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Facts are stubborn things.
—SMOLLETT.

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"Premium, or Bonus, or other Like Payment."

One of the several obscurities of Part III of the National Expenditure Adjustment Act, 1932, was cleared up by the Court of Appeal last week. Since that Act was passed, many have been puzzled to define what constitutes "rent" under the following subsection of s. 29:

"(3) For the purposes of this Part of this Act any sum paid or payable under any contract to which this Part of this Act applies by way of premium, or bonus, or other like payment, shall be deemed to be interest or rent as the case may require, accruing from day to day throughout the term of the contract."

In *Heel v. O'Neill*, the facts were, briefly, that in a Memorandum of Lease of hotel premises, executed on November 25, 1929, the consideration was expressed as follows: "In consideration of the sum of £3,000 paid for goodwill" to the lessor "by the lessee" the lessor doth "hereby lease," etc. After the passing of the Act, the lessee deducted the statutory 20 per centum per annum from the rent payable under the lease, and also charged against the current rent 20 per centum per annum of the sum of £750 (as a quarter of the £3000 paid to the lessor) deducting a proportionate part of such amounts from the rent payable on the quarter days specified in the lease. He claimed he was entitled to the latter deduction on the ground that the goodwill of a business came within the words "premium, or bonus, or other like payment." On the hearing of an originating summons taken out by the lessor for the determination of the question and for construction of the Act, Mr. Justice MacGregor held in an oral judgment that the sum of £3,000 must be deemed to be rent paid "by way of premium, or bonus, or other like payment" within the meaning of s. 29 (3) of the Act. From this judgment, the lessor appealed.

In a judgment by their Honours, Mr. Justice Reed, Mr. Justice Ostler, and Mr. Justice Smith, delivered by Mr. Justice Ostler, the position of the lease is stated as follows:

"The only contracts to which Part III of the National Expenditure Adjustment Act, 1932, applies are contracts in force at the passing of that Act: see s. 31. In this case the only contract in force at the passing of the Act was the Memorandum of Lease executed on November 25, 1929. All prior agreements had been superseded by the contract evidenced by that document, and therefore in our opinion that document alone can be looked at to ascertain the terms of the contract between the parties, and letters written after the contract was executed by the solicitors who acted for both parties cannot vary the nature of that contract."

Their Honours go on to say:

"Now the goodwill of a publican's business is not an interest in land. It is a species of property in the nature of a *chose in action* which can be separated and dealt with entirely separate from the lease: see *West London Syndicate Ltd. v. Commissioners of Inland Revenue* [1898] 2 Q.B. 507; *In re Jacob Joseph (Deceased)* (1905) 25 N.Z.L.R. 225, 7 G.L.R. 643; *Cox v. Harper* [1910] 1 Ch. 480.

"It is quite true, as argued by counsel for the appellant, that a premium on a lease is in the nature of purchase money which a tenant pays for the benefit of the lease. The neatest way of describing such a premium is as "capitalised rent"; but money paid for the goodwill of a business is a different thing from a lump sum paid by way of rent for the benefit of a lease. The payment for the goodwill, therefore, cannot be regarded as part of the rent unless it can be shown that the Legislature, which must be presumed to know the law, intended that such a payment should be deemed to be part of the rent."

Reference is then made to the knowledge of the Legislature as expressed in ss. 120 and 129 of the Stamp Duties Act, 1923, and s. 107 of the Land and Income Tax Act, 1924, which shows that the Legislature was "aware that the goodwill of a business is something quite different from an interest in land." Their Honours conclude their judgment in these words:

"There is nothing in the Act now being construed which can be held to show any intention on the part of the Legislature to widen the definition of rent so as to include sums paid for the goodwill of a business."

In a separate judgment, His Honour the Chief Justice (the Rt. Hon. Sir Michael Myers) states his agreement with both the conclusions and the reasons given in the judgment of Mr. Justice Ostler from which we have quoted. He proceeds to emphasise the point that under s. 31, the substantive section providing for the reduction of "rent," it is necessary before the reduction operates that the rent be payable in respect of land or of any interest in land or in respect of any building or part of a building; and that if the sum of £3,000 which was paid in this case represents a consideration other than rent payable in respect of land or an interest in land, etc., the provisions of the statute do not apply. He then makes reference to *In re Jacob Joseph, deceased*, (1905) 25 N.Z.L.R. 225, 7 G.L.R. 643, which has been frequently followed in New Zealand and has been treated as having settled the law that the interest of the owner of a hotel property in the license granted in connection with such hotel and the goodwill of the business in alcoholic liquors carried on in virtue of such license is property apart from the land: *cf.* Sim, J., in *In re Gilmer deceased, Public Trustee v. Commissioner of Stamp Duties*, [1929] N.Z.L.R. 62; [1928] G.L.R. 390. Reference is made to two Scottish cases in which the incidents of goodwill of hotel premises are discussed, and in which it was held that a sum paid for goodwill is "consideration other than rent": *Drummond v. Assessor for Leith*, (1886) 13 R. (Ct. Sess.) 540; *Hughes v. Assessor for Stirling* (1892) 19 R. (Ct. Sess.) 840.

The learned Chief Justice concludes that,

"The words 'or other payment' in subs. (3) of s. 29 of the Act must, I think, be read as being *ejusdem generis* with the preceding words 'premium or bonus.' I agree that a lump sum paid as here expressly for the goodwill (which must, I think, in the circumstances mean the goodwill of the business of selling alcoholic liquor authorised by the license) is not caught by the words 'premium or bonus or other like payment'; nor, if this view is right, can the payment be regarded as 'rent' or as being paid (within the meaning of s. 31) 'in respect of land or of an interest therein or of a building or part of a building.'"

His Honour added that the draftsman may have had in mind that a sum of money paid as goodwill for the business of licensed premises should be deemed to be rent payable under the lease of those premises and reducible under s. 31. If so, then the learned Chief Justice could only say that in his opinion the language used does not sufficiently show that intention.

Summary of Recent Judgments.

COURT OF APPEAL
Wellington.
Mar. 16, 17, April 7.
Myers, C.J.
Reed, J.
Ostler, J.
Smith, J.

THE KING v. CLIFTON.

Criminal Law—Practice—New Trial—Verdict against Weight of Evidence—Direct Evidence—Crimes Act, 1908, s. 446.

Motion for a new trial on both counts of the indictment preferred against W. A. Clifton and tried at Wellington on October 31 and November 1, 1932, on the ground that the verdict of the jury was against the weight of evidence.

The indictment, charging the indecent assault of two children, was first heard at Wellington on August 11 and 12, 1932, when the jury disagreed. At the second trial, the jury returned a verdict of guilty with a recommendation to leniency. Upon being invited by His Honour the trial Judge to state the reason for the recommendation, the foreman of the jury wrote the following memorandum: "Weakness on part of accused—some sort of kink."

Meltzer, for the prisoner; **Solicitor-General (Fair, K.C.)** for the Crown.

Held: That the principles laid down in **R. v. Styche** (1901) 20 N.Z.L.R. 744, 3 G.L.R. 249, and in **R. v. Findlay** (1907) 26 N.Z.L.R. 980, 9 G.L.R. 446, that are to be applied by the Court of Appeal on an application by a person convicted of a crime for a new trial on the ground that the verdict was against the weight of evidence, cover all applications under s. 446 of the Crimes Act, 1908, and not only cases in which a consideration of circumstantial evidence is involved.

R. v. Perfect (1917) 12 Cr. App. R. 273, referred to.

Solicitors: Crown Law Office, Wellington, for the Crown; **Burton and Meltzer,** Wellington, for the prisoner.

NOTE:—For the Crimes Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, title *Criminal Law*, Vol. 2, p. 182. Case Annotation: *R. v. Perfect*, see E. & E. DIGEST, Vol. 14, p. 520, para. 5849.

SUPREME COURT
Christchurch.
March 22, 24
Kennedy, J.

JOHN BATES AND CO., LTD. v. INWOOD AND ANOTHER.

National Expenditure Adjustment—Annuity or Rent-charge created by Will—Whether Owners of Fee-simple entitled to Statutory Reduction—National Expenditure Adjustment Act, 1932, ss. 31, 32, 42.

Originating Summons applying for an order under the Declaratory Judgments Act, 1908, to determine, *inter alia*, the following question: Whether a certain annuity or rent-charge is affected by the provisions of ss. 31, 32, and 42 of the National Expenditure Adjustment Act, 1932?

W. J. Hunter, for the plaintiff; **R. J. Loughnan,** for the defendant.

Held: That the provisions of the National Expenditure Adjustment Act, 1932, relative to rent reductions, have no application to an annuity or rent-charge which is created by a testator's unilateral act.

Question answered accordingly.

Solicitors: Hunter and Ronaldson, Christchurch, for the plaintiff; **Izard and Loughnan,** Christchurch, for the defendants.

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

SUPREME COURT
Wellington.
Mar. 5, 1933.
Myers, C.J.

McLEOD v. TROTT.

Practice—Motion for New Trial on Ground that Damages too Small—Jury's Verdict sustained although Trial Judge dissatisfied with Amount awarded.

Motion for a new trial on the ground that the amount of general damages awarded by the jury was too small.

C. A. L. Treadwell and **Cresswell,** in support; **Rollings,** to oppose.

Held: Where the verdict of a jury is not perverse or a mere compromise, the fact that it has awarded general damages less than the trial Judge would have given if sitting alone, is not a ground for granting a new trial.

Motion dismissed.

Solicitors: Treadwell and Sons, Wellington, for the plaintiff; **W. P. Rollings,** Wellington, for the defendant.

SUPREME COURT
Christchurch.
March 23, 27.
Kennedy, J.

RINK TAXIS, LTD. v. MACINTOSH.

Motor-vehicles — Traffic License — "Private Motor-car" or "Heavy Motor-vehicle"—Public Works Act, 1928, s. 166—Motor-vehicles Act, 1924, s. 2—Motor-vehicles Amendment Act, 1927, s. 2 (b); Heavy Motor-vehicle Regulations, 1932, Reg. 9 (9).

Appeal from a conviction by a Stipendiary Magistrate upon an information alleging that the appellant did permit to be used a heavy motor-vehicle upon a road before a heavy-traffic license in accordance with the Heavy Motor-vehicle Regulations, 1932, had been obtained.

Regulation 9 of s. 9, headed "Heavy-traffic Licenses," is as follows:—

"Neither the owner of any heavy motor-vehicle nor any other person shall operate any heavy motor-vehicle upon any road unless and until a heavy-traffic license has been obtained in accordance with these regulations, or unless the vehicle is exempt from the liability to obtain an annual license as prescribed by the Motor-vehicles Act, 1924."

