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

"There is one thing that is binding upon us and that is the law, and the House of Lords is an infallible interpreter of the law. A batsman, who, as he said, had been struck on the shoulder by a ball, remonstrated against a ruling of l.b.w.; but the wicket-keeper met his protest by the remark: 'It disna maitter if the ba' hit yer neb; if the umpire says yer oot yer oot.' Accordingly, if the House of Lords says 'this is the proper interpretation of the statute,' then it is the proper interpretation. The House of Lords has a perfect legal mind. Learned Lords may come or go, but the House of Lords never makes a mistake. That the House of Lords should make a mistake is just as unthinkable as that Colonel Bogey should be bunkered twice and take 8 to the hole. Occasionally to some of us two decisions of the House of Lords may seem inconsistent. But that is only a seeming. It is our frail vision that is at fault."

—Lord Sands in *Assessor for Aberdeen v. Collie*, [1932] S.C. 304, 312.

Vol. X. Tuesday, March 6, 1934 No. 4

The Claim of Privilege by State Departments.

The recent case of *Spigelmann v. Hocker and Austin*, (1933) 50 T.L.R. 87, which has caused considerable discussion in England, is of no less interest to practitioners here, since it raises the question of the refusal of Government Departments to produce documents on the ground that their production would be contrary to the public interest.

The leading English case on the point is *Ankin v. London and North Eastern Railway Co.*, [1930] 1 K.B. 527, where the Minister of Transport, to whom railway companies were bound by statute to give notices of accidents, claimed privilege, in the public interest, to comply with any request which he may receive for permission to inspect or obtain copies of such notices. Scrutton, L.J., said:

> "It is the practice of the English Courts to accept the statement of one of His Majesty's Ministers that production of a particular document would be against the public interest, even though the Court may doubt whether any harm would be done by producing it. . . . . the Court accepts his statement upon his responsibility."

Slesser, L.J., was of the same opinion. He said:

> "With regard to the reason given by the Minister of Transport for concluding that production of the report would be contrary to the public interest, in my view of the authorities he was not bound to give any reasons for his conclusion. . . . I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests. Therefore I think that in this case, both on its particular merits and on the general principle, the Court will not interfere, the Minister having said production of the report would be to the injury of the public interest."

Macnaghten, J., in *Spigelmann's* case said that the above quotation from the judgment of Scrutton, L.J., in *Ankin's* case was a clear precise statement of the law of England and was binding on himself, and he must follow it in so far as it was applicable to the facts of the case before him. Briefly, these were as follows:

During the trial of an action for damages relating to a motor-car accident, a police sergeant, who was called as a witness on subpoena, was asked in cross-examination to produce a statement which had been made to him by one of the defendants in the action three days after the accident. The statement had been made, after the usual caution had been administered, on the occasion of a visit made by the police sergeant to the defendant at the hospital where he then was, and it was written down and signed by the defendant. The statement was subsequently attached to a report submitted by the police sergeant to his superior officer in accordance with instructions given to him to make inquiries in connection with the accident. The objection was taken on instructions from the Home Secretary on the ground that it would be contrary to the public interest that such statements should be divulged.

During the hearing of the objection a letter from the Home Secretary addressed to the learned Judge was received and read. Referring to the statement, the Home Secretary said: "I am satisfied that the production of the particular document referred to above, as of other documents of the same class, would be contrary to the public interest."

By the leave of the Court the Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Wilfrid Lewis appeared in support of the objection, and contended that if the Home Secretary stated that the production of such documents would be contrary to the public interest, a Court of law could not order their production. After citing a number of authorities, he submitted that the law was as stated by Scrutton, L.J., in the quotation from his judgment in *Ankin's* case which we have set out above.

Macnaghten, J., after reviewing the authorities cited by all the counsel who had addressed him, referred to the letter from the Home Secretary, and stated that he must read that letter in conjunction with the remarks of Scrutton, L.J., in *Ankin's* case which he was bound to follow. Scrutton, L.J., spoke of a particular document, while the Home Secretary seemed to be referring to a class of documents, a class, moreover, which had previously always been produced in Court without any objection. The objection, therefore, had not been taken in the manner in which the law required it to be taken in order to be effective and the document must be produced. In case of doubt, however, he proposed first to look at the document himself and would satisfy himself that no injury to the public interest would take place by its publication before allowing it to be used at the trial.

His Lordship then read the document and decided that there was nothing in it the publication of which could be injurious to the public interest.

The question now arises as to whether the law as stated by the English Court of Appeal in *Ankin's* case is applicable in New Zealand, seeing that *Spigelmann's* case is not helpful, as Macnaghten, J., found a technical reason for eluding the authority by which he was bound. Are we accordingly thrown back on *Ankin's* case, if we seek to learn what is the law on the matter in this Dominion? Here, it has been held that there is no absolute privilege which would make all documents in a Department's possession free from discovery, and too much is claimed when a Minister refuses to make any discovery at all on the ground that production would be contrary to State policy and prejudicial to the public interest: *Barrett v. Minister of Railways*, (1902) 4 G.L.R. 395. It has also been held that production should not be ordered when privilege is claimed on the ground that a document in the possession of the Police Department is information regarding the commission of crime and the head of that Department says it ought not, in the interests of the State, to be produced: *Coe and Simmonds v. Simmonds* (*No. 2*), (1911) 30 N.Z. L.R. 489, where Stout, C.J., said:

> "It may be that injury is done to an individual by preventing him from suing a person who may have been an informer, but the interests of the State are greater than those of individuals; and it would be, in my opinion, a dangerous thing to say that all information received by the Government regarding crimes can be made public if a party chooses to sue another, and that the Government can be compelled to produce the information they have received. This might lead to great injury in the detection of crime."

Neither of these cases touches the point we wish to make, nor is there any rule in our Code of Civil Procedure which deals with an application where privilege is claimed for any document, making it lawful for the Court or a Judge to inspect it with regard to the validity of the claim. (*Cf.* Order XXXI, r. 19A, sub.-r. 2, of the English rules.)

In a South Australian case, which was apparently not referred to either in argument or in the judgment, in *Spigelmann's* case, though Macnaghten, J., considered a number of authorities, their Lordships of the Privy Council could have invoked a South Australian rule similar in wording to the English rule to which we have referred: *Robinson v. State of South Australia*, [1931] A.C. 704, but they did not do so, founding their decision on grounds of principle. Upon an order for discovery, the respondent State had claimed privilege in respect of 1,892 documents tied in three bundles, and alleged to be State documents comprising communications between officers administering the department concerned, and the affidavit had as an exhibit a minute by the responsible Minister stating, *inter alia*, disclosure of the documents would be contrary to the interests of the State and the public.

