of probates and the interpretation of wills, and for the purposes of estate and death duties—a simple contract debt may have a local situation. It has been established "by a long series of authorities that stretch far back into the mists of antiquity" (to use Lord Buckmaster's phrase), that for the purposes of death duties a simple contract debt is assumed to be situate where the debtor resides: see *Royal Trust Co. v. Attorney-General for Alberta* [1930] A.C. 144. The rules "are no doubt somewhat artificial in character, but the local situation proper to be attributed to the various assets of a deceased person has long been governed by them," *per* Lord Merrivale, *ibid*, p. 150.

The earlier probate cases were concerned with the locality of an item of property for the purpose of ascertaining whether it was covered by a probate granted by an ordinary with a limited local jurisdiction: see *Byron v. Byron*, 1 Cro. Eliz. 472. The general principle is well settled in probate cases: *per* Lord Cave in *Toronto General Trusts Corporation v. The King* [1919] A.C. 679, at p. 683.

When dealing with the interpretation of wills, the Courts have held that gifts of property situate in a particular place do include simple contract debts from debtors there resident. Thus, in *Guthrie v. Walrond* (1883) 22 Ch. D. 573, a testator at the time of his death bequeathed to his son "all my estate and effects in Mauritius." At the time of his death, the testator was resident in England. He was not domiciled in Mauritius, but from there was due to him the purchase price of real estate there situate, which was owing by residents of that Colony. It was held that the debt was included in the bequest of property in Mauritius. Fry, J., said that in the earlier cases to which reference had been made the Courts had merely inquired what was the residence of the debtor.

Whether a simple contract debt could be so localized—apart from circumstances relating to wills and death duties—was a matter of doubt until the recent decision of the House of Lords in *English, Scottish and Australian Bank Ltd. v. The Inland Revenue Commissioners* [1932] A.C. 238. Before considering the decision there reached, it may be of advantage to refer to some previous decisions on the point, all of which centre around determination of the question as to whether incorporeal property and choses in action of one kind or another are "property locally situate outside of the United Kingdom" for revenue purposes. Their application is of wide extent.

In the case of the *Smelting Company of Australia, Ltd. v. Commissioner of Inland Revenue* [1897] 1 Q.B. 175, the facts were that the subjects of an agreement executed in England and made between two companies incorporated under the Imperial Companies Acts and having their registered offices and carrying on business in England, were a share in a patent granted in New South Wales and a sole license to use in the Illawarra district there the invention protected by the patent. The Court of Appeal held that such rights were not locally situate outside the United Kingdom.

Lord Esher, M.R., said that the expression "locally situate" could not apply to something which in truth and fact had no locality: it could not be touched, seen, or placed anywhere. Lopes, L.J., took the view that a patent or license to use a patent, which is not a visible or tangible thing, could not be said to be locally situate in New South Wales. And Rigby, L.J., said:

> "No doubt for certain purposes incorporeal rights and choses in action such as debts are treated by a legal fiction as being where the debtor is; but I do not know that we are therefore compelled to say, or ought properly to say, that they have a local situation there. The incorporeal right can only be made effectual where the debtor is from the nature of the right; you can only sue a man where you can find him, but it does not follow that the right can have a local situation there or anywhere."

In *Inland Revenue Commissioners v. Muller and Co.'s Margarine, Ltd.* [1901] A.C. 217, when the question arose as to whether the goodwill of a German business was locally situate outside the United Kingdom, the House of Lords held it was so situate: in the words of Lord Lindley:

> "The legal conception of property appears to involve the legal conception of existence somewhere. Incorporeal property has no existence in nature and has, physically speaking, no locality at all. We, however, are dealing not with anything which in fact fills a portion of space, but with a legal conception, or, in other words, with rights regarded as property. But to talk of property as existing nowhere is to use language which to me is unintelligible."

The *Smelting Company's* case (*supra*) was not expressly overruled though its authority was impaired by the expressions of opinion of the House of Lords; and Lord Lindley, who alone refers to it, said it does not deal with a foreign business. He said that:

> "The authorities which bear upon the locality of incorporeal personal property for the purposes of probate appear to me to afford the best guides for the solution of the case before us."

The judgment was based on the consideration that, as the goodwill was attached to a business situate abroad, it was not locally situate in Great Britain.

Next in order comes the Court of Appeal judgment in *Danubian Sugar Factories, Ltd. v. Commissioners of Inland Revenue* [1901] 1 K.B. 245, when it was held that the sale in England of the benefit of a contract for sale of land by a foreign resident in Roumania of land suitable for the erection there of a sugar factory, was the subject-matter of a personal right "that is so attached to land as to give it a local situation and thus bring it within the decision in *Muller's* case (*supra*)," per Sterling, L.J., at p. 259. And Collins, L.J., said, at p. 253, "it seems to me impossible having regard to the decision in *Smelting Company of Australia v. Inland Revenue Commissioners*, which appears to me directly in point, to hold the property in the present case was situate out of the United Kingdom."

Next in order, comes the Court of Appeal decision in the case of *Velasquez Ltd. v. Inland Revenue Commissioners* [1914] 3 K.B. 458, which upheld the decision of Scrutton, J., who regarded the decision in the *Smelting Company's* case (*supra*) as binding on him and not in terms overruled by *Muller's* case (*supra*). The Court of Appeal upheld his view that "a personal right to a debt not attached in any way to land has no local situation."

Recently, the whole question was revived and reviewed in *English, Scottish and Australian Bank, Ltd. v. Inland Revenue Commissioners* [1932] A.C. 238, when the House of Lords overruled the *Smelting Company's* case, the *Danubian Sugar Factories'* case, and the *Velasquez'* case, and settled the law in relation to the local situation of simple debts. In his speech, Lord Buckmaster says that the first-named:

> "most clearly depends upon the assumption that incorporeal property can have no locality, and it is true that it has not the attributes of place and substance like a chattel which you can handle and move from one place to another. But debts do, in one form or another, represent property of very considerable value in the modern world, and it appears to me that it is desirable that they should possess a locality, even if they are invested with it by means of a legal fiction. . . . I think, too, that the view of *Muller's* case is too narrow in basing the decision solely on the ground of goodwill being attached to some form of hereditament."

His Lordship concluded that, once it be assumed that a debt must have a local situation, it can only be where the debtor or creditor resides. The fact that for purposes of probate and estate duty a simple contract debt was assumed to be situate where the debtor resided was established by a long series of authorities that stretch far back into the mists of antiquity. Where a similar question has arisen in consideration of wills, gifts of property situate in a particular place had been held to include simple contract debts from debtors there resident.

Lord Warrington of Clyde used the analogy of the discovery by a legal fiction of the local situation of a company, which cannot eat or sleep—common tests of residence in human beings—yet to this intangible legal conception has been attributed residence and the Courts have found no difficulty in ascertaining its locality. He, too, said that in the *Smelting Company's* case:

> "One would have thought the Australian locality was unusually clear . . . this case and the other cases dependent on it must be taken to be overruled."

He concluded that the debts in question in the case before their Lordships being all simple contract debts were locally situate where the debtors reside.

Lords Tomlin, Macmillan, and Atkin agreed. Lord Macmillan said:

> "I can see no reason why simple contract debts should have a local situation for the purpose of probate duty, but no local situation for the analogous purpose of stamp duty. So far from regarding the probate cases as anomalous, I regard the principle upon which they have been decided as the sound principle and the stamp duty cases in the Court of Appeal as an aberration which your Lordships have now an opportunity of correcting."

The judgment of the House of Lords has far-reaching effects. It settles the law both as to whether simple contract debts may be localized somewhere, and it decides how their local situation is to be determined. As Lord Macmillan concisely put it:

"It is not permissible to hold that property has no situation. All property must be either within or out of the United Kingdom [for the purposes of the case before their Lordships] and there is no intermediate limbo."

Supreme Court

Herdman, J. September 5, 16, 1932.
Auckland.

In re RADIO CHAIN STORES LTD. (IN LIQDN.): *ex parte* BROWN.

Company—Shares—Irregular Allotment—Application for Shares subject to Express Condition as to appointment as Medical Officer—Calls to be payable out of Income to be earned in that capacity—Whether Contract void—Whether Applicant had consented to his name being left on Register subject to Liabilities of ordinary Shareholder—Companies Act, 1908 S. 100.

Application by Dr. John Falconer Brown to remove his name from the list of contributories in a company named Radio Chain Stores Limited, which is now in liquidation.

The company was registered on May 5, 1931. Prior to registration Dr. Brown was approached by a canvasser employed by the promoters of the company and invited to apply for shares in it. He was told that if he applied for 100 preference shares of £1 each he would receive an appointment as medical adviser of the company. Dr. Brown was to pay £10 in cash and the balance payable in respect of his shares was to be liquidated by applying professional fees earned towards extinguishing that liability. He stated in his affidavit that if there was no appointment there was to be no allotment.

On March 16, 1931, about two months before the company was registered, a letter signed by "A. Taylor, Director" was received by Dr. Brown. It refers to the appointment which was to be conferred upon him in these terms: "Your share application for 100 preference shares must be endorsed 'Subject to appointment as Medical Adviser for City proper,' you to pay your application money, £10, the balance of the share money to be taken from earnings as opportunity offers."

On March 16, 1931, Dr. Brown made application for shares in a form headed "Subject to appointment as Medical Adviser for City proper. J.H.B."

On April 23, 1931, the promoters of the Company met and purported to allot shares to different persons including Dr. Brown and on that date the following letter was written by Mr. Leach who was acting as secretary of the promoters of the Company. It was headed: "RADIO CHAIN STORES LTD. (Incorporated under The Companies Act, 1908) Allotment Letter."

"Dr. J. F. Brown, Queen Street, Auckland. Dear Sir,—I beg to inform you that in accordance with your application the Directors of the above Company have allotted to you 100 Preference Shares of ten shillings each, and that there is due upon such shares the sum of £10 made up as follows:—

Application Money at two shillings per share	£10	0	0
Allotment Money at two shillings per share ..	£10	0	0
	£20	0	0
Less deposit forwarded with application ..	£10	0	0
Balance due ..	£10	0	0

"Balance to be debited against share capital account in accordance with the agreement made between yourself and this Company. Share Script numbers: 926–1025.

I am, Your obedient servant,
A. J. H. LEACH, Secretary."

It will be noted that the statement at the head of this letter that the Company was incorporated was at that time untrue.

Held: The Company, after coming into existence, had not made any valid allotment of shares to plaintiff. The contract to take shares was subject to an express stipulation relating to an appointment and to the payment of calls out of income to be earned and was *ultra vires* the directors. It was not to be inferred that the plaintiff had waived the condition, notwithstanding the contract was a vitiated one, nor that he had assented to his name being left on the register subject to the ordinary incidents of membership.

Leary in support.
Cocker to oppose.

HERDMAN, J., after setting out the facts, said that the incidents narrated above had happened before the registration of the company on May 5, 1931. Two days after that event, namely, on May 7, 1931, a meeting of provisional directors was held at which this resolution relating to the meeting of April 23, 1931, was passed. It reads as follows: "Confirmation of Minutes: Proposed by Mr. W. A. Leach, seconded by Mr. D. K. Duncan 'That the minutes of the previous meeting of the Provisional Directors of Radio Chain Stores Ltd. as read be adopted.' Carried."

It was admitted by Mr. *Cocker* that the passing of this resolution did not amount to an allotment of shares. Indeed, His Honour thought it could be said that there was no evidence that the Company, after it came into existence, made any valid allotment of shares to Dr. Brown. The Secretary stated in his affidavit that following the practice of the Company an agreement relating to his appointment was forwarded for execution. But Dr. Brown denied having received the agreement and His Honour held that receipt by him of the proposed agreement has not been proved.

A statutory meeting of the Company was called for September 19, 1931, and in respect of that notices were sent to shareholders including Dr. Brown. The secretary stated that he must have despatched a notice to Dr. Brown but the latter in his affidavit neither admitted nor denied having received this notice.

The Company after a brief and apparently unhappy existence went into liquidation on December 4, 1931; and it was not until May 5, 1932, that Dr. Brown learned that it had not been incorporated until May 5, 1931, and that he had not been appointed to the office stipulated for. He stated in his affidavit: "I have consistently denied any liability in the matter of payment for the shares on the ground that the terms of payment were not as arranged," and His Honour thought that the correspondence put it beyond doubt that any application for shares made by Dr. Brown was subject to a clearly expressed condition.

It was, however, submitted by Mr. *Cocker* that the stipulation that Dr. Brown should be appointed to a particular office and that his shares should be paid for out of the moneys earned by him when performing the duties pertaining to his office, if *ultra vires* of the powers of the directors of the Company, can be severed from the application to take shares. The view that he contended for was that Dr. Brown intended and agreed to become a shareholder *in praesenti* with a collateral agreement as to what should be the effect of his becoming a shareholder. In other words he asserted that the present case came within **Elkington's case,** 2 L.R. Ch. App. 511, and not within the principle upon which **Pellatt's case** (reported in the same volume at p. 527) was decided. In **Elkington's case** Lord *Cairns* makes this statement: ". . . the real point for determination in this case might be said to be this, did Messrs. Elkington intend and agree to become members and shareholders *in praesenti*, with a collateral agreement as to what should be the effect of their so becoming shareholders or, on the other hand, did Messrs. Elkington agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders?"

His Honour had no doubt at all that the present case was governed by **Pellatt's case** in which it was decided on the facts that Pellatt was not a contributory for that he had only agreed to take shares upon a special agreement as to set off which, if *ultra vires* of the directors, was not binding on the Company and therefore for want of mutuality was not binding on Pellatt, and, if *intra vires*, was still not enforceable against Pellatt because the stipulation on the part of the company had become incapable of being performed.

To understand Elkington's case it is necessary to look closely at the facts. In his judgment, *Turner*, L.J., points out that when Elkingtons applied for 150 shares in the terms expressed in their letter they did something that was quite inconsistent with the notion that it could be intended by the parties that the contract should be wholly contingent upon whether goods should be ordered or not. On p. 520, he says: "They actually accepted the shares, accepted the allotment, and paid the amount which was to be paid upon the allotment. Thereupon they stood as complete shareholders of the company upon the allotment which was made to them. They were registered as shareholders in the company, and so stood, from that time down to the time when their names were taken off by the Vice-Chancellor."

A case which bears a strong resemblance to the present one is a Scotch case decided in the Court of Sessions, **The National House Property Investment Co. v. Watson,** [1908] Sess. Cas. p. 888. The facts were these. A. applied for shares in a company, and paid the amount due on application, on the express condition that the firm of which he was a member should be appointed to a certain office, and that he should be at liberty to pay up the balance due upon his shares by fees to be earned by the firm. Before the balance had been paid the company went into liquidation. The company and its liquidator sued A. for the amount unpaid upon his shares. **Held**: that it was *ultra vires* of the directors to agree to the stipulation as to payment for the shares, and therefore that the defender was not a shareholder and was entitled to absolvitor. See, also, the passage from the judgment of Lord *Cairns* in **Pellatt's case,** cited by Lord *Low* in his judgment.

It having been admitted by Counsel for the liquidator that the original allotment was irregular and His Honour having decided that the contract to take shares was subject to an express stipulation relating to an appointment and to the payment of calls out of income earned and therefore void, it seems to His Honour that one point and one point only was left for decision and it was this: If the contract be void for the reasons already given was there any evidence from which it could be inferred that Dr. Brown, notwithstanding that the contract was a vitiated one, assented or consented to his name being left on the register subject to all the liabilities of an ordinary shareholder? In **Buckley on The Companies Act,** 11th Edn. p. 48, this passage appears: "Where shares have been accepted subject to a condition precedent the condition may have been waived and the applicant may not be bound."