The appellant company was charged with permitting to be used a heavy motor-vehicle upon a road within the No. 14 Heavy Traffic District before a heavy-traffic license in accordance with the Heavy Motor-vehicle Regulations, 1932, had been obtained, contrary to the provisions of cl. 9 (9) of such regulations. The vehicle in question was a Packard motor-car, which, with its maximum load exceeded 2 tons in weight, and was designed solely or principally for the carriage of persons not exceeding nine in number. It was used in the appellant company's business as one of what were designated "Class A" cars, which were kept without taxi disks in a smart appearance undistinguishable from private cars; and it was stated that it was important for the company's business that they should remain so undistinguishable. They could not be hired on the streets as they were kept when not in use in the company's garage awaiting engagement by telephone, letter, or personal call at the company's office. It was contended for the company that the car in question was a "private motor-car" and not a "public motor-car" within the definition of the Motor-vehicles Act, 1924; and that so long as the vehicles in the company's "Class A" were not liable to be licensed to ply for hire, and were not so licensed, they were "private motor-cars" and not "public motor-cars" within the definition of the Act. The Magistrate convicted the appellant company, holding it was required that the company, before using the motor-vehicle mentioned, should procure a license to use the same as required by the regulations.

J. H. Upham, for the appellant; **R. J. Loughnan,** for the respondent.

Held: That the vehicle in question was not a motor-car "which is licensed by any competent authority to ply for hire," and was accordingly not a "public motor-car," but was a "private motor-car," and consequently not within the definition of "Heavy motor-vehicle" in the Heavy Motor-vehicle Regulations, 1932.

Appeal allowed, conviction set aside.

Solicitors: **Harper, Pascoe, Buchanan, and Upham,** Christchurch, for the appellant; **Izard and Loughnan,** Christchurch, for the respondent.

NOTE:—For the Motor-vehicles Act, 1924; and the Amendment Act, 1927, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title, *Transport*, Vol. 8, pp. 800, 819; for the Public Works Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, title *Public Works*, Vol. 7, p. 622; and for the Heavy Motor-vehicles Regulations 1932, see *N.Z. Gazette*, 1932, p. 302.

SUPREME COURT
In Chambers.
Wanganui.
Feb. 21.
Ostler, J.

ANDERSON v. GINN.

Practice—Action claiming Special Damages for Loss of Wages through Illness following Assault—Medical Examination of Plaintiff ordered—Judicature Act, 1908, s. 100 (1).

Motion by defendant for examination of plaintiff by a doctor under s. 100 (1) of the Judicature Act, 1908.

In an action claiming damages for assault and slander the plaintiff claimed special damages for loss of wages due to illness following on assault and slander up to commencement of the sittings at which the case was set down, such illness having been an accident arising from the wrongful act of the defendant.

Section 100 (1) of the Judicature Act, 1908, is as follows:—

"Where any person injured or alleged to have been injured by an accident, through the wrongful act, neglect, or default of any other person, claims compensation or damages on account of the injury, any Judge of the Court in which proceedings to recover such compensation or damages are taken may order that the person injured be examined by one or more duly qualified medical practitioners named in the order, and not being witnesses on either side, and may make such order with respect to the costs of such examination as he thinks fit."

W. J. Treadwell (with him **P. L. Dickson**), for the plaintiff; **L. Cohen,** for the defendant.

Held, ordering plaintiff to submit to examination by doctor appointed by the Court, That the wording of s. 100 (1) of the Judicature Act, 1908, is wide enough to cover the circumstances outlined above.

Order that plaintiff submit to examination by a doctor appointed by the Court within seven days.

Solicitors: **P. L. Dickson,** Wanganui, for the plaintiff; **L. Cohen,** Wanganui, for the defendant.

NOTE:—For the Judicature Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, title, *Courts*, Vol. 2, p. 60.

CT. ARBTN.
Christchurch.
Dec. 21, 22.
Frazer, J.

O'NEILL v. RANGIORA BOROUGH, NORTH CANTERBURY ELECTRIC-POWER BOARD, AND OTHERS.

Workers' Compensation—Unemployment Relief Worker—Detailed by Borough Council to work at Employment found by Power Board—Killed while travelling from Work in Power Board's Lorry—Council held to be "Employer"—Workers' Compensation Act, 1922, s. 3—Finance Act, 1931 (No. 4), s. 26 (2).

Claim by Elizabeth Sarah O'Neill for compensation in respect of the death of her husband, Cornelius O'Neill.

The action was originally brought by the plaintiff against the Rangiora Borough Council and the North Canterbury Electric-power Board, but the Alliance Assurance Co., Ltd., and the Yorkshire Insurance Co., Ltd., the indemnifiers respectively of the two original defendant bodies, were added subsequently as third parties to the action.

The defendant borough, having received a grant from the Unemployment Board, found work for a number of unemployed workers including deceased. The Town Clerk agreed to provide a gang of men to top trees for the defendant Power Board in its district, and the Town Clerk and Borough Overseer detailed deceased to that work as foreman. The Power Board and its officers exercised no control over the men or their work other than indicating the trees to be topped. The deceased was required to be transported daily in a Power Board lorry to different parts of the Board's district. After cessation of work on August 30, 1932, he was returning on the lorry when he was thrown and later died from his injuries.

A. W. Brown, for the plaintiff; **H. C. D. van Asch,** for the Rangiora Borough Council; **E. W. White,** for the North Canterbury Electric-power Board; **C. S. Thomas,** for the Yorkshire Insurance Co., Ltd.; **M. J. Gresson,** for the Alliance Assurance Co., Ltd.

Held, 1. That, whichever of the defendant bodies was the actual employer, it was part of the duty of deceased to travel from work on the Power Board's lorry on the day on which he was killed; and that the accident whereby he met his death arose out of and in the course of his employment.

Hewitson v. St. Helens Colliery Co., Ltd. (1924) 16 B.W.C.C. 230, H.L. followed.

2. That, in terms of s. 26 (2) of the Finance Act, 1931 (No. 4), the Borough Council was the "employer" of the deceased worker.

Judgment accordingly.

Solicitors: **W. L. Aynsley,** Rangiora, for the plaintiff; **Helmore, van Asch, and Walton,** for the Rangiora Borough Council; **Johnston, White, and Kippenberger,** for the North Canterbury Electric-power Board; **C. S. Thomas,** for the Yorkshire Insurance Co., Ltd.; **Rhodes, Ross, and Godby,** for the Alliance Assurance Co., Ltd., all of Christchurch.

NOTE:—For the Workers Compensation Act, 1922, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, title *Master and Servant*, Vol. 5, p. 597; for the Finance Act, 1931 (No. 4), title *Work and Labour*, Vol. 8, p. 1238; Case Annotation, *Hewitson v. St. Helens Colliery Co. Ltd.*, see E. & E. DIGEST, Vol. 34, title *Master and Servant*, pp. 280, 281, para. 2364.

COURT OF ARBITRATION
Auckland.
March 20.
Frazer, J.

IN RE THE AUCKLAND PLUMBERS AND GASFITTERS' INDUSTRIAL AGREEMENT.

Industrial Agreement—Award—"Workers"—Apprentices—Industrial Conciliation and Arbitration Act, 1925, s. 33.

Application by the Auckland Plumbers and Gasfitters' Industrial Union of Workers to have an industrial agreement relating to the conditions of employment of journeymen plumbers and gasfitters, dated October 10, 1932, and filed in the office of the Clerk of Awards at Auckland under No. 280, declared to be an award of the Court.

Section 33 of the Industrial Conciliation and Arbitration Act, 1925, provides, with certain reservations, that where it is proved to the Court that an industrial agreement is binding on employers who employ a majority of the workers in the industry to which it relates in the industrial district in which it was made, the Court shall, on the application of any of the parties to the agreement, declare the same to be an award.

The question for determination was whether apprentices are to be included as "workers in the industry."

Section 33 of the Industrial Conciliation and Arbitration Act, 1925, is as follows:—

"Where it is proved to the Court that an industrial agreement (whether made before or after the commencement of this Act) is binding on employers who employ a majority of the workers in the industry to which it relates in the industrial district in which it was made, the Court shall, on the application of any of the parties to the agreement, declare the same to be an award unless, in the opinion of the Court, such agreement is, by reason of its provisions, against the public good or is in excess of the jurisdiction of the Court."

Held: That the term "workers" in the above-quoted section includes apprentices.

NOTE:—For the Industrial Conciliation and Arbitration Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, title *Industrial Disputes*, Vol. 3, p. 939.

Delegated Legislative Powers.

A Defence of the System.*

By the Rt. Hon. G. W. Forbes,
Prime Minister of New Zealand.

The delegation by Parliament of legislative powers has been receiving a great deal of attention within the past two or three years, for the most part of a critically unfavourable nature. "Government by Order in Council" has become a catch cry, the popular appeal of which has not only tended to confuse the issue but threatens to become an even greater danger to practical administration than the abuse of powers delegated by Parliament.

Delegated legislation, despite popular belief of the moment, is no new phenomenon. From the time when Parliamentary enactments first became a part of the law of England it has been necessary for Parliament to delegate certain powers of legislation, and it is inevitable that the increasing complexity of modern life and government will necessitate an ever-increasing delegation.

In England the whole question was considered by a Special Committee on Ministers' Powers appointed by the Lord Chancellor (Lord Sankey) in 1929. This Committee, which was representative of all parties in Parliament and of the legal profession, made a very exhaustive inquiry in the course of which it received evidence, both written and oral, not only from Government officials, both legal and lay, but from such non-official bodies as the Association of British Chambers of Commerce; Association of Municipal Corporations; County Councils Association; Federation of British Industries; General Council of the Bar; Law Society; National Chamber of Trade; National Federation of Property Owners and Ratepayers; and the Shipowners' Parliamentary Committee.

The Committee's report which was presented to the Imperial Parliament in April of last year is a document which demands consideration by all who are interested in this question. Section 11 of the Report deals with Delegated Legislation, and on pages 51–53 the Committee sets out its reasons for coming to the conclusion that the system of delegated legislation is both legitimate and constitutionally desirable for certain purposes. These reasons are briefly summarised as:

(*a*) Pressure on Parliamentary time;
(*b*) Technicality of subject matter;
(*c*) Unforeseen contingencies;
(*d*) Flexibility;
(*e*) Opportunity for experiment;
(*f*) Emergency powers.

On pages 53 and 54 the Committee summarises the arguments against delegated legislation and comments on them as follows:

> "Each of these criticisms is important, but they do not destroy the case for delegated legislation. Their true bearing is rather that there are dangers in the practice, that it is liable to abuse; and that safeguards are required. Nor do we think that either the published criticisms or the evidence we have received justifies an alarmist view of the constitutional situation. . . . For the most part the dangers are potential rather than actual; and the problem which the critics raise is essentially one of devising the best safeguards."

