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" *A Locrian who proposed any new law stood forth in the assembly of the people with a cord round his neck, and, if the law was rejected, the innovator was immediately strangled.*"
—GIBBON, Decline and Fall of the Roman Empire.

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"Suffering" Judgment to go by Default.

An important judgment as to what might constitute a fraudulent preference by a company in its suffering judgment in a judicial proceeding to go by default was given on November 16 last by Eve, J., in *In re M.I.G. Trust, Ltd.* [1932] W.N. 258. Owing to the similarity of the sections of the English Bankruptcy Act and Companies Act under notice in that case to the corresponding provisions of the New Zealand statutes, the judgment is of special interest to us.

The M.I.G. Trust, Ltd., had deposited with the Gresham Trust, Ltd., the title deeds of certain farm properties as part security for a loan. A memorandum of deposit was executed, but it had not been registered within twenty-one days as required by s. 79 of the Companies Act, 1929 (Imperial). On March 6, 1931, about a year later, the Gresham Trust, Ltd., applied to the Chancery Division under s. 85 of the same Act for leave to extend the time for registration on the ground that the omission to register was due to inadvertence. On the notice of motion being served on the M.I.G. Trust, counsel was briefed on its behalf to oppose, and in fact appeared on the day of hearing when the Motion was adjourned to March 10. When it again came on, it was announced that the managing director of the M.I.G. Trust, who was also a director of the Gresham Trust, had instructed the solicitors concerned to withdraw opposition. An Order was made by Maugham, J., extending the time for registration. The attention of the Court was not, however, drawn to the facts, including the original instructions to counsel to oppose the Motion on the ground that the M.I.G. Trust was insolvent, and that there would be numerous creditors who would be prejudiced if leave were given to register the charge.

On March 31, on the company's own petition, presented eight days after the time for registration had been extended, an order was made for the compulsory winding-up of the company. The liquidator now contended that, on these facts, the company had "suffered" a judicial proceeding which amounted to a fraudulent preference. Eve, J., at the hearing of the summons by the liquidator, said he considered that if the above-related facts had been brought to the attention of the judge hearing the Motion, he would have afforded the creditors of the M.I.G. Trust an opportunity of debating the question whether the making of the order would not amount to a fraudulent preferring of the Gresham Trust.

The section in the Companies Act, 1929 (Imperial), dealing with fraudulent preference is, in its essentials, similar in wording to s. 247 (1) of our Companies Act, 1908, which provides as follows:

> "Any such conveyance, mortgage, delivery of goods, payment, execution, *or other act relating to property* as would, if made or done by or against any person, be deemed, in the event of his bankruptcy, to have been made or done by way of undue or fraudulent preference of the creditors of such person shall, if made or done by or against any company, be deemed, in the event of such company being wound up, to be made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly."

Turning to s. 79 of the Bankruptcy Act, 1908, fraudulent preference is there defined. By subs. (1),

> "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and *every judicial proceeding taken or suffered* by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor with a view to giving that creditor [or any surety or guarantor for the debt due to that creditor] a preference over the other creditors, shall, if the person making, taking, paying, or *suffering* the same is adjudged bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the Official Assignee."

The sub-section quoted is identical with s. 44 of the English Bankruptcy Act of 1914. The words in brackets were inserted in the section of our Act by s. 5 of the Bankruptcy Amendment Act, 1927, following the remarks of Mr. Justice Ostler, in *In re H. Linney and Co. Ltd.* [1925] N.Z.L.R. at p. 921, where His Honour said that, if those words which were in the corresponding s. 44 of the Bankruptcy Act, 1914 (Imperial), had at the time of his delivering judgment been law in New Zealand, he would have had no hesitation in deciding differently in regard to the question of the paying-off by directors of an overdraft for which they were sureties; but as the law stood before the amendment of 1927 the transaction under discussion could not be held to be a fraudulent preference.

Whether or not a preference is fraudulent is a question of fact: *Cook v. Rogers* (1831) 7 Bing. 438, 131 E.R. 169; but where a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor with the result of giving him a preference in fact, and the reason for such is unexplained, a *prima facie* case of fraudulent preference is established: *In re Cohen* (*supra*). In *In re the M.I.G. Trust, Ltd.*, it was shown that the sole continuing director was confident that the company was bound to go into liquidation, and that many creditors of the company were bound to be prejudiced if the Trust were permitted to register the charge, and that such facts had been communicated to the Trust's solicitors by a member of the common directorate of the two companies concerned.

In *In re New Zealand Electrical Appliance and Engineering Co., Ltd.* [1927] N.Z.L.R. 16, Mr. Justice Sim states that, in order to establish a fraudulent preference,

> "It must be clear that the substantial and dominant view of the debtor was to give a preference (*ex parte Hill*, (1883) 23 Ch. D. 695; *In re Reimer* (1896) 15 N.Z.L.R. 198; *Sharp v. Jackson* [1899] A.C. 419); and it is not sufficient that the creditor was in fact preferred (*ex parte Taylor* (1886) 18 Q.B.D. 295), but in some circumstances that fact may establish a *prima facie* case of fraudulent preference (*In re Cohen* [1924] 2 Ch. 515)."

His Honour goes on to say that in applying the law to the case of a company, the inquiry is as to the state of mind of the directors when the act complained of was performed: *Buckley's* case [1899] 2 Ch. 725.

Not every payment or other transaction which has the effect of preferring a creditor must necessarily be fraudulent: See *re Laurie* (1898) 67 L.J. Q.B. 431; *Sharp v. Jackson* [1899] A. C. 419; and *Official Assignee v. Wairarapa Farmers' Co-operative Assn., Ltd.* [1925] N.Z.L.R. at p. 8. On this point, the conditions required to establish a fraudulent preference under s. 79 of the Bankruptcy Act, 1908, were referred to by Mr. Justice MacGregor in *In re Green's Grocery Stores, Ltd.* (1928) 4 N.Z.L.J. 171 (the only place where it is reported), as having been "tersely stated" by Pollock, M.R., in *In re Cohen* [1924] 2 Ch. 515. At p. 533, the learned Master of the Rolls says:

> "The conditions which s. 44 [of the Bankruptcy Act, 1914] requires are plain. First, that the payment is made by a person unable to pay his debts as they become due from his own money. Secondly, that it in fact prefers one creditor over others. Thirdly, that the dominant motive with which the payment was made was a desire to prefer that creditor to whom the payment was made. I have separated conditions 2 and 3 purposely, for clearness, for I think it has been decided many times that the mere fact that the payment does in fact prefer one creditor over others does not make it void as against the trustee in bankruptcy. . . . In *ex parte Lancaster* (23 Ch. D. 695), Cotton, L.J., had definitely stated that the onus lay on the trustee to give evidence that the view entertained by the debtor was to prefer the creditor. 'Dominant or substantial' not necessarily the 'sole' view is that which has since *ex parte Hill* (23 Ch. D. 695) been interpreted to be the proper meaning of the word. . . . Evidence of kinship would *prima facie* discharge the onus upon the trustee as in *In re Laurie* (68 L.J., Q.B. 431), and see *ex parte Topham* (L.R. 8 Ch. 614, 620). There are other facts which do likewise; and if the onus is discharged, no doubt the debtor must then displace the *prima facie* evidence of a dominant intention to prefer given by the trustee. This can be done by proving that the payment was under pressure, or for one or other of the many reasons indicated by Phillimore, J., in *In re Ramsay* ([1913] 2 K.B. 50)."

In the last-mentioned case of *In re Ramsay,* Phillimore, J., said at pp. 84, 85:

> "The Court must be satisfied that the dominant or substantial motive was to prefer the creditor, and was not to obtain some advantage to the debtor, or rather, to get rid of the negative expression that there was no substantial advantage to the debtor likely to accrue by reason of the act of preference, no escape from criminal prosecution, no escape from being declared, whether criminally or not, a trustee who had failed in his trust, no advantage which would enable him to keep afloat and carry on his business; and although in some cases a writ may be pressure, there are cases where writs are of absolutely no importance to the debtor, no terror; and in such cases, I do not think that the threat of a writ or the issuing of a writ, ought to be called pressure."

In the *Wairarapa Farmers'* case (*supra*), Mr. Justice Salmond said at p. 6:

> "In the absence of any satisfactory explanation by the debtor or the company [the preferred creditor] sufficient to put a different colour on the transaction, I think that the inference of fraudulent preference would be proper and indeed unavoidable."

The same view was taken by Eve, J., in the *M.I.G. Trust* case: he considered that, in the absence of evidence to explain the motive or intent which prompted the withdrawal of the brief to oppose the Motion to register the charge, he could only conclude that the dominating motive or intent was to prefer the Gresham Trust. The learned Judge accordingly held that the decision of the M.I.G. Trust not to oppose the making of the order in favour of the Gresham Trust, or at least to direct the attention of the Court to circumstances which probably would have led the presiding judge to refuse to make the order sought, amounted to "suffering" a judicial proceeding to go by default against the M.I.G. Trust in favour of one of its creditors; and this constituted in the circumstances a fraudulent preference which made the registration of the charge void as against the liquidator.

Summary of Recent Judgments.

SUPREME COURT
In Banco.
Christchurch.
Dec. 2, 6.
Ostler, J.

IN RE AN ARBITRATION, SHAW AND PIDGEON.

Building Contract—Architect's Final Certificate given and Payment thereunder accepted—Subsequent Discovery by Contractor of Mistake in Deductions from Contract Price—Account reopened and Mistake rectified.

Questions of law arising out of a building contract and stated by arbitrators under a submission to arbitration for the opinion of the Court, of which the following one was reserved: Whether, the final certificate having been given and the contractor having been paid the balance due under it, he could subsequently claim to have the account reopened. The facts as found by the arbitrators sufficiently appear in the judgment.

The specifications in a building contract let to S. provided (*inter alia*) for the underpinning of a single wall, later found unnecessary. On a settlement with the architect of the amounts to be allowed off the contract price for work specified but not done, S. and the architect both deducted from the contract price the cost of underpinning two walls. The architect gave his final certificate and S. was paid the balance due to him thereunder before S. discovered the mistake. Another claim by S. on the employer, but not relating to the amount of the allowance, was disputed and was submitted to arbitration. Before the reference took place S. discovered the mistaken deduction and claimed the amount he had wrongly allowed. This claim was also submitted to arbitration.

The arbitrators submitted for the opinion of the Court (*inter alia*) the question of law as to whether, the final certificate having been given and the contractor having been paid the balance under it, he could have the account reopened.

Wright for the arbitrators and the umpire; **Upham** and **Twyneham** for Pidgeon, the employer; **Sargent** and **Nicholls** for Shaw, the contractor.

Held, on the principle of **Daniell v. Sinclair** (1881) 6 A.C. 181, That, notwithstanding the final certificate had been given, the contractor was entitled to have his account reopened and his mistake rectified.