His Honour had been told that Dr. Brown had received a notice of a statutory meeting and that he had taken no notice of it. But why should he act upon receipt of such a notice? He was aware that he had applied for shares subject to a condition. He knew that his application had been accepted subject to a condition and probably he thought that these events had taken place after the company was registered. But he also knew that he had received no appointment and that no income resulting from any appointment had been earned. Moreover, and this was most important, he believed that under the arrangement he had made he could not be called upon to contribute a shilling towards uncalled capital except from earnings as an employee of the Company. Years might pass before sufficient was earned to pay all calls made. Sufficient might never be earned to meet calls made. He had a right to believe that his position was so sure that he need not trouble about a notice of any statutory meetings or of any other kind of meeting. Did the receipt of a notice of a meeting without challenge and without any subsequent repudiation amount to an assent on his part to become liable for anything more than he was liable for under an agreement which, as it happens, has no legal effect? His Honour did not think so, and should not so decide. Then it was said that his name is on the register. What register? A book had been produced which records Dr. Brown as being the owner of 100 shares two months before the Company saw the light of day. S. 100 of the Companies Act, 1908, requires a Company to keep a register book of its members and to record the date at which the name of any person was entered in the register.

March 16, 1931, was the date upon which Dr. Brown's name was entered upon the register but there was then no company, and no valid allotment of shares in favour of Dr. Brown had ever been made. His Honour doubted whether any allotment of shares that would stand investigation had ever been made by this Company which in the course of its brief career had left so many things undone that it ought to have done.

The subject of registration is considered by the learned author of **Palmer's Company Precedents,** 14th Edition at p. 47. Referring to certain cases that had been referred to he proceeds to make this statement: "The cases under the last two heads come to this: that a person is to be regarded as a member if his name is on the register of members with his consent, or if he is estopped from denying that he is registered without consent. He may not have applied; the shares may have been placed there without his consent and contrary to his wishes, but if he assents to his name being on the register, he is to be considered a member of the company. Mere entry of a person's name on the company's register, however, without agreement or assent, is not enough."

His Honour said he had examined such cases as **Wheatcroft's case,** 29 Law Times, p. 324; **In re James Burton and Sons, Ltd.,** [1927] 2 Ch. 132; **The Railway Time Tables Co. case,** 42 Ch. D. 98; **Crawley's case,** 4 Ch. App., 322, but the facts and circumstances in all those cases differ widely from those in the one now under review.

In **Wheatcroft's case,** it was found by the Vice-Chancellor that 30 shares in the company had been allotted to Wheatcroft

in his presence in 1867, and that as auditor of the company he had by a balance sheet recognised and acknowledged the possession of and title to the shares. In **Burton and Sons,** the applicant for relief had received a share certificate, had been placed on the register, had accepted a bonus and had attended a meeting of shareholders. It was held that his conduct estopped him from denying that he was a member of the company. In **Railway Time Tables case,** Mrs. Sandy's name was on the register and after she knew that she was on the register she did certain acts which were consistent only with an intention on her part to be treated as a member of the company. In **Crawley's case,** L.R. Ch. App. Vol. 4, p. 323, Crawley had executed a blank transfer of shares which he wished to repudiate; and in the **N.Z. Farmers' Dairy Union v. Birch,** 15 N.Z.L.R., 315, there had been a valid allotment of shares and the shareholders had received three notices of calls followed by a circular rendering a statement of his share account. The shareholder ignored the notices and the circular and took no steps to dispute his liability until he was sued. The strong evidence from which assent was inferred in the cases referred to was entirely absent in the present case.

Order removing the name of John Falconer Brown from the list of contributories.

Solicitors for applicant: **Bamford, Brown and Leary,** Auckland.
Solicitors for the Company: **Hesketh, Richmond, Adams and Cocker,** Auckland.

Reed, J. August 31; September 13, 1932. Wellington.

In re MAHUPUKU (DECD.): THOMPSON AND ANOR. v. MAHUPUKU.

Will—Interpretation—Maori Customary Marriage of Testator's Widow—Whether same a "marriage" to defeat Gift of Income during Widowhood—Usual point of view of Testator considered.

Originating Summons to determine whether or not the gift of income made by the will of Wi Tamahau Mahupuku to his wife Eva Mahupuku has been defeated in the following circumstances.

Wi Tamahau (the surname of himself and his wife are omitted throughout) was a European by birth and was born on April 8, 1896, but, as a child, was adopted by Tamahau Mahupuku, M.P., and his legally married wife Arete Mahupuku. He was educated at Hikurangi College, a native scholastic institution. When he was about seven years of age Tamahau Mahupuku, M.P., died and Arete Mahupuku, taking Wi Tamahau with her, moved from the pa where they had been living to a 12-roomed house owned by the former and situated in Greytown. Wi Tamahau when of the age of 20 was legally married by a native Church of England clergyman to Eva, a half-caste native girl from Opotiki of the age of 18. They were married in the house of his adopted mother. There are two children, boys, of the marriage. Wi Tamahau died on September 18, 1920, leaving a will dated April 22, 1920, probate of which was granted to James Frederick Thompson of Greytown, Solicitor, and Whare Eruera Turei, the plaintiffs.

The will as drawn appointed as executors Mr. Thompson and Mr. Robert Ward Tate, solicitor, of Greytown, as executors, but the name of Whare Eruera Turei was inserted as an additional executor before the will was signed. The latter was one of the witnesses to the will and endorsed a certificate thereon that the will was explained by him to the Testator in both Maori and English and that he clearly understood the effect of the will. It does not appear why Mr. Tate did not join in taking out Probate but in all probability his Magisterial duties rendered it inadvisable. These apparently irrelevant facts were mentioned as having some bearing as indicating that Wi Tamahau had a European rather than a Maori bias.

The will is carefully drawn in English by a solicitor and contains full and complete directions for the disposal of the Testator's Estate with full power to the Trustees with regard to advancement for maintenance, education, and benefit of the infant children of the Testator. The will provides that the Trustees are "to stand possessed of the residue thereof upon trust to pay the net annual income thereof to my wife Eva Mahupuku during her lifetime so long as she shall remain my widow subject to the obligation of maintaining and educating thereout such of my children as shall for the time being be minors and shall not be married and after the decease or second marriage of my said wife which event shall first happen upon trust for all my children."

The widow, Eva, sometime after his death contracted a sexual relationship with a native or half-caste, it does not appear which, and has given birth to a child. The parties are living together. In these circumstances, the Trustees have deemed it their duty to ask the Court to determine whether the relationship that has been established constitutes a "marriage" within the meaning of that word in the will so as to defeat the gift of income.

Held: That the words "so long as she shall remain my widow" meant "so long as she shall not contract a legal marriage." There is only one marriage law in New Zealand for all races, and evidence of Maori want of knowledge of the legal meaning of words is not admissible: *Rangi Kerehoma v. Public Trustee* [1918] G.L.R. 483 followed; *Love v. Ihaka Te Rou* (——) 8 N.Z.L.R. 198 applied.

Evans-Scott for the Trustees.

Hodgson for the Widow.

Wiren for Sons of Testator.

REED, J., after reading the foregoing facts, said that the only affidavit filed on behalf of the Trustees was by one of them, Whare Eruera Turei, who described the relationship as a "Maori customary marriage." There was no evidence as to how the sexual relationship in the present case was brought about but it would appear that in what is termed a Maori customary marriage no formality whatsoever is required, the parties simply living together, and if they tire of each other they separate without formality, and enter into fresh relations with others, and, that which, if the marriage were a legal one, would be termed polygamy is recognised. These unions are recognised by the Native Land Courts as sufficient for the purposes of succession to the estates of Maoris and half-castes, whether the estate consists of land or personal property, and whether the land is customary or freehold. No such union or customary marriage, however, is valid for any other purpose: **Rira Peti v. Ngaraihi Te Paku,** 7 N.Z.L.R. 235.

The position is as stated by *Chapman*, J., in **Rangi Kerehoma v. Public Trustee** [1918] G.L.R. 483, 485 as follows: "There is only one marriage law in New Zealand for all races, and there is no status of concubinage such as is recognised in some countries, and the so-called marriage according to Maori custom is no marriage in law. It results in a voluntary cohabitation; but a man may have several such unions at the same time and may dissolve them at will, and the woman may do the like, just as Europeans may do." It was contended, however, that the natives recognise such unions and that in construing this will the duty of the Court is to endeavour to ascertain the intention of the Testator, and that for that purpose evidence is admissible to show in what sense a Maori would use the word marriage.

Counsel relied on such cases as **In re Rayner** [1904] 1 Ch. 176, 188; **McGibbon v. Abbott,** 10 A.C. 653, 658; **Day v. Collins** [1925] N.Z.L.R. 280. Those cases are distinguishable; in the first case it was clearly shown by the context that "securities" meant "investments"; in the second it was held by the Privy Council that a will, written in English, and executed by a person domiciled in Lower Canada, must be interpreted according to the law of Lower Canada; and in the last the question was as to who was the *persona designata* to receive a legacy under a will, and it was decided by reference to the context, in which, as pointed out by Stout, C.J., the testator had made his own dictionary by which he defined "my wife" as referring to a woman who was not his wife in law.

His Honour said he was not satisfied that the Testator in the present case should be regarded as having a Maori point of view. He was born a European and lived independently as a European. He and his wife spoke English as a matter of course in their home, and he had as his friends Europeans as well as Maoris. Mr. Evans, manager of the New Zealand Loan and Mercantile Agency at Masterton, deposed that he had numerous talks with him on many occasions over a period of six years and regarded him as more European than Maori. He had his will drawn by a solicitor and appointed two Europeans as his executors and trustees, adding, however, at the execution of the will, Whare Eruera Turei, an educated Maori. But consideration of his mental bias was really irrelevant; the question was concluded by the decision of the Court of Appeal in **Love v. Ihaka Te Rou,** 8 N.Z.L.R. 198. In that case, a Maori made his will in Maori of which the following is a trans-

lation: "Notwithstanding that my first will may have been lost, this is my last word: (I give) to Hera, to Wi Tako, to Hori Kerei, to Ihaka te Rou, all my lands and goods." The question was as to whether the beneficiaries took as joint tenants or tenants in common. The case first came before *Prendergast*, C.J. In holding that the words created a joint tenancy that learned Judge said: "It was also endeavoured to establish that a Maori making a will must make it, in the absence of expressions to the contrary, in a sense which would be consonant with the ideas of Maoris generally, and that Maoris had no idea of survivorship. I suppose the same may be said of the great majority of persons who are not Maoris, but still, when they use language which in law creates a joint tenancy, their intention not to do so cannot be ascertained by enquiring what their intentions were, or what their state of knowledge is of the effect of the words they use. The words used have a known legal meaning, they are unambiguous, and the evidence of the Maori want of knowledge is not admissible." The case went to the Court of Appeal, and *Richmond*, J., delivering the judgment of the majority of the Court—himself, *Williams*, and *Denniston*, JJ., *Conolly*, J., dissenting, said: (p. 216): "Evidence that the right of survivorship is unknown to the Natives is tendered to show that the Maori testator cannot have meant to create a joint tenancy. In my opinion, such evidence is inadmissible. The intention must be taken to be what the words express. A Maori testator using English words must be deemed to mean what an Englishman would mean by the same words; a Maori testator using his own language must be deemed to mean what an Englishman would mean by the equivalent English phrase."

The present case was stronger, here there was a European executing a will in English and using words having a strict and primary legal meaning with nothing in the context from which it is apparent that they were used in any other sense. Marriage means a legal marriage and that construction must be placed on the word where used in the will, and "so long as she shall remain my widow" meant so long as she shall not contract a legal marriage.

The question submitted was answered as follows: That the gift of the income made by the will of the deceased to Eva Mahupuku has not been defeated by the sexual relationship into which she has entered.

Solicitors for the plaintiff: **J. F. Thompson,** Greytown.
Solicitors for sons of testator: **Wylie and Wiren,** Wellington.
Solicitors for the defendant: **Potts and Hodgson,** Opotiki.

Ostler, J. August 5, 26, 1932.
Blair, J. Wellington.

O'NEILL AND ORS. v. THE N.Z. NATIONAL CREDITMEN'S ASSOCIATION (WELLINGTON) LTD.

Practice—Special Jury—Action for Libel—Motion to Review Order for Special Jury—Principles to be Applied in Determining whether Expert Knowledge on Part of Jury Required—Code of Civil Procedure, R. 259.

Summons for a trial by special jury. The Chief Justice ordered the action to be so tried. The matter came before Ostler and Blair, JJ., on motion to review. The plaintiff is a builder and contractor. The two personal defendants are alleged respectively to be manager and secretary of the defendant company. The company was formed to supply to its clients information concerning the financial position and credit of persons doing business with such clients. The company, it is alleged, divides its clients into various trade sections according to the particular class of business carried on, and information respecting any particular person is sent only to the particular business section of the defendant company's clients who trade with or are likely to trade with that particular person. The plaintiff being a builder and contractor, any information respecting him would be given only to those firms—clients of the defendant company—whose business it is to trade with building contractors.

The action is for libel, the libel alleged being that the plaintiff had been put on its "C" list by the company and such list had been sent out to its "Builders Supply Section" of clients.

It is alleged that by describing the plaintiffs as in the "C" class the defendants meant and were understood by their clients to mean that the plaintiffs were persons of bad financial repute, or alternatively that they were not persons to whom credit should be given, or alternatively that they were five months overdue in the payment of some one or more of their trade accounts without having made satisfactory arrangements with all their creditors. In the list which the defendants sent to their clients the plaintiffs, it is alleged, were not included by name, but a number was given, and the key to such number identified the plaintiffs as the persons referred to as being in the "C" class. Damages totalling £3,000 are claimed.

The defence filed admits the incorporation of the company, admits that the defendant Sullivan is manager of the company, but denies that Bell is the secretary. Then follows a general denial of every other allegation in the statement of claim. For a further defence the defendants say that if the words and figures are proved to have been published by them they are incapable of any defamatory meaning.

Held: The question as to whether expert knowledge is required on the part of the jury is one of fact in each case. It is to be determined first whether the mental processes through which the jury must go in order to arrive at their verdict involve the application of expert knowledge appertaining to some trade or business. If they so require, the case is one where a discretion arises to order a special jury. *Wilkins and Field v. Wright*, 19 N.Z.L.R. 278, and *Nash v. Nash* (unreported: 1928: *Ostler*, J.), applied and followed. Subject to a specified undertaking being given by the defendant company, the order for a special jury should stand.

Watson and **James** for plaintiff.

Cleary for defendant.

OSTLER and BLAIR, JJ., in a judgment delivered by the latter, said that the Chief Justice had not delivered a written judgment and they were thus without the advantage of having his reasons before them. Ordinarily motions to review are brought before the Judge who made the order in Chambers. The matter was claimed by the parties to be urgent, and the Chief Justice, their Honours were informed, suggested to the parties that as, owing to absence from Wellington on circuit, he would not be able to hear the motion for review, it might be taken by another Judge or Judges. Accordingly the matter came before their Honours and was fully argued.