Their Lordships, before considering the express rule to which reference has been made, inquired as to the character and quality of the privilege itself, and as to the attitude of the Court with reference to it when its possible existence in relation to documents comes under judicial notice. They proceed:

> "First of all, it is, their Lordships think, now recognized that the privilege is a narrow one, most sparingly to be exercised. 'The principle of the rule, Taylor points out in his work on Evidence, section 939, 'is concern for public interest, and the rule will accordingly be applied no further than the attainment of the object required.'"

The Board express surprise that the cases illustrating the limitations on a rule so circumscribed are not more numerous, and they find the explanation in the judgment of Rigby, L.J., in *Attorney-General v. Newcastle upon-Tyne Corporation*, [1897] 2 Q.B. 384, 395, where, himself an ex-law officer, he says:

> "I know that there has always been the utmost care to give a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded."

Their Lordships then point out that protection has not been limited to public documents of a political or administrative character. But the fact that the documents are confidential or official is alone no reason for their non-production: the foundation of the rule is that the information cannot be disclosed without injury to the public interest: *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.*, [1916] 1 K.B. 822, 829, 830, and *Smith v. East India Co.*, (1841) 1 Ph. 30, 41 E.R. 550. They add that it is conceivable that even in connection with the production of documents relating to the trading, commercial, or contractual activities of a State, there may be "some plain overruling principle of public interest concerned which cannot be disregarded,"

> "but the cases in which this is so must, in view of the sole object of the privilege, and especially in time of peace, be rare indeed."

After referring to the increasing extension of State activities into the spheres of trading business and commerce, and of the claim of privilege in relation to liabilities arising therefrom now apparently freely put forward, they say that the Courts must be reminded that

> "While they must duly safeguard genuine public interests, they must see to it that the scope of the undoubted privilege is not, in such litigation, extended. Particularly must it be remembered in this connection that the fact that production of the documents might in the particular legislation prejudice the Crown's own case or assist that of the other side is no such 'plain overruling principle of public interest' as to justify any claim of privilege."

And further

> "In truth, the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation, is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security."

That the Court has a reserve power to inquire into the nature of the document for which production is sought, and to require some indication of the nature of the injury to the State which would follow its production, was the view expressed by Griffith, C.J., in *Marconi Wireless Telegraph Co. v. The Commonwealth* (*No. 2*), (1913) 16 C.L.R. 178, where the learned Chief Justice of Australia said the Court cannot without abdicating its duty refuse to be bound to inquire into the facts so as to ascertain what is the nature of the alleged State secret.

The Judicial Committee expressly confirmed this view. Their Lordships said:

> "The existence of such a power is in no way out of harmony with the reason for the privilege provided that its exercise be carefully guarded so as not to occasion the State the

mischief which the privilege, where it exists, is designed to guard against."

In distinction to the conclusion of Macnaghten, J., in *Spigelmann's* case, the Judicial Committee did not consider the privilege lost merely by reason of the insufficiency of the form in which it had been claimed, and, as it would or might be contrary to the public interest to deprive the respondent State of an opportunity of regularizing its claim to protection, they indicated the nature of the appropriate affidavit that should be made in such cases.

With reference to the whole matter, their Lordships stated they were much impressed by the observations of Starke, J., in his dissenting judgment in *Griffin v. State of South Australia* (1925) 36 C.L.R. 378, 402, where he said:

> "No one has suggested that the interests of the public are such that a Judge ought not to see the documents."

They then referred to the express terms in which the power of the Court to inspect is conferred by the South Australian rule which was copied from the English rule that we have already mentioned, and then find a satisfactory precedent for the exercise of the Court's inherent reserve power in *Queensland Pine Co. v. The Commonwealth of Australia*, [1920] St. R. Qd. 121, where

> "Notwithstanding a certificate from the Minister of State of the Commonwealth claiming protection for documents on this occasion in terms direct and unambiguous, the learned Judge at the trial inspected them, and having done so expressed the opinion that the facts discoverable by inspection would not be detrimental or prejudicial to the public welfare, and he ordered that inspection of all the documents should be given to the plaintiff. The jurisdiction was there exercised at the trial: their Lordships see no reason why it should not equally be exercised on interlocutory application. Their Lordships need hardly add that the Judge in giving his decision as to any document will be careful to safeguard the interest of the State, and will not, in any case of doubt, resolve the doubt against the State without further inquiry from the Minister."

The appeal was disposed of quite apart from the South Australian rule to which we have referred, by remitting the case back to the Supreme Court of South Australia with a direction that it was a proper one for the exercise by that Court of its power of itself inspecting the documents for which privilege was set up in order to see whether the claim was justified.

We have quoted extensively from this judgment, as the expressions of opinion of their Lordships of the Judicial Committee as to the *ratio decidendi* of their decision are binding on all our Courts.

We are not concerned, therefore, with the statement of the law in *Ankin v. London and North Eastern Railway Co.*, which was decided by the English Court of Appeal in the year previous to the South Australian appeal, and which, in that appeal, though put forward by counsel in argument for respondent State was not referred to in their Lordships' judgment.

It is clear, therefore, *Spigelmann's* case is of little interest to us, but that, apart from and in the absence of any rule on the point, the New Zealand Courts have an inherent power of inspecting the documents for which a Department claims privilege, either at trial or interlocutory proceedings, in order to determine whether the facts discoverable by their production would be prejudicial or detrimental to the public welfare in any justifiable sense.

Summary of Recent Judgments.

SUPREME COURT
New Plymouth.
1934.
Feb. 15, 20.
MacGregor, J.

GILBERT v. SAMPSON.

Fencing—Trees planted "on or alongside" any Boundary Line or Fence—Meaning of "alongside"—Fencing Act, 1908, s. 26.

The word "alongside" in s. 26 of the Fencing Act, 1908, which prohibits a person from planting trees *on or alongside* any boundary line or fence without the previous written consent of the occupier of the adjoining land, must be construed as "contiguous" to, in its ordinary sense—viz., "touching"—that boundary line or fence, and not in its loose sense as meaning "neighbouring."