Solicitors: A. S. Nicholls, for the contractor; **Roy Twyneham,** for the employer; **Duncan, Cotterill, and Co.,** all of Christchurch, for the arbitrators and the umpire.

SUPREME COURT
In Chambers.
Blenheim.
Dec. 9, 13.
Blair, J.

IN RE A MORTGAGE, R. TO PUBLIC TRUSTEE.

Mortgagors and Tenants Relief Acts—Interpretation—Notice—After Consent Order on Mortgagor's Application for relief, Default made in Observance of Conditions thereof—Whether Mortgagee required to give Fresh Notice before exercising Remedies—Mortgagors and Tenants Relief Act, 1932, s. 2.

Action for possession of certain mortgaged property by reason of admitted default on the defendant's part as mortgagor. The case is reported on the point raised by the defendant that it is necessary for a mortgagee, in the circumstances outlined in the headnote, to move afresh by giving notice under the Mortgagors and Tenants Relief Act, 1932.

After application (as mortgagor under a second mortgage) for relief by R., an order was made by consent on July 23, 1931, that, subject to the payment by R. of rates, &c., and instalments falling due to the State Advances Superintendent as first mortgagee, the P.T. should not before March 31, 1932, do any act or exercise any power mentioned in s. 4 of the Mortgagors Relief Act, 1931, save by leave of the Court upon application by the mortgagee on account of any breach by R. of the terms and conditions of the said order. R. did not comply therewith.

Plaintiff did nothing to exercise his rights as mortgagee until he sued for possession in this action, before the commencement of which no notice of intention to exercise his rights as mortgagee was given. R. then moved under the Mortgagors and Tenants Relief Act, 1932, for special leave to apply for relief, but his application was refused.

R. now opposed the claim for possession on the ground that it was necessary for the plaintiff to move *de novo* by giving notice under the principal Act, thus giving S. an opportunity to apply again for relief. He based his application on s. 2 (3) of the Mortgagors and Tenants Relief Act, 1932.

Churchward, for plaintiff; **Scantlebury,** for defendant.

Upon an interpretation of that subsection,

Held, That the subsection has no application to cases where the mortgagee has prior to its enactment given due notice to the mortgagor, and the mortgagor has moved the Court for relief. *Aliter,* if the mortgagor has, since the relief order, cured the default upon which it was made.

The Court distinguished between an order made at the behest of a mortgagor threatened with action by a mortgagee, and an order made at the behest of a mortgagor who moves the Court without any such threat having been made.

Order accordingly.

Solicitors: Burden, Churchward, and Reid, Blenheim, for the plaintiff; **A. E. L. Scantlebury,** Blenheim, for the defendant.

NOTE:—For the Mortgagors and Tenants Relief Act, 1932, s. 2, see Kavanagh and Ball's *Rent and Interest Reductions,* p. 26.

SUPREME COURT
In Chambers.
Auckland.
Nov. 29; Dec. 9.
Smith, J.

RE BRYANT (A BANKRUPT), EX PARTE AUCKLAND HARBOUR BOARD SINKING FUND COMMISSIONERS.

Bankruptcy—Proof of Debt—Amendment—Mortgage Security undervalued—Mistake—*Bona fides* considered—Bankruptcy Act, 1908, s. 102.

Application for an order giving leave to the Auckland Harbour Board Sinking Fund Commissioners to amend a valuation and proof of debt lodged by them with the Official Assignee in Bankruptcy of A. W. Bryant, by increasing the valuation of a mortgage security held by the Commissioners from £1,250 to £1,565.

B. was adjudicated a bankrupt on July 28, 1932. He was owner of a house property mortgaged to the S.F.C. in 1929, when a professional land-valuer had valued the security at £2,308 and £1,500 was advanced. In his statement of assets B. valued the property at £1,295.

Sir J.G., one of the S.F.C., but not a professional valuer, and the C.'s secretary visited the property for the purpose of valuing it, and the former's valuation of £1,250 was approved by the S.F.C. after the proof of debt valuing the security at that amount had been sent to the O.A.

The O.A. on October 19, 1932, entered into an agreement for sale for £1,440, subject to the provision that if the O.A., as vendor, was unable before October 31, 1932, on payment or offer of £1,250 plus costs and mortgagee's expenditure on the property, to obtain release of the mortgage, either party to the agreement should be absolutely entitled to rescind it *in toto.*

When the S.F.C. first heard of the sale, they were unwilling to allow the £1,250 to remain on mortgage, and desired the property to be abandoned to them. Later, the O.A. required them to give up their security, stating he had no reason to think they had made any error in their estimate.

The grounds for the application by the S.F.C. for leave to file an amended proof of debt was that the valuation in the proof of debt was made *bona fide* on a mistaken estimate.

Leary for the Sinking Fund Commissioners; **Rudd** for the Official Assignee.

Held, on the facts, That the valuation and proof of debt were made *bona fide* and without any intention of overreaching the other creditors, and that amendment of the proof of debt should be allowed on terms.

Re Arden, Ex parte Arden (1884) 14 Q.B.D. 121, followed.

The order of the Court allowed the asked-for amendment upon the terms that the costs of the Official Assignee as between solicitor and client, both in respect of the agreement for sale and purchase and of the present proceedings, be paid by the Commissioners as taxed by the Registrar.

Amendment allowed on terms.

Solicitors: Bamford, Brown, and Leary, Auckland, for the Auckland Harbour Board Sinking Fund Commissioners; **L. F. Rudd,** Auckland, for the Official Assignee.

NOTE:—For the Bankruptcy Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, title *Bankruptcy,* Vol. 1, p. 466: Refer also to *Baldwin's Law of Bankruptcy and Bills of Sale,* 11th ed. 625.

SUPREME COURT
In Chambers.
Palmerston North.
Sept. 5; Dec. 23.
Blair, J.

HASTINGS v. HASTINGS (No. 2).

Divorce—Practice—Costs—Husband successful in resisting Defence that Separation brought about by his Misconduct—Wife possessing Private Means, resident in New South Wales, and defending Petition from there—Limited Costs allowed Wife—Divorce and Matrimonial Causes Act, 1928, ss. 18, 51.

Question of costs reserved, the argument thereon being submitted in writing. The husband had been granted a decree *nisi* on the ground that the petitioner and respondent had been parties to an agreement for separation which had been in full force for not less than three years. The wife had defended the suit on the ground that the separation had been due to the petitioner's misconduct, but this was not proved. The husband applied for costs on the grounds that he was the successful party and the respondent wife was possessed of independent means. The circumstances of the parties sufficiently appear in the judgment reported in (1932) 8 N.Z.L.J. 207.

A husband's petition for divorce founded on an agreement for separation was resisted by wife on the ground that such separation had been brought about by husband's misconduct, which was not proved at the hearing. The parties resided in New South Wales up to the time of the separation, and for some years subsequent thereto. The husband then acquired a New Zealand domicile, which enabled him to secure a decree *nisi* in the Dominion. The wife, as a resident of Sydney, had her evidence and that of her witnesses taken on commission. The husband claimed costs against the wife.

S. R. Mason, for the petitioner; **Goldstine,** for the respondent.

Held, 1. That it would not be "just" that an innocent wife who unsuccessfully defends a divorce suit should be ordered to pay her husband's costs when he applies for dissolution of the marriage and she opposes it, even though she be a woman of means.

Bagnall v. Bagnall, 7 G.L.R. 454; **Mills v. Mills** [1923] N.Z.L.R. 30; [1922] G.L.R. 420; **Millward v. Millward and Andrews** (1887) 57 L.T. 569; and **Hyde v. Hyde** (1888) 59 L.T. 523 distinguished.

2. That the husband having obtained, by reason of his change of domicile, the advantage of the New Zealand statutory provision enabling a divorce to be obtained on the ground of mutual separation for three years, which he could not have done had he retained his New South Wales domicile, and the wife having been at the disadvantage of having her evidence taken in New South Wales, she should be allowed the costs, fees, and expenses charged or incurred by the commission on the taking of evidence in Sydney, and counsel's fee in respect of the hearing, leaving each party to bear his or her Sydney counsel's fees and witnesses' expenses.

Order accordingly.

Solicitors: Mason and Mason, Auckland, for the petitioner; **Goldstine and O'Donnell,** Auckland, for the respondent.

NOTE:—For the Divorce and Matrimonial Causes Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Husband and Wife,* Vol. 3, 865; *Sim's Divorce Act and Rules,* 4th Ed., p. 84.

SUPREME COURT
In Chambers.
Auckland.
Dec. 9; Jan. 11.
Smith, J.

IN RE A LEASE, DAWSON AND ANOTHER TO WOOLWORTHS (N.Z.), LIMITED.

National Expenditure Adjustment—"Fair" Rate of Rent—Application by Lessors for Exemption from Statutory Reduction—Matters to be taken into Account in determining Fair Rental—Existing Economic Conditions considered in relation to the Nature of Lessee's Business—National Expenditure Adjustment Act, 1932, Part III, s. 38.

Application by the lessors under a deed of lease dated October 1, 1929, for relief from the operation of Part III of the National Expenditure Adjustment Act, 1932, which requires, unless relief be granted, a deduction of 20 per cent. from the rental reserved by the lease. The lessors are the executors of a deceased person's estate. The lessee is an incorporated company, which carries on a successful business in Queen Street, Auckland. The application had been heard by the Auckland City Mortgagors' Liabilities Adjustment Commission, and that Commission had come to the conclusion that the lessors had not made out a case for relief. The lessors did not accept this view, and the matter was contested before the Court.

Woolworths (N.Z.), Ltd., under contract made on October 1, 1929, leased city premises with a provision that any permanent additions should involve permanent improvements to a value of not less than £3,000, without compensation. The rental was to be £1,740 until January 1, 1936, and £3,500 for the remaining five years. The sum of £4,318 was spent in the permanent improvement of the premises. The company considered this involved a writing-off of £425 per annum during the term of the lease. The Mortgagors Liabilities Adjustment Commission held that the lessors had not made out a case for relief from the provisions of Part III of the National Expenditure Adjustment Act, 1932.

Johnstone, for the lessors, in support; **Barrowclough,** for the lessee company, to oppose.

Held, 1. That, for the purpose of deciding whether the rent payable under a lease is fair or not, the nature of the premises must be taken into account; and such premises must be the premises as they exist under the lease pursuant to which the rent in question is payable.

2. That, as the permanent improvements contemplated by the contract were executed before the statutory reduction of rent began to operate, the premises must be taken to be the premises so altered and improved.

3. That the inquiry as to whether the rental is "fair" under the existing contract, must, in the first place, be concerned with the period during which the rent is to be statutorily reduced; and must, in the second place, be concerned with the fair letting-value of the premises during that period, when the existing or estimated economic conditions are taken into account.