The defence that if the words and figures are proved to have been published by the defendants they are incapable of any defamatory meaning is a matter of law: **Capital and Counties Bank v. Henty,** 7 A.C. 741, and may therefore be disregarded in this application. For a further defence the defendants say that the Builders Supply Section of the defendant company is a voluntary association of traders whose business is the selling of plant and materials used by traders: that the object of this voluntary association is the interchange of information beneficial to members, and to afford mutual protection: that the association appoints an executive which meets monthly for the purpose of grading the credit standing of customers: that this voluntary association employs the defendant company for the purpose of receiving returns from the individual members, and for communicating to members the determinations of the executive as to the credit grading of customers: that if it be proved that the defendant company published the information alleged in the statement of claim the defendant company did so in discharge of its duty to the members of the association, and it was done *bona fide* and without malice, and was therefore privileged.

This defence, it will be observed, raises a question of law, and if it be decided in the defendant's favour the only question for the jury would be one of malice. The defendant, it will be noted, claims that it passed on information given to it by the executive of the voluntary association, and did so believing such information to be true. This is matter of fact affecting a matter of law.

The remaining defence is one of justification of the words used with their alleged meaning. In the particulars of justification the defendants say that the plaintiff O'Neill in January, 1930, assigned his estate to trustees for the benefit of his creditors, and agreed to pay into the hands of his trustees sufficient cash to enable them to pay to his creditors a dividend of 15/- in the £; and that the assigned estate has up to the present yielded dividends totalling 4/- in the £, and that O'Neill has outstanding liabilities totalling over £1,500 to his Christchurch creditors.

Justification is pleaded only with reference to the statements allegedly made concerning the plaintiff O'Neill. No justification is pleaded to the claim by the plaintiffs Mrs. O'Neill and Pugh, who trade under the name of "O'Neill and Pugh." So far, therefore, as these two plaintiffs are concerned, the case is one of a general denial with the added defence of qualified privilege. Assuming that the Court finds as a matter of law

that the publication was privileged, then the case resolves itself, after proof of publication, into the questions of malice and damages.

In O'Neill's case there is added the question of justification. The defendant will on this head have to show that the plaintiff O'Neill was either of bad financial repute or a person to whom credit should not be given, or that he was five months overdue in the payment of one or more of his trade accounts without having made satisfactory arrangements with all his creditors. This last-mentioned alternative innuendo will, their Honours presumed, depend on proof—probably documentary—as to what inclusion on the " C " list means.

Some embarrassment may, and probably will, arise by reason of the joinder of two actions in one. O'Neill was, it is alleged, placed separately on the " C " list, and the firm of O'Neill and Pugh was also separately listed. Except for the fact that Mrs. O'Neill is the wife of the plaintiff O'Neill there is no connection between the two sets of plaintiffs, and their causes of action are entirely different. Moreover justification is pleaded in one action and not in the other. As, however, it is the plaintiffs who are responsible for this joinder they cannot complain if, when considering the case from the jury point of view, it is treated as one action only affecting the credit of traders in which a general denial and privilege and alternatively justification are pleaded.

The matters of fact for trial in the action as at present framed are : (a) publication ; (b) the defamatory meaning of the words ; (c) justification ; (d) malice ; and (e) damages. Malice will arise only if the Court rules that the occasion was privileged.

For the defendant it was contended that the principles to be applied on a review were similar to those on an appeal from a Judge. Their Honours did not think this is so. In **Munns v. Levin** [1929] N.Z.L.R. 590, a case of review of a Judge's order giving leave to defend on a bill writ, the Court held that on review the matter must be treated as at large. A review generally comes before the same Judge who heard the matter in Chambers, and it is obvious that he would not consider himself trammelled by his former decision. Reviews are not infrequently based on additional evidence. Except, therefore, for the respect which is naturally due to the opinion of another Judge the matter is entirely at large, and must be considered in the same way as if the motion had been the original one.

The affidavit in support of the summons for trial by special jury states firstly that the publication is alleged to be in code. This is true, but it would not be a matter for expert knowledge on the part of witnesses, or the jury themselves, to understand a translation of such code. All that is required to be understood on this head is that a certain person is designated by number instead of name.

The affidavit also states that the defendant association is an association of traders selling plant and material to builders, and its object is to afford the members mutual protection against losses in business arising from the granting of credit, and that the allegation is that the lists published to members were defamatory of the plaintiffs in that they meant the plaintiffs were not persons to whom credit should be given. The affidavit also states that the gradings in the list are made by the executive for the use of members. The deponent, who is the managing director of the defendant company then states that in his opinion expert knowledge of business matters on the part of the jurymen is required " for the purpose of determining the meaning to be attributed to the inclusion of the plaintiffs in the said lists and for the purpose of deciding the issues of justification and malice raised by the pleadings."

It is not suggested in the affidavits that expert evidence will be called by auditors or accountants as to questions of auditing or accountancy. Where nice questions of the proper practice of auditors or accountants arise, or as to whether a company was or was not in the opinion of accountants solvent at a particular time is an obvious case for expert knowledge. And their Honours could also conceive a case where two business men, when speaking of business matters, may use terms and expressions which to business men convey a particular meaning but to other persons might mean something entirely different. In such cases the parties are using what are terms of art and the case then becomes one where expert knowledge is required, In the present case, the plaintiffs allege that the defendants have falsely and maliciously stated of them that they were unworthy of credit. The third alternative innuendo is disputed, and it was stated in argument that the meaning had been superseded by another meaning. The plaintiff of course has to prove the innuendo alleged, but a question might well arise as to the meaning of placing a person on the " C " list, and this meaning could in the minds of commercial men bear a different meaning to that understood by persons unversed in commercial affairs.

Rule 259 gives discretion to a Judge to order trial by a special jury. There is, however, this proviso to the rule : " Provided that no case or enquiry shall be tried or heard by a special jury . . . unless in the opinion of the Court or Judge expert knowledge is required."

The rule, therefore, means that unless expert knowledge is required the general discretion conferred by the rule does not arise. It is clear that the words " expert knowledge is required " mean expert knowledge on the part of the jury, either from their own knowledge or acquired from the evidence of witnesses. The affidavit does not claim that expert witnesses will be called unless merchants when giving evidence about the persons to whom they would give credit are giving expert testimony.

The defendant relies mainly on **Wilkins and Field v. Wright,** 19 N.Z.L.R. 278, and an unreported case, **Nash v. Nash,** in which *Ostler*, J., on October 26, 1928, ordered a special jury.

In **Wilkins and Field v. Wright** the defendant was the manager of a debt collecting company. He wrote a letter to the plaintiff in which he said : " It becomes easy now for me to comprehend why so many trade inquiries are received by this office respecting the business of Messrs. Wilkins & Field and why it is in so unsatisfactory a condition." The publication alleged was to the defendant's own clerk who had copied the letter for his employer to send. The plaintiff alleged these words imputed doubtful solvency, the defendant claiming that the words read with their context meant that by reason of carelessness in bookkeeping and in the management of the plaintiff's business many trade enquiries had been received by the defendant company respecting the plaintiff's business, and that by reason of such carelessness the plaintiff's business was in an unsatisfactory condition. The affidavit in support of the application for special jury said that the action involved questions of considerable difficulty as regards the bookkeeping and management necessary for the proper conduct of a mercantile business and the functions of a trade protection society. *Stout*, C.J., held that the expressions used were terms used by business men and about business matters, that they might, therefore, be in a sense the expressions of experts, and that what the meaning and effect of these expressions was should be determined by business men.

Their Honours said they had looked at the file in **Nash v. Nash,** which was a libel action. The plaintiff alleged that the defendant had written the following letter to a business firm : " We know you have an order for J. Nash Wellington. Please do not associate his credit with our own. He has no capital. The only terms you could possibly do business with him is cash on delivery."

Another letter in similar terms was written to another firm. The allegation was that the plaintiff meant that the defendant was insolvent. The defence admitted writing both letters, and pleaded justification and privilege, but denied the allegation that the letters meant that the plaintiff was insolvent. The affidavit in support of the summons was by the defendant who claimed that expert knowledge was required to determine the meaning of the letters. *Ostler*, J., ordered trial by special jury.

In an affidavit in opposition to the summons in the present case the meaning of grading the plaintiffs into the " C " class is defined, it is stated, by the defendants themselves in a memorandum published to members. This says : "Builders should be graded into three classes, viz. : (a) Prompt payers and those whose credit standing is known to be undoubted. (b) Any builder who is or becomes more than three or less than five months overdue with any account or accounts without having made satisfactory arrangements with his creditors. (c) Any builder who is or becomes five months overdue with any account or accounts without having made satisfactory arrangements with all his creditors."

The matter of establishing whether or not an account is five months overdue is probably not one of much difficulty, but there comes into the " C " grading the element as to whether the arrangements with creditors are or are not " satisfactory." This term is used by business men to other business men, and if this question arises in the action what might be " satisfactory " to a common jury might not be " satisfactory " in the sense that business men use, and in the sense that the recipient of the lists would understand it. The publication in the present case is limited to publication to merchants trading with builders and contractors. The defence denies the meaning attributed by the plaintiff to the words, so that there will be in issue in this action matters similar in character to those treated as

proper for trial by special jury in **Wilkins and Field v. Wright** (*supra*) and in **Nash v. Nash.** It might well be said that the present case is a stronger one for trial by special jury than either of those cases.

Another case relied on by the defendants was **Fraser v. Isaac,** 17 N.Z.L.R. 416, where a special jury was ordered to try a libel case concerning alleged "appalling" bills of costs by a solicitor.

The issue of malice in the present case, it is submitted, has involved in it the element of mercantile practice. The publication being limited to business men interested in the supplies to builders, it is claimed that it is for business men with due appreciation of the risks of business to judge to what extent a merchant may fairly go in making enquiries and disclosing the result to other firms trading in the same line of business. If **Wilkins and Field v. Wright** is to be taken as correctly laying down the law, then on that ground also expert knowledge is required.

In **Rosenberg v. Universal Supply Co.,** 22 N.Z.L.R. 107, a special jury was ordered where the only element of expert knowledge justifying such order was the fact that part of the damages claimed was for loss of commissions based on prospective profits. The above are all the cases quoted by the defendants.

Their Honours then examined the cases quoted by the plaintiffs in opposition to the summons. **Coghill v. Wilkinson,** 5 G.L.R. 431, was a libel case, the words being "The other night Coghill was in my shop. £1 was missed from the till and I am morally certain that he took it." The claim for special jury was based on the ground that difficult questions would arise as to whether the defendant was acting maliciously and as to whether the communication was a privileged one. In refusing the application *Williams,* J., said: "But all these cases interpret the expression 'expert knowledge' in the ordinary sense, that is to say knowledge required in respect of some particular trade or business or occupation or of mercantile usage or of the course of dealing with mercantile men." The learned Judge found in the case before him an absence of necessity for "expert knowledge" in the sense in which he defined it. But when the above quoted words are applied to the present case a different answer is required.

Stout, C.J., refused a special jury in **Munro v. Mowbray,** 34 N.Z.L.R. 750, a slander action where special jury was asked for in relation to the claim for damages. The report is not very helpful as to the facts. The refusal was based on the ground that the action was a simple one of slander and wanting in the elements present in **Wilkins and Field v. Wright** and other cases quoted by the defendants in this case. **McLean v. New Zealand Times,** 28 N.Z.L.R. 343, was a claim for libel which consisted in statements decrying the accommodation provided by the plaintiffs for their workmen at the Otira Tunnel, and further statements alleging that the water supplied was poisonous and produced a swelling if it touched the slightest cut, and that there were poisonous fumes in the tunnel and that every day men were taking fits owing to the poisonous fumes. The affidavit in support of the summons stated that evidence would be required from persons engaged in similar business and employing a similar class of labour, and that the plaintiffs intended to adduce evidence of scientific witnesses in relation to the water and fumes. *Chapman,* J., considered that although evidence of experts as to the fumes and water would no doubt be required, this fact did not of itself make a case for trial by special jury, as in this respect the case differed little from accident cases where medical experts are called. He did not think the case would be decided upon the expert evidence and refused a special jury.

The application for a special jury in **Nicholson v. Scandinavian Water Race Co.,** 30 N.Z.L.R. 835—a malicious prosecution case—was based on the difficulty of a jury appreciating the distinction between innocence on the part of the plaintiff and reasonable grounds for prosecution on the part of the defendants. The only suggestion of expert knowledge was that the jury would be required to appreciate what the duties of directors of a company are in prosecuting a servant. *Williams,* J., refused the application.

All the cases quoted by the plaintiff are cases where the necessity for expert knowledge on the part of the jury was not established. It cannot be disputed that unless expert knowledge is required on the part of the jury then the discretion to grant a special jury does not arise. The question as to whether expert knowledge is required is really one of fact in each case. Having ascertained the nature of the mental processes the jury must go through to arrive at their verdict, the question in each case is whether these mental processes involve the application of expert knowledge appertaining to some trade or business. If they do so require then the case is one where a discretion to order a special jury arises, but if they do not so require then there is no discretion in the Court so to order. Any case that is looked at brings one no further than this: that a particular Judge on particular facts did or did not consider that the jury, when hearing and considering the case, would require a higher degree of technical intelligence than ordinary. **Wilkins and Field v. Wright, Nash v. Nash,** and **Frazer v. Isaac** were all instances of cases where such a degree of intelligence was, in the opinion of the judge, required to try them. The matters in question in the present case when compared with those in **Wilkins and Field v. Wright** and **Nash v. Nash** appeared to their Honours to be just as technical, if not more so, than those two cases.

An affidavit had been filed by the plaintiffs suggesting that the activities of the defendant company are such that many persons interested in the company might be upon the special jury list. The defendant was prepared to undertake to disclose to the plaintiffs the names of any clients of the defendant company and the names of any employees of clients of the defendant company, and have these names excluded. This, their Honours thought, should be done. If the defendant gives this undertaking, the order made by the Chief Justice should stand.

Solicitors for the plaintiffs: **Chapman, Tripp, Cooke and Watson,** Wellington.

Solicitors for defendants: **O'Donnell and Cleary,** Wellington.

Blair, J. June 6, August 15, 1932.
New Plymouth.

BARNITT v. WAITARA HARBOUR BOARD.

Land—Title by Adverse Possession—Land vested by Statute in Harbour Board—Land Transfer Title obtained twenty-one years afterwards—Whether Title can be acquired adversely to Board's title—Land Laws Amendment Act, 1931, S. 10—Waitara Harbour and Borough Empowering Act, 1910, S. 9.

Question of law before trial, whether by virtue of s. 10 of the Land Laws Amendment Act, 1931, a title to certain land can be acquired or be deemed at any time prior to the passing of the said Act to have been acquired by the plaintiff by possession or user of such land adversely to, or in derogation of, the title of the said Board.

The plaintiff in the action claims a certain piece of land by virtue of alleged adverse possession for a period prior to the year 1910. By virtue of s. 9 of the Waitara Harbour and Borough Empowering Act, 1910, this piece of land became vested in the defendant Board as an endowment. The defendant Board did not obtain a Land Transfer title to the said lands until 1931.

For the defendant Board it was claimed that s. 10 of the Land Laws Amendment Act, 1931, precludes any claim to the land in question in this action by virtue of adverse possession.

Held: Sect. 10 of the Land Laws Amendment Act, 1931, does not prohibit the acquisition by adverse possession the land which is the subject-matter of this action.

Billing for plaintiff.
Nicholson for defendant.

