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

"*An advocate should be fearless in the interests of his client; but with this restriction, that the arms he wields should be those of the warrior, and not those of the assassin. It is his duty to strive to accomplish the interest of his clients*—per fas, *but not* per nefas. *It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge of truth and justice.*"

—Sir Alexander Cockburn.

"*That has always been regarded as the definition of what counsel may do. I suppose Sir Alexander Cockburn was rather thinking of the duel. But the weapons of the warrior will not preclude you from making a smoke-screen between your client and the Crown. The weapons of a warrior now include the various kinds of bombs which may be exploded to the confusion of the prosecution.*"

—Lord Darling.

Vol. IX. Tuesday, June 20, 1933 No. 11

"Further and Other Relief."

Attention has been drawn to the form of Statement of Claim, p. 76 *ante*, relative to proceedings under Rule 466 of the Code of Civil Procedure, where an Injunction only is sought. In such Form, the prayer for relief, besides asking for an Injunction, asked "for such further and other relief in the premises as to this Court shall seem just." It has been suggested that the inclusion of this prayer for general relief is incorrect in view of the wording of Rule 466, since, in a note to Rule 462 the authors of *Stout and Sim's Supreme Court Practice* say in their latest edition, at p. 294, "no relief beyond the issue of an injunction can be claimed in a statement of claim filed and served without a writ of summons." Attention has likewise been directed to *Colegrove v. Young*, (1902) 22 N.Z.L.R. 491, there cited, as to whether a plaintiff in such a proceeding can amend his statement of claim as in any ordinary action.

Two considerations arise: (*a*) How have the Courts treated its inclusion in statements of claim under Rule 466, where an injunction only is sought; and (*b*) is the prayer for general relief a claim for anything more than the injunction which is sought?

In the first place, it must be borne in mind that its inclusion does not necessarily import a claim for any additional or alternative relief, since a prayer for general relief "implies that everything which is necessary for the purpose of the relief for which he [the plaintiff] expressly prays may be done": *Jervis v. Berridge*, (1873) 8 Ch. App. 351.

An examination of the judgments in *Colegrove v. Young* (*supra*) shows that too much reliance on the point in question must not be placed on the headnote, which says:

> "No relief beyond the issue of an injunction and costs can be claimed in a statement of claim for an injunction filed and served without writ under Rules 452 [now 466] and 265 [now 270]. *Quaere*, Whether a plaintiff can amend his statement of claim in a proceeding under those rules as he can in an ordinary action."

Here there was, first, a claim that the defendant be ordered to deliver up all lists of customers of the late partnership which were in his possession or custody or under his control—which certainly was different in substance from the claim for injunction specified in the second and third paragraphs of the claim,—and the fourth payment was the general prayer for relief. Amendment was asked for, and under Rule 265 (now 270), Stout, C.J., allowed the abandonment of the first and fourth prayers for relief. This was part of a judgment of the Supreme Court, and it was not referred to in the subsequent judgments in the Court of Appeal in the case cited.

We now come to *Dillon v. Macdonald*, (1902), 21 N.Z.L.R. 375, 4 G.L.R. 375, where it was held by Edwards, J., in the Supreme Court and affirmed on appeal, that Rule 116 enabling a plaintiff, in addition to asking for specific relief, to ask generally for such judgment as the Court may consider him entitled to, must in its application be limited to granting to the plaintiff relief of such a kind that the statement of claim gives the defendant notice that it will or may be asked for. From this, it should follow that the general prayer for relief in a statement of claim under Rule 466 has application only to the preceding claim for an injunction to which alone plaintiff is entitled under the procedure covered by that Rule, and, it is submitted, does not vitiate that claim.

Against this contention, there is *Kerr v. Brown*, [1925] G.L.R. 379, where Reed, J., referred to *Mansford v. Ross*, (1885) N.Z.L.R. 4 S.C. 290, quoted as an authority by Stout, C.J., in *Williamson and Musgrove v. Dalgleish*, (1899) 1 G.L.R. 269,—which report is silent as to the prayer in the statement of claim which was objected to. The learned Judge followed, though apparently with some hesitation, the earlier authority, after observing:

> "The objectionable part of the prayer is quite unnecessary as regards the form of the injunction, and gives no power to the Court to give damages, nor, in fact, any other relief than that of an injunction."

It should be noted that in *Mansford v. Ross* (*supra*), Williams, J., said,

> "The question is not without difficulty. . . . The way in which the rules are framed makes the question exceedingly difficult to understand. I think my construction of the rule is the right one, but one speaks with considerable diffidence, because probably no one man might take one view and another another view. My view is based on convenience of construction."

The words of the learned Judge anticipate the doubts that have since arisen, and now arise, as to the definition of Rule 466, since, in *Fashions, Ltd. v. Burston*, [1927] G.L.R. 28, the prayer for general relief was included in the statement of claim, as it has been in many another since, without objection from the Bar or comment by the Bench.

It would be well if the matter were authoritatively settled or the Rule recast in the light of present-day opinion, without the payment of too much regard to the following of old judgments for the sake of conformity alone. So much doubt has been expressed in those judgments that a settlement of the point would be welcomed.

After such consideration as has been given to the procedure in question, it only remains to ask: "Does the prayer for general relief mean anything at all?" In England, "it is not necessary to ask for general or other relief, for this 'may always be given, as the Court, or a Judge may think just, to the same extent as if it had been asked for.' (Order xx, r. 6)": *Odgers on Pleading and Practice*, 8th Ed. 213; and see also *Bullen and Leake's Precedents of Pleadings*, 7th Ed. 39.

In *Hiern v. Mill*, (1806) 13 Ves. 119, 33 E.R. 237, a rule is laid down by Lord Erskine, L.C., to the effect that a plaintiff "cannot desert the specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances will, consistently with the rules of the Court, maintain that relief." Applying this to the procedure under Rule 466, the general prayer does not ask for anything that is inconsistent with the rules of the Court, inasmuch as the plaintiff under those rules cannot desert the specific relief (the injunction) prayed.

This rule was followed in *Cockerell v. Dickens*, (1840) 3 Moo. P.C.C. 98, 13 E.R. 45, which held that it has always been the practice of the Court to confine the relief given under the power to give general relief to relief which is consistent with the case made out on the pleadings, and not to give relief inconsistent with it. This seems to imply that where an injunction only is sought the inclusion of a prayer for general relief is mere surplusage; and that its inclusion or omission cannot, therefore, invalidate the claim for the injunction itself. See also, hereon, *Jervis v. Berridge* (*supra*).

So far as New Zealand, specifically, is concerned, Mr. J. C. Stephens in his recently published authoritative work, *Supreme Court Forms*, says, at p. xlii, in relation to the general prayer in a statement of claim: "The effect of the addition of these words has never been decided. In an action, the statement of claim may include a prayer for general relief. R. 116. That widens the scope of the statement of claim to some extent, but to what extent is not clear."

Judicial Salaries' Reduction.

We have already fully stated our reasons for resisting, on constitutional and other grounds, the application of "cuts" to the salaries of the Judges of our Supreme Court (see Vol. VII, p. 101). It now appears from a number of recent commentaries in the Press in England that the "cuts" in judicial salaries there is increasingly regarded as having been ill-advised, and that they ought not to have been made.

The line of objection seems now to be quite apart from any question of constitutional law, that the "cuts" tend seriously to affect the public opinion of the standing and prestige of the Judges as persons who, in their judicial capacity, have ever stood apart from any influence of the executive or administrative authorities. It is felt that no reduction in their salaries should have been made if only for the reason that the Judges are called upon, not infrequently, to decide issues between the Crown and the subject, and to show the same impartiality—as they do in fact—as in cases between subject and subject.

Summary of Recent Judgments.

COURT OF APPEAL
Wellington.
1933.
Mar. 29, 30; May 25
Myers, C.J.
Reed, J.
MacGregor, J.
Ostler, J.
Smith, J.

THE KING v. FREDERICK WILLIAM SEATON AND RITA ISABELL SEATON.

Criminal Law—Evidence—Incest—Legitimacy—Mother's Evidence of Non-access—Applicability to Criminal Trials and effect of Rule of Law prohibiting Spouse from giving Evidence of Non-access after Marriage to bastardise Child born in Wedlock.

Case Stated by His Honour Mr. Justice Herdman for the opinion of the Court of Appeal, pursuant to s. 442 of the Crimes Act, 1908.