Therefore, young macrocarpa trees planted for a length of about 25 chains parallel to and at a distance varying from 2 ft. to 4 ft. from the boundary line or fence were held not to have been planted "alongside" such boundary line or fence.

Dictum of the Court of Appeal in *Spargo v. Levesque*, [1922] N.Z.L.R. 122, 128, as to meaning of "alongside," followed.

Meaning of "contiguous" in *Spillers, Ltd. v. Cardiff Assessment Committee*, [1931] 2 K.B. 21, adopted.

Middleton, for the appellant; **Croker,** for the respondent.

Solicitors: Monaghan and Middleton, New Plymouth, for the appellant; **Croker and McCormick,** New Plymouth, for the respondent.

Case Annotation: *Spillers, Ltd. v. Cardiff Assessment Committee*, E. & E. Digest Supplement to Vol. 38, title *Rates and Rating*, p. 33, para. 226 cc.

NOTE:—For the Fencing Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 1, title *Boundaries, Fences, and Party Walls*, p. 677.

SUPREME COURT
Dunedin.
1933.
Nov. 29.
Dec. 12.
Kennedy, J.

SILVERSTREAM DAIRY COMPANY, LTD. v. DAVID.
MOSGIEL CO-OPERATIVE DAIRY FACTORY COMPANY LTD. v. DAVID.

Fisheries—Pollution of Stream so as to Poison or Injure Fish—Whey-washings—Scope of Regulation within Drainage Board District—Fisheries Act, 1908, s. 94 (1), Reg. 6.

Section 94 (1) of the Fisheries Act, 1908, provides:—
"The regulations made under section eighty-three hereof may provide for all or any of the following matters:— . . .
"(*l*) For preventing the pollution of any river, stream, or waters in which salmon, salmon fry or spawn, or trout, trout fry or spawn exist or have been liberated, such pollution being caused by casting or allowing to flow into or placing on or near the bank or margin of any such river, stream, or waters sawdust or sawmill refuse, lime, sheep-dip, flax-mill refuse, or any other matter or liquid poisonous or harmful to fish."

On appeal from convictions by a Stipendiary Magistrate who held that the appellants did allow to flow into a stream in which trout existed a liquid—namely, whey-washings—which was injurious to fish,

E. J. Anderson, for the appellants; **P. S. Anderson,** for the respondent,

Held, dismissing the appeals, 1. That the regulation made under the above-quoted section applies to whey-washings, which are in fact harmful or injurious to fish, and accordingly come within any genus or category wide enough to include as a species the various substances particularly named in the regulation.

2. That there is no inconsistency between the application of the Fisheries Act, 1908, and of s. 261 of the Public Works Act, 1928; and, as the Taieri County Council had not the full powers of a Drainage Board and had done nothing sufficient to exclude the provisions of the first-named Act, the regulations made thereunder applied to the stream into which appellants had allowed to flow the liquid which was injurious to fish.

Brodrick and Another v. Blackie, (1915) 34 N.Z.L.R. 1113, referred to.

Solicitors: Webb, Allan, Walker, and Anderson, Dunedin, for the appellants; **Statham, Brent, and Anderson,** Dunedin, for the respondent.

NOTE:—For the Fisheries Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Fisheries*, p. 344.

SUPREME COURT
Auckland.
1933.
11 Dec.
1934.
Feb. 16.
Herdman, J.

IN RE WILSON (DECEASED), WILSON AND ANOTHER v. WILSON AND OTHERS.

Will—Restraint on Alienation—Proviso protecting absolute Gifts of Residue to Testator's Children from Bankruptcy or Execution—Validity—Property Law Act, 1908, s. 24.

A testator directed his trustees to divide—

"the residue of my trust estate into as many equal parts as I have children who shall survive me and attain the age of twenty-five (25) years and to hold one of such equal portions for each child absolutely on his or her attaining such age," and, after making provision for the application of the income for education and maintenance, and for the share of a child predeceasing him or dying before attaining the age of twenty-five years with or without leaving issue, the testator provided:

"the respective shares of my said children in the said rest or residue of my trust estate shall not during their respective lives pass by bankruptcy or be liable to be seized sold attached or taken in execution by process of law."

On an originating summons to determine certain questions arising on construction of the will,

Goulding, for the plaintiffs; **Jacka,** for E. Wilson, S. F. Wilson, G. A. Wilson, and J. R. Wilson; **Noble** for R. W. Wilson, A. L. Wilson, and M. L. Wilson; **Rudd,** for the Official Assignee; **Wilson,** for R. J. Wilson.

Held, 1. That, following *Craig v. Craig*, [1918] N.Z.L.R. 106, and in *Re Rayner, Couch v. Warner*, (1925) 134 L.T. 141, the residue was to be divided between all the children of the testator who attained the age of 25 years, including those children who were over that age at the testator's death.

2. That the operation of s. 24 of the Property Law Act, 1908, is not restricted to life interests, but applies also to absolute gifts of residue, and that, therefore, the share or interest which had become vested in a child of the testator on attaining the age of 25 years was protected, by virtue of s. 24, by the final proviso of the will as set out above.

Kidd v. Davies, [1920] N.Z.L.R. 486, followed.

Re Brown, Stephens v. Brown, [1925] N.Z.L.R. 170, referred to.

Solicitors: Bell and Speight, for the plaintiffs; **L. N. Jacka,** for E. Wilson, S. F. Wilson, G. A. Wilson, and J. R. Wilson; **W. Noble,** for R. W. Wilson, A. L. Wilson, and M. L. Wilson; **L. F. Rudd,** for the Official Assignee; **Goldstine, O'Donnell, and Wilson,** for R. J. Wilson.

Case Annotation: *Re Rayner, Couch v. Warner*, E. & E. Digest, Vol. 40, title *Wills*, para. 6293, p. 771.

NOTE:—For the Property Law Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Real Property and Chattels Real*, p. 1077.

Agreements for Sale and Purchase.

Some Essentials to be Remembered.

By L. W. GEE.

"The draftsman," said Mr. Justice Blair in *Ross v. Gilmer*, [1932] N.Z.L.R. 507, "has slavishly adopted certain stock clauses more appropriate to a document of a temporary nature and has added some apparently of his own, with the idea that there was only one person to be considered in the transaction."