BLAIR, J., said that the references in the Harbours Act, 1923, to endowments are s. 49 (1) (d) and ss. 130-133. Sect. 49 (1) (d) makes profits of land set aside as endowments part of the Harbour Fund. Nothing turns in this phase of the case on the provisions in the Harbours Act.

The only portion of that section that can be invoked in this case is the reference to land reserved as *a road or street or for any other purpose.* It cannot be claimed that it was reserved either as a road or a street so that the Board to bring the land concerned in this section within the benefit of that section must rely upon the words "any other purpose."

The first enquiry naturally is as to whether the vesting of land in a Harbour Board as this land was constitutes such land a reserve. There is no definition of the word "reserved" in the 1931 Act. The 1931 Act is really an amendment to the Land Act, 1924. It is entitled "An Act to amend the law

relating to Crown and other lands" and the words "principal act" are defined as meaning the Land Act, 1924. Neither the word "reserve" nor "reserved" is specifically defined in the 1924 Act, but Part XI of that Act specially deals with reserves. These provisions do not appear to be of assistance in determining the question to be decided. By s. 367 endowments vested on local bodies can by proclamation be made subject to the provisions of the Act, but it is not suggested that this has been done. *Edwards*, J., in **Sampson v. New Plymouth Harbour Board**, 27 N.Z.L.R. 607, held that title could be obtained by adverse possession against a Harbour Board of lands granted to the Board upon trust for the construction and maintenance of a harbour or breakwater, etc., notwithstanding that the Board had no power to alienate the lands in question. The Board's contention in the present case involved the proposition that s. 10 of the 1931 Act abrogates that decision. One would think that if the Legislature intended to alter that decision it would have done so more effectually than by mere inference from an amendment to a statute amending the land laws. His Honour said he could not conceive that the Legislature when using the words "any other purpose" following the words "road or street" can have intended these words to cover the countless reserves and trusts which are vested in the hundreds of local bodies throughout New Zealand. The words "any other purpose" should, he thought, be read *ejusdem generis* with "road or street."

It is a matter of serious doubt whether a harbour board endowment can be deemed covered by the word "reserved" in the context in which it appears in s. 10. The section is not speaking of actual roads or streets or reserves, but is speaking of land "reserved" for that purpose, and it by no means follows that land reserved for roads or streets or reserved from sale will necessarily become roads or streets or become reserves. Sect. 129 of the Land Act, 1924, which is specifically referred to in s. 10, requires that of Crown Lands available for disposal there shall be reserved from sale strips one chain wide along the sea shore, along the shores of large lakes and along rivers of an average width of not less than thirty-three feet. The Section does not say that lands so reserved from sale become roads, streets, or reserves.

Question of law is answered as follows: Sect. 10 of the Land Laws Amendment Act, 1931, does not prohibit the acquisition by adverse possession of the land the subject matter of this action.

Solicitors for plaintiff: **Billing and Little**, New Plymouth.

Solicitors for defendant: **Nicholson, Bennett and Kirkby**, New Plymouth.

Herdman, J. June 21, 22; July 8, 1932. Auckland.

LISTON v. JENKINS AND ORS.

Contract—Alleged Sale of Bricks by Description and by Sample—Claim by Owner of Erected Building against Brick Manufacturers for Damages for Breach of Conditions and Warranty—Representations as to quality made to Plaintiff's Architects and price determined—Defendant's Bricks stipulated in Specifications—Building Contract subsequently providing that Contractor should supply all Material including specified Bricks according to Sample supplied to Architects—Bricks supplied to Contractor and Paid for by him—Whether Privity of Contract Between Owner and Brick Manufacturers—Whether Owner had any interest in a Contract entitling him to Damages.

Claim for £1,275 as damages for breach of contract by defendants who formerly were trading together as the Drury Brick and Tile Company. The plaintiff through his architects discussed the quality of certain bricks and their suitability for exposed work in a contemplated building. The price was fixed between such architects and the brick manufacturers' representative. The bricks were specified in the subsequent building contract and were used in the erection of the building, being supplied to and paid for by the contractor. Later, it was found that the bricks were not according to the sample supplied by the brick manufacturers to the architect and failed to fulfil the warranty alleged to have been given to the plaintiff. The details of conversations between the architects and defendants and the general practice adopted in similar circumstances appear in the judgment.

Held: Non-suiting plaintiff: Privity of contract between plaintiff and brick manufacturers had not been proved. The builder was under an obligation to provide plaintiff with the building specified, and with the stipulated bricks for the price mentioned in the building contract. Any contract on the brick manufacturers' part to provide bricks in accordance with sample was made with the builder and not with the plaintiff.

Barrowclough and **A. A. Coates** for plaintiff.
H. P. Richmond for defendants.

HERDMAN, J., said that at the conclusion of the plaintiff's case Mr. *Richmond* moved for a nonsuit upon two grounds. First, that it was not proved that the plaintiff had any interest in a contract which would entitle him to recover damages: second, that there was no proof of a contract for the sale and purchase of bricks between plaintiff and defendants. For the purposes of this judgment His Honour assumed that plaintiff's pleadings were unobjectionable.

As to the proof which has been submitted in support of the plaintiff's claim: There was evidence that the plaintiff, who is Bishop of the Roman Catholic Diocese of Auckland, is the owner of the land upon which The Star of the Sea Convent was erected. A certificate of title was put in which shows that the Roman Catholic Bishop of the Diocese of Auckland is seised of an estate in fee simple in the land. There was also evidence that Messrs. Tole & Massey, who are architects, were instructed by plaintiff early in 1930 to prepare plans and specifications for a new convent block and new dormitory block at Howick. There was certainly evidence that Mr. Tole in his capacity as plaintiff's architect was interviewed by Mr. Beaumont, who represented the defendants, about bricks and he was asked whether he would consider using them in the proposed convent building.

Then there was evidence that a Mr. Moir, acting for defendants, interviewed Mr. Tole on the subject of bricks for the new building. Mr. Moir was apparently a kind of commercial traveller, one of his lines being defendants' bricks. Later he left two sample bricks with Mr. Tole. Mr. Tole and his partner, Mr. Massey, appeared to have tested and examined the bricks carefully, but Mr. Tole said that "no definite contract was made then."

The next incident of importance that happened was a visit which Mr. Waterhouse, one of the defendants, paid to Messrs. Tole and Massey. It would appear from the evidence that he was loud in his praises of the article which he and his partners manufactured and that he exerted himself to get them to specify his bricks. His Honour then quoted what Mr. Tole said concerning that interview, which, in the particulars supplied by the plaintiff was stated to have taken place between the 1st and the 10th of April, 1930, and, as the specifications provide that all external facing bricks are to be "Drury common pressed bricks," it was evident that the investigations made about these bricks and the conversations with Messrs. Beaumont, Moir, and Waterhouse took place before specifications were completed and before tenders were called for.

There was evidence that, acting for the plaintiff, Messrs. Tole & Massey decided to ensure that Drury bricks should be used for facing purposes and that a successful tenderer should pay for them at a certain rate. It is well known that architects stipulate that certain material shall be used on a work by a contractor and that before specifications are completed ascertain at what price it can be supplied. The information so obtained is incorporated in the specifications. But because an architect makes inquiries about material, because he interviews manufacturers of materials and obtains quotations, because he goes the length of announcing to the manufacturer that he will stipulate in the specifications that a particular article is to be used and that it can be got at a fixed price, it did not follow that he, on behalf of his principal, had made a contract with the manufacturer which would confer rights upon the former.

In the present instance it was not difficult to discover Mr. Tole's attitude of mind. He gave his evidence quite frankly. He said: "I never had any contract which showed what quantity of bricks were used. I never had any account sales which showed what quantity of bricks were used." He then proceeded to make this important statement: "Mr. Clements was the contractor for the bricks which were used . . . Clements (the contractor) was to supply all the material. The usual thing is that the contractor supplies all the material and does the work and gets paid. It is quite common that someone else should be employed to do part of the work." Then follows this

express statement: "This is a case in which an article is named and the price is fixed and the builder has to supply and which he has to pay for."

The evidence given by Clements, the contractor, indicated that when a contract was contemplated, that happens to which His Honour had already adverted. Before tenders are called for and before the specifications are completed, negotiations may be carried on by the architects about the supply of material necessary for the completion of the work. It may be bricks. It may be steel. It may be a hot water appliance. It may be something else. But whatever happens the negotiations may amount to nothing more than an informal arrangement between the architects and suppliers of the material required that that material shall be specified.

His Honour failed to see how anything that took place between the architects and the defendants in the present instance could be construed into a contract for sale and delivery of bricks to which plaintiff was a party. Were he to find that such a contract had been entered into, he would be arriving at a conclusion altogether inconsistent with the one fact which, so far as the supply of bricks is concerned, stands out plainly from all others. That outstanding fact is this: the contract for the erection of the building which Clements signed provided that he should supply all material, and it stipulated that external facing bricks to be used should be Drury bricks which he was to pay for at the rate of £5 3s. 6d. per thousand bricks, and the bricks were to be in accordance with a sample supplied by the architects.

The history of the building of the convent showed that Clements saw the manager of the Brick Company about the supply of bricks and that he not only considered that he was the person who was obliged to pay for them but that he did in fact pay for them. He took delivery of the bricks and when bricks were rejected it was he who arranged with the company about the allowance by way of deduction that he was to get. Accounts for bricks supplied were rendered to Clements and he received the ordinary trade discount of 5% calculated upon the price he paid for bricks delivered. Clements contracted to "execute and complete the works and things shown upon the said drawings and described in the said specifications for £10,131 15s. 0d. The view that he took of the matter is expressed in the following passage in his evidence: "I considered that I was certainly the person who had to pay for the bricks. I would not know if I would be sued for them. It is quite a common thing to specify the price of a special article in the specification. We generally assume that a certain amount of negotiations have taken place. Where you see the price in the specification you assume that a certain amount of negotiations have taken place. You take that into consideration in your tender. Generally the architect has already arranged with the person who is to supply the particular article and generally when you go there the arrangements have already been made for you. I paid for the bricks by cheque and I arranged for the number of bricks which were credited to me to be supplied. I fixed up myself what they were to allow me for bricks which were rejected. The greater number I could get condemned the better it would be for me, but, as a matter of fact, I did not get allowance for the actual number which were condemned."

His Honour then quoted Lord *Haldane* in **Hampton v. Glamorgan County Council** [1917] A.C. at p. 21: "The substance of the contract was that for £13,600 this man Shail, the contractor, was to put up a building complete to the satisfaction of the respondents, and among the things which the building was to include was this heating apparatus which Shail was to get put in to the satisfaction of the architects." In that case the specifications contained this provision: "Provide the sum of £450 for a low pressure heating apparatus." By direction of the architect the builder accepted a scheme submitted by an engineer. Nevertheless it was held that the builder in employing a specialist to instal a heating apparatus was acting as principal and not as agent of the building owner. Lord *Haldane* said: "If there is anything clear from the correspondence it is that the appellant who supplied certain goods had to look to Shail, the contractor."

So, in the present case, Clements was to complete the whole work for £10,131 15s. 0d., and in doing so was to use Drury facing bricks which were to be up to the standard of those lodged with the architect. His business was to make a contract for the supply of bricks with the defendants and this he did. His Honour had no doubt that the true position was accurately stated by Mr. Tole when he said: "This is a case in which an article is named and the price is fixed and the builder has to supply and which he has to pay for." Mr. Moir put the matter in a different form. He said: "I was endeavouring to influence Mr. Tole to specify the Drury Company bricks."

When the architects were discussing bricks with the representatives of the Brick Company the parties to the conversations which ensued had in mind that specifications for a building were in the course of preparation and that tenders for a contract would be called for and that a contract would be let. The brick manufacturers wanted to get their bricks specified and the architect wanted Drury bricks.

Cases of this kind are governed by their particular facts. As a rule an employer, desirous of having a building erected, contracts with one contractor for the performance of the whole work. In the present case, His Honour said he was asked to decide that so far as the supply of facing bricks was concerned there was a contract between plaintiff and defendants quite distinct from the contract for the erection of the building entered into by plaintiff with Clements, the contractor.

The situation that had arisen in this case was not unlike that described in **Hudson on Building Contracts,** 5th Ed. at p. 530, (*q.v.*).

If an express contract between a building owner and a specialist be proved no difficulty arose, but in such a case as the present one the contractor had bound himself generally to supply all material and, in particular, to supply pressed bricks made by defendants. **Hobbs v. Turner** (1902) 18 T.L.R. 235, would appear to be a clear instance of a contract made between the building owner and a specialist. It is pointed out in **Hudson's** work that in that case there was a provision in the contract between the building owner and the contractor that the building owner should have the option of employing specialists independent of the contractor, and it was found that the option had been exercised (see the author's statement on p. 532). His Honour could not, however, discover any difference in principle between the present case and the instances referred to by **Hudson** nor had he been able to discover anything in the evidence or the circumstances which would justify him in finding that there ever was or is now privity of contract of any kind between the plaintiff and the defendants. His Honour was certain that the defendants had never for a moment dreamt that they were liable in contract to both the contractor and the plaintiff; to the contractor for the supply of bricks of a particular kind and quality in return for a price to be paid, and to the plaintiff upon the same ground or in the alternative upon a warranty given in consideration of their bricks being specified in the contract.

In **Leslie and Co. v. The Managers of the Metropolitan Asylums District,** 68 J.P. 86, the contractors sued the building owners claiming that they had suffered damage by reason of the delay of specialists. It was held in that case that the contractors and not the building owners had contracted with the specialists and that the contractors had no right of action against the building owners.

So, in the present case, Clements was under an obligation to provide the plaintiff with the building specified and with the bricks specified for the price mentioned in the contract. He alone was responsible to the plaintiff for the completion of the building and for the quality of the material used in its construction. If His Honour accepted the argument submitted by counsel for the plaintiff, what would be the result? He should have to find that the defendants were parties to two contracts relating to the supply of bricks, one with the contractor, Clements, the other with the plaintiff. In the contract with Clements, defendants were under an obligation to provide Drury pressed bricks in accordance with a sample provided. It was said that under contract with the plaintiff they were to do the same thing. If there had been a breach of contract by the defendants then there was a breach of both contracts, and defendants might be sued by the plaintiff and by Clements for what was in substance the same default, so a situation would develop which would be grotesque. That could not be the correct construction to place upon the facts and circumstances of this particular case. His Honour preferred to respect the practice which appeared to have been followed in the cases to which he had referred. The plaintiff had failed to prove privity of contract between himself and defendants.

Plaintiff nonsuited.

Solicitor for plaintiff: **J. C. Tole,** Auckland.

Solicitors for the defendants: **Buddle, Richmond and Buddle,** Auckland.

NOTE: From the above judgment, the Plaintiff appealed. Without calling upon the Respondents' counsel, the Court of Appeal (Myers, C.J., MacGregor, and Kennedy, JJ.) dismissed the appeal on the grounds that the Appellant had not succeeded in establishing any contract between the parties to the action.

Ostler, J. September 13, 16, 1932.
Wellington.

In re TREMEWAN (DECD.): TREMEWAN AND ORS. v. McDOUGALL AND ORS.

Will—Interpretation—Bequest of residue in case of grandchildren's death before attaining age of twenty-five years to their children who shall attain the age of twenty-one years—Whether void for remoteness—Whether class taking under bequest closed at Testator's death—Identification of beneficiaries to share in distribution.