The accused were jointly tried for incest. The relationship alleged between them was that of father and illegitimate daughter. The acts of intercourse were proved. Mrs. B., the mother of the female accused, was tendered as a witness, after evidence had been given *aliunde* tending to prove non-access of her husband at the time the female must have been conceived, and there was other evidence to prove that the male accused was the actual father of the female accused. The evidence of Mrs. B. was admitted subject to objection by counsel, and she testified that the male accused was the father of the female accused; that the signature to an entry in the birth register of the birth of the female accused, showing that the father was the male accused and the mother Mrs. B., and that the child was illegitimate, was in the handwriting of the accused, and that he said he wanted the children to be registered in his name because he was the father. In cross-examination by counsel for the female accused, she said, "B. (her husband) was not with me when S. [the male accused] first went there," the place where the female accused was conceived and born.

Herdman, J., directed the jury that they were entitled to draw an inference from the evidence of another witness that no sexual intercourse could have taken place between B. and Mrs. B. by reason of the former's absence at the time when the female accused was conceived, and that, if they did draw that inference, they were then entitled to consider Mrs. B.'s evidence for the sole purpose of determining the paternity of the female accused.

The jury found the accused guilty, and *Herdman, J.*, reserved for the Court of Appeal the question whether Mrs. B.'s evidence was properly admitted.

In the Court of Appeal:

Leicester for F. W. Seaton; **Solicitor-General, Fair, K.C.,** with him **C. H. Taylor,** for the Crown.

Held, per *Myers*, C.J., *Reed*, *MacGregor*, and *Smith*, JJ., (*Ostler*, J., dissenting), That the rule of law, that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock, applied in *Russell v. Russell*, [1924] A.C. 687, to divorce proceedings, applies in all cases and in all Courts, the Court of Appeal being bound not only by the actual decision of the House of Lords, but also by the expressions of opinion in the majority decisions of the *ratio decidendi*.

Held, per *Myers*, C.J., *Reed* and *MacGregor*, JJ., That the rule referred to (*supra*) makes inadmissible not only evidence of non-intercourse with the husband, but also evidence that another man was the actual father of the child, even though there might be evidence *aliunde* of the non-access of the husband, the relationship being directly in issue and necessarily involving the question of legitimacy, the question whether the male accused was the father of the female accused connoting proof that the husband was not the father. The mother's evidence was, therefore, wrongly admitted.

Per *Ostler*, J., That the Court of Appeal is bound only by the actual decision in *Russell v. Russell*, [1924] A.C. 687, that the rule of evidence which prevents a married man or woman from bastardising his or her child applies to proceedings in divorce, and not by the expressions of opinion that the rule was one of general application in the judgments of the majority of the House of Lords which were *obiter dicta*; that the rule

does not extend to criminal cases; that it would be contrary to the interests of justice to extend it; and that the evidence of the mother to prove the male accused was the father of the female accused was admissible.

Per *Smith*, J., That the decision in *Russell v. Russell*, [1924] A.C. 687, had reference to the question whether non-access could be proved by a spouse for the purpose of rebutting the presumption of legitimacy and was not directed to the question whether actual paternity could be proved by a spouse during a trial after satisfactory evidence to rebut the presumption of legitimacy had been given *aliunde*; that the necessity of the case required the application of the rule laid down in relation to bastardy cases in *Rex v. Reading* (1735) Cas.t. Hard. 79; 95 E.R. 49; Cun. 140; 94 E.R. 1113; that, after evidence has been given *aliunde* of the non-access of the husband, the mother may give evidence of intercourse with the person alleged to be the actual father; and that, as she had given evidence other than that of intercourse with the male accused, a part of her evidence had been wrongly admitted.

Per *Myers*, C.J., *Reed*, *MacGregor*, and *Smith*, JJ., That, as there was other evidence than that wrongly admitted proper to be submitted to the jury, a new trial should be ordered.

New Trial Ordered.

Solicitors: **Crown Law Office**, Wellington, for the Crown; **K. C. Aekins**, Auckland, for the accused, F. W. Seaton.

Case Annotation: *Rex v. Reading*, 3 E. & E. Digest, p. 365, para. 56; *Russell v. Russell*, *ibid.* 1933 Supplement (Vol. 3, p. 43) para. 70a.

SUPREME COURT
Wellington.
May 15; June 2.
MacGregor, J.

WILLIAMS v. WILLIAMS.

Divorce—Deed of Separation—Provision therein that agreement void if Husband proves Wife's association with Specified Persons—Alleged Breach of such Provision by Wife—Whether deed "in full force" and binding on Husband in respect of past Maintenance—"Molest, disturb, or annoy—" Divorce and Matrimonial Causes Act, 1928, s. 10 (i).

Two actions heard together by consent, the parties in each case being the same. In the first case, Mrs. W. sought a divorce from her husband as based on a deed of separation, and, in the second case, she claimed the sum of £463 10s. as arrears of maintenance due under the same deed, in respect of two children of the marriage.

The deed of separation contained a clause that the agreement should be null and void and not binding on the husband in the event of his proving that the wife at any time thereafter had associated with certain specified persons, and that the other individual clauses of the deed (including a covenant by the husband to pay maintenance for the support of the children) should be "deemed to be read in conjunction with and subject to such clause." The wife on two occasions met and conversed with one of the prohibited persons.

On the wife's seeking a divorce on the grounds of mutual separation on the ground that the agreement was in full force and had been in full force for not less than three years, the husband contended that the said meetings amounted to a breach of the deed, in 1926 at the time of such meetings, and rendered it null and void.

Leicester, for the petitioner (and plaintiff); **C. A. L. Treadwell** (with him **Joseph**) for the respondent (and defendant).

Held, 1. That, even if the husband's contention were sound, which was doubtful, the agreement for separation was in full force, and had been in full force for not less than three years within the meaning of s. 10 (i) of the Divorce and Matrimonial Causes Act, 1928.

2. That the effect of the said clause was to make the contract voidable by the husband, and, until he elected to avoid it by proving the forbidden association, the deed was binding on both parties. As the husband had not so elected or exercised his right of avoidance, (assuming that he had such right) until he filed his statement of defence to the wife's writ for maintenance, he was liable for the arrears up to date of the issue of the writ.

3. That a covenant by the wife that she would not "molest, disturb, or annoy" her husband was not broken by her taking the children to England without her husband's knowledge or consent, thereby depriving him of his right of access given by deed of separation, since such removal had been effected in order to protect the wife and children from the importunity and probable violence of the husband. If there had been a breach, such breach was no defence to an action by the wife for arrears of maintenance of the children, the husband's remedy being a counterclaim for damages.

Fearon v. Hunt, (1884) 28 Ch. D. 606, and **Marshall v. Marshall**, [1923] 2 W.W.R. 820; 27 E. & E. Digest, 239, para. 2102 (i).

Solicitors: **Leicester, Jowett, and Rainey**, Wellington, for the petitioner (and plaintiff); **Treadwell and Sons**, Wellington, for the respondent (and defendant).

NOTE:—For the Divorce and Matrimonial Causes Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Husband and Wife*, p. 865.

Case Annotation: *Fearon v. Earl of Aylesbury*, 27 E. & E. Digest, p. 231, para. 2019; *Hunt v. Hunt*, *ibid*, p. 235, para. 2062; *Marshall v. Marshall*, *ibid*, p. 239, para. 2102 (i).

COURT OF ARBITRATION
Christchurch.
May 15.
Frazer, J.

IN RE FORBES AND OTHERS AND THE CANTERBURY GROCERS' ASSISTANTS' INDUSTRIAL UNION OF WORKERS.

Industrial Conciliation and Arbitration—Conciliation Commissioner's Discretion—When Exercisable—Industrial Conciliation and Arbitration Act, 1925, ss. 49, 89, 92, 94, 113; —Amendment Act, 1932, s. 5.

Case Stated by the Conciliation Council at Christchurch, set up to consider a dispute between one Forbes and other master grocers and the Canterbury Grocers' Assistants' Industrial Union of Workers in respect of wages and conditions of employment in the retail grocery trade in the Canterbury Industrial District. The facts are as follows:

F., a master grocer, made an application that an industrial dispute be heard by a Council of Conciliation and desired that the Canterbury Grocers' Assistants' Industrial Union of Workers and the employers in the retail grocery trade in the Canterbury Industrial District be made parties to the proceedings. The Conciliation Commissioner fixed a date for the hearing of the dispute, and all such employers were duly notified. On the sitting of the Council of Conciliation, the Commissioner intimated that he had struck out the names of nine employers in exercise of his powers under s. 49 of the Industrial Conciliation and Arbitration Act, 1925, and further that he had given to the parties so struck out a date for the hearing of a separate dispute.

The position was that there was really a dispute between two sections of the employers, who were in competition with one another in the same class of business and employing the same class of workers, and that these two sections instead of agreeing on the claims to be made against the union had made two different sets of claims.