That one party should seek to insert in the contract something more than the bare essentials of property price and parties is not remarkable. What is strange is that the person, in whose favour the agreement for sale and purchase is drawn, is usually the vendor. For, although the rights, remedies, and conditions implied under an open contract are for the most part sufficiently fair and adequate for universal application, the rule of *caveat emptor* recognizes that questions of quality are peculiar to the individual subject-matter and can better be dealt with expressly by the parties. And matters of quality are the concern of the purchaser. The paramount object of the vendor is money and, fortunately (for the purposes of sale, although perhaps not of exchange), the pound and its vicar in credit the bank cheque are singularly free from defects both latent and patent.

Real property, however, demands a deeper respect for the parol evidence rule and a nicer appreciation of the deficiencies of the law of non-disclosure and misrepresentation. But if the purchaser is unwilling to record in writing his requirements as to borer, carrying capacity, and the like, he might just as well refuse to execute a further fuller and more formal agreement, as he is usually entitled to do. For a party to a contract is not obliged, in the absence of an express stipulation, to enter into a more formal agreement. This difficulty (obviously) can be overcome by the insertion in the contract of such a stipulation. The real difficulty is as to the effect of such a stipulation. Such a clause only entitles the parties to demand the insertion of such terms as are already expressed or implied in the contract unless as in *Shannon v. O'Driscoll*, [1930] G.L.R. 470,

"a proper agreement containing all usual provisions in agreements of a like nature shall be prepared and signed by the parties."

it is so ingeniously worded as to make the "contract" in which it appears an incomplete contract.

In either case the parties are at liberty to bargain in respect of any suggested new terms; and the solicitor for the purchaser is usually in the happy (if less profitable) position of being able to advise his client to rely on the preliminary contract (and lodge a caveat) should the vendor not agree to the modifications he suggests.

Perhaps, from the point of view of the purchaser, the most objectionable clauses common to many agreements for sale and purchase are the default clauses and those provisions making the price payable irrespective of the transfer. These provisions have recently been more fully discussed by Mr. Stephens in this JOURNAL.* The number of persons who agree to buy

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*(1933) 9 N.Z.L.J. 283.

land with the intention of paying for the same although the vendor at the date of payment may not be ready and willing to transfer must be extremely small. Yet in informal contracts it is frequently found that a date for payment of the purchase-money is fixed but there is no mention of completion by transfer, and the rule is that when a day is fixed for payment but none for the conveyance the vendor may sue for the purchase-money as a debt irrespective of whether he is then ready and willing to transfer. This must come as a shock to the purchaser and as a surprise to the vendor. But the surprise is not necessarily pleasant; for both stipulations are independent, and a vendor who has to wait some years for payment may find himself open to an action for not executing a transfer, presumably within a reasonable time after the signing of the contract: *Mattock v. Kinglake*, (1839) 10 Ad. & El. 50; 113 E.R. 19. Unless the construction adopted by the Court of Appeal in *Ruddenklau v. Charlesworth*, [1925] N.Z.L.R. 161, [1924] G.L.R. 417, is to be applied to contracts of this nature, a position will arise similar to that in *Bodley v. Macdonald*, (1901) 20 N.Z.L.R. 371, 3 G.L.R. 373, where a clause providing for the balance of purchase-money being paid by the purchaser executing an agreement covenanting to pay the same entitled the purchaser to a conveyance immediately upon execution of the agreement and the vendor would thereupon become an unsecured creditor for the balance of the purchase-money.

In contracts like that of *Mattock v. Kinglake* (*supra*) where there is a day fixed for payment but no express provision for transfer, both vendor and purchaser may therefore be concerned to see that in a subsequent agreement the stipulations for payment and transfer are made mutually dependent; but where the obligation to convey arises "on" or "upon payment" as in *Yates v. Gardiner*, (1851) 20 L.J. Ex. 327, *Dicker v. Jackson*, (1848) 6 C.B. 103, *Sibthorp v. Brunel*, (1866) 3 Ex. 826, and *Lindsay v. Direct London and Portsmouth Railway Co.*, (1850) 19 L.J.Q.B. 417, the position is different. In the former case, both the express stipulation to pay and the implied stipulation to convey are independent; but in the latter cases the agreement to pay is independent and the vendor can sue for the purchase-money as a debt whether he is or is not ready and willing to convey; but as far as the purchaser is concerned the provision for payment is a condition precedent and he cannot demand a conveyance until he has paid the purchase-money. Although in *Tattle v. Gibson*, [1925] N.Z.L.R. 813, G.L.R. 359, the inference was drawn from other parts of the agreement that the stipulation to pay was not independent, it is better to provide expressly that both stipulations are mutually dependent.

Default clauses vary, of course; but there is a certain unanimity in the manner in which we modify the rules of common law, equity, statute, natural justice, and the express agreement of the parties, and within a small compass the solicitor for the purchaser may find much to object to. The provision that all moneys shall be forfeited in the event of any default is of little assistance in settling the accounts between vendor and purchaser in the event of rescission; for equity can grant relief and the parties might consider it better to state expressly what the defaulting purchaser shall pay for his occupancy of the property in such an event. Where the purchaser is in possession, s. 94 of the Property Law Act must be complied with, and a provision that upon default the vendor may reenter without notice is ineffective; while if the right to reenter is limited to arise after a fixed number of days' notice, it is deceptive as the notice must be reasonable in the light of the particular breach of covenant.

The right to sue for the deficiency in price is not a complete remedy unless a right to sue not only for expenses but also for arrears of rates and interest payable under the contract up to the date of the resale is added (see *Sandrey v. Hampton*, [1927] N.Z.L.R. 673, [1926] G.L.R. 553); but the vendor is not necessarily entitled to have this remedy in either form. Not only are clauses, originally drawn for documents of a temporary nature, not always appropriate to cases where payment of the purchase-money is postponed until long after possession is given; but the law itself, evolved from transactions where completion by payment and conveyance is intended to be made as soon as the title has been approved, is not necessarily suitable to the more protracted transaction. For example, the rule that the existence of a mortgage is not, owing to the operation of s. 70 of the Property Law Act, a defect in title is a good rule in general and prevents a purchaser from rescinding on a mere technicality where the existence of the mortgage has not been disclosed. But a purchaser who agrees to pay his purchase-money by instalments over a long period may find that he can be compelled to pay all but the last instalment notwithstanding that there exists a mortgage under which there is owing an amount many times greater than that last instalment. A purchaser should therefore either search the title before signing the preliminary contract or insert in the contract an express stipulation that there are no mortgages on the title. Conversely a vendor who sells on a small deposit and postpones the payment of the balance of the purchase-money for some years would be wise to stipulate that he will be entitled to give a registered mortgage for a limited amount, otherwise if he is obliged to borrow money his mortgage will have to be a mortgage of his interest under the agreement for sale.