Originating Summons taken out by the executors and trustees of the will of Thomas Tremewan late of Porirua, farmer, deceased, for the interpretation of the will which was made on October 13, 1924, a few days before testator's death. Probate was granted to the executors on November 6, 1924.

The testator was twice married. By his first marriage he had three children, two sons, Henry Ambrose Tremewan and Eli William Tremewan, and one daughter, Mrs. C. M. M. McDougall. At the time he made his will, his two sons had predeceased him; and his daughter, who is still alive, was then fifty years of age and a widow. The second wife of the testator, Maria Tremewan, survived him, and died without having remarried on October 24, 1929. At the date of the will there were 13 grandchildren of the testator alive, two of whom had already attained the age of 25 years. Seven of these were grandsons, and the other six were granddaughters. All thirteen are still alive. No further grandchildren have since been born, and seeing that at the time the will was made there was only one child living, Mrs. McDougall, and she was a widow of fifty years the testator must have known that the class of his grandchildren was closed.

By his will the testator gave his whole estate (the nett value of which was about £10,000) to his trustees upon trust as to his household goods and personal effects for his widow, and as to his dwellinghouse to allow his widow to occupy it for her life. The trustees were then directed to sell and convert into money the rest of his estate, and, after paying his debts and funeral and testamentary expenses, to set aside £3,000 to provide an income for his wife during her life or until she should remarry, and he then gave legacies of £3,000 to his daughter Mrs. McDougall and £50 to his nephew Charles Tremewan.

The will then provided: "The sum of Five hundred pounds (£500) each for each of my seven grandsons now living who shall attain the age of twenty-five years the sum of One hundred and twenty-five (£125) each for each of my six granddaughters now living who shall attain the age of twenty-five years *and upon trust* as to the rest and residue of the trust funds for all my grandchildren who shall attain the age of twenty-five years the share of each grandson being four times that of each granddaughter *and I hereby declare* that if any grandson or granddaughter shall die before attaining the age of twenty-five years leaving issue who shall attain the age of twenty-one years such issue shall take the share which his or her or their parent would have taken had he or she attained the age of twenty-five years and if such issue be more than one the share of each male shall be four times that of each female."

The questions for determination were: (1) Is the bequest of the rest and residue of the trust funds as contained in the Will void for remoteness? (2) One of the grandchildren having attained twenty-five years of age in the testator's lifetime and being still living at the date of the testator's death, is the class taking under the said bequest closed at the testator's death? (3) Do the beneficiaries under the said bequest consist of: (a) the grandchildren living at the date of the testator's death; and (b) the issue whether born before or after the testator's death (who attain twenty-one years of age) of any such grandchild dying before attaining twenty-five years of age, the issue taking their parents' share?

Held: Bequest of residue not void for remoteness as testator knew when making his will that it was impossible for the number of grandchildren to increase. The rule in **Andrews v. Partington,** 3 Bro. C.C. 401, applied. The provision for the widow did not amount to a life estate.

Cahill for trustees.

Levi for defendant grandsons except infants.

Evans for all daughters of deceased's sons.

Broad for infant grandsons and for daughters of Mrs. McDougall.

Barrett for executor of widow and for Mrs. McDougall.

OSTLER, J., said that in his opinion the bequest of the residue of the trust funds is not void for remoteness. The testator knew when he made his will that he had thirteen grandchildren, and that it would be impossible for the number of his grandchildren to increase. Therefore the residuary bequest to his grandchildren must be taken to be a bequest to the same grandchildren to whom he had just previously given specific legacies. The will must be read as though its words were, "*Upon trust* as to the rest and residue of the trust funds for all my *said* grandchildren" etc. That being so the bequest cannot be void for remoteness, for all the said grandchildren were living at the date of the will, and even should one or more of them die leaving issue before attaining twenty-five years, the bequest would vest within a life or lives in being and twenty-one years thereafter.

But even if this were not the true construction of the will, this would be a case in which the rule in **Andrews v. Partington,** 3 Bro. C.C. 401, applied. The rule laid down in that case was that where in a will a gift is made to such of the children of A as shall attain a specified age, only those who are in being when the eldest of the class attains that age are included in the class. All afterborn children are excluded. Consequently in this case, as at the date of the will two of the grandchildren had attained the age of twenty-five, the class was closed. No future grandchild could come within it. This rule is merely an arbitrary rule of convenience, but it is well established, and has been followed again and again. The last case in New Zealand in which it was followed was **Bunny v. Tatham** [1926] G.L.R. **133,** at 135. There is another rule of convenience that a gift to a class not preceded by a life estate is a gift to such of the class as are living at the death of the testator: see **Singleton v. Gilbert,** 1 Bro. C.C. 542n. These two rules were applied in the well known case of **Picken v. Matthews,** 10 Ch. D. 264. In that case, the testator gave his property upon trust for the children of his daughters who should live to attain twenty-five years of age. At the date of his death one of his daughters had a child who had attained twenty-five years. It was held that the gift was not void for remoteness, but was a valid gift limited to the grandchildren living at the testator's death. That case is undoubtedly good law, and is authority for holding that the residuary trust in this case is not void for remoteness. See also **In re Barker,** 92 L.T. 831; **In re Mervin** [1891] 3 Ch. at 204; **In re Deloitte** [1919] 1 Ch. 209. The case of **Re Whitten,** 62 L.T. 391, is easily distinguishable, on the ground that the substitutionary gift was to children of the beneficiaries who attained twenty-five years, whereas in this case it was to children who shall attain twenty-one years.

It was contended in the present case that the trust for the payment of the income on the £3,000 which was to be set aside for the maintenance of the widow was in effect a life estate, and the existence of this life estate prevented the class beng. ascertained at the date of the testator's death. The case of **Re Faux,** (1915) 113 L.T. 81, was relied on to support this argument. The answer was that the provision for the widow does not amount to a life estate, and that case has no application to the facts of this case.

The questions asked were answered: (1) No; (2) Yes; (3) Yes.

Solicitors for the trustees: **Devine, Crombie and Cahill,** Wellington.

Solicitors for defendant grandsons except infants: **Levi, Jackson and Yaldwin,** Wellington.

Solicitors for all daughters of deceased's sons: **Bell, Gully, MacKenzie and O'Leary,** Wellington.

Solicitor for infant grandsons and for daughters of Mrs. McDougall: **The Public Trust Office Solicitor,** Wellington.

Solicitors for executor of widow and for Mrs. McDougall: **Bunny and Barrett,** Wellington.

Blood Groups and Filiation.

By Dr. W. Stuart Findlay, M.A., D.Sc., etc.,
Pathologist, University of London.

From the point of view of forensic practice we may ask whether blood group tests are sufficiently evidential for the results obtained by this means to be used with certainty in the courts of law. The answer to this question is undoubtedly in the affirmative, though the evidence may not be positive, for on the other hand such tests furnish incontrovertible evidence for the exclusion of blood relationship when the blood group of the child does not agree according to a definite scheme with that of the alleged parent. It is the established opinion of all biologists that blood group tests afford clear conclusive proof of filiation, for the accuracy of the theory upon which the tests are based has been verified beyond all manner of doubt and indeed the biological foundation of such tests lies on much surer ground than many forensic tests whose results are now admitted as evidence in law.

The individuality of the blood is an inherited characteristic following Mendelian laws and since we know that no agglutinogenic property can appear in the children which was not present in one of the parents it naturally follows that parental combinations can only give rise to children of certain well-defined groups. There are four distinct groups, universally annotated, as O, A, B, and A B, and for various parental groups the possible blood group of the children may be forecasted as hereunder :—

Parents' Group.	Children's Groups.
O × O	O
A × A	O and A
B × B	O „ B
O × A	O „ A
O × B	O „ B

Regarding group A B, which only occurs in 3 per cent. of cases, the children's groups are limited, for the combination O × A B can only give rise to A or B children, while the other possible combinations with one A B parent cannot yield children of O group. Thus A × B is the only parental combination left which can give rise to children of any and all groups and that only in the case of heterozygotes, which only constitute some 13 per cent. of the total, so that it is possible to make an accurate forecast of the children's group in 87 per cent. of all cases.

If a child agrees with the forecast it *may* be the child of both parents ; if, however, it does *not* agree with the parental group, then one or both of the parents must be spurious.

This leads us to indicate illegitimacy as follows :—

Parental Combination.	Children Cannot Be			
O × O	—	A	B	A B
O × A	—	—	B	A B
O × B	—	A	—	A B
O × A B	O	—	—	A B
A × A	—	—	B	A B
B × B	—	A	—	A B
A × A B	O	—	—	—
B × A B	O	—	—	—
A B × A B	O	—	—	—

In actual practice the mother's identity is seldom in question except in those cases of accidental exchange or substitution, but even in such a case the problem will be concerned with a definite couple and not with the mother alone. In some cases with an O group child and an alleged A B mother or *vice versa*.

Usually in practice it is the identity of the father that is the essential problem, in which case from an examination of the maternal and child groups a forecast can be made of the father's group. If the forecast is not verified then we must exclude the alleged parent. Further forecasts are possible when there are two or more children, thus, if one child belongs to O group and another to A B, the only possible combination is A × B for the parents. Hence if the mother is of A group the father must be of B group, and conversely.

Thus the investigation of blood groups allows us to exclude paternity in certain cases ; it cannot of course serve to prove it directly and positively. Only in particular circumstances as when several alleged fathers have been excluded and a single one remains who is found to agree with the forecast can the latter be definitely charged.

Blood group investigations in these cases within the limits stated are now no longer merely a theoretical notion but have largely passed into the realms of practical law. In the United Kingdom the first case where blood group tests were used was in the Dublin Circuit Court on January 25, 1932, wherein a farmer successfully appealed against an affiliation awarded against him by a district court. The test was carried out by a forensic expert in the presence of a State pathologist, with two doctors and the legal advisers of the interested parties.

In Germany, Denmark, and Russia these tests are now regarded as affording invaluable evidence and have been regarded as such since 1925. In many German judgments may be quoted the following from Landgerichct II in Berlin, in April, 1927 :—

" Paternity cannot be allowed in this case, for expert evidence shows it to be clearly impossible for the plaintiff to have been conceived during the co-habitation of his mother with the defendant. The plaintiff belongs to group B—a property that is found neither in his mother's blood nor in that of the defendant. The evidence of the experts, which is based on numerous investigations carried out in all civilised countries, and is now no longer questioned by competent scientists, and is moreover directed to be used as evidence by the superior judicial authorities, shows that the real father must belong to B group for him to have transmitted this property to the plaintiff. The defendant therefore cannot be the father of the plaintiff."

It seems remarkable that these tests have not been used in the United Kingdom, whereas in Berlin alone some 3,000 cases have been decided by this means since 1924. In conclusion I would refer those interested to Professor Latti's work, ably translated by Dr. Howard Bertie, and just fresh from the press, which expounds the scientific aspect of these biological tests lucidly and accurately.

Editorial Note : The Moss classification of blood groups is almost exclusively used by medical men in New Zealand. Consequently, the notation used in the above article, read in terms of the Moss grouping, may be applied as follows : O = 4 (Moss) ; A = 2 ; B = 3 ; AB = 1.

Revising the New Zealand Statute Book.

An Historical Survey: From Landmark to Landmark.

By THE HON. SIR THOMAS SIDEY, B.A., LL.B., M.L.C.

During his term as Attorney-General, Sir Thomas Sidey earned the appreciation and gratitude of the Legal Profession, and he has carried into his retirement from office its sincere respect and regard. The initiation of the greatly-needed REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908–1931, *was due to his interest and energy. We are fortunate in having Sir Thomas's own account of the pressing need he found for that compilation, and a summary of the results of his close study of the progress of Statute Revision from the earliest days of the Dominion's history.*—ED.

During my term of office as Attorney-General, arrangements for the publication of a reprint of the New Zealand Statutes were completed; and it was my intention, had the opportunity presented itself before my retirement from office, to read at one of the Conferences of the legal profession a paper on the Growth and Revision of our Statute Book, prepared for me by Mr. J. W. Heenan, LL.B., First Assistant Law Draftsman. This opportunity did not arise, and

The Hon. Sir Thomas Sidey.

in view of the fact that the Reprint is now about to make its appearance, the time is opportune for the publication of a brief summary of that paper.

The story of Statute Revision in this country falls into several distinctive periods. The first is that from the raising of New Zealand to the status of a separate colony in 1840 to the meeting of the first representative Assembly in 1854. During this period, the Legislative authority was a Legislative Council consisting of not less than seven persons inclusive of the Governor. There was an Executive Council consisting, in addition to the Governor, of the Colonial Secretary, the Attorney-General and the Treasurer, all of whom were *ex officio* members of the Legislative Council. All laws were proposed by the Governor.

The second period may be described as that of the Provinces, extending from 1854 to 1876. During this period a system of Provincial Government existed side by side with, but subordinate to, the General Government.

The abolition of the provinces took place in 1876, and another period may be said to extend from 1876 to 1895, in which year the Act was passed which authorised the consolidation of 1908.

The period from 1895 is determined by the passing of the Consolidated Statutes in 1908, and the final period is from 1908 till the appearance of the Reprint of 1932.

PRIOR TO RESPONSIBLE GOVERNMENT: 1840 — 1854.

The periodical revision of the Statute Book, the really urgent necessity for which was recognised in England only after the lapse of some 600 years, was very early in our history felt to be a matter of considerable moment. The first few years, indeed the whole period up to the establishment of responsible government, were marked by intense activity on the part of the Legislative Council, and when in 1848 the Colony was divided into the two Provinces of New Ulster and New Munster the need for a reprint in handy form of all the Ordinances enacted by the General Legislative Council of New Zealand prior to the division was considered by the Legislative Council of New Munster. Following upon the report of a Committee of which he was Chairman, the Hon. Alfred Domett prepared a volume the size of which bears eloquent testimony to the legislative activity between 1840 and 1850.

What gives to this publication a very particular value, apart altogether from its material contents, is the fact that it was compiled and arranged according to a carefully thought-out scheme. Known popularly as "*Domett's Ordinances*," one has no hesitation in giving to him chief credit for the very fine work. The contents were arranged not chronologically, but under three main heads: First—Imperial Acts of Parliament; Charters and Royal Instructions. Second—Ordinances of New Zealand actually in force at the date of publication. Third—An Appendix, Part I of which contained under various subject subheadings Ordinances repealed, disallowed, or obsolete; and Part II, also under appropriate headings, Proclamations and Notices under the Charters and Ordinances.

The careful thought given to the preparation of this Volume is best shown in the arrangement of the Ordinances in force under the three general headings of Public Interests (General Government), Public Interests (Social Economy), and, finally, Private Interests.

It must be emphasised that this work in no way represents the finished labour of any actual revision or consolidation by the Legislature. It was merely a reprint, but a reprint prepared in such a way as to confer many of the benefits of consolidation.

The Period of the Provinces: 1854 — 1876.

At the very beginning of responsible government, some six years after the publication of Domett's volume, a select committee of the House of Representatives was set up to report on the advisability of a reprint of all the Ordinances of the old Legislative Council on the lines of Domett's volume which was then nearly out of print. The Committee reported (D.–31 of 1856) that owing to the proposal of the Government to consolidate many of the old laws and to repeal others, it was not advisable to reprint Domett's volume and generally that any further reprint be deferred.