On the evidence before the Court, the present fair rental would be in excess of a statutorily reduced rent plus an annual allowance of £435 on account of the permanent improvements, and it followed that the rent payable under the contract, taking into consideration the nature of the premises, was a fair rent. The lessors had therefore made out a claim for relief.

Order relieving lessors from statutory reduction of rent.

Solicitors: Clayton and Mellsop, Auckland, for the lessors; **Russell, McVeagh, Macky, and Barrowclough,** Auckland, as agents for **Webb, Richmond, Swan, and Bryan,** Wellington, for the lessee company.

NOTE:—For the National Expenditure Adjustment Act, 1932, Pt. III, see *Kavanagh and Ball's New Rent and Mortgage Reductions*, p. 42.

SUPREME COURT
Palmerston North.
Nov. 4; Dec. 22.
Blair, J.

PELLATT v. BARLING (No. 2).

Criminal Law—Appeal—Increase of Penalty to make general Appeal—Wilful Damage—Evidence not supporting Magistrate's findings of Fact—Justices of the Peace Act, 1927, s. 216 (*d*) (vi).

Appellant was charged with wilfully damaging a motor-car to the value of 4s., contrary to section 216 (*d*) (vi) of the Justices of the Peace Act, 1927.

The facts as found by the Magistrate were that appellant removed the cap from the benzine tank of a motor-car belonging to M, dropped a lighted match into the tank, setting fire to the benzine therein, and then ran away, leaving the benzine on fire. The cap was subsequently found to be missing, and cost 4s. to replace. The evidence was that appellant dropped the cap on the ground and ran away, and that the cap was not seen again. The fire was extinguished, and no apparent damage was done to the car by the fire. The earlier proceedings are reported in **Pellatt v. Barling,** [1932] N.Z.L.R. 1688; 8 N.Z.L.J. 247.

The Magistrate sentenced appellant to one month's imprisonment with hard labour, and declined to increase the penalty so that a general appeal could be had.

Cooper for appellant; **P. B. Cooke** for respondent.

On appeal by way of case stated;

Held, 1. That the Magistrate should have increased the penalty to permit of a general appeal.

Lang v. Reid, [1916] N.Z.L.R. 1193, followed.

2. That there was no evidence upon which appellant could have been convicted of the offence alleged.

Regina v. Pembleton, (1874) 38 J.P. 454, referred to.

Appeal allowed.

Solicitors: Cooper, Rapley, and Rutherford, Palmerston North, for appellant; **F. H. Cooke,** Palmerston North, for respondent.

NOTE:—For the Justices of the Peace Act, 1927, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, title *Criminal Law*, Vol. 2, 351.

SUPREME COURT
Christchurch.
Dec. 14, 19.
Ostler, J.

COX AND WALSH v. BURTON AND ANOTHER.

Bills of Exchange—Cheque—Illegality—Onus of Proof—Presentment—Notice of Dishonour—Interest—Bills of Exchange Act, 1908, ss. 30, 45, 46, 50, 57, 74, 75.

C. and W., bookmakers, had had many bets with M., a horse-trainer, who gave a cheque for £650 in favour of C. in 1926, and another cheque in 1927 to replace it. W. died in 1926, and M. in 1929. C. with W.'s executrix did not sue until 1931, and then (after amendment allowed by the Court at the trial) for £650 and interest thereon on an alleged contract of loan, as to which it was held they had not discharged the onus of proof; and, alternatively, on the second cheque.

Defendants, the administrators of M.'s estate, set up the defences that the cheque was given for a gaming debt, and that there was no corroboration of a claim against the estate of a dead man; and that there was no proof of presentment for payment and dishonour, or notice of dishonour.

Sim for plaintiffs; **Thomas** and **Dr. Haslam** for defendants.

Held: 1. That the onus of proof of illegality was cast on the defendants by s. 30 of the Bills of Exchange Act, 1908, and the principle laid down in **Talbot v. von Boris** [1911] 1 K.B. 854—viz., that the provision of s. 30 (2) of the Bills of Exchange Act, 1882 (Imperial), and of the New Zealand Act of 1908, does not apply to a case where the holder seeking to enforce the instrument is the person to whom it was originally delivered and in whose possession it remains; that it was not affected by the decision in **Jones (R. E.), Ltd. v. Waring and Gillow** [1926] A.C. 670; that had the onus been on the plaintiffs, the learned Judge would have held that it had not been discharged, but that, as the onus was on the defendants, on the evidence they had not discharged it.

2. That the rule as to corroboration of a claim against the estate of a dead man has no application where the onus of proof is on the latter's representatives.

Tamara te Angiangi v. Treadwell, [1926] N.Z.L.R. 696, followed.

3. That, on the facts, there had been presentment, dishonour, and notice of dishonour.

Semble, that failure to present the cheque, in view of the drawer's account at the bank having been closed within six years from the date of its issue, would not have been a good

defence, and that notice of dishonour would, under the circumstances, have been dispensed with under s. 50 (2) of the Bills of Exchange Act, 1908.

Judgment was given for £650, but without interest, in view of the long delay in making the claim.

Solicitors: W. R. Olliver, Christchurch, for the plaintiffs; **C. S. Thomas,** Christchurch, for the defendants.

NOTE:—For the Bills of Exchange Act, 1908 (N.Z.), see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, title, *Bills of Exchange*, Vol. 1, p. 583; for the corresponding Imperial Act, see *Halsbury's Statutes of England*, Vol. 2, p. 35; refer also to *Halsbury's Laws of England, Replacement Ed.*, Vol. 2, paras. 818, 944; *Byles on Bills*, 19th Ed., pp. 23, 268; *Chalmers on Bills of Exchange*, 10th Ed., 294; *Grant on Banking*, 7th Ed., 17, 62-63; *Paget on Banking*, 4th Ed., 107, 185.

SUPREME COURT
Wellington.
In Chambers.
Feb. 6.
Ostler, J.

MURPHY v. MURPHY.

Divorce—Practice—Order for Permanent Maintenance—Charging-order to secure Arrears—Issued and Registered Seven Years after Order for Payment of Maintenance—Jurisdiction—Code of Civil Procedure, RR. 314, 319, 594.

Motion to set aside a charging-order as having been illegally obtained.

In 1925, the parties had been divorced and an order for permanent maintenance had been made against the husband. In 1932, the husband was in arrears with the payment of his maintenance, and there was a dispute between himself and his former wife as to the amount of these arrears which she claimed amounted to £40. Purporting to act under R. 314, her solicitors in 1932 obtained a charging-order absolute against certain land owned by the former husband and this charging-order was registered against the land.

Blundell in support of Motion; **Levi** to oppose.

Held, that the charging-order, having been issued more than six months after the judgment, had been obtained without jurisdiction, and was therefore set aside.

Commercial Agency (Ltd.) v. Adams, (1901) N.Z.L.R. 578, referred to.

Quaere, whether an order for permanent maintenance may be enforced by charging-order.

Solicitors: Bell, Gully, Mackenzie, and O'Leary, Wellington, for plaintiff; **Levi, Jackson, and Yaldwin,** Wellington, for defendant.

NOTE:—For *Code of Civil Procedure*, RR. 314, 319, 594, see Stout and Sim's *Supreme Court Practice*, 7th Ed., pp. 233, 238, 381.

Rules and Regulations.

Opticians Act, 1928. Opticians Regulations Amendment, 1932, *re* syllabus of subjects in which candidates may be examined.—*Gazette* No. 78, December 22, 1932.

National Expenditure Adjustment Act, 1932. Partial exemption of Thames Borough Debentures from operation of Part IV of the Act.—*Gazette* No. 78, December 22, 1932.

Board of Trade Act, 1919. Board of Trade (Wheat) Regulations, 1933. Prescribing for the control and regulating the purchase of wheat.—*Gazette* No. 1, January 6, 1933.

Judicature Amendment Act, 1932-33. Order in Council fixing special sitting of the Court of Appeal.—*Gazette* No. 6, January 31, 1933.

Local Government Loans Board Act, 1926. Order in Council declaring certain Public Bodies to be Local Authorities for the purposes of the Act.—*Gazette* No. 8, February 2, 1933.

Honey-export Control Act, 1924. Amended Regulations *re* Levy on Honey intended for Export.—*Gazette* No. 8, February 2, 1933.

Honey-export Control Act, 1924. Notification *re* Publication of notices by the Board.—*Gazette* No. 8, February 2, 1933.

An Interview with the Right Hon. Lord Salvesen.

[*Concluded from p. 22.*]

DIVORCE REFORM.

A reference was then made to a recent plea by Lord Salvesen in the pages of the *Juridical Review* for a reform of the law of Divorce in Scotland. He said that he had not been a member of the Divorce Commission of 1908, but that he had given evidence before it.

"For some years I have been agitating for the reform of our Divorce law," he continued. "Since I have been in New Zealand, I have made myself acquainted with the grounds of divorce here. My only criticism is that I think you have gone a little too far in this Dominion, in permitting what amounts practically to a divorce by consent. Apart from the obvious probabilities of hypocrisy on the part of petitioners using the ground of restitution of conjugal rights, I think that the almost automatic granting of dissolution of marriage after three years' separation is an over-extension of grounds for divorce."

"I think you have gone too far. I agree entirely with the legislators here in so far as they have not confined divorce, as it is in England, to cases of infidelity, or, as in Scotland, to cases of infidelity and desertion. And I think that permanent insanity and serious criminality on the part of either spouse should also be grounds for a divorce. But I notice with some dismay that you have as many divorces here for a population of one-and-a-half millions as we have in Scotland for five millions of people. I think I am right in saying that, roughly speaking, about five hundred divorces are granted here every year; and that is just about the number in Scotland, where we have divorce for infidelity at the instance of either party and where we have also divorce for four years' desertion."

It was suggested that the comparative fewness of Scots divorces may be due to the higher cost of litigation there in comparison with the prescribed maximum scale costs in this country.

"No, on the contrary," Lord Salvesen replied, "every poor person in Scotland is entitled to get the services of a solicitor and barrister without charge, so that any working-woman who can qualify a good case for divorce against her husband can obtain it for no more than bringing her witnesses to the Court, which in many cases does not exceed five pounds in total cost. That has been our law for four hundred years."

Lord Salvesen was referred to a passage in his recent article in the *Juridical Review* in which he said:

> "Unfortunately, our Parliament never seems to have any time to deal with questions of social reform of real importance to the law and to society. Only those things that concern a great number of the voters in their constituencies appear to interest our Scottish members. Yet it is to be noted that two Acts which affect a very small number of the population, relating respectively to the marriage of an uncle with his niece by marriage and of an aunt with her nephew by marriage, have been put in the statute-book at the instance of private members of Parliament."