The Council of Conciliation stated a case for the advice and opinion of the Court of Arbitration as to whether the Conciliation Commissioner had exceeded his powers in so striking out employers as parties to the dispute.

Held, 1. That the Commissioner's discretion under s. 49 should be exercised only in cases in which the cited party had gone out of business, was bankrupt, was not an employer in the industry, or had not been served with the citation, and in cases of a similar nature.

2. That s. 81 indicates that all employers engaged in an industry should be cited, as, in view of ss. 89, 92, and 94, an award is intended to be of universal application to the industry concerned.

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

SUPREME COURT
Auckland.
1932
Dec. 12.
1933
March 31.
Smith, J.

IN RE MURPHY (DECD.), THE GUARDIAN TRUST AND EXECUTORS COMPANY OF NEW ZEALAND LTD., v. OTAHUHU BOROUGH.

Contract—Gift, or Agreement for Valuable Consideration.

Originating Summons for an order determining whether the plaintiff, as executor of the will of James Murphy (deceased), is bound to transfer to the Mayor, Councillors, and Burgesses of the Borough of Otahuhu the lands referred to in an agreement between them dated January 23, 1932.

The plaintiff is the executor of the will of James Murphy who died on January 30, 1932. The circumstances leading up to the making of this agreement were that Murphy inquired of the defendant borough whether it would accept a gift on certain conditions, (*a*) that he was to find the purchase money to buy the land; (*b*) that he and his estate were to have the use of certain cottages on the land for ten years free of rates and rent; (*c*) that the defendant should pay all costs and expenses; and (*d*) that the land should be called "Murphy Park." The defendant borough replied to this inquiry by a letter of January 19, 1932, and said it "will accept the gift of the piece of land mentioned by you on the terms you suggest."

Upon receipt of this letter, Murphy completed negotiations with the owners of the lands comprising the four and one-half acres referred to in the letter, at a total price of £2,125. On January 23, 1932, he entered into agreements for sale and purchase of the lands with the respective owners of them. Immediately after the execution of these agreements, and on the same day, he executed the agreement with the Borough Council, and his death followed on January 30, 1932, before he had paid any of the purchase money under the agreements with the owners of the lands, and without doing anything further himself to complete those agreements or the agreement with the defendant Council. Subsequently to Murphy's death, the plaintiff, as his executor, completed the agreements for sale and purchase, and the estate became the owner of the four and one-half acres.

The plaintiff asked for an order determining whether, as executor of M.'s will, it was bound to transfer to the Corporation the lands mentioned in the agreement.

Holmden, for the plaintiff; **Wood,** for the defendant.

Held, That the transaction was not a gift, but an agreement for valuable consideration enforceable at the suit of the Corporation.

Park v. Dunn, [1916] N.Z.L.R. 761, applied on question of adequacy of consideration.

Question answered: Plaintiff, as executor, is bound to transfer to the defendant Corporation the lands mentioned in the agreement.

Solicitors: Wynyard, Wilson, Vallance, and Holmden, Auckland, for the plaintiff; **R. W. F. Wood,** Otahuhu, for the defendant Corporation.

SUPREME COURT
In Chambers.
Wellington.
May 8, 15.
Ostler, J.

BODDIE AND ANOTHER v. SIEVWRIGHT AND OTHERS.

Practice—Statement of Claim—Amendment—Addition of New Cause of Action—Court's Discretion—Code of Civil Procedure, RR. 270, 271.

Motion for leave to amend a statement of claim.

Under RR. 270 and 271 the Court has a discretion to allow an amendment of a statement of claim, where, although such amendment raises a new cause of action, it is so closely connected with the original one that they can conveniently be tried together, and defendants are not prejudiced by the allowance of the amendment.

Amendment allowed, and plaintiffs ordered to file a new statement of claim, and pay defendants' costs of a new statement of defence in any event.

Doyle v. N.Z. Candle Co., Ltd. (1901) 19 N.Z.L.R. 623, referred to; **Whitney v. Gillian** (1884) N.Z.L.R. 3 S.C. 19, and **Attorney-General v. West Ham Corporation** (1910) 74 J.P. 196, applied.

Evans-Scott for plaintiffs; **Sievwright** for defendant company; **Buxton** for defendant Sievwright; **Virtue, Spratt,** and **Cresswell,** for second, third, and fourth defendants respectively.

Order allowing amendment; plaintiffs to file new statement of claim and defendants allowed costs of new statement of defence.

Solicitors: Menteath, Ward, Macassey, and Evans-Scott, Wellington, for the plaintiffs; **Bell, Gully, Mackenzie, and O'Leary,** Wellington, for the first defendant; **Young, White, and Courtney,** Wellington, for the second and fourth defendants; **A. B. Sievwright,** Wellington, for the defendant company; **Morison, Spratt, and Morison,** Wellington, for the third defendant.

Case Annotation: *Attorney-General v. West Ham Corporation,* E. & E. Digest, Pleading and Practice Volume, p. 104, para. 891.

SUPREME COURT
Wellington.
1933.
May 9, 17.
Blair, J.

CAMPBELL v. LINDSAY.

Contract—Principal and Agent—Land-agent—"Appointment to act"—Letter of Principal's Solicitors repudiating Liability on Ground that Commission not yet earned or payable—Signature of "Person lawfully authorised to sign such Appointment"—Land Agents Act, 1921-22, s. 30.

Appeal from the decision of a Stipendiary Magistrate.

Respondent, a land-agent, arranged for appellant, the owner of a farm, a lease of the farm with a compulsory purchasing-clause. Appellant, after accepting the offer of a lease, authorised respondent to retain on account of commission the sum of £50 out of £110 paid by the tenant for a half-year's rent in advance, and promised to pay the balance of commission shortly.

Correspondence followed in which the respondent's solicitors wrote claiming such balance and threatening proceedings, and appellant's solicitors, on the instructions of their client, replied on July 15 denying liability for the amount claimed, adding:—

"Our client does not consider that the commission as claimed is either earned or payable until the sale is actually completed. He further considers that he is entitled to the sum of £50 already held by your client and should you decide to issue proceedings of which we will accept service our instructions are to counter-claim for this amount."

In an action by respondent against appellant in the Magistrate's Court the Magistrate gave judgment for respondent for the balance of commission claimed.

Commin, for appellant; **Scannell,** for respondent.

Held, dismissing the appeal, 1. That, if appellant's solicitors were "lawfully authorised" to write in terms of their letter of July 15, "an appointment" fulfilling the requirements of s. 30 of the Land Agents Act, 1921-22, could be spelt out of the correspondence.

Thornes v. Eyre, (1915) 34 N.Z.L.R. 651; **J. W. Samson and Co. v. Mitchell,** [1927] G.L.R. 427; and **Looney v. Pratt,** [1919] G.L.R. 231, followed.

2. That appellant's solicitors had authority to write what they did, although it had an effect not anticipated. They were, therefore, "lawfully authorised to sign such appointment" on behalf of appellant as required by s. 30 of the Land Agents Act, 1921-22.

John Griffiths Cycle Corporation v. Humber and Co., [1899] 2 Q.B. 414; **Daniels v. Trefusis,** [1914] 1 Ch. 788; and **North v. Loomes,** [1919] 1 Ch. 378, followed; **Thirkell v. Cambi,** [1919] 2 K.B. 590, distinguished.

The appeal accordingly dismissed.

Solicitors: **Cornford, Son, and Commin,** Hastings, for appellant; **Carlile, McLean, Scannell, and Wood,** Hastings, for respondent.

Case Annotation: **John Griffiths Cycle Corporation v. Humber and Co.,** 12 E. & E. Digest, p. 158, para. 1123; **Daniels v. Trefusis,** 12 E. & E. Digest, 157, para. 1112; **North v. Loomes,** *ibid,* para. 1109; and **Thirkell v. Cambi,** 12 E. & E. Digest, p. 135, para. 908.

NOTE:—For the Land Agents Act, 1921-22, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 1, title *Agency*, p. 22.

SUPREME COURT
Wellington.
In Chambers.
June 2, 9.
MacGregor, J.

IN RE LAMACCHIA (A BANKRUPT).

Bankruptcy—Bankrupt's right to select and retain "Tools of Trade," &c., to the value of £50—Sole asset of value exceeding that sum—No right to select and retain—Bankruptcy Act, 1908, s. 121.

Notice of Motion by the Official Assignee of Guiseppe Lamacchia, a bankrupt fisherman, for an order declaring whether the launch *Sicilia* was a "Tool of trade" within the meaning of s. 121 of the Bankruptcy Act, 1908, so that the said bankrupt was entitled under that section to select and retain same as his own property, or whether the said launch formed part of the property passing to the Assignee and divisible among the creditors.