Towards the end of 1873 the then Premier (Mr. Julius Vogel, C.M.G.) approached the Chief Justice (Sir George Alfred Arney) on the subject of Law Reform generally, the more prominent of the subjects discussed being the Consolidation of the Statute Law of New Zealand and the amelioration of the practice and procedure of the Supreme Court with a view to diminishing delay and expense to suitors. The Chief Justice brought the whole question before his brother Judges and subsequently addressed a letter to the Premier. This letter, together with a special memorandum by Mr. Justice Johnston and certain other correspondence, was presented to Parliament in a *Paper* (A.–5 of 1874).

Mr. Justice Johnston's memorandum was a particularly outspoken, interesting, and valuable contribution to the general question and should be read by every student of New Zealand legal history.

After the Abolition of Provinces: 1876 — 1895.

There was no immediate outcome of this correspondence between the Government and the Judges. Within two years a great constitutional change—the abolition of the Provinces—had taken place and this demanded and engaged the full attention of the Legislature and the Government. But abolition in itself not only made the consolidation of our statute laws a pressing necessity, but made it more practicable than it had hitherto been.

In 1878, Parliament, in the Reprint of Statutes Act of that year, attempted to deal with the question of reissuing the Statute Law in a convenient form. The Act provided for the appointment of a Commission of three persons (one being a Judge of the Supreme Court) to prepare a new edition of the Public General Statutes in force in the Colony, omitting therefrom all enactments which had expired by effluxion of time, had had their effect, or had been expressly and specifically repealed or disallowed.

To facilitate the labours of the Commission, a Repeals Act was passed in the same Session; and the Schedule of Repeals shows very vividly how much dead law had even then—in less than forty years—accumulated. Printed on foolscap size paper, in small type, the Schedule takes up no fewer than sixteen pages—three dealing with Imperial Acts, four with Ordinances of the General and Provincial Councils before the establishment of responsible Government, and nine with Acts of the General Assembly from 1854 to 1877.

The Commission contemplated by the Reprint of Statutes Act was duly issued to Mr. Justice Johnston, Mr. W. S. Reid (Solicitor-General), and Mr. Shaw (Assistant Law Officer); but within a year it was found that something more than a mere reprint was required. As a result of an Interim Report of the Commissioners (*Parliamentary Paper*, H.–20 of 1879) the Reprint Act of 1878 was superseded by the Revision of Statutes Act, 1879. As under the Act of 1878, the work was to be done by a Commission which was directed to prepare and arrange for publication an edition of all the Public General Acts.

The Commissioners appointed in due course were Mr. Justice Johnston and Mr. W. S. Reid; Mr. Curnin, the Law Draftsman, was their Secretary. As they were to report from time to time, their consolidations were not all enacted in any one Session, but ran through the Statute Books of several years, the volumes 1880, 1881, 1882, and 1886, in particular, containing the bulk of their finished effort; in 1881 appeared their volume of Imperial Acts in force in the Colony. Reporting to the Governor on June 2, 1884 (*see* A.–6 of 1884), they stated that they had already prepared upwards of fifty Bills, which consolidated nearly 280 Acts and Ordinances of the Colony. Several of these Bills had not then been passed, and a number of important subjects remained to be consolidated.

One object in setting up the Commission was not realised. No definitive and separate edition of the Statutes was published. That had to wait until the Consolidation of 1908.

In the years intervening between the completion of the work done by the Commission under the Revision of Statutes Act, 1879, and the Commission which prepared the consolidation of 1908, a good deal was done from time to time to clear the Statute Book of dead lumber and in the reconstruction or consolidation of more important Acts.

At the beginning of 1879 on ten such subjects as Auctioneers' Licensing, Branding Stock, Dogs Registration, Fencing, Fires Prevention, Impounding and Trespass, Licensing Public Houses, Police Organisation, Police Offences, and Roads and Highways, there were no fewer than 203 Provincial Ordinances in force—each restricted in its operation to a particular Provincial District, but administered by the General Government. In 1892 most of the Provincial Ordinances then remaining in force were repealed by the Provincial Ordinances Act of that year.

In the previous year (1891), a further extensive Repeals Act had been passed; and, in 1893, the Criminal Code (which had been prepared in 1883) at last became an accomplished fact. What that one Act did in cleaning up the Statute Book, apart altogether from its own merits as a Code of Criminal Law, may best be judged from its Third Schedule which repeals parts or the whole of no fewer than thirty-three Imperial (the earliest being 5 and 6 Edw. VI, c. 11) and twenty-eight New Zealand Acts which had hitherto contained the statute law in New Zealand in relation to Crimes.

The Consolidation of 1908: 1895 — 1908.

Another landmark in the history of Statute Law Revision in New Zealand is the Reprint of Statutes Act, 1895. This Act practically repealed the Statutes Revision Act of 1879. The Commission appointed under it a few years later consisted of the Chief Justice (Sir Robert Stout), the Solicitor-General (Dr. F. Fitchett) and Mr. W. S. Reid. Dr. Fitchett had succeeded Mr. Curnin as Law Draftsman in 1894, and Mr. Reid as Solicitor-General in 1900. Their experience admirably fitted these two gentlemen for their arduous labours; and Mr. Reid's experience in connection with the consolidations under the 1879 Act was of inestimable value. His record of having sat on two Consolidation Commissions was unique, and is not likely to be repeated in this Dominion.

The Commission's labours were directed to a complete consolidation of the Public General Acts, apart from those dealing with Native land. Local and Personal Acts did not come within the scope of their work. As usual a series of Repeal Acts paved the way. In this case, the idea of a general consolidation was carried to its logical conclusion—the issue of a special edition of the Statutes superseding (with respect to the Public General, but not Local Acts) all the volumes to which hitherto reference had to be made. Thus the consolidation of 1908 effected the greatest of all reforms of our Statute Book.

In the following year, the Native Land Act was passed. This comprehensive consolidation and amendment of the law relating to Native lands was the work of Professor (afterwards Sir John) Salmond, and its enactment may be regarded as the completion of the work contemplated in 1895, when the Reprint of Statutes Act was passed.

The Period since 1908.

It is our greatest trial that no work of consolidation can ever be final. What Mr. Justice Johnston said in 1873: "The best Consolidation Acts which can be produced will certainly be subject to amendments from time to time, and most certainly soon after their first enactment," is as true to-day as when he said it. For the very Session in which the Consolidated Statutes were produced there is an annual volume containing no fewer than fifty Public Acts of which twenty-nine were amendments of the Consolidated Statutes of that year. And what began in 1908 has continued. Of the 209 separate Acts contained in the five volumes of the Consolidated Statutes few remain unamended. Of these, only three—the Bills of Exchange Act, the Partnership Act and the Sale of Goods Act—are of outstanding importance. A large number of the Consolidated Statutes have been repealed—a few, like the District Courts Act—because the need for them had disappeared: others in the process of consolidating them and their amendments; others in the process not of pure consolidation but of reconstruction.

On the question of Consolidation, it must be obvious to all who have frequent occasion to use the Statute Book that a very great deal has been done since 1908 to remedy the inconvenience caused by frequent amendments, however necessary they may be. Consolidations with amendments, complete redraftings, and pure compilations, of lengthy Acts, numbering nearly seventy in all, have been passed within the last twelve years.

The Reprint of 1932.

Early in 1930, I was called upon by virtue of my office to consider whether the time had arrived for the Statute Law to be once more brought up to date, and if so, whether this should be done by a consolidation on the lines of that of 1908, or by a Reprint. The position at that time was that all the volumes of The Consolidated Statutes of 1908 were out of print, as were, also, the sessional volumes of 1908, 1909, 1910, and 1911. Though much of the legislation contained in the Consolidated Statutes of 1908 had been repealed, a considerable proportion was still in force, and the Government recognised that it was under some obligation to make the Statutes available for practitioners and others who might desire to purchase them. Was this to be done by reprint or consolidation? In deciding in favour of a reprint, the following are some of the considerations that were taken into account:

First: Owing to the work of consolidation that had been already accomplished and to which I have drawn attention above, there was no longer the same urgency for a general consolidation that there would otherwise have been. The really urgent cases requiring "pure consolidation" had been dealt with, while a general consolidation would involve the "pure consolidation" of Acts that required not consolidation but complete reconstruction.

Second: The saving of time in preparation was an important advantage in favour of the reprint. The consolidation which was published in 1908 was authorised in 1895. A consolidation on the same lines would necessarily take a number of years of uninterrupted work to complete, whereas it was contemplated that a reprint would be on sale within two years from the date of its authorisation.

Third: No matter how capable those may be to whom the task of consolidating the law may be entrusted, there is always a risk that inadvertently the law may be altered by them. In the case of a reprint, this danger does not arise for no re-enactment of the law is involved.

The Reprint of Statutes Act, 1931, makes provision for judicial notice of the Reprint being taken by all courts and persons acting judicially; but it also provides that the Reprint shall, in relation to any enactment therein contained, be taken as correctly expressing and setting forth the law only until the contrary is proved either by the production of the official volume of statutes in which such an enactment was originally contained, or otherwise. While having this great advantage over a consolidation, a "reprint", on the lines agreed upon, shares with a consolidation in the narrow sense of that term the advantage of bringing the statement of the law up to date.

Fourth: As compared with a consolidation on the 1908 lines, the Reprint as now about to be published has the advantage that, in addition to the actual text of the enactments, it contains much useful information in the form of editorial notes.

Fifth: The reprinted Statutes have been classified in accordance with subject matter, so that as far as practicable all related statutes are to be found together in one volume. The classification is based on one with which practitioners are already familiar (*viz.* Halsbury's Laws of England) and each "title" is prefaced by a comprehensive survey of its subject-matter.

There is the question of cost, and in these difficult times it will be readily understood how important is this consideration where government approval of any proposal has to be obtained. Taking no account whatever of the cost of printing, but having regard only to fees paid to the three Commissioners, and to their secretary and staff, over £5,000 was expended in connection with the 1908 Consolidation ; and when I state that the fee paid to each of the three Commissioners was at the rate of only £250 per annum, it will be realised that the cost of a Consolidation to-day would be much in excess of that sum.

Part of the Government's arrangement with the Publishers was to the effect that the Reprint should be kept up to date by means of an annual cumulative supplement. In this way the practitioner will be enabled with the least possible effort on his own part to ascertain with absolute certainty at any particular moment whether or not any Act has been repealed or altered since December 31, 1931 (the date at which the law is stated in the Reprint) ; where the law has been so amended, the supplement will also disclose the nature of the amendment and where it is to be found in the Statute Book.

I conclude this sketch of the history of our Statute-book by adopting the words of His Honour the Chief Justice as appearing in his Foreword to the Reprint :

> " I hope and believe that these volumes will be a great convenience to the Courts, to practitioners, and to Government Departments, and that they will greatly expedite and simplify the work of all whose business it is to construe and advise upon the statute law."

The Annual W. J. Hunter Cup Contest.

Christchurch Practitioners at Golf.

The annual match for the Cup presented by Mr. W. J. Hunter for competition among members of the profession in Christchurch took place on October 4 at the Shirley Golf Links. A morning of brilliant sunshine and an ideal afternoon brought out a large number of competitors, and the presence of a large number of ladies lent a festive air to the gathering. Mr. Justice Adams and Mrs. Adams, Mr. H. A. Young, S.M., and Mrs. Young, Mr. E. D. Mosley, S.M., and Mrs. Mosley, and Mr. H. P. Lawry, S.M., were among the many guests of the President of the Canterbury Law Society (Mr. A. T. Donnelly) and Miss Donnelly who entertained them at afternoon tea after the conclusion of the match.

The win of the President was a very popular one, and, to the great joy of the assemblage, Mr. Donnelly had to call upon Miss Donnelly to present the cup to himself. He explained that this situation had arisen from the fact that through his consistent bad play during the season, his handicap had increased so considerably as to influence the result in his direction. He expressed appreciation of the Christchurch Golf Club's courtesy in allowing the annual match to be played on its links, " particularly," he concluded, " as I understand it takes fully three weeks to get the course in order again after it !" Mr. Donnelly had also won the Cup in 1926.

The scores were : A. T. Donnelly : Gross 85 ; Hcp 16 ; Net 69 ; M. H. Godby, 76, 5, 71 ; P. H. Wood, 82, 9, 73 ; C. A. Stringer, 88, 15, 73 ; L. A. Charles, 97, 24, 73 ; C. W. Webber, 82, 7, 75 ; G. W. C. Smithson, 99, 24, 75 ; C. S. Penlington, 84, 8, 76 ; M. W. Simes, 87, 11, 76 ; E. W. Reeves, 89, 13, 76 ; P. Wynn-Williams, 90, 14, 76 ; C. S. Branthwaite, 94, 18, 76 ; V. W. Russell, 87, 10, 77 ; R. L. Ronaldson, 87, 10, 77 ; A. W. Smithson, 86, 7, 79 ; J. D. Hutchison, 95, 13, 82 ; A. C. Fraser, 100, 17, 83 ; E. D. R. Smith, 103, 20, 83 ; M. J. Burns, 107, 24, 83 ; W. R. Lascelles, 97, 13, 84 ; E. E. England, 108, 24, 84 ; R. C. Abernethy, 86, 1, 85 ; D. W. Russell, 101, 16, 85 ; R. Twyneham, 103, 18, 85 ; H. K. Kippenberger, 96, 10, 86 ; A. H. Cavell, 106, 20, 86 ; E. S. Bowie, 108, 22, 86 ; I. D. Wood, 100, 12, 88 ; C. G. Penlington, 112, 24, 88 ; H. Edgar, 110, 21, 89 ; H. P. Lawry, 104, 14, 90 ; T. K. Papprill, 112, 22, 90, and E. W. White, 121, 24, 97.

London Letter.

Temple, London,
15th September, 1932.

My dear N.Z.,

I am reminded, and stand convicted, that I promised a quick " follower " to my last short letter and have not fulfilled the promise. Be it my excuse that my time and attention have been occupied in preparing for the reception of, and receiving, a son of one of you, come to England to pass through our Cambridge and back to your Law Courts. I had, for the purpose, to peruse again (with the same pleasure as before ; but with a return of the misgiving, that England hardly deserves it), Mr. Alan Mulgan's *Home*, so that I might appreciate the point of view of a young man, coming for the first time. It happened that I was due to sit as deputy, my annual " holiday task," for a Stipendiary of a Midland District ; so that, within hours of his setting foot in England, he was rushed from the East Coast, through Suffolk, Cambridgeshire (where we made a detour through the Colleges, to whet his appetite), Huntingdonshire, Leicestershire, Northamptonshire, Warwickshire, Staffordshire, and on to the edge of Shropshire, where we pulled up, breathless, and asked him what he thought about it all. And then, lest he might be demoralised by too much rural beauty, we took him through a week of Police Courts in the mean streets of the Black Country ; and he was plunged into the affairs and litigations of the not-too-good-looking and not-always-too-washed-on-weekdays Staffordshire folk, who, rather than the elegant scenery of East Anglia and of the Shires, have made this Country what it is, and, it may be noted in passing, have always led the way in voluntary recruiting in every war in which the Country has been involved. I think he liked the people, and approved the method of the administration of their justice. Ask him, when he comes back, none the worse (I hope, for you send us a good type, and shrewd) for his years over here.

Events of a minor sort have been occurring during the month ; notwithstanding that we are submerged in Vacation, the Law is not altogether dead from the neck down.