The problem in New Zealand fines itself down to the same issue. It is not only impracticable but clearly impossible, if legislation is ever to get on the Statute-book, for every Bill to deal in detail with the matters now left to be dealt with by Regulations, just as it is impossible to require that the Code of Civil Procedure under the Judicature Act should be amended only by Act, or that the Municipal Corporations and Counties Acts, for instance, should contain all that is now contained in Borough and County By-Laws.

I cannot be too emphatic in stating that neither the present nor any conceivable future New Zealand Parliament could possibly refrain from delegating certain of its powers of legislation. In particular many of the matters which in the past two years have claimed the attention of Parliament have been of such novelty, complexity, and technical difficulty, as to necessitate Parliament dealing with matters of principle and leaving a host of matters of detail to be worked out by Regulations.

The subject-matters that have been left to Regulations have, despite what seems to be popular opinion to the contrary, always been given most serious consideration not only by the Departments concerned and the Law Drafting Office, but by the Government itself.

It is always possible that mistakes have been made and the Government is as much concerned as its critics to ensure that Parliament does not lightly delegate its powers, and welcomes constructive criticism of recent delegations by Parliament. To be constructive this criticism must be specific and not in vague general terms of condemnation.

Recently, the Associated Chambers of Commerce wrote to me expressing alarm at the extent of the delegated legislation under Acts of recent years, and to make my point clear I cannot do better than quote the last paragraph of my reply:

> "It would materially help the Government in its consideration of your representations if, with respect to the 186 Acts of 1929-30-31 mentioned in your letter, your Executive would specify such of the matters mentioned in the sections of those Acts authorising the making of Regulations as it considers should either have been dealt with in detail in the Acts themselves, or else in Regulations remaining inoperative until confirmed by Parliament."

* Portion of an address delivered in Auckland on March 28, 1933.

Auckland's First Woman Barrister.—Although there are several women solicitors in Auckland, the admission as a barrister and solicitor of Miss Marion van Beeresteyn Hollway, of the staff of Messrs. Thorne, Thorne, White, and Clark-Walker, by Mr. Justice Herdman was the first occasion on which a woman has applied there for admission as a barrister. Miss Hollway, who is 23 years of age, was born in Auckland, and has lived there practically all her life. Her secondary education was obtained first at the Whangarei High School and afterwards at the Epsom Grammar School. She successfully studied for her LL.B. degree at the Auckland University College. She has been with the firm of Thorne, Thorne, White, and Clark-Walker for the past three years.

A System Open to Abuse.

Legislation by Orders in Council.

By Professor R. M. Algie, LL.M.

The Prime Minister recently stated that he might be forced to have much more frequent recourse to the practice of legislating by Order in Council. Later, upon the occasion of his visit to Auckland, Mr. Forbes dealt at great length with the grounds upon which delegated legislation could be justified. Unfortunately, however, no serious attempt was made to discuss or to explain away the evils that are far too obvious in the abuse of this system of legislation by Order in Council. No one would quarrel with the Prime Minister's statement that this form of law-making must at times be resorted to. It is not the use of the system that is objected to—it is only in respect of the abuse of it that vigorous criticism can be well founded—and upon the question of these abuses, the Prime Minister has so far made no comment.

The practice of legislating by regulation instead of by statute, may arouse widely different opinions amongst members of the legal profession. Some may feel that if a Government Department is influential enough to secure the passage of the particular Order in Council it desires, so much the better ; it only tends to make the law a little more complex and unknowable than it is at present, and this merely adds to the work which calls for the assistance of lawyers. Such Departments, therefore, should be acclaimed and honoured at all convivial gatherings of the profession in much the same cheerful spirit as that in which we tender a toast to the "client who makes his own will." But there are other solicitors, indeed, many of them, who see in this form of legislation certain definite tendencies towards grave evils, which might under given circumstances have far-reaching consequences.

It is admitted, then, that there are circumstances in which a certain amount of power must be reserved in a statute for a Minister or some other authority to make regulations ; but it is submitted that this power should be reserved *only* when there exist circumstances which definitely require and justify the reservation of such a power. An examination of the statutes passed in recent years in New Zealand will lead irresistibly to the inference that a power to make regulations is regularly inserted in our statutes on every possible occasion as a piece of convenient machinery irrespective of whether or not a pressing need for such a power actually exists. In 1901, about one-fifth of the Public and General Acts contained a clause authorising the making of regulations : in 1916, about one-third conferred such a power : while in 1931, practically one-half of such Acts authorised the drawing-up of regulations, and it is fair to say that the very nature of practically all of the remaining Acts would have rendered the reservation of such power utterly unnecessary and superfluous.

Quite recently, I had the privilege of perusing a Bill, which proposed to confer upon a particular Department the power of making regulations of such breadth and generality that the control of a very important trade would have been placed under the tender mercies and jurisdiction of that Department. I am confident that an impartial observer would have formed the opinion that there was no pressing urgency for the adoption of such regulations : he would have felt, I am sure, that there existed no sound reason for doing this thing by regulation instead of by statute, and he would have been convinced that the contemplated provisions, if embodied in the Bill itself, would most certainly have failed to pass through the House.

Again, if it is necessary to resort to this form of legislation in order to facilitate the conduct of Parliamentary business, it ought to be possible for Parliament to prescribe, within strictly defined limits, the matters which should be dealt with by the regulations which are subsequently to be made. This course, if followed, would provide ample protection for the citizen in that he could always, if he chose, test the validity of such regulations by an appeal to the Courts.

Unfortunately, however, the clearly marked tendency of recent years has been to confer this regulation-making power in *wide* and *general* terms. This can only be described as a deliberate and poorly-concealed device for ousting the jurisdiction of the Courts.

There is yet another aspect of the matter that calls for attention. At various times in recent years there have been enacted statutes which give power to make regulations and which go much too far in the direction of ousting the jurisdiction of the Courts. In the present article two citations only can be given ; but it is submitted that they are remarkable examples of the lengths to which the abuse of the system of legislating by Order in Council can be carried. The examples referred to are as follows :

Education Amendment Act, 1915.

Section 6. "The Governor-General in Council may make such regulations as he thinks necessary or expedient for *avoiding any doubt or difficulty* which may *appear to him to arise* in the *administration* of the *principal Act* by reason of any omission or inconsistency therein, and all such regulations shall have the force of law, anything to the contrary in the principal Act notwithstanding."

Education Amendment Act, 1919.

This Act gave power to make additional regulations upon a great variety of subjects. It says :

"Notwithstanding anything to the *contrary* in the principal Act, the Governor-General may, by Order in Council, make regulations . . ."

Then follows the list of topics that may be dealt with ; and this is rounded off by the remarkable clause set out below :

"*No regulation under this section shall be invalid because it deals with any matter provided for in the principal Act or*" [*because it*] "*is contrary to the provisions of that Act.*"

Now if this sort of thing can be done once, it can be done again ; and it is confidently claimed that enough has been said to justify the conclusion that the system of resorting to delegated legislation is open to very serious abuses, and that it has been very definitely abused in New Zealand.

The Statute of Frauds.

Is it a Sword as well as a Shield?

By JAMES WILLIAMS, LL.M. (N.Z.), Ph.D. (Cantab.).

Mr. Harold Lightman, in a learned article contributed to the *Law Journal* (vol. 74 (N.S.), pp. 182, 194, 205) and recently reprinted in a condensed form in the NEW ZEALAND LAW JOURNAL, has investigated the commonly stated principle that the Statute of Frauds is a shield and not a sword; and from his research has concluded that the statute has a more extended operation than this statement would suggest. In Mr. Lightman's view:

> "If a plaintiff in an action for, say, the recovery of land establishes by the force of his own case a *prima facie* title, so that if no evidence for the defence was called he would be entitled to judgment as against a defendant in possession of the land, it is not open to the defendant to meet the statement of claim by some 'cock and bull' story of a parol contract—but must bring his case within the four corners of the Statute of Frauds and produce written evidence of his title or a good equitable defence, such as part performance of a parol agreement."

For this proposition Mr. Lightman relies chiefly upon *Maddison v. Alderson*, 8 App. Cas. 467, and an Australian case, *Perpetual Executors and Trustees Association of Australia Ltd. v. Russell*, 45 C.L.R. 146. It is proposed in the present article to consider whether the authorities bear out Mr. Lightman's conclusions.

The question involved is really a question of the proper construction of the Statute. What is the true meaning of the words "no action shall be brought whereby to charge"? *Prima facie* those words mean that one claiming under a contract not complying with the Statute may not enforce that contract by bringing an action upon it. But a contract may operate in other ways than as a cause of action. And it is well settled that contracts failing to comply with the Statute are not thereby avoided, but are merely rendered unenforceable by action. As the Statute says, "no action shall be brought" upon them. But if the operation of the Statute is merely to prevent the bringing of actions upon such contracts, then it would seem to follow that for all other purposes those contracts must be good. "The contract is not a nullity," said Lord Selborne, L.C., in *Maddison v. Alderson*, 8 App. Cas. at 475; "there is nothing in the Statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences." Now a contract may sometimes serve to justify some act which would otherwise be wrongful. If a defendant is sued for doing such an act, and simply says that what he has done or is doing is justifiable as being done in pursuance of a contract, is he "bringing an action whereby to charge" the plaintiff upon that contract? It is submitted that he is not. He is defending an action, not bringing one, and to say that to defend an action is in substance the same thing as to bring one is merely to misuse language.

Apart from authority, therefore, it would appear from the words of the Statute itself that the Statute does not prevent a defendant from relying by way of defence upon a contract not complying with the Statute. But it is undeniable that in many respects the Courts have departed from the strict meaning of the words of the Statute, and even the clearest demonstration of the plain and literal meaning of those words is no absolute proof that the law at the present day is in accordance with that meaning. As Lord Moulton (then Fletcher Moulton, L.J.) remarked (*Hanau v. Ehrlich*, [1911] 2 K.B. 1056, 1066), "little is left of the Statute. The Courts are bound by decisions which they may well think out of harmony both with the spirit and the letter of the enactment." On the point at present under discussion, however, it is submitted that the authorities show that the plain meaning of the Statute has for once been accepted by the Courts. It was upon the plain meaning of the Statute that North, J., chiefly based his opinion in *Miles v. N.Z. Alford Estate Co.* (1886) 32 Ch. D. 266, 279. *Clarke v. Grant*, 14 Ves. 519, was referred to by him merely as affording confirmation of the view to which he had come independently of that case and upon the words of the Statute only. And although *Clarke v. Grant* did not directly involve the point then before North, J., it did indicate that the Statute was directed against a plaintiff seeking to enforce his contract and not against a defendant seeking to rely upon the true agreement as a defence. If, in spite of the Statute, a defendant was allowed to prove a parol contract (which should have been in writing) in answer to a plaintiff seeking to ignore that contract by pleading some other and different contract, why should the defendant not be allowed to follow the same course where the plaintiff seeks to ignore the true agreement between the parties, not, indeed, by pleading a different contract, but by suing for the recovery of whatever he has hitherto done or paid under the contract? The analogy between the two cases seems to be closer than Mr. Lightman allows.