"It was simply a short Act making it lawful," he replied. "Formerly a niece by marriage was regarded in the same position as a niece by blood relationship, but now it is quite lawful for a man to marry his wife's

niece after his wife is deceased, there being no blood relationship between them; and, in the same way, it became lawful for a woman to marry her husband's nephew after her own marriage had terminated. But these little matters where social injustice exists are often not dealt with by Governments, but have to be brought under the notice of Parliament by a private member who has had his attention called to them."

His Lordship was told that such was the case here, and an amendment to the Dominion's Marriage Act was made on the lines he had mentioned at the instance of a private member in 1929.

Domicile and Divorce.

Attention was drawn to the growing agitation for the reciprocal recognition of divorce decrees in the British Dominions, and His Lordship was asked if this were practicable.

"Well, you see, we do not agree as regards grounds, and there are different views as to the requirements respecting domicile. We consider that domicile is the only thing that gives jurisdiction in divorce cases."

The recent case of *Worth v. Worth* and its implications was mentioned.

"Well, I have had to consider that point very carefully because of suggestions having been made that the grounds of jurisdiction should be altered," said the eminent Scots jurist; "and I have come to the conclusion that the only safe ground of jurisdiction is the domicile of the defendant. I think, in most cases that is the law—I do not say in America, where, of course, a domicile may be created by a few weeks' residence in certain States."

Testator's Family Maintenance.

"Has any move been made to deal with testator's family maintenance, similar to what has been done in New Zealand?" Lord Salvesen was next asked.

"Well, I can only say that Lord Astor introduced a Bill in the House of Lords which was designed to overcome the scandal that arises from the English law under which a man may leave his whole property away from his wife and family, and leave them destitute after they have been brought up in luxury. In Scotland, this cannot happen. In Scottish Law a man can dispose of his personal estate up to one-third in the case of his being survived by a widow and one or more children. That has not caused any real difficulty in Scotland, because the control a man has is very considerable by being free to dispose of one-third of his personal property. He has also complete control over his heritage and he can leave that as he pleases. If he dies leaving only a wife, she has an absolute claim to half of his personal estate and she also has a right to one-third of his moveable property. I have never heard any objection taken in Scotland to that law which has been in force for many centuries. If a man has a rooted dislike to any member of his family he can, during his lifetime, settle property on the other members of his family; so that he can retain a very complete control over any ne'er-do-weel. I have known cases where that has been done; but it is very exceptional.

"Speaking from an equitable point of view, it seems to me that the Scottish law is very sound. In the case of a ne'er-do-weel to whom his father has advanced money, that can be imputed to part of his lawful share of the estate. In Scotland, therefore, the question very seldom arises; but, on the other hand, it is the cause of grave scandal in England where a man on his deathbed, because of some slight quarrel with any members of the family, may cut them off with a shilling."

"Is no reference made to amendment of the law along the lines of the equitable manner in which our law of Family Protection operates: it seems often to be discussed in English legal periodicals?"

"I can only say that they take no notice of the Scots law which has been in operation for all these centuries," Lord Salvesen smilingly replied.

Subsidised Shipping.

Finally, as one of the most distinguished living experts in marine law, Lord Salvesen was asked his opinion about the facilities placed at the disposal of subsidised foreign shipping in competition with British ships which had not such Government assistance.

"No question of international law arises," he said; "but, of course, it is extremely unfair competition and it has been very disastrous to British shipping. The only way in which it can be checked is by our Government providing a similar subsidy. Two can play at that game. The questions of the expediency of a subsidised mercantile marine, and of the adoption of retaliatory measures may have to be considered. I believe, however, that shipowners are not at all sure whether the British marine would be the gainer by any such action."

Impressions in New Zealand.

Before saying "Goodbye," Lord Salvesen discussed his visit to the Dominion. He said:

"I have enjoyed my trip immensely here. I am impressed by the spaciousness of the country and its comparative emptiness, and the great potentialities there are here whenever prices become resurgent. There seems to be any amount of land that is capable of more extensive cultivation, and any amount of land still to be recovered from the bush; but, at present, there is no inducement for people to start farming when farming is, for the moment, such an unprofitable occupation."

Finally, Lord Salvesen asked the Journal to convey his compliments and good wishes to the members of the legal profession in the Dominion. He said he had sat with Sir Michael Myers for a short time and had the pleasure of seeing some of our barristers at work. He observed that our Courts are modelled on the English lines. "And you seem to have a very competent Bench," said His Lordship in conclusion.

The Late Mr. J. E. Russell.

It is with great regret that practitioners learnt of the death of Mr. J. E. Russell, of the firm of Russell, McVeagh, Macky, and Barrowclough, Auckland, as the result of a boating accident on January 29. Mr. Russell was the only son of the senior member of that firm, Mr. E. R. N. Russell, for whom great sympathy is felt by his professional brethren. The deceased, who qualified for a commission in the Air Force, took his B.A. and LL.B. degrees at Cambridge University in the years following the Armistice. On his return to Auckland he became a partner in his father's firm. The late Mr. Russell, who was thirty-four years of age, leaves a widow and two young children.

Currency and the Common Law.

The Banco de Portugal Case Recalled.

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

As the eminent jurist, Sir Frederick Pollock, wisely observes: "Our Lady of the Common Law is not a professed economist." Since certainty is one of the first virtues that is demanded of any legal system, it is perhaps fortunate that His Majesty's judges are reluctant to formulate opinions on what, even in these enlightened days, can hardly be termed an exact science. But occasionally a question of economics appears boldly before them and they are compelled to adjudicate on matters foreign to their professional experience. A classic example occurs in the recent suit of *Banco de Portugal v. Waterlow and Sons Ltd.*, which in June last ended its varying fortunes from trial to final appeal before the House of Lords (48 T.L.R. 404).

The Plaintiff is the Central Bank in the State of Portugal, enjoying an exclusive license for the issue of bank notes as legal tender throughout the country. The Defendants are the world famous firm of printers, whose head office is in London. In the year 1922, the Bank entered into a contract with Waterlows for the printing of a supply of bank notes. Each of these notes was of the value of 500 escudos, being at that time worth about £5 in English currency, and bore on its face a portrait of Vasco da Gama, the navigator. Waterlows fulfilled two orders in pursuance of their contract, and, on the Bank's instructions, kept the plates pending any later issue that the Banco de Portugal might authorise.

In December, 1924, a Dutchman named Marang van Ysselvere interviewed Sir William Waterlow. Though Sir William was unhappily ignorant of the fact, the visitor was an audacious scoundrel who might fill a worthy place beside Jabez Balfour or Clarence Hatry. His associates were a group of astute criminals, including the Portuguese Minister at the Hague and at least one diplomatic representative of a South American State. Marang unfolded a plausible tale of the formation of a Dutch syndicate which was designed to render timely financial assistance to the Portuguese territory of Angola, and convinced Waterlows that he was the accredited representative of the Banco de Portugal. So ingratiating was Marang, that the firm made no enquiries as to his *bona fides*, and on his instructions printed and delivered to him no fewer than 580,000 Vasco da Gama notes.

The conspirators obtained the authority of the Portuguese Minister of Finance to form the Banco Angola e Metropole, and, with the capital resources which Messrs. Waterlow had so obligingly supplied, proceeded to inflict a dose of inflation on the Portugese people. Strangely enough the circulation of the millions of additional escudos had no effect on the currency of the country and the foreign exchange rate remained unaltered.

Everything proceeded merrily until December, 1925, when the Banco de Portugal suddenly discovered the fraud. It was not until some weeks later, when Sir William Waterlow had reached Lisbon, that they were in a position to distinguish the good Vasco da Gama notes from the fruits of Marang's ingenuity. As one of their Directors stated in evidence, they had no option but in the meantime to recall all Vasco da Gama notes and to meet them with other currency. Had they declined to honour any Vasco da Gama notes, their action would have had fatal repercussions on the credit of the Bank, the commercial life of the country would have been paralysed, and Portugal would have celebrated another revolution.

By the time confidence had been restored, the Bank had honoured over one million pounds' worth of false escudo notes. They recovered nearly half a million pounds from the liquidation of Marang's Banco Angola e Metropole, and, in April, 1928, issued a writ in London claiming that Waterlows were liable for the difference. At the original trial before Wright, J. (47 T.L.R. 214), and before the Court of Appeal a few months later (47 T.L.R. 359), Waterlows strenuously argued that they had not broken their contract with the Bank, and in consequence were not liable to pay anything. Not a single judge was prepared to uphold this contention, and, by the time the suit had reached the House of Lords, Waterlows frankly conceded that they had been at fault.

The firm was therefore liable to reimburse the Bank to the extent of its losses, but opposing counsel violently disagreed as to the basis of calculating the damages. The notes of the Banco de Portugal were inconvertible and there was no prospect of Portugal's return to a gold standard. Hence Waterlows argued that they were liable only for the cost of printing sufficient notes to replace those which had been paid out to honour the Marang forgeries—a comparative trifle of a few thousand pounds. The Bank contended that in addition to the outlay for printing, they were entitled to the face value of the replacement issue of genuine notes—a grand total of £610,391; and by a majority of 3 to 2 in the House of Lords the latter argument prevailed.

Messrs. Waterlow's argument on the matter of damages was favourably received in the Court of Appeal by that eminent commercial lawyer, Lord Justice Scrutton, and in the House of Lords by Lord Warrington of Clyffe and Lord Russell of Killowen. Lord Justice Scrutton remarked that the Bank was under no obligation to replace the forgeries by anything else than their own notes. There was no evidence that the reduced amount of unissued notes occasioned the Bank any loss of profit or that they suffered in any way by the increased amount of notes actually put into circulation to honour the spurious Vasco da Gama issue. The Bank had therefore paid out 200,000 genuine notes at the mere cost of printing fresh currency "to replace them in its till." In a similar vein, Lord Warrington consoled himself that if he dissented from the majority he did so "in good company." He emphasised the essential difference of a central bank from any other institution. Whereas the respondent Bank could pay in other currency which it had power to create for the purpose, the other institution would have to procure the necessary currency by expenditure of money or sale of goods or "in some similar way." Lord Russell of Killowen delivered a lengthy judgment to the same effect.

The opinions of the majority were delivered by the Lord Chancellor (Lord Sankey), by Lord Atkin, and by Lord Macmillan, who was already distinguished by the famous Report on currency problems which bears his name. Lord Atkin pointed out that the argument on behalf of Waterlows "struck home at the present time where our currency is a paper currency." In his opinion, "the Bank by issuing its note as the

trader issues his promise to pay a fixed sum, issues a bit of its credit to that amount; like the trader, it is bound to pay the face value in currency, and like the trader it is liable on default to judgment for the face value exigible out of its assets; and, like the trader if it is compelled by the wrong of another to incur that liability, its damages are measured by the liability it has incurred." Lord Macmillan regarded the inconvertibility of the note as "an irrelevant circumstance" and concluded "that the Bank, being compelled to issue for nothing notes for which, if it had issued them in the ordinary course, it would have received value corresponding to the purchasing power of the number of escudos which they represented, has suffered loss to the extent of the face value of these notes."