Swift, J. Again our eloquent and (whatever folk may say of him) sterling Mr. Justice Swift, has had occasion to administer a rebuke to Advocate, of the Bar, which was about as rough and ready as any we remember reading. He told him, upon his suggesting that the Appellate Bench as constituted was not likely to be impartial in his cause, that he had better withdraw the observation, or " it might be the last he would ever make from the Bar."

He really is a rough diamond, is Swift, J. ; but to my way of thinking it is a right sort of roughness, and I do not see why fools should be suffered gladly, even with resigned gladness, by their Lordships, nor why impertinences should be regarded more in sorrow than in anger. And, anyhow, he undoubtedly is the most eloquent lawyer of our day ; his summing-up is always pleasant and sometimes positively delightful to listen to, as art for art's sake purely.

Given his gifts, I am content (and I fancy you are) if a man has strength and honesty ; his words need not be smooth, if they are to be trusted ; and we need no earnest professions of his noble motives and his disinterested judgment if we find, as in his case we do, that he is stalwart and to be relied upon, personally. Sir

Rigby Philip Watson Swift is a bone of never-ending contention, as to his merit and worth ; the sort of subject of discussion which gives rise to such Latinities as *Quot homines, tot sententiae*, and *De Gustibus Non Erit Disputandum*. But let that not cloud your judgment ; take it that it establishes, whatever else may remain uncertain, that he is certainly " a character " and has lots of it. Then wait till you come to England and have me show you round ; I will convince you, knowing, as I begin to know, your taste in men, over where you are.

Of the Judicial Committee : If their personalities continue to interest, even after I have worn them threadbare in these letters, you may well compare and contrast Lord Blanesburgh, giver of the Presidential Address at the Oxford Conference of the International Law Association, some weeks back ; and Lord Macmillan, recently at the Hague and presiding over the General Section of the International Congress of Comparative Law. You must by now have a clear conception of the bubbling vitality and genuineness of the former, once " Younger, K.C." and always " Robert " to those Chancery men who had to do with him in close association. On the other side you have the agreeable humour and even more agreeable manners of the so-very-Scottish Scot ; and an unobservant person, or rather a person not susceptible to atmosphere nor given to instinctive likes and dislikes, might find it impossible to decide which of the two men to select as the more ' delightful.' Scotland comes much into the conversation of both ; and both go far to belie the national accusation of ' dourness.'

I should imagine that the International Pundits and camp followers fell at once for Lord Blanesburgh ; on the other hand, I wonder what conviction Lord Macmillan's appreciation of the differences between ' the formulary system of English law and the non-empiricism of the Scot's law ' really carried to the ears of those who heard it ? Not quite genuine ; not quite through-and-through : is our feeling. But here, again, is a frequent bone of contention ; and those who like and admire Swift, J., have little to say for Lord Macmillan, and that little is harsh. To the adverse critics of the Puisne Judge, the Law Lord is the modern *example par excellence* of what a perfect, legal gentleman should be.

The recent death of our former, and first, Public Trustee would dispose me, after the appropriate lament, to a discourse upon his Office. But it is a barrister speaking, whose position is such that the *cestuis qui trustent* can never be his personal acquaintance or direct prey ; and a common law barrister at that, to whom equitable beneficiaries suggest a horrid fear, as of the Great Unknown, and whom, if the truth be told, one of the confounded genus has fetched up to London to-day, this lovely September day in mid-holiday, in the matter of his death duties.

You, with your wider reach, do not feel the divisions of work as we do here, between our Divisions of the High Court ; it always seems to me that if ever Lincoln's Inn and the Temple come to blows (and if it is possible to conceive of our quiet and orderly friends over the way coming to blows with anyone, ever) it will be upon the issue : to which side do Death Duties properly belong ? They arise, it might well be argued against us of the Common Law, in the matter of Estates ; and Estates should be no concern of ours. But I fancy we should win in the long run, since taxation, in all its varied and unpleasant aspects, is mainly handled by us.

Yours ever,

INNER TEMPLAR.

The Appointment of Receivers.

Some of the Effects Considered.

By C. PALMER BROWN, M.A., LL.B.

(Concluded from p. 286).

The case of *Moss Steamship Company v. Whinney* [1912] A.C. 254, is interesting for its discussion of this principle as well as for the simplicity of its facts and for the sharp difference of opinion between the minority consisting of Hamilton, J., Fletcher Moulton, L.J., and Lords Shaw and Mersey on the one hand and the majority consisting of Vaughan Williams, L.J., Buckley, L.J., and Lords Loreburn, Halsbury, and Atkinson on the other. They all agreed that the appointment of a Receiver did not affect the entity of the Company ; but the minority treated the Company as still contracting by a Receiver in place of directors while the majority held that the Receiver completely superseded the Company and could give no lien for its past debts. The Receiver gave an order for delivery and shipping of beer signed in the name of the Company—" *per* A F. Whinney Receiver and Manager." Later, a bill of lading was signed giving the shipping company a lien not only for current freights but for back freight as well. The final decision was that this was beyond the powers of the Receiver and inoperative, but the judgments discussed in some detail the effect of the appointment of a Receiver on the Company. Fletcher Moulton, L.J., made the following comments :

> " It was suggested that Ind Coope & Co. Ltd. after the appointment of the Receiver and Manager was a different entity to that which it was before that date. To my mind this is a complete fallacy. The Company then was and still is a going concern. No steps have been taken to wind it up. The debenture holders found that it was to their interest to keep the Company alive and so long as it lives it is and must be one and the same entity. . . . . The whole beneficial interest in its assets may have passed to the debenture holders and others and this may fundamentally change the position of those who seek to enforce legal rights against it. . . . . And it was continually urged upon us that this was a case of a mortgagee taking possession and that thereafter the mortgagor had nothing whatever to do with the property and the dealings with it must *ex necessitate rei* be dealings of the mortgagees and not of the mortgagors. To my mind the error of this reasoning is due to taking too superficial a view of the nature of the transaction. It is true that it is a case of the mortgagee taking possession, but it has the peculiarity that part of the property mortgaged is the undertaking of the Company itself. The debenture holders might of course refuse to perform or to enforce the contracts to which the Company was a party or to use any of its assets for the continuance of its business or in discharge of its liabilities. . . . . The receiver has the right if he thinks fit to fulfil or enforce as the case may be the contracts existing with the Company. In doing so there is no question of novation."

Buckley, L.J., said :

> " I agree that the Company were in this transaction the consignee but not in the sense in which the defendants seek to affirm that they were such. The debenture holders had intervened and by a receiver appointed by the Court had taken possession. The shipper was not the mortgagor Company but the mortgagees by their receiver dealing with the assets of the Company. . . . . The shippers and the consignees were the same person and that person was not the mortgagor but the mortgagees by their receiver."

Lord Loreburn said :

> " I agree with Moulton, L.J., that the Company was still alive and its business was still being carried on by Mr. Whinney but he was not carrying it on as the Company's agent. He superseded the Company and the transactions upon which he entered in carrying on the old business were his transactions upon which he was personally liable. He was really

a trustee and the shipowners dealt with the trustee. No doubt there may be cases in which a receiver and manager is in all senses the agent of the Company and a question may then arise as to his authority. But here he was not such an agent and this was sufficiently conveyed to the shipowners by the notice that he was receiver and manager."

Lord Halsbury said:

"A great many joint stock companies obtain their capital or a considerable part of it by the issue of debentures and one form of securing debenture holders in their rights is a well-known form of application to the Court of Chancery which practically removes the conduct and guidance of the undertaking from the directors appointed by the Company and places it in the hands of a manager and receiver who thereupon absolutely supersedes the Company itself which becomes incapable of making any contract on behalf of the Company or exercising any control over any part of any property or assets of the Company. . . . . No one, I should have thought, could contend that when a Company has been so altered in its management that a receiver has been appointed who is the only person that can contract that its former course of business can be considered as making the very first consignment subject to the forms which were in use when the Company and not the receiver were conducting the business. . . .. But once a receiver and manager is appointed things are changed and every man of business would know and ought to know that the only person with whom he could contract safely would be the manager appointed by the Court of Chancery."

Lord Atkinson said:

"This appointment of a receiver and manager over the assets and business of the Company does not dissolve or annihilate the Company any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it does entirely supersede the Company in the conduct of its business deprives it of all power to enter into contracts in relation to that business or to sell pledge or otherwise dispose of the property put into the possession or under the control of the receiver and manager. Its powers in all these respects are entirely in abeyance. . . . . It would seem to me plain therefore that the Ind Coope & Co. designated as consignee must be the same Company as that first mentioned in that letter that is the disabled and superseded Company whose powers were dormant so that the letter must be read as if after the words Ind Coope & Co. Ltd. where the same occur for the second time the words 'over whose business the abovementioned A. F. Whinney has been appointed receiver and manager by the Court of Chancery' had been written into it. Read with that interpolation this letter in my view amounts in effect to a direction to consign the beer to Whinney . . . . and if the same interpolation be made in the bill of lading as I think it must be then Whinney is himself under the contract the consignee and as he owes nothing for back freight there is no lien."

Lord Shaw contented himself with adopting the views of Fletcher Moulton, L.J., and added:

"The question is raised in several of the judgments of the Courts below as to whether the shippers Ind Coope & Co. formerly and Ind Coope & Co. per Whinney latterly were the same shippers. There is much to suggest that substantially they were,—the continued entity of Ind Coope & Co. being as stated."

Lord Mersey said:

"Mr. Whinney was a receiver and manager appointed by the Court; he was not appointed by the debenture holders although no doubt he was appointed at their instance; nor was he appointed by the Company. He was agent neither the one nor the other and therefore could make no contracts upon which either could sue or be sued. The contract in this case affords a sufficient illustration of what I mean. The debenture holders could certainly not be sued upon it for they as a body never had power to carry on the business or to contract in relation to it, nor could the Company be sued upon it for they had ceased to be able to make any contracts by an agent or otherwise.

After referring to the phrase of Buckley, L.J. "I agree that the Company were in this transaction the consignees but not in the sense in which the defendants seek to affirm that they were such" he adds:

Ind Coope and Company do not and indeed cannot exist in two different senses. The Company has not been wound up nor is it even in liquidation. The only change that has happened is that instead of the business being managed by an official appointed by the Board of Directors it is managed by an official appointed by the Court but the Company is still the same Company and the business is still the same business."

Somewhat similar questions arose in *Parsons and Ors. v. Sovereign Bank of Canada*, 107 L.T. 572. The question there was whether certain contracts for the supply of paper were binding upon the Receiver of the Company and the answer was unsatisfactorily indefinite. The judgment of the Privy Council was delivered by Viscount Haldane the other members of the Court being Lords McNaughton, Atkinson, and Shaw:

"In order to answer this question it will be convenient in the first place to look at the position in point of law of the receivers and managers. A receiver and manager appointed as were those in this case is the agent neither of the debenture holders whose credit he cannot plead nor of the Company which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The Company remains in existence but it has lost its title to control its assets and affairs with the result that some of its contracts such as those in which it stands to an employee in the relation as master to servant being of a personal nature may in certain cases be determined by the mere change in possession and the Company may be made liable for a breach. But it does not follow that all the contracts of the Company are determined. Even to put the higher case when a mortgagee acting under a power in his mortgage assumes control of the business of the mortgagor, the mortgagee may be in a position to say that he has authority to carry out in the name of the mortgagor contracts with a third person, *e.g.* for the manufacture and delivery of goods—and the third person may have no rights to allege a breach on the ground of mere change of those who actually manufacture and deliver the goods for the company. In the present case the contracts were contracts entered into before the receivers and managers were appointed and had been entered into in the ordinary course of the business of the Company in manufacturing and delivering paper and there is in their lordships' opinion no ground for presuming that the receivers and managers intended to act otherwise than in the name of the Company to carry to a conclusion the business which was current or that they meant to repudiate the obligations of the Company. In the absence of a liquidation the persona of the contracting company remained legally intact though controlled by the receivers and managers."

After distinguishing the case of *Reid v. The Explosives Co. Ltd.*, 19 Q.B.D. 264, where a contract of service was held to be terminated by the appointment of a Receiver, the judgment proceeds:

"It is for example far from clear that in the absence of a bankruptcy the mere appointment although compulsory of a manager to continue in the name of a mortgagor the existing management of an agricultural estate would effect such a disturbance of an owner's possession as to determine the agreements with the farm labourers employed on the property. In the case of contracts to deliver paper such as existed in the present case there appears to be no reason for saying that the possession of the undertaking and assets given by the order of the Court for the express purpose of carrying on the business put an end to those contracts. The company remained in legal existence and so did its contracts until put an end to otherwise."

The position of the opposite party to the contract on the appointment of the Receiver is thus a difficult one. In *Whinney's case*, the opposite party expressly stipulated for a lien for arrears and lost it; in the gas case the opposite party was held entitled to refuse to supply until arrears were paid but in the recent electric lighting case the Receiver secured his supply without paying the arrears. Apparently the Court will not expressly sanction the breaking of contracts unless the company is totally insolvent; and in the Canadian case both parties were held bound. It may be most important that a client should know whether

the new management is to be bound by the contracts of the old management and he should undoubtedly enquire at the first opportunity. But, if the Receiver refuses to answer, what can he do but consult his solicitor? And what principle can his solicitor deduce from the authorities quoted? It is submitted: (1) if the contract is for personal service such that the service becomes impossible it is broken immediately upon the appointment (*Reid's case*; *Parson's case*); (2) in any other case, it remains in force until breach or anticipatory breach by the Receiver.

Correspondence.

[*It is to be understood that the views expressed by correspondents are not necessarily shared by the Editor.*]

Doctors with a Difference.

Sir,—In a recent issue of your London namesake and contemporary I read a biographical note of a practitioner recently made a K.C., who has for many years held the degree of Doctor of Laws. His name is used five times, each time with the prefix "Mr.", and never with the prefix "Dr." After all the title is one of precedence, conferred by virtue of a royal charter, and might, one would think, be as justly used as the "Sir" of a knight, and even more properly than the courtesy "Hon." of the issue of the peerage. With us, I think, the rule is different. One remembers Dr. Foster, Dr. Findlay, Dr. Bamford, of a past generation, and Dr. Haslam of the present. Is there some subtle differentiation whereby the doctor is misterified and the reader mystified? Even in England, the prefix appears to be used in the case of some practitioners; for instance, Dr. Burgin whose death was recently referred to.

Yours, etc.,
"INQUIRER."

(Our correspondent has raised an interesting point, on which we would be glad of some further light from our readers. In the local Reports, the gentlemen mentioned seem to be called "Mr." on some occasions, "Dr." on others. See, for instance, Dr. Hosking (1 Jur. Rep. 48); Dr. Laishley (14 N.Z.L.R. 631, and 17 N.Z.L.R., 572); Dr. Bamford [1922] N.Z.L.R. 343; Dr. Fitchett [1922] N.Z.L.R. 653); Dr. Findlay, *passim*.

This is merely a casual collection, and does not pretend to be complete. On the other hand, these gentlemen are also mentioned in the Reports without their degree. We notice, however, in English Chancery Reports, the prefix "Dr." is frequently used; while in the Common Law cases, the reverse practice is followed. In Australia, the Reports treat the matter as indiscriminately as do our own. We shall welcome illumination.—ED.)

The human stories of the old Irish Bar are numerous. Who was the counsel who, in the Court of Appeal, complained that he had been badly treated by the Judge in the Court below. "In what way?" inquired the President. "He stopped me, my lord." "And how did he do that?" asked the President, having endured the flow of counsel's words, undammed, for hours. "By fraudulently pretending," said counsel, "that he was in my favour."