Cunningham, for the Official Assignee; **Willis,** for the bankrupt.

Held: That where the only tool of trade of a bankrupt exceeds £50 in value, he is not entitled under s. 121 of the Bankruptcy Act, 1908, to select and retain it.

Quaere: A fisherman's launch of the value of £400 is not a "Tool of trade" within s. 121 of the Bankruptcy Act, 1908.

Order accordingly.

Solicitors: **Luke, Cunningham, and Clere,** Wellington, for the Official Assignee; **Allan F. Hogg,** Wellington, for the bankrupt.

NOTE:—For the Bankruptcy Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, Vol. 1, title *Bankruptcy*, p. 466.

COURT OF ARBITRATION
Auckland.
May 1, 1933.
Frazer, J.

IN RE THE AUCKLAND RETAIL BUTCHERS' DISPUTE.

Industrial Conciliation and Arbitration—Appointment of Assessors—Recommendations by Applicants contrasted with opposing Recommendations by Respondents—Powers of Commissioner—Industrial Conciliation and Arbitration Act, 1925, ss. 41 (9), 43 (5).

Case Stated by a Conciliation Commissioner for the advice and opinion of the Court of Arbitration.

Section 41 (9) of the Industrial Conciliation and Arbitration Act, 1925, makes it mandatory on a Conciliation Commissioner to appoint the assessors recommended by the applicants seeking to have an industrial dispute heard by a Council of Conciliation, provided such assessors are qualified under s. 41 (6). Section 41 does not enable a Commissioner to make a selection from separate and opposing recommendations by the original applicants and other applicant parties to a dispute subsequently joined, as does s. 43 (5) in relation to opposing recommendations of assessors by respondents.

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.

The Statute of Frauds.

A Consideration of Morris v. Baron.

By CLAUDE H. WESTON.

Morris v. Baron, [1918] A.C. 1, is another nail in the coffin of the Statute of Frauds, the case for the repeal of which would seem, indeed, to be unanswerable, as Dr. James Williams says in his book on Section 4 of the Statute. The facts were that there had been an alleged breach of a contract to sell and purchase certain blue cloth, and action had been raised with counterclaim. A new parol contract was entered into whereby each party agreed to withdraw the legal proceedings: the defendants were to have three months in which to pay for some of the cloth already delivered: they were to be given credit for £30 towards the legal expenses, and an option on their part to buy the remainder of the cloth was to be substituted for the contract for sale and purchase. There remained, therefore, as part of the new contract, three portions of the old: the remainder of the cloth, the price, and payment of the purchase money for the cloth delivered thereunder. With some hesitation, the Court of Appeal and the House of Lords accepted the contention that the new contract was one within the Statute. It was therefore unenforceable against the plaintiffs, for they had signed nothing: the defendants, on the other hand, were bound, as they had written a letter to the plaintiffs, setting out its terms.

The Court of Appeal had to decide whether, under the circumstances, the parties were obliged by law to revert to the conditions of the old contract, or were to remain suspended in mid air together with their unenforceable new contract. The Court of Appeal said that they must revert. The House of Lords, faced with the one issue, decided that they could not revert, the new contract, although otherwise unenforceable under the Statute, having rescinded the old contract. This would seem to be in accordance with common sense, because to decide otherwise would be to attempt to turn back the pages of time: the old contract was already in the limbo of the past. The House had also the support of the rule that a parol contract can rescind a contract *simpliciter,* (*Price v. Dyer,* 17 Ves. 356; *Robinson v. Page,* 3 Russ. 114), and, further, there was the opinion, quoted by Lord Dunedin, of Sir Edward Fry in his work on *Specific Performance,* 3rd Ed., S. 1039:

> "But where the new contract is relied on only as an extinguishment of the old one, the mere fact that it is not in writing, and so could not be put in suit, seems to be no ground for denying its effect in rescinding the original contract. The Statute of Frauds does not make the parol contract void, but only prevents an action upon it, and it does not seem to be necessary to the extinction of one contract by another that the second contract could be actively enforced. The point has never, it is believed, been matter for decision, but in point of principle it seems to stand on the same footing as a simple agreement to rescind."

So far, the House stood on firm ground. Whether the parties to this contract were in the air or not, was not its affair. It was not responsible for the acts of the Legislature of Charles II, and had the justification of authority and common sense for its decision. But

in their anxiety not to impair the rule that a contract under the Statute cannot be varied by a parol contract, some of the learned Law Lords were tempted to discuss variation and partial rescission and to suggest that whether the second contract in any particular case did rescind the first or not, depended upon various factors.

A contract of partial rescission, although not containing any term that might vulgarly be called a variation, is in strict law a variation, using the word as a term of art: *Stowell v. Robinson*, (1837) 3 Bing. (N.C.) 928, 132 E.R. 668. The partial rescission is a subtraction from the terms of the old contract. But, on the other hand, does not every variation, of whatever degree, operate as an absolute rescission of the old contract? Legally, this would seem to be so. The old contract goes and a new one is formed, composed of the terms of the old contract that survive and of the new terms. In such consideration, the class of case referred to by Lord Atkinson at page 31, should not be forgotten:

> "There is a clear distinction, however, between cases such as these and cases like *Ogle v. East Vane*, where one party, at the request of and for the convenience of the other, forbears to perform the contract in some particular respect strictly according to its letter. As for instance, where one party, bound to deliver goods sold upon a certain day, at the request of and for the convenience of the other, postpones delivery to a later day. In such a case, the contract is not varied at all, but the mode and manner of its performance is, for the reasons mentioned, altered."

But, returning once more to the ordinary variation, I suggest that in the minds of the parties themselves the old contract is wiped out. If they were asked whether, seeing that the new contract could not be enforced, it was intended to revert to the old contract, in ninety-nine cases out of a hundred, they would say, "No." Actually, their minds never turn to the question whether the new contract is enforceable under the Statute or not. They regard the contract as a business transaction to be performed by the two parties in due course. Further, if perforce we rely on the theory that all men know the law, then they must be regarded as making a contract which they know cannot be enforced, and as voluntarily taking the chance. Lastly, the passage of time, in reality, wipes out the old contract: in most cases it is impossible to revert to it, because conditions have changed.

With great respect, it may be submitted that many of the doubts raised by speeches made in the House in this case could have been avoided if the Lords had found it possible to hold that a variation of a contract, in all cases, entails rescission. The amount of variation varies in every contract; it is a matter of degree and who is to say when variation ends and rescission begins? At the same time, the decision of the House on the facts in *Morris v. Baron* is clear: that a new contract which purports to destroy an old one and at the same time to build up a new one out of its ashes, although unenforceable as a new contract, possesses the power of rescinding the old one.

Legal Golf Tournament: The Annual Wellington Legal Golf Tournament will be held on the Hutt Golf Club's links on June 23. Entry forms have been distributed to all legal offices, but if further particulars are required, application should be made either to Mr. E. D. Blundell (Messrs. Bell, Gully, Mackenzie, and O'Leary) or to Mr. T. P. McCarthy (Messrs. Leicester, Jowett, and Rainey).

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Bonds and Trust Deeds.

(*Concluded from* p. 143.)

In the second Australian case interim judgment only has been as yet delivered but doubtless on answer by the Court to the remaining questions the decision will find its way into the reports as a valuable guide in preparation of bond schemes. The case is *In re Australian and New Zealand Investments, Limited* (in liquidation), which came before Mr. Justice Harvey, Chief Judge in Equity at Sydney. The proceedings took the form of a motion by the Liquidator, one Smythe, for directions upon over thirty questions and sub-questions thought to arise in the liquidation and to concern trustees, bondholders, creditors of the company, secured and unsecured, and shareholders. Some only of the questions it was found necessary to answer but much light is thrown by the judgment upon the rights in the liquidation of bondholders and debenture-holders.