Thus the protracted litigation drew to a close, and, as the result of an unfortunate error of judgment, a firm, whose good faith was never impugned, was condemned by the narrowest of margins in the colossal sum of £610,000.

Death of South Africa's Chief Justice.

An Interesting Career.

A conspicuous figure in the Judiciary of the British Commonwealth of Nations has been removed by the death of the Rt. Hon. Jacob de Villiers, Chief Justice of South Africa. Born in 1868 in the Orange Free State, de Villiers came to England for his legal education, and was called to the Bar at the Middle Temple in 1893. Returning to South Africa to practise, he quickly made his mark, and in 1896 was appointed State Attorney for his native State, no small honour for a young man of twenty-eight.

Then came the Boer War and de Villiers exchanged the Courts for the field. In its earlier stages he fought with valour and distinction, but he was badly wounded at Bothaville, taken prisoner by the British, and sent as a prisoner of war to an internment camp at Bermuda. Released at the end of the war, he returned and resumed his practice, and after being in 1907 appointed Attorney-General in the Transvaal, he became in 1910, on the establishment of the Union, Judge President of the Transvaal. This is a position which in the Provinces of South Africa corresponds to the Chief Justiceship in the Provinces of Canada and the Australian States.

Above the Provincial Courts is the Appellate Division of the Supreme Court of South Africa, and this consists of the Chief Justice, two permanent Judges of Appeal, and two additional Judges of Appeal taken from any of the Provincial Courts. Mr. de Villiers, after his judicial appointment, acted as an additional Appeal Judge, and in 1920 left the Transvaal to become a permanent member of the Appeal Court. On the death of Sir William Solomon in 1930 he succeeded him as Chief Justice, being soon after sworn of the Privy Council. A serious student of law, with marked ability for dealing with facts and applying legal principles, his career on the Bench fully justified his appointment, and he made notable contributions to South African jurisprudence, while in dignity, tact, and humanity he well upheld the traditions of his office. But especially his career was an outstanding example of the reconciling influence and effect of the enlightened policy which turned the war into the means of welding the opposed races into the South African Union.

Sales by Hirers

To Bona Fide Purchasers.*

By C. Evans-Scott, LL.M.

The decision of the Court of Appeal in *General Motors Acceptance Corporation v. Traders' Finance Corporation, Ltd.*, imports that every hire purchaser can transfer a good title to a *bona fide* purchaser or mortgagee for value unless the agreement either (a) is a "Customary Hire-purchase Agreement" as defined in s. 57 of the Chattels Transfer Act, 1924, or (b) is registered under that Act.

The Court of Appeal based its decision upon s. 19 of the Chattels Transfer Act, 1924. Referring to the conditional sale agreements entered into by the Appellant Company, the Court of Appeal said in its judgment at p. 33: ". . . none of the agreements under any of the appellant's 'plans' come within s. 57 (1) of the Chattels Transfer Act. Consequently they require registration, and, as they are not registered, s. 19 of the Act applies."

Section 19 provides as follows:

> "Upon the expiration of the time or extended time for registration no unregistered instrument comprising any chattels whatsoever shall, without express notice, be valid and effectual as against any *bona fide* purchaser or mortgagee for valuable consideration, or as against any person *bona fide* selling or dealing with such chattels as auctioneer or dealer or agent in the ordinary course of his business."

If s. 19 is effective in the case of an unregistered hire-purchase or conditional sale agreement then the consequences are alarming.

Every hire-purchase agreement not coming within s. 57 would have to be registered to protect the owner against a fraudulent sale by the hirer to a *bona fide* purchaser for value.

When we realise that s. 57 applies only if the owner is the manufacturer of the chattels or a person engaged in the trade or business of selling or disposing of such chattels and that such articles as bicycles and radio sets are not included in the schedule of chattels which may be the subject of "Customary Hire-purchase Agreements," the far-reaching effect of the decision is at once apparent. Nor would this effect be limited to hire-purchase or conditional sale agreements. Section 19 refers to "instrument comprising any chattels." Upon looking at the definition of "Instrument" we find it includes "any document that transfers . . . the right to the possession of chattels . . . temporarily . . . by way of bailment or lease."

If the possession of an article is temporarily transferred to a bailee and the transaction is embodied in a document which is not registered, does this vest in the bailee power to give to a third party a good title to the chattels owned by the bailor? Consider the position of a landlord who lets a fully furnished flat: could the tenant pawn his landlord's silverware and give a good title to the pawnbroker merely because the lease was not registered? If the judgment of the Court of Appeal is carried to its logical conclusion all these consequences must necessarily follow.

It is submitted, with the greatest respect, that s. 19 cannot affect the title of the owner of goods sold under hire-purchase or conditional sale and for the following reasons: The effect of s. 19 is to render unregistered *instruments* ineffectual as against *bona fide* purchasers

* (General Motors Acceptance Corporation v. Traders' Finance Corporation, Ltd. [1932] N.Z.L.R. 1).

for value without notice. The avoidance of an instrument for non-registration can affect the title of that person only whose title depends upon that instrument. If his title does not depend upon the instrument, then it follows that his title cannot be affected merely because the instrument is invalid or ineffectual for non-registration.

It is submitted that the real object of s. 19 is to protect *bona fide* purchasers of chattels over which there has been given an unregistered instrument by way of security to secure an advance of money. The Grantee under such an instrument depends for his title upon the instrument and accordingly he may be deprived of his title by the avoidance of the instrument for non-registration under s. 19.

In a hire-purchase agreement, however, the owner does not depend for his title upon the instrument; and it follows that, if the instrument is ineffectual for non-registration, he cannot be prejudiced.

A so-called Hire-purchase Agreement may be either: (a) A true hire-purchase agreement within the law laid down in *Helby v. Matthews* [1895] A.C. 471, or (b) An agreement to sell within the law laid down in *Lee v. Butler* [1893] 2 Q.B.D. 318. It is convenient to treat the two classes separately.

(a) A TRUE HIRE-PURCHASE AGREEMENT: Assume a document of this class is unregistered; assume the hirer purports to sell the chattels to a *bona fide* purchaser for value. What then does s. 19 provide? It provides that the instrument shall be ineffectual against such purchaser. How can that affect the owner? His title is not created nor transferred to him by the hire-purchase agreement; he had his title before and independently of the agreement. As was said by Lord Esher in *In re Davis, Ex Parte Rawlings*, (1888) 22 Q.B.D. 193, at p. 197: "The hiring agreements do not confer on the lenders" (*i.e.* the owners) "any property in the goods; the property in the goods was theirs before the hiring agreements were made."

Looking at the question from the other angle. Could a hirer confer upon a purchaser a title he never had and which is expressly reserved to the owner? The law expressed in the maxim, *Nemo dat quod non habet*, is embodied, so far as goods are concerned, in s. 23 (1) of the Sale of Goods Act, 1908, which provides:

> "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

Are we to assume that s. 19 of the Chattels Transfer Act was intended to repeal in part s. 23 (1) of the Sale of Goods Act, 1908, a section which embodies a cardinal principle of Common Law?

(b) AN AGREEMENT TO SELL: If the document falls into this class the owner may admittedly be divested of his title in favour of a third party if the person to whom he has agreed to sell is allowed to have possession of the goods or documents of title to the goods. This, however, is the result not of s. 19 of the Chattels Transfer Act but of s. 27 (2) of the Sale of Goods Act, 1908. It was on s. 27 (2) of the Sale of Goods Act, 1908, that His Honour Mr. Justice Ostler based part of his judgment in the Supreme Court in *Traders' Finance Corporation, Ltd. v. General Motors Acceptance Corporation.*

The ground upon which the owner may be divested of his title when the transaction amounts to an agreement to sell is the possession of the goods by the person who has agreed to buy and not the mere non-registration of the document of sale. The avoidance of the document for non-registration could not alone affect the title of the owner who has by such document merely agreed to sell the goods. As in the case of hire-purchase agreements, his title does not depend upon the conditional sale agreement but exists independently thereof.

The Court of Appeal in its judgment, at pp. 21 and 22, refers to a danger which would exist if s. 19 did not protect the title of a purchaser from a dealer who himself held upon hire-purchase:

"A person who bought a motor-car from a dealer in the ordinary course of business and paid the full purchase money in cash might find his vehicle seized months afterwards by a third party upon the ground that the dealer had no title to dispose of the property in the car."

That danger is, however, provided against by s. 3 (1) of the Mercantile Law Act, 1908, which gives the necessary protection to purchasers from Mercantile Agents whether or not the agent has a title to goods sold.

The decision of the Court of Appeal may have been justified upon other grounds; but, it is submitted, that it was not justified upon the only ground on which it was expressly based.

Rating Charges.

Created by Unemployment Act.

By HAROLD E. BEECHE.

Sections 26 and 27 of the Finance Act, 1931 (No. 4), dealing with unemployment relief, are of more than passing interest to practitioners generally and to conveyancers in particular.

Section 26 provides (*inter alia*) that a local authority may with the concurrence of the Unemployment Board undertake and carry out works in the relief of unemployment including works outside the ordinary functions of a local authority and works for the benefit of privately-owned property.

Section 27 vitally affects an owner or mortgagee. It provides that the local authority may agree with an owner or occupier for the payment of the cost of such works in one sum or by instalments. Any sum so payable in any year shall be deemed a special rate levied by the local authority over the land affected and the provisions of the Rating Act, 1925, with any necessary modifications, apply accordingly.

An inspection of a form of agreement issued by a local authority indicated that a space is allocated for the written consent of the owner or mortgagee. But what is the position of the latter when they do not consent to such work being carried out by the local authority? Since the amount due for the work becomes a special rate and the provisions of the Rating Act, 1925, apply, it would appear that the owner and the mortgagee become liable as for general rates. Even assuming the work undertaken improves the security, the finding of the necessary money to pay for such unsolicited improvements might be a matter of great inconvenience to the mortgagee.

It is not, therefore, necessary, when acting for a purchaser, lessee, mortgagee, or other person acquiring any interest in land, to ascertain the existence of such a special rate, particularly where instalments are spread over a number of years.

Irresponsibilities.

The onlooker of course sees most of the game, or as Omar Khyyam's parodist puts it:

"*The man who stands behind you looking on*
He knows about it all, he knows, he knows."

and looking down into the arena where raged the contest in *Wood v. Letrik, Ltd.*, (*Law Journal* Newspaper, January 16, 1932) the spectator wonders why the action took the form, or ended with the result it did.