The opinion of North, J., does not stand alone in the books: there are both decisions and *dicta* which are to the same effect. *Miles v. N.Z. Alford Estate Co.* went to the Court of Appeal, but there the point on the Statute became immaterial. Bowen, L.J., however, expressed the following opinion upon it (32 Ch. D. at 296): "A verbal agreement, if executed, is accord and satisfaction. The only effect of the *Statute of Frauds* is to prevent the active prosecution of claims in the Law Courts which are not supported by written evidence at the trial."

In *Thomas v. Brown* (1876) 1 Q.B.D. 714, 723, the purchaser of land paid to the vendor a deposit on account of the purchase-money; but subsequently she decided not to go on with the purchase and brought an action to recover the deposit. On her behalf it was contended that the contract did not comply with the Statute and hence could not be relied upon by the defendant to justify his retention of the money. But Mellor and Quain, JJ., held that the plaintiff could not support her case merely by showing non-compliance with the Statute. "Now where, upon a verbal contract for the sale of land," said Quain, J., "the purchaser pays the deposit and the vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money."

A similar case was *Jones v. Jones*, (1840) 6 M. & W. 84. There the defendant gave the plaintiff a promissory note to secure the payment of the purchase price of a house and land which the plaintiff had verbally agreed to sell to the defendant. The defendant having re-

fused to pay the note, the plaintiff commenced an action, and the defendant contended that there was no consideration for the note, inasmuch as the contract of sale was unenforceable. If the defendant's contention had been sound, then it would have followed that had the defendant paid cash, he could have proceeded as a plaintiff to recover the amount paid. The Court of Exchequer, however, overruled the defendant's contention. "It is clear," said Lord Abinger, C.B., "that this is a case where the parties have paid their money down—or, what is equivalent, given a promissory note payable on demand—for a future conveyance. Can anybody say that they are not bound to pay it; unless they show that the plaintiffs have refused to execute that conveyance?"

The foregoing authorities, according as they clearly do with the language of the Statute, would seem to show that Mr. Lightman's submission is illfounded. Mr. Lightman suggests, however, that the cases of *Maddison v. Alderson*, 8 App. Cas. 467, and *Perpetual Executors and Trustees Association of Australia Ltd. v. Russell*, 45 C.L.R. 146, support his contentions.

Maddison v. Alderson was certainly argued throughout on the basis that either a contract complying with the Statute or else a sufficient part performance had to be proved, and certainly, as Mr. Lightman points out, the plaintiff in that case had pleaded the Statute by way of reply to the defence as well as by way of defence to the counterclaim. But even were it a fact that in *Maddison v. Alderson* the defendant might have objected to this reply, her omission to do so could scarcely be considered as being sufficient to raise *Maddison v. Alderson* by implication to such a position of authority as to enable it to displace the express decisions on this point which have already been cited.

When *Maddison v. Alderson* is carefully considered, however, it would seem that the defence that the defendant's possession of the deeds was justified by the contract pleaded was one which depended for its validity not on the existence but on the enforceability of the contract. Hence the Statute was in that case rightly pleaded in reply. The defendant had not obtained possession of the deeds in pursuance of the contract, but had taken them after the deceased's death, and had thereby, it is submitted, committed a conversion. If she was to retain the deeds she had to prove circumstances beyond the fact of her possession giving her some right to them. Her possession was wrongful, and the principle is *nullus commodum capere potest de injuria sua propria*—no man can take advantage of his own wrong: *Broom's Legal Maxims*, 9th Ed. 197. As a defence, therefore, her possession of the deeds could not avail her. And to show that she was entitled to the deeds independently of that possession she would have had to show that there was vested in her some right enforceable independently of the circumstance of her possession. This she could not do except by setting up the contract and showing that it was enforceable by reason of part performance. Hence, whether *Maddison v. Alderson* be regarded from the point of view of the counterclaim or of the defence the question ultimately involved was in either event the same: was there sufficient part performance to enable the contract to be enforced? And it was to this question that the attention of Counsel and the Courts was chiefly directed.

Nevertheless *Maddison v. Alderson* does suggest a restriction on the general statement of the principle that the Statute is not available by way of reply to a defence—viz., that before that principle applies it must appear that the position justified by reference to the unenforceable contract was brought about by or in pursuance of that contract or else that that contract was made in contemplation of that position. If the position sought to be justified has been brought about independently of the contract and if the contract has no reference to that position, then *prima facie* that contract will be irrelevant to a consideration of whether the position from the defendant's point of view was rightfully or wrongfully brought about or is now to be excused. If the position has been brought about by or in pursuance of the contract, then the authorities already cited would plainly apply. But although the position may not have been brought about by or in pursuance of the unenforceable contract, nevertheless that contract may be in the nature of a release from or composition for the prior and wrongful act or omission of the defendant and may in terms justify him in maintaining the position brought about by that act or omission. And to rely on the contract purely as a defence seems to be no more bringing an action charging the plaintiff upon that contract than to rely upon a contract in pursuance of which the position attacked was brought about, and in neither case, it is submitted, would the Statute offer any bar to such a defence.

The matter may be illustrated by reference to a contract for the sale of land. A. verbally agrees to sell B. Blackacre for £100. B. pays £100, then repenting of his bargain, seeks to recover that sum. The Statute of Frauds will not preclude A. from pleading the contract to justify his retaining the money paid to him in pursuance thereof: *Thomas v. Brown*, 1 Q.B.D., 714. But if B. had occupied the land as a trespasser, and had subsequently (without going out of possession) agreed with A. that in consideration of A.'s waiving the trespass he (B.) would purchase the property for £100, it is submitted that so long as B. was willing and ready to pay the purchase price he might rely upon the oral agreement as a defence to any action which A. might bring either for trespass or recovery of possession, notwithstanding that B.'s position was in its inception wrongful and not obtained in pursuance of the contract: *cf. Crosby v. Wadsworth*, 6 East 602.

The only authority which seems to run counter to this proposition is *Perpetual Executors and Trustees Association of Australia Ltd. v. Russell*, 45 C.L.R. 146, a decision of the High Court of Australia. In that case neither *Thomas v. Brown*, 1 Q.B.D. 714, nor *Jones v. Jones*, 6 M. & W. 84, was referred to. The judgment of Gavan Duffy, C.J., Starke, and McTiernan, JJ., is simply a statement, without any adequate consideration either of the express words of the Statute or of the authorities, that "neither at law nor in equity can a claim unenforceable by action because of the Statute be enforced by counterclaim or defence." Certainly such a claim may not be enforced by way of counterclaim; but it is submitted that the weight of authority as well as the express words of the Statute disproves the remaining part of this proposition.

The judgment of Evatt, J., upon which Mr. Lightman so much relies, although ingenious, seems to be based upon a fallacy. The learned judge seems to have assumed that a defendant pleading an unenforceable contract to defeat an action of ejectment (where the contract related to land) might subsequently plead the Statute when the plaintiff, having failed in the first action, sued for specific performance (to recover the purchase price) in a second proceeding: "The de-

fendant," he said (p. 155), "has the advantage of a decree for specific performance without the disadvantage of having to carry out any part of the bargain on his part. The parties remain between two worlds—one dead, the other powerless to be born." But the answer to the dilemma propounded by the learned judge seems plain. A party may not both affirm and disaffirm a contract: *per* Stout, C.J., in *New Zealand Insurance Co. Ltd. v. Tyneside Proprietary Ltd.* [1917] N.Z.L.R., 579. If the vendor sued for specific enforcement and the defendant pleaded the Statute, then it is submitted that the defendant could not thereafter defend a subsequent action for ejectment and mesne profits on the ground that his possession was justified by the contract. "A man cannot at the same time blow hot and cold," said Honyman, J., in *Smith v. Baker*, L.R. 8 C.P. 350, 357. "He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage." And in such a case as that at present being discussed, there would seem to be no reason why the plaintiff should not sue alternatively for specific performance and ejectment with mesne profits, thereby putting the defendant to his election and disposing of all questions in the one proceeding.

For the foregoing reasons, therefore, it does not seem possible to regard *Perpetual Executors and Trustees Association of Australia Ltd. v. Russell* as correctly expounding the law, and so far as Mr. Lightman's conclusions follow that case, it is contended, with great respect, that they are erroneous. The true principle, it is submitted, may be stated as follows. A contract not complying with the Statute of Frauds may be relied upon by way of defence to justify the defendant in maintaining a position brought about by or in pursuance of that contract or excused by it. In such a case the defendant is not bringing an action to charge the plaintiff on the contract, but merely proving the contract to explain his own position.

Bench and Bar.

Mr. H. R. Cooper has been appointed Crown Prosecutor at Palmerston North in the place of Mr. F. H. Cooke, who has resigned that office after holding it for many years.

Recent admissions in Christchurch include Messrs. J. H. Polson and H. M. S. Dawson as barristers and solicitors, and Mr. A. S. Lyons, of Leeston, as a barrister.

In Auckland, Miss M. van B. Hollway and Mr. A. M. D. Segar were recently admitted as barristers and solicitors, Messrs. W. W. Meek and J. H. Clayton as barristers, and Mr. B. C. Griffiths as a solicitor.

Messrs. Goldstine and O'Donnell, of Auckland, have been joined in partnership by Mr. J. N. Wilson who has been their managing clerk. The firm will be known as Goldstine, O'Donnell, and Wilson.

The Responsibilities of a Husband.

Some Reflections with a Moral.

By R. A. Singer.

(*Concluded from page 84*).

It is common to observe in newspapers, advertisements notifying the public that a husband will not be responsible for his wife's debts. Such a notice, contrary to common belief, has practically no legal effect whatsoever, and is merely an unnecessary publication of domestic differences, which are eagerly looked for by a public thirsting for some interest and amusement in these depressing days. For, "if the separation has taken place by the wife's fault, there is no need for such notice, for the husband is not liable anyhow; if by the husband's fault, then he is liable, and any such notice cannot lessen his liability; and if by mutual consent the husband is not liable, if the arrangement between them is that he shall not be." And where the parties are living together, such notices are seldom employed or required, and a husband can do all he wants to do by private prohibition or, if he has actually constituted her his agent, by direct notice to the tradesman. And, in any case, if the husband wishes to avail himself of any such advertisement, he would have to prove that such advertisement actually came under the notice of the tradesman giving credit to the wife, which, of course, is usually quite impossible.

Will you bear with me while I give you an example of a piece of literature buried in a legal judgment? It is the judgment of Mr. Justice McCardie, the bachelor Judge, who strangely enough has adjudicated upon many cases coming under this branch of law. I remember Mr. Justice McCardie personally very well. We were members of the Midland Circuit, and I used to hear him in advocacy in Birmingham, where he practised, when I was practising at the Bar in England. I specially remember his memorable successes in two breach of promise cases, consecutively heard in Birmingham, where he appeared for the plaintiff in each case and in each case obtained a verdict for his clients. In each case, I may say, the defendant was neither present nor represented.