Australian and New Zealand Investments, Limited, was incorporated in Sydney, N.S.W., in October, 1927, with the main business of growing flax in New Zealand. From time to time it raised money by the issue of 7 per cent. bonds, of £21 10s. each, known as Hempland Bonds, there being three series issued—namely "A" and "B" both issued in 1928, and "C" issued in 1929. Each issue was secured by an indenture made between the company and the Public Trustee of New South Wales. Of bonds in "A" group, 3,171 were issued and the whole were fully paid for, and 212 were paid up to £2,172. Of "C" group bonds, 2,120 were issued, of which 1,963 were fully paid for, and 157 were paid up to £1,499. The trust deed provided that the company should deposit £5 7s. 6d. of the amount of each fully-paid bond with the Public Trustee as guarantee of the performance of its obligations. It was also stated that the actual ownership of the unencumbered land to be acquired by the money derived from the bond issues would be vested in the bondholders' trustee. In November, 1930, an agreement was made between the company and the Public Trustee relating to £7,465 held by the Public Trustee under trusts in respect of the bond issue. By this agreement, an indenture was executed, creating a floating charge over the business and assets of the company, and ranking *pari passu* with a debenture given by the company to McCarron Stewart and Company, Limited. The object of these transactions was to complete payment by the company for certain land mentioned in the schedule to the "B" bonds. The amounts owing under this debenture on December last was £8,336 to the Public Trustee, and to McCarron Stewart and Company, Limited, £1,529. In December, 1931, the company raised £5,000 by the issue of a second series of debentures and these were protected by trust deed between the company and Smythe, the present liquidator, who had also been appointed receiver for the Public Trustee and McCarron Stewart and Company Limited. The bondholders of each group recently formed societies under the Incorporated Societies Act, 1908 (New Zealand), for the protection of the interests of the bondholders. These

societies were each parties to the proceedings. "A," "B," and "C" bonds were issued in New Zealand and all the States of Australia.

The first questions for determination were whether the indentures made between the Public Trustee and the company in respect of "A," "B," and "C" bonds were valid and enforceable documents; and whether the bonds were valid or were illegal by virtue of the provisions of the Companies Act, 1899, s. 4 (N.S.W.), making provision similar to that of the Tasmanian legislation above mentioned. The Court held that the indentures were enforceable and that the bonds were not illegal under the Companies Act.

Contending that the first indenture between the company and the Public Trustee was not enforceable and that the bonds were not valid, counsel for the liquidator had directed the attention of the Court to the decision of the Full Court of Tasmania in *In re Tasmanian Forests Proprietary Limited* (*supra*). Mr. Justice Harvey gave a decision against this view, holding that the bonds and deeds of trust were valid and enforceable documents. In the course of judgment, His Honour said:

"The memorandum of association of the company says that its objects were to purchase certain flax-bearing lands in New Zealand, to grow flax, and to erect a milling plant. Apparently it contemplated carrying on its operations by a process of selling bonds or certificates to the public. These bonds were to be sold in series, and each series had reference to a particular area of land. The money received from the sale of bonds was used by the company for the purpose of bringing into a flax-bearing state the lands in respect of which the series of bonds were issued. . . . For the purpose of ascertaining the exact position of the various bondhelders and the company and the relations of the bondholders *inter se* both the bond and the trust deed have to be looked at. The trust deed in each case is a very comprehensive and elaborate document, and from careful perusal of the trust deeds it appears to me that the scheme aimed at was that when the series of bonds were completely subscribed for the company would complete the contract for the area of land which was described in those bonds. . . . It was confidently expected that as soon as the flax was ready to produce harvest, the bondholders would come together to decide what they would do with their lands, which would have been transferred to a trustee, and they would have become equitable tenants in common. The company would have been working up the land, which the bondholders might acquire if they thought fit, and they would then have to decide whether they were going to start business with the land.

"In my opinion it was perfectly clear there was no idea of the bondholders entering into any business whatever for themselves. The only business to be carried on was, first, the business of the company in selling its bonds, and, secondly, in preparing the lands so as to be ready as flax farms. Whether the bondholders were going to carry on business for themselves rested in the determination of the future. But the business up to that period was the business of the company only. It would receive any rents and profits to be made by the land, and in the meantime would be able to use it for any purpose in carrying on business. All that was required of the company was that at the stated period it would hand over to the trustee the land which the bondholders might buy and a flax farm ready for use. It was on the "A" and "B" issues perfectly clear that it was entirely a matter for the bondholders to decide in the future whether they would carry on the flax-growing business or not. . . . I think it a reasonable construction to hold it to mean that if the bondholders wished to carry on the business personally they might do so, but if not, would do so by means of a bondholders' company. I think that I must hold that the scheme which was elaborated in these bonds and the trust deeds was not an illegal contract, and that there was no illegal association formed for carrying on business for profit. No business was contracted to be carried on under the terms of the documents."

The next questions for determination by the Court were whether the contract between the company and the Public Trustee were capable of specific performance and, if it were, then in respect of what areas of land. The company placed itself under obligation not only to purchase land, but also to plant with flax and cultivate up to date of transfer to the Trustee for the bondholders. The Court was informed that sufficient areas had been planted with flax to satisfy the requirements of "A" and "B" bondholders, but there was considerable deficiency in regard to the "C" area planted. The company had not been able to complete the purchase of the "A" land; the "B" land had been transferred to the company and was subject to security to the Trustee and others; the vendor of "C" land had re-possessed a considerable area, including part of the land planted. The time for transfer of "C" land had not yet arrived.

It was argued on behalf of the liquidator that the contract held by the bondholder was one for personal services on the part of the company and that the interrelations of the bondholders rendered the remedy of specific performance inapplicable. The Court decided against these contentions on two grounds, first that the company had not only executed the contract for purchase of the land but had improved it in accordance with the trust deed, so that the land was now in a position to be transferred to the bondholders or to the Trustee; and secondly, whether the land had been improved or not there was no reason why the Court should not enforce specific performance. The case seemed parallel to *Soames v. Edge* (1860) John. 669; 70 E.R. 588. If the owner of unimproved land contracted to build thereon and sell the improved land, and the purchaser paid the agreed price, and if before the house was completed the vendor became financially embarrassed, there was no reason why a Court of Equity should not compel him to convey the land partially improved and allow the purchaser to recover damages for the vendor's default.

The fact that in the present case a number of individuals were unascertained did not create any difficulty of principle. The whole of the bondholders together were entitled as tenants in common to have the land conveyed to the Trustee for themselves.

As to the trust funds the argument of the liquidator was that this was the property of the company and that the bondholders had no interest therein. Again the decision favoured the bondholders, the Court holding in effect that each fund was held for the purposes of ensuring that the company would carry out its obligations under the relative trust deed, with an ultimate resulting trust to the company of any balance not required to carry out the duties of the Trustee to the bondholders.

The "A" trust fund as accordingly held applicable first to pay the expenses of the Trustee, secondly to pay the balance due to the head vendors of the area of land, and the balance (if any) to pay interest to the bondholders.

One further important principle, one of priorities, arises from the issue of "B" bonds. Before the company went into liquidation and while it was in the process of improving and paying for the lands allotted to the "B" group the vendors insisted on payment of the purchase money. The company thereupon borrowed moneys to complete the purchase, a sum from the Trustee out of the "B" trust fund and another sum from another company. These sums were secured by the issue of debentures protected by caveats. The advances having been made to pay off the head vendors they were entitled to priority over the right of the "B" bondholders to specific performance of their contract.

The R.M.

Some Memories of the Bench.

By James Cowan.

(*Continued from p. 145.*)

The Doctor on the Bench.—An Auckland Magistrate whom one used to see daily at close quarters, in a course of police-court reporting duty, was a gentleman of another type again, the late Dr. Giles. He died a few years ago in his nineties. Dr. Giles was a really remarkable man, of scholarly tastes. He had seen much of the rough end of life. As a young military doctor, he went out to the Crimean War and he worked in the hospital at Scutari tending the wounded with Florence Nightingale. A few years later, he was bush settler and doctor at Mauku in South Auckland, and had to abandon his home in the Maori War. He practised the dual occupations of doctor and justice at Hokitika in the boom years of the gold-digging. Such a man brought to his position as magistrate in Auckland in his old age a vast practical experience and a profound knowledge of mankind. He was the most thoughtful, contemplative of men; in fact, he always seemed to us to be pained deeply by the cases that confronted him, and the problem of arriving at a correct diagnosis from the mass of conflicting evidence. He had a way of wrinkling his forehead and twitching his eyebrows that probably was involuntary, but this appeared to indicate intense suffering. I think his sensitive soul really did shrink from some of the things he had to listen to in his daily purgatory on the Bench.

There was one lawyer of other days who had a great local reputation for successfully defending police court cases. He possessed a perfectly diabolical genius for (metaphorically) eviscerating police witnesses in the box. But to the Bench he was all deference, even obsequiousness. How he loved to "your Worship" the presiding magistrate or the J.P.—especially the J.P.'s!

"If your Worship pleases, it will be fresh in your Worship's memory that when this case first came before your Worship it was remarked by your Worship that"—and so on and so forth.

At every "Your Worship" Dr. Giles's eyebrows would twitch violently and his forehead would work itself into knots, almost with its visible throbbing. How he must have writhed! But never a word from him.