The claim, it will be remembered, is another instance of an over-enthusiastic advertiser being taken at his word. Mr. Wood, a grey haired and rather credulous gentleman, came across an advertisement for an electric comb whose virtues were epitomised in the attractive words: "In ten days not a grey hair left—£500 guarantee."

There seemed to be no catch about it; so being much worried about his greyness Mr. Wood bought the comb and assiduously followed the directions. On the evening of the ninth day he retired to bed expecting when he woke up he would find his head once more ornamented with the permanently waved and luxuriously growing crop of bright red hair that was his boast in his younger days, but, of course, he was disappointed. He went at once to his solicitor and an action was brought, with the result that the Defendants were pointedly reminded of Mrs. Carlill and her Carbolic Smoke Ball and were ordered to hand out the £500 0s. 0d.

Now, with all respect to the draftsman of Mr. Wood's pleadings and to everyone else concerned, it seems to me that this action was entirely misconceived. The advertisement guaranteed that in ten days the plaintiff would not have a grey hair left, so that his claim should have been founded not on the failure of his hairs to change to their pristine henna colour, but on their failure to fall out altogether!

* * * *

Of course you have your D.O.R.A. in England—the fertile progenitrix of that ever-increasing brood of exasperating regulations one of which recently caused Mr. Herbert Metcalf in the Woolwich Police Court to throw down his coat and go off the deep end (*Law Journal* Newspaper, November 28, 1931, p. 347); but even in New Zealand we have many departmentally-drafted and amusingly impossible regulations.

One of these (*Health Regulations*, H. 125, s. 12, subs. 17) I came across the other day.

For the life of me I cannot imagine why it has been found necessary or desirable to forbid the carriage of milk by motor vehicle unless the same be driven by an air-cooled engine; but here is the regulation:

> "17. No person while carrying in any vehicle milk for sale or for delivery to a customer shall carry or convey water in the same vehicle or any other fluid capable of being used for diluting milk."

So that while the milkman is prevented from putting water in his milk, he is forced to put milk into his radiator. This, of course, might very possibly be injurious to the milk, but it would be a lot worse for the radiator.

Then again; of course I am no chemist, or anything like that, and so I can't for the life of me think of any fluid at all that is not "capable of being used for diluting milk," but as a practical person I do know one fluid that can be mixed with milk to the mutual improvement of both, and that is some nice old real Jamaica Rum.

R. J.

"Penalty" or "Liquidated Damages"?

"A Covenanted Pre-estimate of Damage."

The fact that the case of *Widnes Foundry* (1925), *Ltd. v. Cellulose Acetate Silk Company, Ltd.* [1931] 2 K.B. 393, was recently before the House of Lords ([1932] W.N. 177; 48 T.L.R. 595) shows that the question whether a sum of money stipulated by the parties to a contract to be paid in the event of a breach is a penalty or liquidated damages, is still, in some cases, a matter of controversy, notwithstanding the clear rules laid down by Lord Dunedin in the well-known case of *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.* [1915] A.C. 79. See also *Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6.

In *Dunlop's Case*, it will be remembered, Lord Dunedin set out the chief principles which should guide the Court in distinguishing between a penalty and liquidated damages as follows:—

(i) Though the parties to a contract who use the words "penalty" or "liquidated damages" may, *prima facie*, be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

(ii) The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

(iii) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach.

(iv) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

In *Widnes Foundry* (1925), *Ltd. v. Cellulose Acetate Silk Company, Ltd.* (*supra*), the plaintiffs sued the defendants for the price agreed to be paid by the defendants for the installation of an acetone recovery plant supplied by the plaintiffs. The defendants set up a counterclaim for substantial damages for delay, on the ground that the contract specified delivery and erection within 18 weeks of the approval by them of the plaintiffs' drawings; that the time expired on July 27, 1929; and that the plant was not delivered and erected until February 10, 1930.

The evidence showed that the plaintiffs originally offered to supply the machinery within nine months, but that the defendants wanted quicker delivery and stated that they must have the machinery within 18 weeks. The plaintiffs said that they were prepared to deliver the machinery within that time but that the price would be increased by 500*l.*, and the defendants in turn stipulated that there should be some

guarantee that the work would be carried out within the time specified, and they suggested a guarantee of a penalty of 20*l.* a week.

Further negotiations ensued and the contract, as ultimately completed, contained the following clause :—

" 10. If this period of 18 working weeks is exceeded we [the plaintiffs] agree to pay by way of penalty the sum of 20*l.* per working week for every week we exceed the 18 weeks, subject to the usual strike, lock-out and general conditions beyond our control."

Mr. Justice Wright at the trial found that the plaintiffs had broken the contract ; that it was not completed until January 3, 1930 ; and held that the defendants were entitled to recover their actual damage, which he assessed at 5,850*l.* The plaintiffs admitted liability for 30 weeks' delay at 20*l.* a week and paid the sum of 600*l.* into Court.

On appeal to the Court of Appeal, it was held that the clause in question was a clause liquidating the damages and that the defendants could not recover more than 20*l.* a week over the period of delay.

The Court applied the rules laid down by Lord Dunedin in *Dunlop's Case* (*supra*), and Scrutton, L.J., emphasised the fact that it was the defendants who introduced the question of the 20*l.* per week as a guarantee for the work being completed within the time stipulated, and stated that their request for a guarantee was unintelligible if they could recover all the damages they had suffered.

The defendants appealed to the House of Lords, and Lord Tomlin, in delivering the judgment of the House, affirmed the decision of the Court of Appeal and said that what the parties meant by Clause 10 was that, in the event of delay, the damages and the only damages were to be 20*l.* a week, no less and no more. His Lordship pointed out that, except for the fact that the 20*l.* a week was called a penalty, which in the cases was far from conclusive, it appeared to be an amount of compensation measured by the period of delay. He said :

> " I agree that it is not a pre-estimate of actual damage. I think it must have been obvious to both parties that the actual damage would be much more than 20*l.* a week, but it was intended to go towards the damage and it was all that the sellers were prepared to pay. I find it impossible to believe that the sellers, who were quoting for delivery at nine months without any liability, undertook delivery at 18 weeks, and in so doing, when they engaged to pay 20*l.* a week, in fact made themselves liable to pay full compensation for all loss."

This decision is clearly in accord with sound common sense, but its interest, from the legal point of view, lies in the fact that it illustrates the importance to be attached to the word " covenanted " in Lord Dunedin's rule that the essence of liquidated damages is " a genuine covenanted pre-estimate of damage."

On a first reading, Lord Tomlin's statement in *Widnes Foundry* (1925), *Ltd. v. Cellulose Acetate Silk Co., Ltd.* (*supra*), that " it was not a pre-estimate of actual damage " might appear to be inconsistent with Lord Dunedin's rule above mentioned, but upon closer examination it will be seen that the 20*l.* a week was not, in fact, a pre-estimate by the parties of the damage which was likely to result from a breach of the contract to deliver on the specified date—both parties were fully aware that the actual damage would considerably exceed that sum—but that it was an agreement by the parties that the 20*l.* a week would be paid by the one and accepted by the other in full satisfaction of any claim to

(*Continued from first column.*)

damages which might arise by reason of delay, or, in other words, it was a " genuine *covenanted* pre-estimate of damage," and so rightly held to operate as an effective limitation of the damages recoverable, notwithstanding the use of the word " penalty."

The House of Lords expressly left open the interesting question whether, where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it, or, in a suitable case, ignoring it and suing for damages.

Consents by Mortgagees.

Some Comments.

By C. Palmer Brown, M.A., LL.B.

Mr. Henry Cotterill's suggestion (p. 26, *ante*) that mortgagees should be joined in leases under the Land Transfer Act in order to give them an undoubted right to sue on the covenants and to have other personal rights against the lessee deserves support ; but there is authority against it, and the objections of the Registry Office and of the profession have to be met.

In *Kerr on Australian Land Titles* (*Torrens*) *System*, p. 328, it is said :

" The mortgagee can only consent to but cannot join in the lease as under the general law." (The authority quoted is Instrument 418359 in the South Australian Registry.)

Presumably, the author and the Registrar have in mind the rule that leases are to be in statutory form (see our Act of 1915, s. 93 (1)) ; but the joinder of an additional party would appear to be a variation from the form not being in a matter of substance, and so authorised by s. 223 (2).

An attempt is made in several offices to improve the position of the mortgagee by the insertion in the lease of the following clause :

" Until the first mortgagee named in the Memorandum of Encumbrances hereunder written shall require payment of the said rents to him and shall give to the lessee or leave at or upon the premises a notice in writing requiring such payment the said rent shall be paid to the lessor or to the second mortgagee named in the said memorandum and until such second mortgagee shall give or leave the like notice the said rent shall be paid and payable to the lessor and upon the giving of such notice as aforesaid such mortgagees according to their priorities shall have and may exercise all powers rights and remedies of the lessor hereunder *and may sue upon any covenant herein contained as though such mortgagees had been parties to these presents.*"

There are, however, two serious objections to this form : (*a*) The mortgagee's rights do not arise until a definite act of taking possession has occurred, and mortgagees usually shrink from definitely taking possession ; and (*b*) it is in effect a contract by B with A that C shall have the right to sue B. Such a contract may work an estoppel between A and B, but C can scarcely rely on such an estoppel : possibly, he might be able to rely on s. 44 of the Property Law Act, 1908 ; but that is unsatisfactory ground. It would seem that A is a necessary party to any action by C against B, and that may raise practical difficulties.

Mr. Cotterill's suggestion seems the better practice.

Australian Notes.

By Wilfred Blacket, K.C.

Herbert Page. To your Editorial lament I wish to add my personal tribute. Many there be who say that his death in harness was as he would have wished it to be, but I am sure this was not so. His business, great as his achievements have been, was not his life: that was lived in his home. My abiding sorrow is that he did not enjoy the years of "rest well won" which should have crowned his work. You of the Dominion know of the enduring monument that he builded by his "work well done" there, but he grudged every day of his visits for they kept him away from the home where his heart stayed always.

"**Someone had Blundered.**" *Devanny v. The King*, on appeal to the High Court, is not likely to be the subject of boastfulness by the Federal authorities. The offence alleged was that the prisoner had solicited subscriptions for the Communists who are an "unlawful association" under the Crimes Act (Federal), 1932, passed for the purpose of punishing Devanny and others in like case offending. The Act provides that statements in the averment shall be evidence of the facts stated, and taking some advantage of this provision counsel for the prosecution drew an indictment containing 27,453 words. It began with a specific statement that the accused had committed the crime charged and then proceeded to state in detail the things that had been done by him in the course of committing the said crime. Five of the Justices held that the introductory general statement was limited by and had to be read subject to the averments and particulars which followed, and that the 27,453 words of the indictment were insufficient by reason of certain omissions of necessary averments to support the conviction, which was therefore quashed with much costs. Mr. Justice Rich dissented.