The habit (which has now received statutory recognition) of not paying the balance of purchase-money on the appointed day demands that a provision for payment of interest after that date should be inserted in the agreement; otherwise interest after that date, if recoverable at all, will be recoverable only as damages or on an implied contract to pay where the purchaser continues in possession after the day for payment of the balance of the purchase-money and the omission of such a clause may have more consequences than those appearing in *Ruddenklau v. Charlesworth* (*supra*).

There are occasions, then, when either party may well desire to modify the preliminary contract; but the extraordinary thing is that the vendor so often demands it as of right and so often has his way.

The Court of Appeal.

This Year's Divisions.

The Divisions of the Court of Appeal for the ensuing year have been constituted as follows:—

First Division: The Rt. Hon. the Chief Justice, and their Honours Mr. Justice Herdman, Mr. Justice MacGregor, Mr. Justice Blair, and Mr. Justice Kennedy.

Second Division: The Rt. Hon. the Chief Justice, and their Honours Mr. Justice Reed, Mr. Justice Ostler, Mr. Justice Smith, and Mr. Justice Johnston.

Professor Algie's Report on Legal Education.

"Overhaul of the Present System Overdue."

By W. J. HUNTER.

Through the courtesy of the Editor of the LAW JOURNAL I have had an opportunity of reading this interesting and valuable report. It must be confessed at once that many men are admitted to the profession who are not fit to practice without supervision. Why is this?

1. I think the outstanding reason is that, as a result of the legislation abolishing the necessity for serving articles, the bias of legal education and training is almost entirely on the theoretical side. There is, speaking generally, no proper provision for practical training. It is not essential that the law student should have any experience at all in a law office, and if he has, he may not get proper all-round training, but may be confined to a round of more or less mechanical duties. Practitioners are not to blame for this. With the best will in the world to afford assistance to the student, they are compelled by necessity to regard their offices as places of business, and not as schools for training the legal neophytes who, after two or three years spent in picking up what they can of elementary principles of practical work while devoting the evenings to study and attending lectures, will set up in practice on their own account. Certainly a good deal of practical work can be learned in a Law School and in the absence of the necessity for Articles in New Zealand, I think that as much practical work as possible should be done there. Much of Practice and Procedure, Conveyancing, and Book-keeping which will be useful in practice, can be taught there under teachers who are themselves experienced practitioners, so that students who are really suited for the profession shall have learned the ground-work and can quickly adapt what they have learned to the actual business of doing work for clients.

2. This brings me to Professor Algie's views as to what it is proper to teach in a University and what is not. Like most University teachers, the learned Professor is uneasy at the thought that vocational training, as opposed to what is merely cultural, should obtain in a University. No doubt there is a great deal to be said in support of the contention that a University training should be one of general culture only, and that the details of a profession should be learned elsewhere. But the Professor admits that the primary and essential aim of Legal Education must be, as matters now stand in New Zealand, to provide the best possible equipment for men who decide to engage in the actual practice of the law. Is the University really making the best of its opportunities to provide such equipment, or is it concentrating its efforts on teaching principles of law, essential as a ground-work for the man who intends to devote himself to the work of a barrister, but failing to provide instruction suitable to the general practitioner who will devote at least nine-tenths of his time to the office work of a solicitor?

The University has, in fact, taken over the teaching of Law as a preliminary to practice. There is no adequate system of training outside the walls of the University. It seems to me, then, that every effort should be used to train men there, so that when they are admitted they are qualified to practise. The present system is simply a reproach to those concerned as practical men of affairs, and I think that overhaul of the present system is long overdue. It does not follow, however, that Professor Algie's report, valuable as it is, contains the proper remedy for the present state of the matter.

3. The learned Professor has a great dislike of the system of examiners being appointed from amongst the practitioners themselves. He would have the examining, as well as the teaching, done by teachers of law. But surely this is to ignore the fact that the Profession has a responsibility for the testing of its new members! The Professor complains that the Profession has delegated its duty of teaching to the University, but he would go further and ask the Profession to delegate the examining, as well as the teaching, to the University. Surely this is inconsistent! The real reason for leaving the work of examining to experienced practitioners seems to be because they are most likely to be in touch with the actual requirements for practice. It is true, of course, that testing by written examination only is not an ideal method, as it lends itself to the undue advantage of the candidate who has the facility for memorising, particularly where a portion of the Syllabus, as here, consists of a knowledge of the provisions of certain Statutes. But the learned Professor might give the examiners credit for possessing reasonable intelligence and the knowledge that the "Crammer" is abroad in the land, and, as far as the syllabus permits, to frame a reasonable proportion of questions in such a manner as is likely to enable him to detect, and judge accordingly, the candidate who has been "crammed" on a set of notes.

It is impossible, within a reasonable space, to comment on the Professor's proposed new syllabus further than to say that it does not seem to make any provision for the large number of students whose place of residence does not permit of their attending a University College. From my experience as one of the "amateur, external Examiners" referred to by the Professor, I would say that while many of them are obviously handicapped by not being able to attend classes, there are amongst them some excellent, well-informed students, and that the requirements of students so placed should not be ignored in any system of reform of the syllabus or course of training.

The Equality of Members of the Bar.

The Practice in England.

"There is never a question of master and man in the profession," says Colonel R. T. Blackham in *Wig and Gown*. "All advocates, whether silks or stuff gownsmen, are equal, and the youngest junior addresses the most senior K.C. as 'Jones' or whatever his name may be. The word 'Mr.' is never used between gentlemen of the Inns of Court. Even the Judges resent the formal 'Sir' of other walks of life. When he was visiting my Livery Company, I addressed the Lord Chief Justice as 'Sir,' and he turned to me and said: 'Blackham, both you and I are members of the Bar, and if you address me again as 'Sir' I shall call you 'Your Holiness.'"

The Temple.

"The Home of the Common Law."

To enter any of the Inns is to catch at once the spirit of the old days. "What a collegiate aspect has that fine old Elizabethan Hall, where the fountain plays," exclaims Charles Lamb in his essay on *The Old Benchers of the Inner Temple*, in which he describes the Temple as "the most elegant spot in the metropolis." After the Temple Church, with its storied past, middle Temple Hall, with its magnificent hammer-beamed roof and richly carved screen, is the most historic place in the Temple. The Inner Temple Hall was built but sixty-five years ago, but the "old Elizabethan hall," erected whilst Plowden was Treasurer of the Inn has a history of 350 years. It is one of the very few surviving buildings in which one of Shakespeare's plays was performed during the great dramatist's lifetime. A performance of *Twelfth Night* was given in the Hall in 1601, at which Shakespeare himself may have been present.