Opening the Court.—There is a touch of the Wild West and of Bret Harte days in the story of the first magistrate at Okarito, down on the Golden Coast, a hundred miles south of Hokitika. It was in 1865, in the first great gold rush, and thousands of diggers were beachcombing the auriferous sands from the Grey down to Bruce Bay. Mr. Price was the Goldfields Warden and Magistrate sent from Hokitika to open a court at Okarito, and to establish order on the field where many rough characters had congregated. He had been warned that he might expect some trouble when he set out to introduce the law to the new camp, and he took necessary precautions.

There was a crowded house in the slab-and-canvas Court on opening day. Mr. Price walked in and took his seat behind the slab table. He reached round to the tail-pocket of the long coat he wore and drew out two Colt revolvers. Amid dead silence in Court, he laid the weapons on the table in front of him, muzzles towards the audience, and quietly announced that the Court was now open. This dramatic method of instituting the reign of the law on the gold frontier seems to have been successful; for Okarito was remarkably free from serious crime during the height of the great treasure-hunt.

Sentence Reduced.—In former times, the native Assessors in certain Maori districts exercised magisterial powers. I am not sure exactly as to the extent of their jurisdiction, but they seem to have had a degree of authority corresponding with that of our pakeha Justices of the Peace. Some of them took themselves very seriously indeed, and their petty judicial functions were discharged with a dignity befitting the Supreme Court Bench.

There is a story of a South Island assessor of the 'sixties, the old Chief Pora Taki, who was the head man of the small tribe at Rapaki, on the shore of Lyttelton Harbour, a pretty little village under the shadow of the Port Hills where a remnant of his people live to-day. Paora was a tattooed ancient who wore a bell-topper and a frockcoat for Church and Court. He was lay-reader as well as assessor.

One day a young Maori was brought before him by the tribal policeman on a charge of drunkenness and disorderly conduct. Paora, as it happened had a particular dislike for this fellow; he had been waiting for the opportunity of placing him where he considered the reprobate properly belonged, and now the chance had come. It was with the utmost satisfaction that he announced a conviction, and sentenced the prisoner to three years' imprisonment with hard labour in Lyttelton Gaol. Off to the prison the amazed and horrified fellow was taken, in spite of his protests, and Paora, having seen him away under the policeman's charge in the whaleboat, retired to his *whare* triumphant at having ridden himself of a thorn in the flesh. He was a vastly disgusted man when the reprobate walked back into the *kainga* a couple of days later, having done the twenty-four hours that the gaol authorities at Lyttelton considered would cover the situation.

To be concluded.

An English Appreciation of the late Sir Alexander Gray.—The *Law Journal* (London) in its issue of May 6, a few days after his death, devoted a full column to an appreciation of the late President of the New Zealand Law Society. It speaks of "the love, respect, and admiration which he never failed deservedly to evoke" in those outside the Dominion who knew him and who shared with New Zealanders his friendship. "His death was like that of a young man, greatly loved; and it has a peculiar melancholy coming so soon after the King had honoured him with a knighthood in the last New Year Honours," says our contemporary, which goes on to remark that Sir Alexander "did more than any other man to maintain and to exalt the prestige and scrupulous honour of the legal profession in New Zealand; and in the result there is no country in the world where professional standards are higher or more generally followed and observed."

Australian Notes.

By WILFRED BLACKET, K.C.

Situation Vacant.—The Commonwealth wants a new Supreme Court Judge for the Northern Territory. Any barrister or solicitor who has been in practice within the Commonwealth for five years will do, and the salary less income tax deductions is £938. His "daily round" will combine the dignity of the Supreme Court and "the trivial task" of sitting in any other Courts of limited jurisdiction that there are in the territory. His first shock will come when he is examined by the Commonwealth medical officer who will decide whether he is a fit and proper person to live at Darwin. This latter condition would have aroused the wrath of that splendid Australian Sir Samuel Griffith, our first Chief Justice of the High Court, who on one occasion fiercely resented a criticism of the Darwin climate contained in an affidavit. "I hope," he said, "that I shall never again hear it stated that there is any part of Australia that is not fit for an Australian to live in." As to the territory, I do well remember meeting a man who had lived there for fifty years. His visit to Sydney at the end of that time was for the purpose of "learning these new darnces." I knew then there was no risk in asking him to "come and have a whisky," for of course he had never tasted spirituous liquor.

Marine Insurance. The unanimous opinion of four Judges of the Supreme Court, N.S.W., in *Norwich Union F.I. Society Ltd. v. W. H. Price Ltd.* is that apart from fraud, or mutual consent of the parties, the acceptance or abandonment of insured goods is conclusive evidence of loss under section 68 of the Marine Insurance Act and is irrevocable. The facts proved on trial under the Commercial Causes Act, cor. Halse Rogers, J., were that lemons shipped on the Aageterk by the defendant at Messina were insured with the plaintiff company. During the voyage the ship struck a submerged rock and a portion of her cargo was damaged, the damage to the ship necessitating her return to Gibraltar. The lemons escaped damage but were sold with some other cargo at the latter port, the owners of the steamer gave the defendant a short landed certificate stating the sale of the lemons, and the company then claimed the amount payable under the policy. This was paid by the plaintiff company the defendant company agreeing to abandon to the insurers its interest in the goods. The plaintiff company subsequently discovered that the lemons had not been at all damaged and sued for the amount paid by them on the ground that it had been paid under a mistake of fact. Halse Rogers decided against this claim on the grounds already stated, and his decision was upheld by Street, C.J., and James and Davidson, JJ., on appeal.

A New Name for it. Men who have grown weary of "telling the old, old story" to account for delay in returning home at night may find much comfort in a recent Sydney decision. A citizen of such credit and renown that I will describe him as "Jorkins" was charged with having driven a car while under the influence of liquor. He in fact drove it against another car and thus attracted police attention. The resident medical officer at Sydney Hospital who examined Jorkins after the collision swore that the defendant was then under the influence of liquor and unfit to drive a car, and the two arresting constables gave similar evidence. But Dr. Benjafield, for the defence, said that Jorkins had called at his surgery four days later and appeared to be so much under the influence of liquor that he was about to have him turned out, but upon making close examination found that he was not drunk but merely "suffering from a recurrence of a form of toxaemia," and thereupon the magistrate said he didn't think he would be justified in convicting on the charge. This excuse for lateness in returning home may be of limited value, however, because a man suffering from toxaemia might have some difficulty in remembering and pronouncing the name of his ailment.

Feros Mores. The ancient Romans believed, and embodied the belief in a phrase that has since become classic, that a man who had faithfully absorbed the learning of the times, was thereby prevented from being a larrikin; but A. L. Paton and John Lee, students of Sydney University, upon a recent visit to Melbourne, appear not to have favourably illustrated the old adage, for they were found after midnight with a large electric light globe, and sundry fish knives, spoons, and forks in their possession. The globe had been unscrewed from the front of a cafe, and the other articles taken from restaurants. Their explanation to the arresting constable was that they wanted these articles as souvenirs of a pleasant holiday in Melbourne, but Mr. Wanliss who appeared for them at the Police Court said that the articles had "been taken in a spirit of bravado," and the captain of the tennis team of which they were members, described their action as "an unfortunate lapse into childishness." The magistrate said that "stealing is stealing whatever else it may be called," but lest they should lose the benefit of the scholarships they held, released them on condition that they each contributed £5 to the Poor Box. An alarming feature of the case is that neither of the defendants when arrested was at all under the influence of liquor—a fact which may seem to prove the harmful effects of indulgence in total abstinence.

Fidelity Guarantee. The Conference of members of the Councils of the Bar and of Councils of Solicitors' Societies now sitting in Sydney was addressed by Mr. Martin, the State Minister of Justice, who promised that his Government would bring in a Bill containing all the main provisions of the New Zealand Fidelity Guarantee Act. He is not reported to have mentioned that Act in his address, although if the Bill is brought forward it might well be a verbatim reprint of it. Even if submitted to Parliament it is very doubtful if it would be enacted for there would not be a "1,500 to 1" majority as in the Dominion in its favour. In earlier discussions of the matter of Fidelity Guarantee in New South Wales and Victoria, strong opposition to the proposed reform has been shown by prominent lawyers who take the narrow view that honest men should not have to pay for the sins of weaker brethren. At the Conference many admirable addresses setting forth many counsels of perfection have been heard appreciatively, but nothing of a revolutionary nature has yet been attempted nor is now threatened.

Further Mention.—In *Hall v. Wilkins and Wilkins* the High Court of Australia refused special leave to the plaintiff to appeal from the judgment of the Supreme Court of New South Wales affirming the decision of Clancy, J., that a husband is not liable for the torts of his wife: see note of this case on p. 101 *ante*. The refusal affirms the former decision of the High Court in *Brown v. Holloway*, 10 C.L.R. 89, and should greatly comfort husbands whose wives are prone to tort.

Under-Secretary for Justice Retires.