A very important question was raised in argument on the appeal, but formed no part of the judgment which was based on the technical insufficiency of the 27,453 words. This was as to the power of the Federal legislature to pass an Act penalising unlawful associations and all persons, including printers and publishers, acting for or with them. Under our Constitution the only powers the Commonwealth possesses are those given by the Constitution Act; the case is different in Canada where the Dominion possesses all the powers not conferred by the Constitution upon the Provinces. Mr. Justice Rich in his opinion held that s. 51 (39), which gives the Commonwealth powers of legislation over "matters incidental to the execution of powers vested in the Commonwealth," furnished a valid basis for the Crimes Act for the survival of the Constitution appeared to him to be a "matter incidental" to the exercise of the powers under it. He also held that s. 61 of the Constitution Act, which provides that "the executive power shall extend to the execution and maintenance of the Constitution," authorised the exercise of the powers now questioned.

The whole trouble in this matter arises from the fact that Nationalist Ministries in New South Wales have never used the ample powers of the Common Law relating to sedition, and the Federal Ministers have endeavoured to apply some newly-designed remedies of their own to make up for this neglect. Federal authorities rush in where stodgy and fearful State Ministers fear to tread.

Further Mention. Mrs. Aimee Belle Edols whose varied life has already been mentioned (in Vol. 8, p. 339) informed the Judge in Bankruptcy that she was now willing to tell the truth about the 38 or 45 thousand pounds which some gentlemen in Melbourne were said to hold for her. The explanation of the matter was that no such sum had ever been in existence, and that the artless tale about the two gentlemen in Melbourne was just a "corroborative detail intended to give verisimilitude," &c., &c. She, however, still adheres to the statement that she lost £14,000 backing her fancy at various race-meetings, so it is clear that she has had some "crowded hours of glorious life" to set-off against the lonely hours of prison life at Long Bay.

Also a further chapter has to be written concerning Mr. N. I. Francis, solicitor of Melbourne, against whom certain bookmakers made an application that his name should be struck off the roll some ten months ago. The application came on for hearing recently and the bookmakers proved on affidavit that the result of his betting with them on three days in January, 1931, was that he lost £1,665. In his defence Francis asserted that the bookmakers only accepted his bets when they knew that his fancy was "not trying," and that they had "stiffened" a jockey after Francis had backed the horse he was riding. And to these things the bookmakers replied that there were more non-triers than triers at pony races, and it was for the punters to distinguish between "the quick and the dead." Mr. Justice Mann, who listened to these sordid details, seemed to think that the Supreme Court should not act as a debt collecting agency for bookmakers, and dismissing the application made no order as to costs, thereby, in effect, asserting that the outcome of these disreputable transactions was "a line ball" so to speak.

Another "serial" relates to Mr. Dargan's application for a patent to protect his invention of a new way to skin rabbits. In case the paragraph I sent some time ago has been forgotten, I may mention that the new and improved method was to cut open the skin with a knife, but to stop half way to the head and pull out the entrails and/or carcase through the opening. The examiner, in effect, said that he had done it that way sometimes himself when he was a little boy, and *per totam curiam* the examiner's report against the invention was upheld with some alacrity and enthusiasm.

Judge gives an Encore (or grants a new lease of life). On August 18 last, Mr. Justice Mann, of Melbourne, upon affidavits showing that William Pelchen had not been heard of for eleven years and was verily believed to be dead, granted letters of administration of his estate to his brother. Recently the intestate appeared before the same Judge, and possibly with some justifiable indignation asserted that he was alive, and thereupon His Honour revoked the letters formerly granted, and quite possibly congratulated William. The case, though not on all fours, somehow reminds me of one of the brightest of all the pearls in the rosary of *Science and Health*: that is the reference by Mrs. Eddy to "Lazarus who *thought he was dead*." A very natural mistake it was on the part of others, but it was strange that Lazarus was capable of being misled in this way.

In the Name of Sport. Besides indulging in other political iniquities the N.S. Wales Government runs

a Lottery. One Naylor was accustomed to purchase tickets at 5s. 3d. and sell shilling shares in these at considerable profit to himself. The Privy Council quite recently in *Russell v. Naylor* held that by reason of this practice he was liable to be convicted of being the keeper of a common gaming house. In a later case, *Police v. McMahon*, decided by the Supreme Court at Sydney, the facts were that the defendant collected sixpences from fifteen persons and then bought a ticket for 5s. 3d., retaining the balance and giving written acknowledgments to each of the little girls and other subscribers of their interest in the ticket. The Court distinguished his case from Russell and Naylor, holding that persons could lawfully form a syndicate to purchase a ticket, and could employ an agent to buy it, and could remunerate him for his trouble and that consequently McMahon was entitled to leave the Court without the stain of conviction on his character. Knowing the efforts made in the Dominion to prevent gambling I may be pardoned for mentioning that at one Sydney Emporium the girls employed have formed a syndicate of 42 members who each subscribe three halfpence to buy a ticket in each lottery. Last week they won £5—almost 2s. 5d. each.

Harmer Virumque Cano. An interesting study in criminology is disclosed by the facts in the case of Robert Harmer, of Melbourne. On the 12th November last he went out to the pony races and lost all his money: in this, of course, he merely followed the established precedent. He next resolved to do all the damage he could within a limited time, and then throw himself over Princes Bridge, which is as much used for suicide purposes as the Sydney Bridge, but is not so fatal. In the first item of his resolve he was probably acting under the influence of the name he had inherited. He began by pulling up rose bushes and other plants in public places and then showing "how mirth may into folly glide, and folly into sin," he, according to his own confession, set fire to the Broadmeadows Town Hall, a church at Yuroke, and a public school at Greenvale, in each case achieving a considerable degree of success. He later on went to Princes Bridge, but having perceived the Yarra beneath was persuaded by a Salvation Army Officer to prefer surrender to suicide. There seems to have been much method in his madness for having resolved to commit suicide it was quite a reasonable thing that he should wish to get used to fires.

More about Suicide. "The question in this case," said Mr. Farringdon, Coroner, Sydney, "is whether or not a man who drinks sufficient alcoholic liquor to cause his death, thereby commits suicide." He found no sufficient evidence to support the suicide theory, and therefore decided that the death was due "to natural causes, namely, acute alcoholism." The question opens up wide areas of speculation and investigation. He "drank himself to death" is an all too common epitaph: may it not be that the excess of which he was guilty was merely a means to a desired end? Certain it is that men who drink some of the stuff that is sold go as near to committing suicide as men may go. Rum at some notorious houses in the backblocks, and "pink eye" port wine that "will make yer drunk as Klo for eighteenpence" in the city, to wit. And these things *per longum saltum* recall the verdict of the Kempsey, (N.S.W.) jury and their finding that the deceased had "died by the visitation of God *accelerated* by strong drink and exposure."

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Land Transfer Instruments: Alterations After Execution.

Every practitioner is familiar with the strict rules of law relating to the alteration of an instrument after execution, and a registration clerk or two must confess that he has on occasion succumbed to the temptation to fill in a blank space in a Land Transfer instrument in order to pass it over the registration counter. In *Keysen v. Gregg and Another* (1932) 32 S.R.N.S.W. 288, disaster followed such an act, done apparently by the grantee himself. In August, 1927, a Memorandum of Lease for a term of five years of land under the Torrens system was executed by respondent (lessor) and appellants (lessees) and the lessees took possession and paid rent. The appellants in preparing the lease left in the instrument blank spaces obviously intended for reference to the certificate of title, for insertion of the memorandum of encumbrances, and for the date of execution of the instrument. Nothing was said about a prior mortgage or other encumbrance. About June, 1929, the appellants purported to assign their then unregistered lease to other persons who continued to pay rent for a time, when they fell into arrear. In May, 1931, the respondent, apparently finding that the unregistered lease (being for a term exceeding three years) was void under the Real Property Act, 1900 (N.S.W.), filled in these blank spaces and so obtained registration of his instrument prior to bringing action in the District Court for rent. The additions so made were: (1) a reference to the certificate of title; (2) a memorandum of encumbrances, which were two in number, a grant of right of way, and a mortgage under which the respondent had covenanted not to exercise his statutory power of leasing under s. 106 of the Conveyancing Act, 1919, without the previous written consent of the mortgagee; and (3) the date of execution. In an action for rent under the lease, the District Court Judge held that the plaintiff lessor had implied authority to fill in the blanks so left by the defendant lessees, in order "to make it an enforceable instrument."

On appeal it was held by two judges (Halse Rogers, J., dissenting) that the trial judge had gone further than was justified by the law or the facts in evidence. James, J., did not deliver a written judgment, concurring in that of Davidson, J., who based his reasons upon the danger of relaxing the general rule of law avoiding an instrument materially altered after execution without the assent of the party to be charged. The authorities cited by him are *Norton on Deeds*, 2nd Ed., 46 and 44, and the statement of Brett, L.J., in *Suffell v. Bank of England* (1882) 9 Q.B.D. 558.

Now the insertion of the true date of execution of the instrument in the circumstances under consideration is surely no ground for avoidance of the instrument: *Norton, op. cit.* p. 47, *and the cases* there quoted. See also *Adsetts v. Hives* (1863) 33 Beav. 52; 55 E.R. 286. One would say, too, that the insertion in the instrument of a reference to title only, would not affect the rights of any person thereunder, and so constitute a material alteration for the purposes of the rule in *Norton*, cited in the judgment. The actual additions in this regard in *Keysen's Case* (*supra*) were merely the italicised parts of the following, "All that piece of land . . . being *whole* of the land comprised in *Cer-*

tificate of Title dated . . . A.D. 19 . . registered *Volume 3818 Folio 248* and being . . .", which additions accorded with the parts earlier written.

The insertion of the memorandum of encumbrances in the instrument certainly seems to have been material. The reference to the right of way is not relied upon by Davidson, J., because

> "having regard, however, to the lease being of specified premises and to the fact that the plan on the certificate of title would seem to indicate that the lessee might have been able to see that the only right of way was a lane giving access to the rear; it may be that the alteration in this respect was immaterial as it would not in such a case affect the rights or liabilities of the parties."

With due respect, one may question that part of His Honour's judgment. The right of way, apparently, made the premises a servient tenement; it was, according to the memorandum of encumbrance, a burden upon the land comprised in the lease and not a right appurtenant to it as a dominant tenement. Perhaps His Honour meant that on inspection of the land itself the lessees must of necessity have become aware of the exercise of some right of passage over part of the premises; but the extent of that right would not be apparent in any case. The insertion in the lease of the reference to the mortgage is the real foundation of the judgment, and one must unhesitatingly adopt His Honour's conclusion. Certainly the lease was not binding on the mortgagee without his consent, the disclosure to the intending lessees of the existence of the mortgage would have put them upon enquiry and would have entitled them to ask for the consent of the mortgagee to the lease. The absence of such consent entitled the mortgagee to destroy the estate purported to be created by the memorandum of lease.