In view of the pith and cogency and brilliance and usefulness of the judgments of Mr. Justice McCardie in this department, such judgments of his might well be collected together in a volume to be entitled "McCardie on the Law of Lingerie."

The judgment I refer to is that of *Callot v. Nash* (1923) 39 T.L.R. 292. The firm of Callot supplied elaborate masses of highly expensive articles to Mrs. Nash and sued her husband as well as herself for £657, the small balance owing. The learned Judge begins his judgment by saying "The dress of woman has ever been the mystery and sometimes the calamity of the ages." And he proceeds:

> "I will, however, venture to mention some of the items in this case. One is for a 'Gismonda' evening dress at 2,400 francs; another for a morning dress at 2,800 francs; another for a 'Pecheresse' (or female sinner) evening dress at 3,700 francs; another for an evening dress at 3,800 francs; another for a 'Chrysalide' evening dress at 4,600 francs; and another for a fur stole at 15,000 francs. This account of the plaintiff's is a mere fraction of the dressing-debts incurred by the defendant's wife. I might well infer that it is as true in some cases to-day as it was when Ovid" [Ovid,

if you please] "wrote 1,900 years ago, '*Pars minima est ipsa puella sui*,' that is, 'The woman is the least part of herself.'"

And, later,

"Her catholicity of profusion was remarkable. She threw herself beneath the fatal curse of luxury. She forgot that those who possess substantial means are trustees to use them with prudence, charity, and propriety. She forgot that ostentation is the worst form of vulgarity. She ignored the sharp menace of future penury. Dress, and dress alone, seems to have been her end in life. She sought felicity in the ceaseless changes of trivial fashions. Self-decoration was her vision, her aim, her creed. I observe no record of any act of beneficence, no trace of unselfish aid to others; she computed her enjoyment of life by the reckless indulgence of her extravagance. Well was it said by Mr. Hazlitt" [Hazlitt, if you please] in one of his essays: 'Those who make their dress the principal part of themselves will, in general, become of no more value than their dress.'"

And again:

"The defendant here was a captain in the Army, but otherwise he had no particular rank or position. The word 'captain' is not to be taken as a synonym for prodigality. It is true that the husband and wife (particularly in the early period of marriage) lived at times in fashionable hotels, and dined and danced at fashionable restaurants. I must make allowance for irrational tyranny of social convention; I do not overlook the requirements, however foolish, of so-called fashionable society. I am willing, moreover, to recognise the tonic properties of an occasional new costume."

And again:

"No inquiries were made from anyone about the defendant's means or standing. He was never asked a question. Husbands vary. Some repose on financial strength; some hover on the brink of mere indigence. Nothing was known of Captain Nash, except his address at a Paris Hotel, or his address in London. He was merely one of a rapid succession of husbands. He was nothing more. He might well be as transitory as the other two. To the plaintiffs he was only an incidental male appurtenance to Mrs. Nash."

And later:

"The fact that a husband accompanies his wife when shopping, or assists her in the choice of garments, is in itself a neutral thing. It may, indeed, be quite irrelevant, if the credit, as here, is given to the wife. Moreover, as Mr. Justice Rowlatt said in *Seymour v. Kingscote*, 38 T.L.R. 586, at p. 588, 'The only other general circumstance was that he accompanied his wife often to the shop, but I think that is quite irrelevant for this purpose. A man may go with his wife when she orders a dress, whether he is going to pay for it or whether she is. He is going round with her shopping. That is all.' Unless this view of Mr. Justice Rowlatt be correct, then it would follow that even though a man had made his wife a most handsome allowance for dress, and had further expressly prohibited her from pledging his credit, yet he would be liable merely because he showed the courtesy to his wife of assisting her in her choice of a dress. A husband's courtesy is not to be unreasonably checked by the subtle doctrines of tradesmen seeking to fix a husband with liability. I rule that there is here no estoppel or holding out."

And, finally:

"When I observe the consequences of Mrs. Nash's slavery to fashion, I might well apply the words of Victor Hugo" [Victor Hugo, if you please] in his *Nôtre Dame de Paris*, and say: 'Les modes ont fait plus de mal que les revolutions,' that is: 'Fashions have wrought more mischief than revolutions.' It is deplorable to observe the unceasing egotism of the defendant's wife and the recklessness with which she plunged into the tide of illicit profusion. She was the mere devotee of fashion, and thus she trod the path which so often leads to financial dishonour. It is a profoundly regrettable story. It springs into prominence at a time when women have gained a full measure of citizenship and wide opportunities for beneficent service. It is revealed at a period when the calls for social efforts are unceasing, and when the contrasts between the different ranks of our national life grow ever more vivid and more significant and more momentous.

"It only remains to be said that Mrs. Nash disdained the high standard which has been created by the best and most gracious portion of English womanhood. She renounced her duties at the call of empty pleasure. She sacrificed her privileges of social service for the allurements of ignominious folly. I give judgment for the defendant, with costs."

New Zealand Law Society.

Annual Meeting, 1933.

The Annual Meeting of the Council of the New Zealand Law Society was held on Friday, March 24, 1933, in the Crown Solicitor's Room, Supreme Court Buildings, Wellington.

Present: Auckland represented by Messrs. A. M. Goulding and R. P. Towle; Canterbury: Mr. H. F. O'Leary (Proxy); Gisborne: Mr. C. A. L. Treadwell; Hawke's Bay: Mr. H. E. Evans (Proxy); Marlborough: Mr. H. F. Johnston, K.C.; Nelson: Mr. C. R. Fell; Otago: Mr. A. C. Stephens and Mr. R. H. Webb; Southland: Mr. S. A. Wiren; Taranaki: Mr. R. H. Quilliam (Proxy); Wanganui: Mr. N. G. Armstrong; Westland: Mr. A. M. Cousins; and Wellington: Sir A. Gray, K.C., Mr. C. H. Treadwell and Mr. E. P. Hay.

The President (Sir Alexander Gray, K.C.) occupied the chair.

Motions of Sympathy. Before commencing the business of the meeting, reference was made by the President to the loss recently sustained by Mr. M. J. Gresson, a former member of the Council and one of the Committee of Management of the Solicitors' Fidelity Guarantee Fund, in the death of his wife, and a resolution expressive of sympathy with Mr. Gresson and his family in their bereavement was carried, members standing as a mark or respect.

Mr. C. H. Treadwell (Vice-President) referred to the death of Mr. Herbert Page, the Resident Director in Australia of Messrs. Butterworth & Co. (Australia) Ltd., who was well and favourably known to members of the legal profession and a personal friend of many of them. A resolution expressive of the Council's sympathy with Mrs. Page and her daughter in their bereavement, and also with Messrs. Butterworth & Co. in their loss, was carried.

Sir Alexander Gray, K.C. Prior to the business of the Council, Mr. H. F. Johnston, K.C., took the opportunity to express the congratulations of the Society to Sir Alexander Gray, K.C., its President, upon his appointment to knighthood. Mr. Johnston stated that there was no need to descant upon the great work done for the profession by Sir Alexander, and it was therefore all the more gratifying to see that he was described in the London *Times* as "President of the New Zealand Law Society." Sir Alexander's life and conduct were such as to render him singularly fitted for the office of knighthood, and legal practitioners throughout New Zealand joined in congratulating him and in wishing him many years in which to enjoy the honour.

Mr. N. G. Armstrong, President of the Wanganui District Law Society, expressed the gratification of the country Societies at the distinction conferred upon the President of the New Zealand Law Society, and Mr. A. M. Goulding, President of the Auckland District Law Society, added the congratulations of his Society, pointing out the phrase "trusty and well-beloved," which he understood was used in a patent of knighthood exactly expressed the profession's sentiments towards Sir Alexander.

The motion was then carried with acclamation.

In reply, Sir Alexander Gray expressed his gratitude for the laudatory remarks made concerning himself.

He regarded the distinction conferred upon him as a compliment to the legal profession as a whole, and had been much touched by the many congratulatory messages received from his friends in the profession expressive of their regard and approval.

Mr. W. A. Hawkins. At a suitable stage during the proceedings of the meeting, the opportunity was taken of presenting to Mr. W. A. Hawkins, late Secretary of the Society, a radio-gramophone as a token of esteem. The President expressed the satisfaction of the Society with the performance by Mr. Hawkins of his duties during the past eight years, and the latter in a brief speech returned thanks for the handsome gift and expressed his acknowledgment of the kindness and consideration received from members of the Council and others while he was in office.

Report and Balance-sheet. The President, in moving the adoption of the Report and Balance-sheet referred specially to the following matters dealt with in the Report: (1) Appointment of the new Secretary, Mr. H. J. Thompson; (2) Reprint of the Statutes; (3) the number of practitioners who had been struck off the roll, bringing disgrace upon themselves and on the profession.

On the motion of the President, seconded by Mr. C. H. Treadwell, the Report and Balance-sheet were adopted.

Election of Officers for the Current Year. The following gentlemen were unanimously re-elected officers of the Society for the current year—President: Sir Alexander Gray, K.C.; Vice-President: Mr. C. H. Treadwell; Hon. Treasurer: Mr. P. Levi; and Auditors: Messrs. Clarke, Menzies, Griffin, & Ross.

Conveyancing Scale—Costs of Preparing Leases for One Year or less. The Auckland District Law Society, in a letter dated the 8th October, 1932, requested a ruling on the following questions:

(a) Are lessees liable for the lessor's solicitor's costs on all leases, whether for a term of less than one year or over that period?

(b) What is a reasonable scale for the preparation of leases for one year or less?

It was resolved that a committee consisting of Messrs. C. H. Treadwell, P. Levi, and R. H. Webb, who had framed the scale, should be appointed with power to settle the questions and to circulate their decisions among the District Law Societies.

Scale of Charges Allowable on Taxation in Respect of Drawing and Engrossing Documents. Letters had been received from the Auckland, Hawke's Bay, Southland, Taranaki, and Wanganui Societies in connection with the observations of various Registrars on the scale recommended at the meeting of the Council held in September, 1932, and these were considered by the meeting. The general opinion of these Societies favoured the scale as set out in Minute No. 15 of 30th September, 1932, and after discussion it was decided not to alter this scale.

Regulations for the Auditing of Solicitors' Trust Accounts: Regulation No. 33. A lengthy report received from Messrs. J. B. Callan and J. C. Stephens was considered by the Council. It was resolved that the report should be referred to the Audit Committee, and that Messrs. Callan and Stephens should be thanked for the care and trouble taken by them in its preparation.