Sir Francis Drake, like many another famous Elizabethan seaman, trod the oaken floor of the Hall. It is recorded in the Minutes of the Middle Temple that on August 4, 1586, "Sir Francis Drake, one of the Society of the Middle Temple, after his voyage came into the Hall at dinner time, and acknowledged to the Masters of the Bench his old friendship with the Society, those present congratulating him on his happy return, with great joy."

For the American lawyer the ancient Hall of the Middle Temple has a special interest. Did not Mr. Choate call the Middle Temple "the great American Inn"? In the speech he made at the banquet at which he was entertained by the Bench and Bar of England on his retirement from the office of American Ambassador at the Court of St. James's nearly thirty years ago, he pointed out that

"there were five of the signers of the Declaration of Independence who had been bred to the law at the Middle Temple, and three of the framers and signers of the Constitution of the United States who had been bred in the same Inn, and one of them was afterwards nominated by President Washington as Chief Justice of the United States."

Of the five Middle Templars who signed the Declaration of Independence Edward Rutledge became Governor of South Carolina, Thomas Heywood became a Judge, and Thomas McKean became the Chief Justice of the Supreme Court. The other two were Arthur Middleton and Thomas Lynch, the first of whom was admitted to the Middle Temple in 1757, and the latter in 1767. John Rutledge, who was called to the Bar at the Middle Temple in 1760, and who was Chairman of the Committee that drafted the Constitution of the United States, had a career even more distinguished than that of his brother Edward. It was he who was nominated by Washington to be Chief Justice of the Supreme Court. Who shall deny, then, that the American lawyer, as he passes under the Middle Temple Gatehouse—erected, like the Cloisters, by Sir Christopher Wren some 240 years ago—may feel a fitting sense of being on familiar ground?

Although the Inner Temple Hall is a modern structure yet it occupies the site of the old Hall which formerly belonged to the Knights Templars. Whatever, then, may be the truth about the origin and separation of the two Societies, the Inner Temple may claim the more direct descent from the old Templars. The walls of the Hall are rich in fine portraits, from Kneller's portrait of William III and his Queen to those of Lord Halsbury and William Gully, painted whilst the one was Speaker of the House of Lords and the other Speaker of the House of Commons. But the most famous portrait in the Temple is Van Dyck's large portrait of Charles I, which hangs above the Benchers' table in Middle Temple Hall.

Both the Libraries of the Temple are modern structures. As long ago as 1505 the Inner Temple had a Library, for the Inn's records of that year show that two members of the Society were "assigned a chamber newly made under the Library." At the present time the Library contains one of the most notable collections of books in the country. It includes, in addition to some 40,000 law books, some 25,000 literary and historical works. Among the most precious volumes on the shelves are some books that belonged to Sir Edward Coke. The nucleus of the Middle Temple Library was a bequest by Robert Ashley, who, dying in 1641, bequeathed his library to the Society as an acknowledgment of the love he bore it. According to Mr. C. E. A. Bedwell, formerly Librarian of the Middle Temple, and the author of an excellent history of the Inn, the studious and benevolent Ashley thought that in the keeping of the Society his books, of which many were "not easily to be mett withall elsewhere," might "happily be useful to some good spirrittes" after him.

The Temple Gardens, as well as the Middle Temple Hall, have their Shakespearian associations.

> Within the Temple Hall we were too loud:
> The garden here is more convenient.

So does Shakespeare make the Temple Gardens the scene in *Henry VI* of the plucking of the roses by the partisans of the Houses of York and Lancaster. They have an imperishable place in Literature. It was from the upper windows of Crown Office Row, where he was born, that Charles Lamb watched the old Benchers of the Inner Temple "pacing the stately terrace." It was in taking a boat from the old Temple Stairs that Sir Roger de Coverley, a great lover of the Gardens, preferred to employ a boatman with a wooden leg because, presumably, it meant that he had been injured in the "late wars." Many a modern touch may be found in the old *Spectator*.

A volume would be required to record all the great names associated with the Temple. Thackeray, himself a member of the Middle Temple, wonders whether the student, passing historical chambers, says:

> "Yonder Eldon lived; upon this site Coke mused upon Lyttleton; here Chitty toiled; here Barnewell and Alderson joined in their famous labours; here Byles compiled his great work on Bills, and Smith compiled his immortal Leading Cases."

Some buildings remain in the Temple where these reminiscences may be indulged in. It was at No. 5, King's Bench Walk, that Lord Mansfield occupied the chambers alluded to in Colley Cibber's parody of Pope's well-known lines:

> Persuasion tips his tongue whene'er he talks,
> And he has chambers in the King's Bench Walks.

Most precious of all the buildings in the Temple with these literary associations is No. 2, Brick Court,

(*Concluded at foot of page 49.*)

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Memorandum of Lease of Land together with Grant of Rights of cutting Flax thereon.

Under the Land Transfer Act, 1915.

Memorandum of Lease and Grant of Rights of Cutting Flax.

A.B. and C.D. both of etc. (hereinafter together called "the Lessors") being registered as proprietors of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in ALL THAT piece of land situated etc. containing etc. being etc. IN CONSIDERATION of the rents and royalties hereby reserved and of the covenants conditions and provisions on the part of the Lessee herein expressed or implied DO HEREBY DEMISE AND LEASE to E.F. of etc. (hereinafter called "the Lessee") ALL THAT the said land TO BE HELD by the Lessee as tenant for the space or term of years from and inclusive of the day of 19 at the yearly rental of £ payable by quarterly instalments of £ each on the days of and in every year the first thereof to be paid on the day of next and the last thereof to be paid in advance on the day of 19 together with the other quarter's rent then due.