In the dissenting judgment no authorities are cited, and there appears an explanation of the reasoning of the trial judge (at p. 295 of the Report). One respectfully questions whether in the circumstances the lessees were bound by what appeared on the certificate of title which they never saw.

Reviewing the case, one concludes that the ordinary rules as to avoidance of an instrument by a material unauthorised alteration after execution apply to Land Transfer instruments; the filling in of a blank space in the instrument may or may not be material according to circumstances; the insertion of the true date of execution does not avoid the instrument; the insertion of the correct reference to title merely may readily be justified on implied authority; the insertion of a reference to a prior encumbrance can be justified only where the existence thereof is immaterial or where the evidence shows an express or implied authority to make the alteration; to make an instrument subject to an undisclosed prior mortgage or easement is certainly a material alteration.

In New Zealand, no lease of land under the Land Transfer Act mortgaged or encumbered is binding upon the mortgagee except so far as he has consented thereto (s. 95 of the Land Transfer Act, 1915). To that extent one follows the New South Wales case readily enough; but apparently the doctrine of *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 has no application to Torrens system land in that State. The doctrine does apply to land held in New Zealand under the Land Transfer System: *Mayor, etc. of Timaru v. Hoare* (1898) 16 N.Z.L.R. 582. In like circumstances to those in which the respondent Keysen found himself, a lessor might not be faced with the necessity of registration, but the duty of safeguarding an instrument in one's custody free from alteration is brought home by the salutary lesson there dealt out to the respondent.

Legal Literature.

Contested Documents and Forgeries, by F. BREWSTER, Document Specialist. With an Introduction by Sir N. N. SIRCAR, Barrister-at-Law, Advocate General of Bengal; pp. xxiii, 533 including Glossary and Index; Illustrated. The Book Company Ltd., Calcutta.

The practitioner who has a question of forgery or disguised handwriting to deal with would be well advised to consult that book before he begins his investigations. It is written by a document specialist who has had long experience in several countries, but especially in India, and who is a master of his subject. He deals with the different phases of forgery, disguised handwriting, alteration of documents, and finger-prints, in a practical way and in the simplest language, having a great contempt for the pseudo-scientific fudge and jargon with which some so-called experts seek to fog Court and Counsel in the cases in which they are engaged.

Pen-pressure and shading, pen-scope, the spider's-web test-plate, slant, tremor, pen-stops, pen-lifts, tracing, abrasion, erasure, are all adequately explained and there is a useful examination of the details of the small letters in the English alphabet and the features to look out for.

A chapter that should prove very useful deals with typewriting identification; and the author's explanation of the effect upon judge and jury of the exhibition of juxtaposed photographs indicates the value of expense in this direction (Paragraph XVI and XVII) to counsel. Chapters dealing respectively with technical evidence, expert and lay witnesses, and cross-examination, will appeal most strongly, being full of sound advice as the result of court experience. The author's suggested line of examination-in-chief, and specimens of useful questions in cross-examination and of an actual cross-examination, will put the advocate on the right track and keep him there.

Mr. Brewster expresses the opinions that comparison by a judge for himself without technical or other assistance is unsafe (citing a pronouncement of the Judicial Committee of the Privy Council, *Kessarabai v. Jethabahia* [1928] A. 1 R. 277), and that it should be obligatory to provide an accused in case of forgery, etc., with expert assistance at the public expense, and that handwriting experts should be subject to some measure of control as in other professions. In support of the later opinion, he declares that a common form of trickery of some so-called experts is to give two conflicting opinions on the same set of papers and to give a flimsy excuse for the change of view.

This is a book that can be read with profit by both lawyer and layman.

A "Line—Ball" Case.—In a recent action for damages for personal injury arising out of a motor-car accident, the plaintiff's and the defendant's doctors entirely disagreed as to the permanency of the injuries.

Best, L.J., in remitting the action to the Recorder, described it as a "line-ball" case.

Practice Precedents.

Application for Appointment of Interim Receiver and Manager.

The only Rule in the Code of Civil Procedure treating with this procedure is Rule 452, which provides that the person appointed an Interim Receiver in an action must give security before performing any of the acts of his office (see *Stout and Sim's Supreme Court Practice*, 7th ed. 285).

The law applicable in New Zealand follows that which was administered in the Court of Chancery before the coming into operation of the Supreme Court of Judicature Act, 1873 (*Imperial*). The Court has no jurisdiction to appoint a Receiver except in cases in which execution cannot be levied in the ordinary way, by reason of the nature of the property, and in cases in which the Court of Chancery before the Judicature Act would have had jurisdiction to make the order: see *Halsbury's Laws of England*, Vol. 14, p. 115 *et seq.*; *Morgan v. Hart* [1914] 2 K.B. 183, C.A. (in which the position is summed up); and *Evans v. Orr* [1923] N.Z.L.R. 769; G.L.R. 46, as to the application of the Chancery practice.

The Motion is *ex parte*, it being assumed here that the defendant has disappeared: see the notes to Rule 396, and note Rule 413B, *Stout and Sim, op. cit.*, pp. 265 and 271 respectively.

A memorandum for His Honour the Judge should accompany the Motion, substantially setting out the proposed Order it is desired he should make, or containing a draft Order:

As to the making of an Order of this nature: see *Kerr on Receivers and Managers*, 9th ed. 153 *et seq.*

MOTION FOR APPOINTMENT OF INTERIM RECEIVER AND MANAGER.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.
.....Registry.

BETWEEN A.B. & Coy., Ltd., *Plaintiff*
AND C.D. of , Grocer, *Defendant*.

Mr. of Counsel for the above-named Plaintiff Company TO MOVE in Chambers before the Right Honourable , Chief Justice of New Zealand, Supreme Courthouse, , on day the day of , 19 , at 10 o'clock in the forenoon or so soon thereafter as Counsel may be heard for an Order authorising the appointment of a qualified person as an Interim Receiver and Manager of the business lately carried on at by the above-named Defendant upon such terms and conditions as to this Honourable Court may seem fit AND FOR A FURTHER ORDER that the costs of and incidental to this application be costs in the cause UPON THE GROUNDS that it is just and equitable that such Order be made and UPON the further grounds set forth in the affidavit of filed herein.

Dated at this day of 19 .

Certified pursuant to the Rules of Court to be correct.

Counsel Moving.

Reference: His Honour is respectfully referred to the attached Memorandum.

AFFIDAVIT IN SUPPORT.

(*Same heading*).

I, , of the City of , Company Manager, make oath and say as follows:—

1. That I am the Manager of the above-named Plaintiff Company and have knowledge of the recent business affairs of the said defendant.

2. That defendant is indebted to my Company in the sum of £ for goods sold and delivered as shown in the Statement of Claim filed herein.

3. That on the day of 19 , I inquired at the offices of The Steamship Company at and found that the defendant had booked his passage to Australia in the S.S. which sailed on the day of 19 , being five days prior to the issue of these proceedings.

4. That all efforts to find the said defendant have failed.

5. That for two months prior to his disappearance the said defendant consulted me weekly concerning the affairs of his business.

6. That defendant carried on the business of a Grocer at No. , Street in the City of Nelson and contracted the whole of his indebtedness to my firm in respect of the said business.

7. That my Company is the largest of the creditors of the defendant.

8. That hereto and marked "A" is a list of all other creditors who therein consent and concur in this application.

9. That it is expedient and in the best interest of all creditors that the said business be kept alive until such time as it may be sold as a going concern.

10. That a prospective purchaser who is and has been Manager of the said business for the past twelve months has already approached me with the object of acquiring the said business for cash on valuation as soon as legal title can be granted.

11. That it is meet and just that an Interim Receiver and Manager be forthwith appointed.

12. That bankruptcy proceedings against the said defendant are at present being instituted and substituted service will be required.

SWORN, etc.

ORDER APPOINTING INTERIM RECEIVER AND MANAGER.

(*Same heading*).

day, the day of , 19 .

UPON READING the Writ of Summons and Statement of Claim and the Motion and Affidavit filed herein and UPON HEARING Mr. of Counsel for the above-named Plaintiff Company I DO ORDER—

1. That of the City of Manager be and he is hereby appointed as Interim Receiver and Manager of the Grocery Business of the above defendant lately carried on at No. , Street, .

2. That the powers and duties of the said as Interim Receiver and Manager be and they are hereby limited to the supervision and control of the above-named Company and to taking possession of the goods stock-in-trade moneys and all documents connected with the said business.

3. That the said Interim Receiver and Manager do pay all moneys that shall come into his hands and belonging to the said business into a Trust Account to be opened by him in the Bank, .

4. That the said Interim Receiver and Manager render a weekly account to the Plaintiff of all moneys so received by him all moneys required for current expenses being drawn from the trust fund and shown in the said statement, the withdrawals in any week not in any case to exceed the amounts required for current expenses.

5. That all accounts of the said Interim Receiver and Manager be verified by Affidavit and filed in the office of the Official Receiver in Bankruptcy at Wellington on completion of the Interim Receivership.

6. That the remuneration of the said Interim Receiver and Manager be reserved.

7. That the said Receiver and Manager pay to the said Official Assignee all moneys in the said Trust Account on completion of his Receivership.

8. That the said Interim Receiver and Manager before acting as Receiver give security to the satisfaction of the Registrar of this Court to account to this Court on completion of the Receivership for what he receives and to pay the balance which is found due from him to the said Official Assignee.

9. That the costs of this order be reserved.

Judge.

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 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.

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New Books and Publications.

Leading Cases on Mercantile Law. By R. S. T. Chorley. M.A., and H. A. Tucker, LL.B. (Butterworth & Co, (Pub.) Ltd.). Price 11/6d.

The Banker's Customer. By Maurice Megrah, M.Com. (Lond.). (Butterworth & Co. (Pub.) Ltd.) Price 9/6.

Local Government, 1931. Edited by F. C. Allworth, F.R.G.S. (Butterworth & Co. (Pub.) Ltd.) Price 49/-.

My Own Way. By His Honour Sir Edward Parry. (Cassell & Co. Ltd.) Price 19/-.

Paterson's Practical Statutes, 1931. (Law Times). Price 19/-.

Key and Elphinstone's Conveyancing Precedents. Thirteenth Edition, 1932. By Farrer; 2 Vols. (Sweet & Maxwell Ltd.) Price £6/12/6.

The Two Indias. Being an Historical Sketch of the Treaty relations between the Indian States and the Paramount Power. (Sweet & Maxwell Ltd.) Price 14/6d.

British Patents and Designs Statutes as Amended and Consolidated to 1932. By H. J. W. Bliss, B.A., F.I.C. (Stevens & Sons Ltd.). Price 6/-.

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