The Law Practitioners Act, 1931. It was resolved to refer the matter of various suggestions of amendments of the Law Practitioners Act, 1931, for consideration and report on all points to a committee consisting of Messrs. Levi, O'Leary, and Cousins.

Mortgagors' Relief Legislation. The Council considered a letter from the Hawke's Bay District Law Society dated the 19th November, 1932, expressing dissatisfaction with the present system of dealing with Mortgagors' Relief applications, and suggesting that one Judge might be appointed to deal solely with these applications in order to ensure uniformity and despatch. This suggestion was supported by the Wellington District Law Society, in a letter dated the 3rd February, 1933.

Members of the Council having spoken, emphasising the unsatisfactory present position with these applications, the President undertook to see His Honour the Chief Justice on the subject and to represent to him the views that had been expressed.

Reduction of 10 per cent. of Solicitor and Client Charges. (*a*) The Auckland District Law Society had given notice of intention to move to rescind the resolution embodied in a Minute of the Council Meeting of September 30, 1932, this resolution being to the effect that no objection could be taken to the Wellington District Law Society's practice of subscribing accounts with a memorandum as follows:

"A special 10 per cent. discount amounting to £ s. d. will be allowed on the above account if same is paid on or before the day of 193 ."

After discussion, during which Wellington members pointed out that in practice the memorandum had been of great benefit, Auckland's motion was submitted to the meeting and was declared lost.

(*b*) The Wanganui District Law Society, by letter dated the 16th December, 1932, requested a decision on the following points raised in a letter received by them from a firm of practitioners in their District:

1. Does the 10 per cent. reduction apply to fees for work done for Government Departments, where the costs are already low and the bills of costs have to be taxed?
2. Does the 10 per cent. reduction apply where fees are fixed by agreement, as in the case of work done for a Bank or Stock Company at a flat rate, or to work done for Government Departments, such as the State Advances or Crown Lands Departments, where fees are fixed by Statute or Regulation?
3. Does the reduction apply to costs allowed under the Mortgagors' Relief Acts?

It was resolved to inform the Wanganui District Law Society that in the Council's opinion the 10 per cent. reduction had no application to the foregoing cases.

Striking Solicitor off the Roll—Filing Affidavits in the Court of Appeal. An opinion was received from Mr. H. F. von Haast, to whom the question had been referred, stating that he considered that neither party had the right to file affidavits containing additional evidence without the special leave of the Court, and expressing the view that the proceedings in the Supreme Court by District Law Societies against practitioners should include all evidence likely to be of importance in the Court of Appeal.

The Council resolved that the attention of the District Law Societies should be directed to the points mentioned in Mr. von Haast's opinion, and that the matter should also be referred to the Committee appointed to consider amendments of the Law Practitioners Act, 1931.

Solicitors' Charges for Proceedings under the Mortgagors Relief Acts and the National Expenditure Adjustment Act, 1932. The President reported having written

to the Minister of Justice in connection with a suggested increase in the fees allowed in these proceedings, and read the reply of the Minister who regretted that it was not considered desirable to alter the fees, particularly as the Judges or Magistrates had power to increase them in suitable cases.

It was resolved that no further action be taken.

Hawke's Bay Earthquake Disaster. The Hawke's Bay District Law Society forwarded a copy of a letter received from the District Land Registrar at Napier in which the Registrar expressed his gratitude to the Hawke's Bay and New Zealand Law Societies for the work done by members in conveying information as to titles or instruments affecting Hawke's Bay lands.

Mr. H. E. Evans, on behalf of the Hawke's Bay D.L.S., expressed the grateful thanks of that Society for the prompt and valuable assistance received from the New Zealand Law Society after the Earthquake.

Closing of Stamp and Land Registry Offices. The Gisborne and Westland District Law Societies requested the assistance of the Council in preventing the centralisation of the Stamp and Land Registry Offices of the Dominion, the Economy Commission having recommended the closing of all such offices excepting those in the four main cities.

It was resolved that the President and the delegates for Gisborne, Marlborough, and Westland should wait on the Prime Minister and urge the continuance of the District Stamp Offices.

The Rating Act, 1925. Messrs. A. H. Johnstone, A. M. Goulding, and R. P. Towle, the committee appointed to prepare a report relating to suggested amendments of the Rating Act, 1925, notified the Council that this report was now ready.

It was resolved that the report be circulated to District Law Societies and be considered by the Council at its next meeting.

Death Duties Act, 1921, and Valuation of Land Act, 1925. The Auckland District Law Society forwarded a letter, received from a practitioner, which pointed out the unsatisfactory position that now holds in regard to the valuation of land and the possible grave injustice that may result therefrom to beneficiaries in deceased persons' estates where the assets consist of land in whole or part. The provisions of Section 70 of "The Death Duties Act, 1921," and of Section 43 of "The Valuation of Land Act, 1925," were referred to, the practitioner pointing out the defects in the present system of valuation by the Valuer-General and in the right of appeal given by the Valuation of Land Act, there apparently being no remedy in the latter case if an appeal is made to a Magistrate who misdirects himself in a matter of law or is mistaken in his findings of fact.

It was resolved that the Council approved of action being taken to remedy the matters mentioned in the letter, and that these should be referred to the Standing Committee to prepare the necessary amending legislation.

Recovery of Possession of Tenements. The following report was presented by Messrs. C. H. Treadwell and A. M. Cousins, the committee appointed at the last Council meeting to enquire into the question:

REPORT of Committee *re* Recovery of Possession of Tenements.

"At the last meeting of the Council we were appointed a committee to consider and report upon the question of simplifying the procedure in the Supreme Court for recovery of possession.

In our opinion there is no necessity for any alteration of the existing procedure. Under the present practice judgment for possession may be signed if no statement of defence is filed within the prescribed time. If the essential facts are clear or uncontested, the plaintiff may take appropriate proceedings to have any vexatious statement of defence struck out.

We do not think that a plaintiff is likely to suffer any undue delay under the present practice.

(*Signed*) C. H. TREADWELL.
A. M. COUSINS."

It was resolved that this report should be adopted and that Messrs. Treadwell and Cousins should be thanked for their assistance.

Solicitors' Fidelity Guarantee Fund—Annual Report by Committee of Management. The President, as Chairman of the Committee of Management of the Solicitors' Fidelity Guarantee Fund, presented the Committee's report for the year ending 31st December, 1932, and read to the Council the Balance-sheet, Revenue Account, and Statement of Receipts and Payments for the year.

A statement showing the claims pending at 21st March, 1933, and the assets available was also read by the President.

Other Matters. A number of other matters were considered and dealt with.

Legal Literature.

Divorce and Matrimonial Causes.

Rayden and Mortimer's Divorce Practice and Law, Third Edition, by Clifford Mortimer, Barrister-at-Law, of the Probate and Divorce Court, and Hamish H. H. Coates, of the Probate and Divorce Registry, assisted by F. S. H. Bryant, Barrister at Law; pp. cxxvi, 685, and Index, 118.

The last edition of this well-known work came to us in 1926, and since then the Courts have been busy in dealing with new points of practice and with interpretations that have materially extended the scope of a text-book such as this one. The work is thoroughly up to date and is arranged with a care to the convenience of its users. The conciseness and accuracy of text and notes deserve special remark. Each chapter is written in numbered paragraphs with marginal notes, while the footnotes to each paragraph, besides giving the authorities for the text, neatly summarise the points on which they are authorities.

The work is especially useful in New Zealand owing to the provisions of s. 3 of our Divorce and Matrimonial Causes Act, 1928, making provision that, subject to that Act, the Court shall act on principles and rules, which in the opinion of the Court, as nearly as may be conform to the principles and rules upon which the Ecclesiastical Courts in England acted and gave relief. This part of the work under review is exceptionally well and clearly treated, and should be of advantage to those whose practice includes matrimonial causes in this country.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Deeds and Agreements.

(*Concluded from page 84*).

From these cases it is apparent that neither the form of the instrument nor the mode of execution thereof is in itself conclusive on the question of "a deed or not a deed" although some of the relevant considerations (arranged in ascending order of importance) are:

1. What is the form of the instrument, is it in some usual or recognised form of a deed; *e.g.* is it intituled "This Deed . . ." or does it include a formal testatum such as "Now this deed witnesseth" or "these presents witness"?

2. What is the mode of execution of the instrument; is the signature thereto of the party to be bound attested in accordance with statutory requirements; or is the common seal of a body corporate affixed thereto in accordance with the corporation's Articles of Association or other provisions of its constitution?

3. What formal operative words, commonly associated with a deed, are used or implied therein; *e.g.*, do the parties covenant one with the other and his executors or administrators or use other such language indicative of a specialty?

4. What is the effect of the instrument in that does it create by agreement merely rights and obligations between parties providing for future performance, or has it a present operation in that it effects an immediate change of legal relationships; *e.g.*, does the instrument provide that one party will pay and the other accordingly release at a future time, or does it effect a release instanter?

5. What is the dominant purpose of the instrument and is a deed necessary to the attainment of the principal object of the parties; *e.g.* is it desired to create a specialty debt or to pass land in fee-simple?

6. What is the real intention of the parties as evidenced by the whole instrument; *e.g.* do they intend to enter into the solemn obligations and estoppels incident to a deed or specialty, or merely to acknowledge a payment, to give an assent, to signify an approval, or to make a diminutive contract to which the form of a deed is out of proportion?

If then, the instrument is intitutled "This Deed" or if it be in some other recognised or prescribed form of a deed, such as a deed poll or one of the forms of discharge, variation, or assignment of mortgage in the Fifth Schedule to the Property Law Act, 1908, which operate as a deed under s. 67 (2) of the Act, or if again there be some other manifest intention that the document shall take effect as a deed, coupled with the appropriate mode of attestation, this is ordinarily sufficient; but if there is no such manifest intention, it may be difficult to say that the instrument does constitute a deed.

Accordingly one would classify as a deed an instrument under the Chattels Transfer Act, containing express covenants on the part of and appropriately executed by the grantor, but not an instrument under the Land Transfer Act, unless and until duly registered. On the other hand one would not classify as a deed an instrument providing for spearation of and maintenance between husband and wife where such instrument bears merely the leading of "An Agreement . . . Whereby . . ." and includes operative words such as "agree" in contradistinction to "covenant," although perchance the attestation of the signatures of the parties thereto complies with the requirements of s. 26 of the Property Law Act. It is submitted also that the common form of "Agreement" whereby a newly formed company adopts a preliminary agreement for sale and purchase made with a trustee, thereby effecting a novation of contract with the vendor and releasing the trustee who made the agreement prior to the existence of the company is not a deed, although that adopting instrument be executed by the company under seal. In addition to *Froane's* case (*supra*) the Roman maxim *eodem ligamine dissolvitur quo colligatum est* seems to be in point, and a formal instrument is not essential to the purpose.

The Mortgagee and His Lot.