AND FOR THE CONSIDERATION aforesaid the Lessors DO HEREBY TRANSFER AND GRANT unto the Lessee for and during the term hereby created (subject to determination as hereinafter provided) the full free and exclusive liberty and power to cut down remove carry away and sell ALL THAT the green and millable flax growing in and being upon the said land AND ALSO the full free and unrestricted liberty and power to make construct and use all such tramways thereon as shall be necessary and proper for the purpose of cutting down removing and carrying away the said flax AND from time to time to alter and remove from the said land any such tramways SUBJECT to the following covenants conditions and restrictions that is to say :—

I. THE Lessee doth hereby covenant with the Lessors as follows :

1. THE Lessee shall and will duly and punctually pay to the Lessors at or elsewhere in New Zealand as the Lessors shall direct the rent hereby reserved at the times and in the manner hereinbefore provided for payment of the same without any deduction whatsoever.

2. (1) THE Lessee shall and will pay to the Lessors (in addition to the rent hereinbefore reserved and covenanted to be paid) a royalty of for every ton of green flax cut down upon the said land during the term hereby created such royalty to be paid by quarterly payments together with and on the same days hereinbefore appointed for payment of the said rent.

(2) FOR the purposes of computation of the amounts of the said royalty the Lessee will cause all such flax as shall be cut down upon the said land to be accurately weighed within days from the time of cutting and will cause to be kept a full and true record thereof including particulars of dates of cutting and weighing respectively quantities of green flax and all other facts which may be relevant and proper.

(3) WITH each payment of the said royalty the Lessee will deliver to the Lessors a full true and accurate statement accounting for such payment and the Lessee will if so required by the Lessors verify such statement of account and any number of them from time to time by statutory declaration.

(4) THE Lessee will give the Lessors access to all the records of the Lessee relating to the said flax and the cutting and weighing thereof and paying therefor and will permit the Lessors to take from the said records such extracts as they think fit and to enter upon the said land for the purposes of obtaining or checking the same or measuring or weighing any flax (whether standing or cut down) to be found thereon or any fibre or other product derived therefrom.

3. THE Lessee shall and will duly and punctually pay and discharge for and during the term hereby created all rates taxes and other assessments (except alone the Lessors' land-tax) payable in respect of the said land.

4. THE Lessee will at all times use and exercise the rights liberties and powers hereby granted in such manner as to cause as little damage as possible to the Lessors and to the surface and freehold of the said land including the flax plants thereon and will at all times use reasonable endeavours in exercising the right of cutting the said flax not to injure the said flax plants or unduly interfere with the succeeding growth thereof.

5. THE Lessee shall not nor will transfer assign sublet or part with possession of the said land or any part thereof or any of the rights powers and authorities hereby created without the consent in writing of the Lessors first had and obtained :

PROVIDED always that such consent shall not be unreasonably or arbitrarily withheld.

6. [*Covenant for repair of buildings and fences gates and bridges if any.*]

II. THE Lessors DO HEREBY COVENANT with the Lessee as follows :—

7. THE Lessee paying the rent and the royalty hereby reserved and observing and performing all and singular the covenants conditions and restrictions on his part herein expressed or implied he shall quietly hold and enjoy the said land and the rights liberties and powers hereby created throughout the said term without any interruption by the Lessors or any person lawfully claiming under them.

III. PROVIDED ALWAYS and it is hereby agreed and declared by and between the parties hereto as follows :—

8. THE Lessee shall have the right to dig and make drains and ditches through the said land for the purpose of properly draining the same.

9. IT shall be lawful for the Lessee (if he shall have first paid to the Lessors all the instalments of the rent and royalty hereby reserved and having observed and performed all the covenants conditions and provisions herein contained or implied and on the part of the Lessee to be observed or performed) at the determination of the said term by effluxion of time or within days thereafter to take up and remove from the said land all such buildings fixtures machinery and tramways as shall have been erected or placed upon or in the said land by the Lessee.

10. If and whenever the said rent or royalty shall be in arrear and unpaid for the space of days the Lessors may levy the same by distress and such distress may include not only chattels but also all or any fixtures and things affixed to or built into or forming part of the freehold of the said land which would in the appropriate circumstances be removable by the Lessee pursuant to the last-preceding clause hereof.

11. If and whenever default shall be made in payment of the said rent or royalty hereby reserved or any part thereof for the space of days after the same respectively shall be payable whether or not the same shall have been legally or formally demanded or if and whenever the Lessee shall make default in the observance or performance of any of the covenants conditions or provisions herein contained or implied and on the part of the Lessee to be performed or observed then and in any such case it shall be lawful for the Lessors by notice in writing to the Lessee served personally or by letter addressed to the Lessee at his last-known place of abode or business in New Zealand and sent by prepaid registered post or left at such place of abode or business by hand or affixed to any building gate or other erection upon the said land to determine this present lease and grant together with all the estate and interest rights liberties and powers hereby vested in the Lessee but without prejudice to the rights and claims of the Lessors for rent and royalty or either of them accrued or accruing due and without prejudice to the rights and claims of either party for damages in respect of any antecedent breach of covenant condition or provision hereof by the other party thereto.

In witness etc.
Signed etc.
Signed etc.
Correct etc.

Justice under a Republic.

How the Law has fared recently in Spain.

The recent defeat of the Ministry which had held office since the declaration of the Spanish Republic was due, in no small degree, to the manner in which it had flouted the law and the Courts, and to its disregard generally to the protection of private rights. The independence of the judiciary is laid down in the Spanish Republican Constitution, but this was openly defied by the late Government. A Ministerial decree dismissed twelve Judges of the Supreme Tribunal, the highest Court of justice in Spain, without any grounds being stated, without inquiry, and without any notice to its victims other than a notice in the official gazette. In protest, the law students of the University of Madrid declared a strike, and the law societies throughout Spain appealed against the decree with great firmness. A Republican deputy, Señor Villaneuva, raised the question in the Cortes, proving that the dismissals were unconstitutional and unjustifiable. The only satisfaction the Minister of Justice could give was to declare that the dismissed Judges had been "lacking in Republican zeal and had not, therefore, behaved honourably." In the course of the debate the Prime Minister, Don Manuel Azaña, interjected that "judicial power does not exist."

A few days later another Ministerial decree dismissed seventy-eight Magistrates of different rank. Many of these Magistrates fruitlessly appealed to the Government, but they were handicapped from the outset by having no information as to the reason for their dismissal. Out of ninety appeals from Judges and Magistrates, two were successful. The Bar also suffered severely.