Nearly Half a Century's Service.

Mr. R. P. Ward, who recently retired from the position of Under-Secretary of the Department of Justice, is known to practitioners all over the Dominion. In his forty-nine years of service in that Department, and in particular in his connection with the Courts, he has made for himself many friends in the profession by whom he is greatly esteemed. He commenced as a cadet in the Wellington Magistrates' Court on June 1, 1884, and in March, 1925, he was appointed to the office from which he has now retired.

Mr. Ward's long and distinguished service was suitably recognised when a presentation from the officers of the Justice Department throughout the Dominion was made by the Hon. J. G. Cobbe, Minister of Justice, in the presence of a gathering which included Mr. E. Page, S.M.; Mr. J. S. Barton, S.M.; and Mr. T. B. McNeil, S.M.; the Public Service Commissioner, Mr. P. Verschaffelt; the chief clerk at the head office of the department, Mr. J. T. Bishop; the Solicitor-General, Mr. A. Fair, K.C.; the new Under-Secretary of Justice, Mr. B. L. Dallard; the Commissioner of Police, Mr. W. G. Wohlmann; the Official Assignee, Mr. S. Tansley; the Registrar of the Supreme Court, Mr. W. W. Samson; the Chief Electoral Officer, Mr. G. G. Hodgkins; and the Clerk of the Court at Wellington, Mr. F. S. R. Knight.

Before making the presentation, the Hon. Mr. Cobbe spoke of the respect and regard in which Mr. Ward was held. He spoke of the unique length of service that he had rendered, and recalled that he had at times acted as Commissioner of Police and as Registrar-General. Mr. Cobbe said that from his own personal experience of Mr. Ward he could say he was one of the very best type of public servant. Many of the public servants of New Zealand were men of the highest possible attainments, men who were reliable, able, and attentive to their duties, as well as being most courteous and helpful. From Mr. Ward he had always received the utmost help and courtesy.

After thanking Mr. Ward personally for the help he had been to him in his official duties, Mr. Cobbe asked him to accept "something in an envelope" from the staff of the department.

"This gathering to-day shows the affection in which you are held by those with whom you have been associated," the Minister concluded, amid applause.

The Public Service Commissioner, Mr. P. Verschaffelt, in wishing Mr. Ward a long and happy retirement, said that his unfailing courtesy would long be remembered.

On behalf of the rank and file of the Supreme and Magistrates' Courts of the Dominion, the Patent Offices, the Bankruptcy Offices, the Electoral Office, and the Registrar-General's branch, Mr. Bishop tendered expressions of goodwill and best wishes to their retiring "chief." The invitation to subscribe to the presentation met with practically a unanimous response from the Court offices in the Dominion. Officers in sending their contributions expressed the wish that the speaker convey to Mr. Ward their appreciation of all he had done for the Department, and added their expressions of good wishes for the years of his retirement.

Mr. Ward, who was greeted with long and sustained applause, mentioned that when he joined the department as a cadet the staff of the Wellington Magistrates' Court consisted of the chief clerk, Mr. James, a Mr. Foster, and himself. Conditions in those days were very different from what they are now. He was in the service four and a half years before he got his first leave. On one occasion he went seven and a half years without a holiday, and on another occasion for eight years without leave. He added that he could say he was born and brought up in the Courts, as his father was a Stipendiary Magistrate, and he himself had great affection for the old department. He could not have done as he had, were it not for the splendid officers with whom his associations had been most pleasant.

The gathering concluded with cheers for Mr. Ward.

Obituary.

Mr. Alfred James, Dunedin.

A highly respected member of the profession, Mr. Alfred James, of the firm of Messrs. Sievwright, James, and Nichol, died at his residence in Dunedin recently. He was born in Victoria, in 1861, and went to Otago in 1868. He was educated at various schools in Dunedin and upon leaving school he obtained a junior position on the staff of the local Lands and Deeds Registry Office. While he was there his ability attracted the notice of the late Mr. Basil Sievwright, senior partner in the firm of Messrs. Sievwright and Stout, who induced him to accept a position on the staff of the firm. When Mr. Sievwright and Sir Robert Stout later on dissolved partnership, Mr. Sievwright retained the services of Mr. James as his managing clerk, and upon the latter qualifying as a barrister and solicitor in 1884 took him into a partnership, which continued under the style of Messrs. Sievwright and James, until the death of Mr. Sievwright in 1902. After Mr. Sievwright's death, Mr. James carried on the practice on his own behalf until 1907, when he admitted Mr. J. B. Nichol to partnership, the practice thereafter being carried on under the style of Messrs. Sievwright, James, and Nichol.

The late Mr. James was generally recognised as a sound and able lawyer, his specialty being Company law. Though he did not appear frequently in the Courts, his opinion was supported by the judgment in *Aitcheson v. Kaitangata Railway and Coal Co., Ltd.*, (1900) 21 N.Z.L.R. 151, in which he instructed the two members of the Dunedin Bar who are now the Hon. Sir Frederick Chapman and His Honour Mr. Justice MacGregor. Another case with which Mr. James was successfully associated was *Attorney-General, ex rel. Dunedin City Corporation v. Dunedin Arcade Co., Ltd.*, [1929] N.Z.L.R. 621.

In his younger days the late Mr. James took a prominent part in a number of Dunedin activities, and for many years he was a valued member of the Council of the Otago Law Society, of which he was president in 1909 and 1921. While he was president he brought forward a suggestion that a surety fund should be provided by members of the profession, each contributing a certain amount, to cover the losses incurred by defalcations on the part of dishonest solicitors. This was proposed before the audit of solicitors' trust funds was provided for, but the idea was not carried into effect until 1929.

The Council of the Otago Law Society passed a resolution appreciative of the late Mr. James's services to the profession, and of sympathy with his widow and surviving daughter.

Correspondence.

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

Supreme Court Forms.

To the Editor,
"N.Z. LAW JOURNAL."

Sir,—Please allow me to express to you, and through you to Mr. Samson, my deep appreciation of the remarks contained in your last issue. Praise from a man of Mr. Samson's ability and experience is praise indeed.

May I also be allowed to refer to one point, the highly controversial question of Court order or Judge's order. The question of the order for discovery is, I submit, part of a general question. I entirely agree with the opinion expressed in the review that "the granting of a Judge's order is simpler and more expeditious, since it is subject to a review by the Supreme Court and obviates an application to the Court of Appeal." The question to be decided is, however, what do the Rules (which have statutory force) require? There is room for difference of opinion as to the answer to that question. Authorities may be cited on both sides. I have ventured to state my own opinion, and to give my reasons, in the hope that the question will be authoritatively settled; but (may I whisper) I think I am correct, and that the real solution is an alteration in the Rules.

Assuming that my opinion is correct, the difficulty as to appeal may, in the meantime, be got over by transferring the matter from Court to Chambers so as to make the order a Judge's order (see *Woolven v. Frecklington*, [1921] N.Z.L.R. 243, G.L.R. 16, and other cases cited at p. xxxiv of the book) but that does not affect the form of the application which must, in my opinion, be by way of motion where the jurisdiction is in the Court.

May I add that I did *not* confine my enquiries to the Wellington District. I ascertained the practice in Auckland, Hamilton, Christchurch, and Dunedin, and the result is stated in the preface to the book.

Again thanking you and Mr. Samson most sincerely, believe me,

Yours, etc.,
J. C. STEPHENS.

Practice Precedents.

Letters of Administration with Will annexed to Attorney of Executor named in Will.

In the case of a person residing out of New Zealand administration or administration with the Will annexed may be granted to his attorney acting under power of attorney: *Rule* 531E, *Code of Civil Procedure.*

For form of Letters of Administration, see *Mortimer on Probate and Administration*, 2nd Ed. 360-361.

See *In re Colt*, 11 G.L.R. 316.

For form of Bond to be used, see *In re Tancred* (1913) 32 N.Z.L.R. 991; 15 G.L.R. 653. On the subject generally, see *Garrow on Wills and Administration*, 607 *et seq.*

As to Powers of Attorney, see *Powles and Oakley's Probate Practice*, 4th Ed. 276; *Re Elderton*, 4 Hagg. Eccl. 210; 162 E.R. 423, and *Re Ormond*, 1 Hagg. Eccl. 145, 162 E.R. 537.

In practice, the power of attorney is lodged with the application and a copy exhibited. The power of attorney is uplifted after the grant.

It is not the practice to dispense with sureties. On the general practice as to sureties see *In re Morrison, decd.*, 7 *N.Z.L.J.* 115.

Letters of Administration, a copy of same, and a separate copy of will are tendered when sealing is to be effected. The Bond should be lodged at the same time.