The trials of a mortgagee, with his liability for rates in the case of a first mortgage of rateable property and his all too common difficulty in collecting his money or realising his security, have long since become proverbial. The subject of the latest complaint in this regard seems to be a "freak," but none-the-less real.

The mortgagor, who was a European, disposed of the land (a fee-simple otherwise unencumbered) comprised in the mortgage to a Maori by way of exchange. The subject-matter of the security thereupon became Native freehold land under s. 159 of the Native Land Act, 1931. The Native holding the land for a time exchanged it to a European, whereupon the land became subject to the limitation of area under Part XII of the same Act. The mortgagee, now about to exercise his power of sale, finds that without his assent the class of prospective purchasers has been reduced by the restrictions imposed by s. 248 of the Act of 1931, replacing the well-known s. 74 of the Native Land Amendment Act, 1913.

That these restrictions are material, is shown by *Rayner v. The King* [1930] N.Z.L.R. 441, and the earlier case of *McDonald v. Wake* (1919) G.L.R. 106 thereby approved by the Court of Appeal.

Death of Fiji Barrister: All Fiji was shocked by the death of Mr. Hollins Crompton, son of Mr. Robert Crompton, C.B.E., K.C., who was killed instantly on April 8 when his car went over a 30ft. declivity on the main road from Rewa to Suva. He was regarded as the most brilliant of Fiji's younger generation, and it was believed he was certain to take a leading part in the affairs of the colony. Born 33 years ago in England, he went to Fiji with his parents when a child. He graduated B.A., LL.B. at Auckland University College, and was admitted as a barrister and solicitor in New Zealand in 1924. In the same year he was admitted to the Fiji Bar, and he later became a partner of his father. He married Miss Margaret Scott, daughter of Sir Henry and Lady Scott. She died in 1926 after their son was born.

At a special session of the Supreme Court, the Chief Justice paid a fine tribute to the deceased. "Hollins Crompton," he said, "represented the best traditions of our profession, and his passing is mourned by people of all races to whom without regard for any distinction he gave help and friendship and who paid their last respects and honoured his memory. May Hollins Crompton find peace, rest and mercy in the Supreme Tribunal to which he has been called."

Australian Notes.

By Wilfred Blacket, K.C.

Good News for Husbands. In *Hall v. Wilkins and Wilkins*, the Supreme Court of New South Wales modified "the disadvantages of being a husband" for it held that a husband is not liable for the post-nuptial torts of his wife. Mrs. Wilkins whose name was Vera, though her words upon one occasion were somewhat otherwise, said some things about Kathleen Veronica Hall, and the latter lady brought an action for defamation against Mrs. Wilkins and her husband. The trial Judge assessed the slander sued upon at £25, and entered a verdict against the lady for this amount, and found for the husband defendant on the ground that he was not liable for the tort. In so finding he followed the decision in *Brown v. Holloway*, 10 C.L.R., 89. The Supreme Court on appeal affirmed this decision on the ground that as the High Court was the final Court of Appeal for the Commonwealth, although its decisions may be the subject of appeal to the Judicial Committee, the judgment in *Brown v. Holloway* was properly followed, notwithstanding the House of Lords' decision in *Edwards v. Porter*. It was pointed out by the Chief Justice in delivering the unanimous opinion of the Supreme Court that the actual decision in *Edwards v. Porter* was that the husband was not liable inasmuch as the fraud sued upon was directly connected with the money-borrowing contract made by the wife, and therefore statements as to the general rule of liability were not necessary to the decision and might be treated as *obiter dicta*—and this, of course, with the reverential respect that a Judge always has for the other Judge whose opinion he refuses to follow.

The Cow that went dry. Calamity befell the legal profession in Victoria when the action brought by Herbert Walker & Co., against the Nestles Condensed Milk Company tottered along to a sudden and inglorious conclusion. Begun in 1927, the pleadings and interlocutory applications had occupied three years, and another year had been spent in taking evidence on commission. The actual hearing of the action began in November last, and after about a hundred witnesses had been examined, there being several hundred more to follow, McArthur, J., who probably regarded the matter as a sort of disease rather than a lawsuit, suggested to counsel that they ought to settle it. They made a conscientious effort to do so but failed, and so the case jarndyced along for another month when it stopped, the parties agreeing to revert to the *status quo ante*, or as near thereto as they could get after paying their respective bills of costs, together amounting probably to £40,000, for witnesses are more expensive than condensed milk.

His House was his Fore-castle.—The s.s. *Makura* tied up at her Sydney wharf on a certain evening at 6.20 p.m., and Frank Robertson, one of her stewards, went ashore for a drink and was served with the refreshment he required. He also bought a bottle of stout, and being detected in the act of carrying it away was charged with the offence of obtaining it during prohibited hours. For the prosecution it was contended that as he lived in the ship during its stay in port he had not been away from his home since the previous day, and, therefore, was not a "traveller." The defence contended that, as on the previous night he had slept 200 miles away from the hotel, he was a sure-enough traveller although his home travelled with him. The Magistrate held that Robertson was a *bona-fide* traveller, but obviously was not hopelessly in love with his own opinion on the point.

The True Worth of a Wife.—There was a curious happening in the New South Wales Divorce Court recently. A petitioner sued for divorce on the only ground that involves a co-respondent and claimed large damages. The respondent and the co. cheerfully admitted the offence alleged, and the case went to the jury on the issue of damages only. The jury found that the petitioner had sustained no damage. I do not give the names of the parties because they are not people whom readers of the Journal would like to know, and besides that I have mislaid the report of the case.

In the District Court, Sydney, Mrs. Todd obtained a verdict of £120 against Warrington Conolly, solicitor. Her son had been killed by a motor-car, and she retained the defendant to bring an action against R. J. Johnson, the driver of the car, for negligence. He did not issue the writ claiming under the Compensation to Relatives Act, until after the expiration of the time, twelve months, limited by the Act, and so she was deprived of her legal remedy.

James Baker, solicitor, N.S.W., was by the Supreme Court suspended from practice for six months for various peculiarities of conduct of which only one now requires mention. He agreed to make an application on behalf of a client, Mrs. Tarlinton, under the Testators Family Maintenance Act for such costs as he should be allowed out of the estate. On this application Mrs. Tarlinton obtained an order for half the income of the estate and then agreed that Baker should have a bonus of £100. Mr. Baker then prepared an assignment of portion of her share in the residuary estate of the testator and in this deed falsely recited that she was indebted to him in the sum of £100 for money lent and costs for professional services. This recital was the subject of severe comment by the Court, but as in an earlier case of false statements inserted by a solicitor in a document prepared by him a suspension of six months only had been ordered, Mr. Baker obtained the benefit of that precedent.

T. J. McFadden and W. D. Schrader are Sydney solicitors of long experience and high repute. They, some years ago agreed to enter into a partnership for the purpose of buying, subdividing, and selling land. The partnership transactions necessarily were to extend over several years and there were many conditions as to capital and other matters included in the negotiations, but as they never drew up any partnership agreement Harvey, C.J.E., had to inquire into the matter for many days in order to ascertain what each partner had agreed to do and what each had done in order to tell them what their rights and liabilities were. He commented with some force on their omission to draw up any partnership agreement, but this oversight quite probably arose out of the fact that there was no client who could be charged with the costs of it. No careful solicitor would draw such a document until he knew that his costs would be duly paid.

A Sudden Death Decision.—*The Brave New World*, by Aldous Huxley, having been banned by the Customs authorities, it was quite natural that a number of persons would write to the papers stating that the book was just the kind of book that they loved best, and that the world therein described was just the sort of place they would wish to adorn by their presence and performances. Thereupon Lieut-Colonel White, Minister of Customs made a sporting offer. He promised to allow the importation of one book; the importer to be then prosecuted in a Court of Petty Sessions, the Minister undertaking not to appeal from that jurisdiction, but to accept as final the decision of the Magistrate as to whether the book is literature or mere beastliness. The Minister indicated his own opinion that in making this offer he was backing a home-and-dried certainty, and from this it would appear that he has read the book.

What is not income.—In *Carse v. Federal Income Tax Commissioner*, and *Federal Income Tax Commissioner v. Carse*, Wasley, J., in the Supreme Court, Melbourne, decided important points relating to income. In the first case the facts were that Falkiner & Sons, Ltd., had prior to 1914 accumulated a reserve fund of £520,000, £266,000 of this amount being represented by the face-value of British Consols. In 1927, it was resolved that these should be sold, and by a later resolution it was directed that the net proceeds £134 19s. 0d. should be distributed as a bonus to shareholders. The appellant Carse received £2,012 of this bonus in respect of his holding in the company and the Commissioner claimed that this amount was taxable income. His Honour ruled against this contention and directed the assessment to be amended accordingly. In the second case, the company had sold its Tuppal station for £49,000 and had distributed that sum by paying it as bonus to its shareholders. The station had been bought for the purposes of the company's business and not for resale. The appellant won the second leg of his double for Wasley, J., held that the bonus received by the appellant was not, as contended, by the Commissioner, taxable income.

Concerning some Professional Men.—In Melbourne a policeman found that a man who was driving a motor-car had no license. By successive questions he ascertained that the culprit was a barrister, a K.C., and the Attorney-General of the Commonwealth. Then as he pocketed his note-book he said with much satisfaction: "Ah, well then, it'll be no use you trying to plead ignorance of the law."

Politicians and Judges. Sir Francis Gavan Duffy, C.J., High Court of Australia, is to take six months' leave of absence and will then probably retire. Sir Phillip Street, C.J., N.S.W., will be ousted from office by his age in February. Mr. Bruin, K.C., formerly Premier of New South Wales, is mentioned for possible appointment to either position. After his Ministry crashed in 1930, his health, never robust, prevented him from acting as leader of the Opposition, and later on precluded his acceptance of office under Mr. Stevens; but it is probable that he may be quite strong enough to attain to the position of Chief Justice of either Bench. As he is still a member of Parliament, holding what was thought to be a perfectly safe National seat, his advancement would necessitate a by-election, and it is quite likely that the timorous Stevens may not be willing to face this test of his popularity. Which things all go to show that the Bench ought not to be the reward of political eminence, pull, or power—a platitude which has been already sufficiently illustrated.

Practice Precedents.

Injunctions.

See Introductory Notes, p. 75 *ante*.

Assuming a Motion for an Order to Rescind is not filed and a Motion for Perpetual Injunction is filed the motion is as follows:—

(*Same heading.*)

TAKE NOTICE that Mr. of counsel for the Plaintiff company WILL MOVE this Honourable Court at the Supreme Courthouse on day the day of 19 at 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER FOR A PERPETUAL INJUNCTION in terms of the Statement of Claim filed herein UPON THE GROUNDS appearing in the said Statement of Claim and in the affidavit of filed herein in support thereof.

Dated at this day of 19 .

Solicitor for Plaintiff Company.