It was an Irish Judge who, when a donkey brayed during counsel's speech, said: "One at a time, gentlemen, please." When, later in the case, during the Judge's summing up, the donkey again lifted up his voice, the Judge enquired "What's that?" Then it was counsel who said "Only the echo of the Court, my lord."

Practice Precedents.

Discovery and Review of Order.

The following forms are the first of a series, which are submitted as precedents only. Those now appearing relate to an application for discovery under R. 161 of the Code of Civil Procedure: see Stout and Sim's *Supreme Court Practice*, 7th Ed. at p. 142; and also to an application for Review of the order made (R. 421).

It is to be noted that, although R. 161 gives power to any party to apply to the *Court*, as a matter of procedure and in accordance with Their Honours the Judges' decision, the application for discovery is made on Summons and the Order is drawn as a Judge's order. This gives a cheaper and quicker remedy if it is desired to review the Order than would be the case of an Appeal to the Court of Appeal in respect of a Court Order.

It is also to be noted that the forms relating particularly to discovery apply only when the parties are not resident in New Zealand (as distinct from R. 161A). Here, too, the forms are applicable where one defendant has discovery against another defendant. (See *Clarke v. Ellerman Bucknall and Co. Ltd.* [1930] N.Z.L.R. 722; [1920] G.L.R. 328 S.C.)

1. SUMMONS FOR DISCOVERY.

IN THE SUPREME COURT OF NEW ZEALAND
.....District.
.....Registry. No.

BETWEEN A.B., *Plaintiff*
AND C.D. and Co. Ltd. and E.F. and Co, Ltd., *Defendants*.

LET the Defendants C.D. or their Solicitors or Agents appear before the Right Hon. The Chief Justice at his Chambers, Supreme Court House, on Friday the day of 193 , at 10 o'clock in the forenoon or as soon thereafter as Counsel may be heard TO SHOW CAUSE WHY the said Defendants should not be ordered within ten days from the service of the order to make discovery on oath of all documents that are or *have been in their possession or power relating to any matter* in question in this action and that the question of the costs of and incidental to this Order be reserved.

Dated at this day of 19 .

Registrar.

This summons is taken out by of the City of , Solicitor for the Defendants E.F. whose address for service is at the Offices of Messrs. , Solicitors, Number Street, .

2. ORDER FOR DISCOVERY.

(*Same heading*).

UPON READING the Summons sealed herein AND UPON HEARING Mr. of Counsel for the Defendant E.F. in support and Mr. of Counsel for the Defendants E.F. in opposition thereto I DO ORDER that the defendants E.D. do within ten days from the service of this Order make discovery on oath of all documents that are or have been in their possession or power in New Zealand relating to any matter in question in this action and that the question of the costs of and incidental to this Order be reserved.

.....
Judge.

3. MOTION TO REVIEW AND RESCIND ORDER FOR DISCOVERY.

(*Same heading*).

TAKE NOTICE that Counsel for the Defendants C.D. WILL MOVE this Honourable Court on day the day of 19 at 10.30 o'clock in the forenoon or so *soon thereafter as Counsel may be heard on review of the whole* of the Order made in Chambers in this action by the Honourable Mr. Justice on WEDNESDAY the day of 19 whereby the Defendants C.D. were ordered to make

discovery on oath within ten days from the date of service of such Order of all documents that are or have been in the possession or power of the said Defendants C.D. in New Zealand relating to any matter in question in this action and whereby the question of costs of and incidental to the said Order were reserved FOR AN ORDER rescinding the said Order UPON THE GROUNDS that the said Order is erroneous in law AND FOR AN ORDER that the costs of and incidental to this Motion and of the said Order be paid by the Defendants, the said E.F.

Dated at this day of 19 .

.....
Solicitors for Defendants C.D.

To the Registrar,
Supreme Court, Wellington,
and to the Defendant,
E. F.

4. ORDER DISMISSING MOTION ON REVIEW.

(*Same heading*).

WEDNESDAY the day of 19 .

Before the Hon. Mr. Justice
and the Hon. Mr. Justice

UPON READING THE NOTICE OF MOTION to review and rescind the Order for Discovery made on Wednesday the day of 19 AND UPON HEARING Mr. of Counsel for the Defendants C.D. and Mr. of Counsel for the Defendants E.F. IT IS ORDERED that the Notice of Motion be dismissed AND IT IS FURTHER ORDERED that the Defendants C.D. do pay the sum of £ for costs.

By the Court,

Registrar.

5. AFFIDAVIT OF DISCOVERY.

(*Same heading*).

I, X.Y. of the City of in New Zealand, Shipping Agent, make oath and say as follows:—

1. That I am Agent in New Zealand for the Defendants C.D. in connection with the voyage to New Zealand of the Steamship in the month of 19 .
2. That as Agent for C.D. I have in my possession or power the documents relating to the matters in question in this action set forth in the First and Second Schedules hereto.
3. That I object to produce the said documents set forth in the Second Part of the First Schedule hereto.
4. That such documents consist of letters between myself as Agent and as my principal and of letters between myself and my Solicitors and are privileged.
5. That the Defendants C.D. had in New Zealand in the month of 19 but have not now in New Zealand the documents relating to the matters in question in this Action set forth in the Second Schedule hereto.
6. That the last-mentioned documents were on board the Steamship which left New Zealand in the month of 19 .
7. That according to the best of my knowledge information and belief the Defendants C.D. have not now and never had in their possession custody or power or in the possession custody or power of their Solicitor or Agent or of any person on their behalf or on behalf of either of them in New Zealand any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in this action or any of them or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the First and Second Schedules hereto.

FIRST SCHEDULE.

FIRST PART.

1. Freight List from .
2. Cargo Stowage plan of cargo loaded at .
3. Weight and measurement chart cargo loaded at .
4. Copies of Inward Bills of Lading and Tally Books.
5. Letters from to dated .

SECOND PART.

Letters from to .

SECOND SCHEDULE.

Such documents and entries in the Ship's papers as related to matters in issue in this action.

SWORN at, etc.

Legal Literature.

HIRE AND HIRE-PURCHASE.

The Law of Hire and Hire Purchase, by A. A. PEREIRA, M.A., Barrister-at-Law of the Inner Temple and South Eastern Circuit, pp. 227, xxxvi + Index, 16.

It is over twenty years since Mr. J. D. Cassells' *Law Relating to Hire and Hire Purchase* was published, and no new edition appeared. It was found that so many changes and deletions were required, owing to the development of the law on the subject and the consequent multiplication of cases, were necessary that with Mr. Cassells' cordial concurrence, this new work was undertaken. As a result, over half the original work has been omitted and over 400 new cases down to last December included, while the text occupies double the original space. Among the new features are chapters on Fixtures, Assignment and Civil Proceedings. A comprehensive set of precedents lends value to the work.

So extensively have the various forms of hire-purchase been applied in commercial circles in recent years that the work should have a wide appeal to the legal and accountancy professions as well as to business men. The author's noteworthy clarity of expression should result in the layman's easily understanding the explanations of various phrases of a somewhat difficult subject. This text-book comes very opportunely on a branch of law that is the subject of constant reference, especially at the present time, but upon which there has hitherto been a lack of authoritative exposition.

Commercial Law.

As She is Taught.

If the following statements taken from recent examination papers of commercial students sitting for Company and Bankruptcy Law in the B.Com. course be any criterion, lawyers may take solace in a continuing need for their advice in commercial matters:

"A Company is a mythical person."

"A share is the right to participate in the profits or losses of a Company." Obviously an optimist's answer!

"The qualifications of a director are that he is of average intelligence and capacity." From another student: "The director need have no special qualification beyond being a business man—and that is left to the shareholders usually to decide."

"If the mis-statement amounts to fraud, the directors or promoters, or anyone responsible of such a kind, may be sued for damables."

"A Bankruptcy Notice is a notice advertised in the N.Z. Gazette that debtor is bankrupt. It is inserted free of charge by the Official Assignee."

"Public examination of bankrupt where latter proves unresponsive or unruly. The bankrupt is examined here by Assignee and creditors, and is now practically obsolete."

Finally, a delicious proleptic definition:

"A Bailment is a seizure of goods by a Bailiff."

Up to the Minute Case Law.

Noter-up Service to The English and Empire Digest.

All important current cases since the last Supplement (Jan. 1, 1932) to the *English and Empire Digest* are indexed in this feature under the classification prevailing in the latter work.

The reference given in brackets immediately following in the case is to the page in the current volume of *The Law Journal*, (London), where the report can be found; and, secondly, to the *Digest*, where all earlier cases are to be found.

ESTOPPEL.

Estoppel—Insurance Policy—Guaranteed by another Company—No Evidence of Formal Contract—Estoppel by representation.—NATIONAL BENEFIT ASSURANCE CO., LTD., *In re* (p. 134).

As to estoppel by representation: DIGEST 21, p. 290.

HIGHWAYS, STREETS AND BRIDGES.

Public Highway—Trees on Highway the property of landowner — Removal by Highway Authority. — STILLWELL *v.* WINDSOR CORPORATION (p. 24).

As to trees obstructing carriageways: DIGEST 26, p. 387.

INSURANCE.

Insurance (Marine)—Payments by Insurers and Re-insurance as for Total Loss—Payment by Insurers under Running Down Clause on basis of Cross Liabilities—Subrogation.—YOUNG *v.* MERCHANTS' MARINE INSURANCE COMPANY, LTD. (p. 133).

As to re-insurance: DIGEST 29, p. 117.

MASTER AND SERVANT.

Workmen's Compensation—Accident—Arising in the Course of Employment—Death unexplained—Seaman returning to ship—Risk to which Public not exposed.—NORTHUMBRIAN SHIPPING CO., LTD. *v.* MCCULLUM (p. 144).

As to accident when coming to premises: DIGEST 34, p. 309.

NEGLIGENCE.

Negligence—Injury to Infant—Infant in charge of Grandfather—Contributory Negligence of Grandfather—Doctrine of Identification.—OLIVER *v.* BIRMINGHAM AND MIDLAND MOTOR OMNIBUS CO., LTD. (p. 80).

As to negligence of person in control of child: DIGEST 35, p. 72.

Negligence—Motor Cars—Racing on Club Grounds—Spectators admitted to view on payment—Duty owed by Club to Spectators.—HALL *v.* BROOKLANDS AUTO-RACING CLUB (p. 120).

As to duty to invitees: DIGEST 36, p. 35.

Negligence—Crane Sold in Parts by Manufacturers to Builders—Defect in Crane—Parts Assembled by Builders—No Breach of Duty to Person Injured.—FARR *v.* BUTTERS BROS. & CO. (p. 145).

As to the duty to take care: DIGEST 36, p. 12.

PARTNERSHIP.

Action against Firm—Partners resident abroad but with branch in London—Service out of the Jurisdiction—Right to serve on Partners in name of Firm.—HOBBS *v.* AUSTRALIAN PRESS ASSOCIATION (p. 78).

As to service of writ on partners: DIGEST 36, p. 411.

PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

Public Authorities—Protection—Police—Conviction of Receiver—One Charge not proceeded—Property subject to charge handed over to Claimant—Whether Police protected by Statute.—BETTS *v.* RECEIVER FOR THE METROPOLITAN POLICE DISTRICT AND ANOTHER (p. 60).

As to Public Duties: DIGEST 38, p. 106.

RATES AND RATING.

Rating—Industrial Hereditament—Valuation List—Notice of Appeal—Extension of Time—REX *v.* COUNTY OF LONDON JUSTICES: *ex parte* SHOREDITCH ASSESSMENT COMMITTEE (p. 42).

As to rating appeals to London Quarter Sessions: DIGEST 38, p. 643.

Rating—New Building—Gross Value—Comparison with other Assessments—Uniformity.—LADIES' HOSIERY AND UNDERWEAR, LTD. *v.* WEST MIDDLESEX ASSESSMENT COMMITTEE (p. 60).

As to the basis of assessment: DIGEST 38, pp. 518, 582.

Rating—Derating—Freight-Transport Hereditament—Principles of Apportionment—Wharf and Refrigerated Warehouses.—UNION COLD STORAGE CO., LTD. *v.* SOUTHWARK REVENUE OFFICER (p. 156).

As to rating of freight-transport hereditaments: DIGEST 38 (Supplement), p. 22.

SHIPPING AND NAVIGATION.

Shipping—Priorities—Necessaries—Bunkers supplied in Germany—German Commercial Code.—THE ZIGURDS (p. 24).

As to the ranking of liens: DIGEST 41, p. 945.

Shipping—Mortgage—Freight—Equitable Assignment—Joining of Mortgagor as Plaintiff.—THE ZIGURDS (No. 2), (p. 25).

As to assignment of freight: DIGEST 41, p. 638.

Shipping—Necessaries supplied by Ship's Agents—Authority to pay Freight to Ship's Agents—Equitable Assignment of Freight—Practice—Joining of Assignors as Plaintiffs.—THE ZIGURDS (No. 3) (p. 61).

As to assignment of freight: DIGEST 41, p. 638.

Shipping—Priorities—Stevedoring Charges.—THE ZIGURDS (No. 4) (p. 61).

As to the ranking of liens: DIGEST 41, p. 945.

Shipping—Priorities—Master's claims for wages and disbursements.—THE MONS (p. 80).

As to the ranking of liens: See DIGEST 41, p. 945.

Rules and Regulations.

Health Act, 1920. Amended regulations as to infectious and notifiable diseases.—*Gazette* No. 66, October 20, 1932.

Public Revenues Act, 1926. Justices of the Peace Act, 1927. Amended regulations for payment of witnesses.—*Gazette* No. 66, October 20, 1932.

Payment of Jurors Act, 1919. Alterations in rates of fees and allowances payable to jurors.—*Gazette* No. 66, October 20, 1932.

Payment of Jurors Act, 1919. Alterations in rates of fees and allowances payable to witnesses, other than medical witnesses, for attendance at Coroners' inquests.—*Gazette* No. 66, October 20, 1932.

State Advances Act, 1913. Regulations providing for the employment of agents to act on behalf of the State Advances Superintendent.—*Gazette* No. 66, October 20, 1932.

Mining Act, 1926. Amendment to regulation 160.—*Gazette* No. 66, October 20, 1932.

Land and Income Tax (Annual) Act, 1932. Notice by Commissioner of Taxes *re* payment of Land-tax.—*Gazette* No. 66, October 20, 1932.

New Books and Publications.

A History of English Law. By Sir Wm. Holdsworth. Index to History of English Law, 9 volumes. (Methuen & Sons). Price 25/-.

Cockles' Cases and Statutes on Evidence. By C. M. Cahn, M.A. Fifth Edition. (Sweet & Maxwell Ltd.). Price 22/-.

Historical Introduction to the Study of Roman Law. By H. F. Jolowicz, M.A., LL.M. (Cambridge Press Ltd.). Price 25/-.

Steele's Guide to the Final Honours Exams. of the Law Society. Third Edition. (Sweet & Maxwell Ltd.). Price 6/6.

Town and Country Planning Act, 1932,—With Notes, Cross References, and an Introduction by the Hon. D. Meston. (Sweet & Maxwell Ltd.). Price 9/6.

A Textbook of Roman Law from Augustus to Justinian. By W. W. Buckland. Second Edition. (Cambridge Press). Price 44/-.