MOTION FOR LETTERS OF ADMINISTRATION WITH WILL ANNEXED TO ATTORNEY. MOTION TO LEAD TO GRANT OF, ETC.

IN THE SUPREME COURT OF NEW ZEALAND.
.....District.
.....Registry.
IN THE ESTATE OF A.B. of
Farmer deceased.

Mr. of Counsel for Applicant TO MOVE before the Rt. Hon. Chief Justice of New Zealand at his Chambers Supreme Court House on day the day of 19 or so soon thereafter as Counsel may be heard FOR AN ORDER that Letters of Administration with Will annexed be granted to of Accountant, the duly appointed Attorney in New Zealand of the Executor named in the Will of the said deceased UPON THE GROUNDS that the said Executor is resident in England AND UPON THE FURTHER GROUNDS set out in the affidavit of the said (Attorney) sworn and filed in support hereof.

Solicitor for applicant.

CERTIFIED pursuant to Rules of Court to be correct.
Counsel moving.

His Honour is respectfully referred to Rule 531E of the Code of Civil Procedure, and to *In re Tancred*, (1913) 32 N.Z.L.R. 991; 15 G.L.R. 653.

AFFIDAVIT IN SUPPORT OF MOTION.
(*Same heading.*)

I, of Accountant, make oath and say as follows:—

1. That I knew A.B. of farmer, now deceased, when alive, and that the said A.B. was resident or was domiciled at within this Judicial District and that the nearest Registry Office of this Court to the place where the said A.B. resided or was domiciled is at .

2. That the said A.B. died at on or about the day of 19 as I am able to depose from having been present at his funeral.

3. That I believe the written document now produced bearing date the day of 19 and appointing of wife of the said A.B. deceased sole Executor thereof to be the last Will and Testament of the said deceased.

4. That the said named as Sole Executor in the said Will is now absent from New Zealand and is resident in England and is likely to reside there for some time.

5. That by Power of Attorney dated the day of 19 (a copy of which is hereunto annexed and marked "A") the said duly appointed me this deponent to be his Attorney in New Zealand for the purpose of obtaining Letters of Administration with the Will annexed of the said deceased.

6. That I will faithfully execute the said Will by paying the debts and legacies of the said deceased so far as the property will extend and the law binds.

7. That according to my knowledge and belief the estate effects and credits of the said deceased in respect of which Administration is sought to be obtained are under the value of .

8. That I will exhibit unto this Court a true full and perfect inventory of all the estate effects and credits of the said deceased within three calendar months after the grant of Letters of Administration thereof to me and that I will file a true account of my Administratorship within twelve calendar months after the grant of such Letters.

9. That I will duly convey transfer assign pay over and account for all the estate effects and credits of the said deceased to the

said (Executor) or administrator or executors or administrators of the said deceased subsequent to my appointment as attorney of the said .
Sworn, etc.

LETTERS OF ADMINISTRATION WITH WILL ANNEXED.
(*Same heading.*)

To of Accountant the duly appointed Attorney of the Executor named in the Will of the above-named deceased.

WHEREAS the above-named A.B. departed this life on or about the day of one thousand nine hundred and (19) leaving a Will which has been duly proved in this Court, a copy of which is hereunto annexed AND WHEREAS the Executor named in the said Will has not applied for Probate AND WHEREAS you are the duly appointed attorney of the said and have applied to this Honourable Court for Letters of Administration with the will annexed to be granted to you as such Attorney YOU ARE THEREFORE fully empowered and authorised by these *presents to administer the estate effects* and credits of the said deceased and to demand and recover whatever debt may belong to his estate and pay whatever debts the said deceased did owe and also the legacies contained in the said Will so far as such estate effects and credits extend you having been already sworn well and faithfully to administer the same and to exhibit a true and perfect inventory of all the estate effects and credits unto this Court on or before the day of one thousand nine hundred and (19) and also to file a true account of your administratorship thereof on or before the day of one thousand nine hundred and (19) AND YOU ARE THEREFORE by these presents constituted Administrator *with the Will* annexed of all the estate effects and credits of the said deceased but for the use and benefit of the said as such Executor aforesaid and until the said or some other person legally entitled thereto shall apply for and obtain Letters of Administration with the Will annexed of the estate effects and credits of the said deceased.

GIVEN under the Seal of the Supreme Court of New Zealand at this day of one thousand nine hundred and (19).

Registrar.

AFFIDAVIT OF JUSTIFICATION OF SURETIES.
(*Same heading.*)

We, of in New Zealand and of aforesaid, severally make oath and say :—

1. That we are the proposed sureties on behalf of of in New Zealand Accountant, the intended administrator of the estate of the above-named A.B. deceased, in the penal sum of (£) for his faithful administration of the said estate of the said deceased.

2. And I, the said for myself make oath and say that I am, after payment of all my just debts, well and truly worth in real and personal estate the sum of (£).

3. And I the said for myself make oath and say that I am, after the payment of all my just debts, well and truly worth in real and personal estate the sum of (£).

Severally sworn by the said and etc.

BOND.
(*Same heading.*)

KNOW ALL MEN BY THESE PRESENTS that we of Accountants and of and of are held and firmly bound unto Registrar of the Supreme Court of New Zealand for the said District at in the sum of (£) for which payment well and truly to be made to the said or to such Registrar for the time being we do and each of us doth bind ourselves and each of us and the executor or executors and administrator or administrators of us and of each of us jointly and severally firmly by these presents.

WHEREAS by an order of this Court of the day of 19 IT IS ORDERED that Letters of Administration with the Will annexed of the estate effects and credits of the above-named be granted to for the use and benefit of Executor in the said Will named until such time as the said shall apply for and obtain Probate of the said Will upon his giving security for the due administration thereof AND WHEREAS the said has sworn that to the best of his knowledge information and belief the said estate effects and credits are under the value of £

NOW the Condition of the above-written Bond is that if the above-bounden exhibits unto this Court a true and perfect inventory of all the estate effects and credits of the deceased which shall come into possession of the said or any other person by *his order or for his use* on or before the day of 19 and well and truly administers the same according to law, or duly conveys, transfers, assigns, hands over, or accounts for the same to the said or to any person or persons appointed Executor or Administrator or Executors or Administrators of the said deceased after the appointment of the said as Attorney of the said Executor AND renders to this Court a true and just account of his administratorship on or before the day of 19 then this Bond shall be void and of none effect, but otherwise shall remain in full force.

Dated at this day of 19 .

Signed by the said in the presence of [*address*] [*occupation*].

Signed by the said in the presence of [*address*] [*occupation*].

Signed by the said in the presence of [*address*] [*occupation*].

Rules and Regulations.

Air Navigation Act, 1931. The Air Navigation Regulations, 1933.—*Gazette* No. 41, June 1, 1933.

Shipping and Seamen Act, 1908. Regulations for the Loading of Grain Cargoes in Ships at Ports in New Zealand.—*Gazette* No. 41, June 1, 1933.

Naval Defence Act, 1913. Amended Regulations for the Government and Payment of N.Z. Division of the Royal Navy.—*Gazette* No. 41, June 1, 1933.

Post and Telegraph Act, 1928. Amended Regulations relative to Transmission of "Householder" Circulars through the Post.—*Gazette* No. 41, June 1, 1933.

New Books and Publications.

Fraud and Embezzlement. By Irvine H. Dearnley. (I. Pitman & Sons). Price 10/6.

Emery's Law of Wills for Testators. Fourth Edition. (I. Pitman & Sons). Price 5/-.

Civil Procedure in a Nutshell. Second Edition. By Marston Garsia, B.A. (Sweet & Maxwell Ltd.). Price 5/-.

Hudson's Building Contracts. Sixth Edition. By Arnold Inman, K.C., and Lawrence Mead, Barrister-at-Law. (Sweet & Maxwell Ltd.). Price 84/-.

Magisterial Law, 1932. Being the Statutes and Parts of *Statutes of 1932 affecting* the work of the Courts of Summary Jurisdiction, together with Statutory Orders and Notes of Decided Cases. By Albert Lieck and Sophie Lieck. (I. Pitman & Sons Ltd.). Price 28/-

Law of Agency. By Raphael Powell, M.A., B.C.L., Oxon. (I. Pitman & Sons Ltd.). Price 10/6d.

Lectures on Mercantile Law. By M. R. Emanuel. (Gee & Sons). Price 12/6d.

Gibson's Conveyancing. Fourteenth Edition, 1933. (Law Notes). Price 53/-.

Mew's Annual Digest of English Case Law, 1932. (Sweet & Maxwell). Price 27/-.

Yearly County Court Practice, 1933. By Edgar Dale and J. Alun Pugh. (Butterworth & Co. (Pub.) Ltd.). Price 47/-.