This Notice of Motion is filed by Solicitor for Plaintiff company whose address for service is at the offices of Messrs. of Solicitors.

FORM OF JUDGMENT.

day the day of 19 .

THIS ACTION coming on for trial on the and days of 19 before the Honourable Mr. Justice UPON READING the Notice of Motion filed herein and the Statement of Claim and Statement of Defence filed herein and the affidavits filed in support and in opposition thereto AND UPON HEARING Mr. of counsel for the Plaintiff company and Mr. of counsel for the Defendant THIS COURT DOTH ORDER AND ADJUDGE that the Defendant his servants or agents or any or either of them be and they ARE HEREBY RESTRAINED from in any way carrying on the business of the Defendant under the title or name of Wonder Full Foods [*town*] either alone or in conjunction with any other word or words howsoever in connection with the business of Defendant as a caterer and tea-room proprietor in the City of AND IT IS ORDERED that a WRIT OF INJUNCTION DO ISSUE ACCORDINGLY AND IT IS FURTHER ORDERED that the Defendant DO PAY to the Plaintiff Company the sum of for costs.

By the Court,

Registrar.

PRAECIPE FOR WRIT OF INJUNCTION.

(*Same heading.*)

PRAECIPE for Writ of INJUNCTION against (Defendant) pursuant to the Judgment of this Court dated day the day of 19 .

Dated at this day of 19 .

Solicitor for Plaintiff Company.

To the Registrar, Supreme Court, .

WRIT OF INJUNCTION.

(*Same heading.*)

GEORGE THE FIFTH, etc.*

To the above-named (Defendant) and his servants or agents and each or any or either of them.

WHEREAS by a Judgment of this Honourable Court bearing date the day of 19 IT WAS ORDERED AND ADJUDGED that you the said Defendant your servants

* See Form No. 29, *Stout and Sim*, 7th Ed. p. 401, for the King's title.

or agents be and you and they were thereby restrained from using in or in connection with (Defendant's) business as a caterer and tea-room proprietor in the City of the words Wonder Full Foods [*town*] and that a Writ of Injunction do issue accordingly WE THEREFORE IN CONSIDERATION OF THE PREMISES do henceforth and forever strictly enjoin and restrain you and each of you from using in or in connection with the said business the title or name of Wonder Full Foods [*town*] either alone or in conjunction with any other word or words howsoever in or in connection with the business of (Defendant) as a caterer and tea-room proprietor in the City of .

WITNESS the Right Honourable Chief Justice of New Zealand at this day of 19 .

Registrar.

MOTION FOR LEAVE TO ISSUE WRIT OF ATTACHMENT.

(*Same heading.*)

TAKE NOTICE that Mr. of counsel for Plaintiff company will move this Honourable Court at the Supreme Courthouse on day the day of 19 at 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER that the Plaintiff company may be at liberty to issue a Writ of Attachment against the above-named (Defendant) for Contempt of Court in disobeying a Writ of Injunction issued pursuant to an Order of this Honourable Court made on the day of 19 restraining him and his servants or agents from using in or in connection with his business as caterer and tea-room proprietor the words Wonder Full Foods [*town*] in the City of which said Writ was sealed on the day of 19 and was served on the Defendant on the day of 19 AND FOR SUCH FURTHER OR OTHER ORDER as to this Court may seem meet AND FOR A FURTHER ORDER that the Defendant DO PAY to the Plaintiff company the costs of sealing the said Writ of Injunction and the costs of and occasioned by this application and incidental to the issuing and execution of the said Writ of Attachment AND that all such costs be added to the amount of the Judgment recovered by the Plaintiff company AND ALSO TAKE FURTHER NOTICE that upon the hearing of the said application the Plaintiff company intend to use the affidavits filed in this action in addition to the affidavit filed in support of this application.

Dated at this day of 19 .

Solicitor for Plaintiff Company.

To Solicitor for the above-named Defendant and to the above-named Defendant and to the Registrar of this Court.

AFFIDAVIT IN SUPPORT OF ORDER FOR LEAVE TO ISSUE WRIT OF INJUNCTION.

(*Same heading.*)

I, of the City of company manager, make oath and say as follows:—

1. That I am the manager of the Plaintiff company.

2. That Judgment was given for the Plaintiff company in the above action on the day of 19 whereby it was ordered and adjudged that the above-named Defendant his servants or agents or either or any one of them be and they were thereby restrained from in any way carrying on the business of the Defendant in the City of under the title or name of Wonder Full Foods [*town*] in or in connection with the said business and it was ordered that a Writ of Injunction do issue accordingly.

3. That I am informed and verily believe that the said Writ of Injunction was duly issued and served on the Defendant personally on the day of 19 .

4. That the Defendant has failed to comply with the said Injunction.

5. That since the said Judgment the Defendant has removed part of the title or name only and has substituted for the said title or name the words Wonder Foods.

6. That on the day of 19 I notified the Defendant in writing that failing full compliance with the terms of the said Judgment steps would be taken to compel him to do so, a copy of the said notification being attached hereto and marked "A."

7. That the defendant has still failed to comply with the terms of the said Judgment and the said Writ of Injunction.

SWORN, etc.

ORDER FOR WRIT OF ATTACHMENT.

(*Same heading.*)

day the day of 19 .

Before the Hon. Mr. Justice

UPON READING the Notice of Motion for leave to issue a Writ of Attachment filed herein and the affidavits filed in support thereof AND UPON HEARING Mr. of counsel for the Plaintiff company in support of the said Motion IT IS ORDERED that leave be and the same is hereby granted to the Plaintiff company to issue a Writ of Attachment against the Defendant [*name*] of in the City of caterer and tea-room proprietor for his contempt in disobeying a Writ of Injunction issued pursuant to an Order of this Court made on the day of 19 restraining him and his agents or servants from using in or in connection with his business as caterer and tea-room proprietor the words Wonder Full Foods [*town*] either alone or in conjunction with any other words howsoever in connection with his said business in the City of AND IT IS FURTHER ORDERED that the said Writ of Attachment do lie in the Office of this Court until the expiry of three days from the date hereof AND IT IS FURTHER ORDERED that the Defendant do pay to the Plaintiff company the sum of £ for costs.

By the Court,

Registrar.

PRAECIPE FOR WRIT OF ATTACHMENT.

(*Same heading.*)

PRAECIPE for Writ of Attachment against [*full name, address, and occupation of defendant*].

Dated at this day of 19 .

Solicitor for Plaintiff Company.

To the Sheriff of the District of .

WRIT OF ATTACHMENT.

(*Same heading.*)

GEORGE THE FIFTH, etc.

To the Sheriff of the District of .

WE COMMAND YOU to attach [*defendant, address, occupation*] and to have him here before this Court at forthwith there to answer as to such matters as are then and there laid to his charge and further to perform and abide by such order as the Court shall make and HEREOF FAIL NOT and bring this Writ with you.

WITNESS the Right Honourable Chief Justice of New Zealand at this day of 19 .

Registrar.

AFFIDAVIT OF SERVICE OF WRIT OF INJUNCTION.

(*Same heading*).

I, of the City of Law Clerk, make oath and say as follows:—

1. That I am a Law Clerk in the employ of Solicitor for the Plaintiff company, in this action.

2. That I did on the day of 19 serve the above-named Defendant with a Writ of Injunction, a true Copy of which is hereunto annexed and marked "A" at by delivering the same to him personally.

3. That the said is and has been personally known to me for the past five years and that at the time of service of the said Writ of Injunction the said (Defendant) acknowledged to me in writing as appears by the memorandum hereto attached and marked "B" that he was the Defendant therein named.

SWORN, etc.

AFFIDAVIT THAT DEFENDANT IS NOT A DISCHARGED SOLDIER, ETC., IN SUPPORT OF WRIT OF SALE FOR COSTS.

(*Same heading.*)

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

1. That the above-named Defendant is not an assisted discharged soldier within the meaning of the Soldiers Protection Regulations 1919 as continued in force by the War Regulations Continuance Act 1920.

2. That the said Defendant is not the guarantor of a soldier within the meaning of the War Regulations of the 7th May 1918 as continued in force by the War Regulations Continuance Act 1920 in respect of the Judgment obtained against him in the above action.

SWORN, etc.

PRAECIPE FOR WRIT OF SALE.

(*Same heading.*)

PRAECIPE for Writ of Sale against the said Defendant for the sum of £

Dated at this day of 19 .

Solicitor for Plaintiff Company.

To the Sheriff of the District of .

WRIT OF SALE.

(*Same heading.*)

To the Sheriff of the District of .

See form No. 31 (*Stout and Sim*, 7th Ed. page 401.)

See also Directions as to execution to be endorsed on Writ. Form No. 30. The Writ of Sale is served on the Sheriff personally together with:

1. Praecipe for issue and return of Warrant.
2. Letter indemnifying the Sheriff against costs and disbursement in connection with the execution.
3. Execution fee (£1).
4. Letter directing Sheriff as to any Chattels to be seized (if known to Plaintiff).

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.

AGRICULTURE.

Agricultural Holding—Landlord—Notice to Quit—Estoppel—Recovery of Compensation.—FARROW *v.* ORTTEWELL (p. 387).

As to compensation for disturbance: DIGEST 2, p. 48.

COMPANIES.

Company—Fraudulent Preference—Mortgage—Registration—Suffering Judicial Proceeding—Withdrawal of Opposition.—M.I.G. TRUST, LTD., *In re* (p. 366).

As to fraudulent preference: DIGEST 10, p. 974.

DAMAGES.

Contract—Penalty or Liquidated Damages—Inadequacy of Sum as compared with Prospective Loss.—CELLULOSE ACETATE SILK CO. *v.* WIDNES FOUNDRY (1925), LTD. (p. 108).

As to liquidated damages or penalty: DIGEST 17, p. 136.

INCOME TAX.

Income Tax—Financial Business House—Profit made by Conversion of Bonds.—WESTMINSTER BANK *v.* OSLER (INSPECTOR OF TAXES) (p. 386).

As to profits on realised investments: DIGEST 28, p. 62.

MASTER AND SERVANT.

Contract of Service—Wages during Sickness—Incapacity from Accident arising out of and in course of Employment.—MALONEY *v.* ST. HELENS INDUSTRIAL CO-OPERATIVE SOCIETY LTD. (p. 365).

As to absence of servant through illness: DIGEST 34, p. 86.

NUISANCE.

Highway—Obstruction Necessary and Reasonable—Damage to Owner of Neighbouring Property.—HARPER *v.* HADEN & SONS, LTD. (p. 386).

As to rights of neighbouring owners: DIGEST 36, p. 186.

REVENUE.

Stamp Duty on Deeds—Annuity—Periodical Payment.—HENNELL *v.* INLAND REVENUE COMMISSIONERS (p. 387).

As to stamp duty on annuity bonds: DIGEST 39, p. 275.

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