The Minister has been frank enough to publish the grounds for his final decisions in regard to expulsion from the Bar of a number of its prominent members. We learn from *The Spanish Republic* (Eyre and Spottiswoode, 1933), that:

> "Thus we know that the Cadiz Attorney, Don Manuel Gandalla, has been expelled from his profession for writing, some years ago, a volume entitled *The Psychic Profile of the Dictator, with a Reasoned Sketch of his Work*, a book in which he praised Primo de Rivera; the Cordova Attorney, Señor Munoz Cobos, suffered a similar fate for 'remaining faithful to his Monarchist ideals, and alleging illness as a pretext for not being present at a railway-station to meet the President of the Republic'; Señor Carrasco, ex-President of the Court of Appeal at Zaragoza, was dismissed from office 'owing to his marked resistance to everything concerning the Republican regime'; a Santander Magistrate, Señor Palomeque, had to leave the service 'for not dropping his title, and for frequenting the company of traditionalists'; his colleague at Zaragoza, Señor Serrano, was dismissed 'for his well-known traditionalist sympathies and his opposition to the divorce laws'; Señor Cayon, Attorney of Cuenca, 'because he belonged to traditionalist clubs and associations'; a Magistrate of Tarragona, Señor Company, 'for writing articles under a pseudonym in *Las Noticias*, a Monarchist newspaper published at Barcelona'; and finally, a Cordova Magistrate has had his career cut short on account of 'his close friendship with Señor Cruz Conde, who formerly represented at Cordova the interests of General Primo de Rivera' (!!!). We have quoted from the official document that gave the reasons for the dismissals. It is all that need be said to show the respect of the Spanish Republic for the independence of Magistrates and Judges.
>
> "We should note, however, that while honourable men lose their careers for having served the Dictatorship, Señor Largo Cabellero, who was Councillor of State under General Primo de Rivera, now holds office as Minister of Labour, proving that grounds for disqualification are not the same in all cases. But if final evidence were needed of the Spanish Government's contempt for the Courts, it is furnished by the case of Captain Sanjurjo. This officer was found innocent and discharged by the Supreme Court of Justice of the Republic, the same Court that passed sentence of death on his father, leader of the August revolt, and condemned General Garcia de la Herran to life-long imprisonment in a penitentiary. But the Government kept Captain Sanjurjo in prison, and deported him to Villa Cisneros, to expiate the very crime of which he had just been declared guiltless by the highest Court in the land."

This manner of oppression is incomprehensible to those who have lived only under the protection of British institutions; but the tale of the recent Spanish Government's imitation of its mentors in Moscow is consistent in its flagrant disregard of the most elementary principles of justice. But the Spanish people have evidently had enough, as the remarkable success in the recent elections of Señor Gil Robles, a barrister thirty-four years of age, bears witness.

(*Concluded from p. 47.*)

where Blackstone wrote the fourth volume of his *Commentaries*, and where Oliver Goldsmith, occupying the chambers above, gave entertainments to his friends which disturbed the labours of the famous jurist. Here it was that Goldsmith died, and the low tombstone in Churchyard Court marks approximately the resting place to which his remains were carried.

Australian Notes.

By WILFRED BLACKET, K.C.

False Reports of Crime.—In last year's JOURNAL, Vol. 9, on p. 221, I mentioned the case of D. K. Mackintosh, of Melbourne, who pleaded guilty to a charge of giving a false report of a crime the information alleging a sort of Common Law misdemeanor to which the prisoner pleaded guilty. The New South Wales police have been quick to follow this useful precedent. The facts in the present case are that at Wollongong one F. Maudlin, whose surname probably may in part account for his conduct, had been in possession of a ring which he had borrowed and then sold. Being unable therefore to return it, he had reported to the local police that it and various other property had been stolen from his tent. The result of police enquiries was the arrest of Maudlin on a charge of stealing the ring, and a further charge of making a false statement which caused the police to waste their time thereby depriving the public of their services. He pleaded guilty to stealing the ring, and said he had made a false report to the police because he wanted an excuse for not returning it. Upon this latter charge he was committed for trial.

Despite their Affliction.—Maxwell, K.C., the blind barrister of Victoria, recently added to his record of forensic achievements by getting a disagreement in the case of *R. v. Baye*. The prisoner was superintendent of a State boys' home at Newhaven. The charge was manslaughter and the case for the Crown was that Baye had tortured a boy named Simpson by sticking pins and needles into his legs and had hit him over the head with a cricket-bat, the blow causing a wound, tetanus, and death. Baye admitted the blow with the bat, but said it was not intended as a punishment but as a surprise. No doubt it would be a surprise; for boys are not accustomed to such strokes with a bat: they are "not cricket."

Despite his affliction, Maxwell is easily the leader of Victorian barristers in the Criminal Courts and has in recent years fought valiantly for the defence in many well remembered and notorious cases. In New South Wales there is also a blind barrister, but he is still a junior. In his case it is remarkable how the loss of one sense has quickened the other senses. In a trial in the country he was assisting the Crown Prosecutor, and one of the jurors persistently interrupted by asking questions. "That juror asks a lot of questions" observed the C.P. "Yes," said McWilliam, "but they are not his own questions. He is asking them for the man sitting next to him"; and the C.P. after closely observing the two jurors found that it was even so. Once when Chairman of a Wages Board, McWilliam insisted on viewing the locus. It was a gasometer 150 ft. or more in height. To reach its dome he had to ascend an iron ladder which consisted merely of steps and frame. He went up and walked about the dome and came down, and he was the only one of those present who had no fear in the performance. I am tempted to add that once in a fiercely fought action I had to inspect the locus and in the course of the inspection to ascend on a perpendicular iron ladder without handrails to get to the top of a building 85 ft. high, our client's foreman was ahead of me. Just as he was nearing the top he looked down and said: "Get down quickly—they've soaped the ladder."

Discharge of a Cannon.—If Judge Barton is right, vagrancy was abolished when the dole came along. At Orange (N.S.W.), Quarter Sessions, L. J. Cannon appealed against a sentence of six months' imprisonment inflicted upon him upon a charge that he was without lawful visible means of support. The evidence showed that he was without money when arrested and without employment, but that under an emergency relief order he was entitled to twelve hours' work once a fortnight for which he would receive coupons for 18s. 9d. "If the right to the dole is not visible means of support" said His Honour allowing the appeal and quashing the conviction, "then tens of thousands of people could be convicted and sent to gaol because they could not get work." That unfortunately is the fact, but the statement does not answer the question whether or not the dole is "visible means of support." But yet it would seem that the conviction was wrong, for if Cannon could have shown that some person paid him with an order for goods (illegal under the Truck Act) to the value of 18s. 9d. for twelve hours' work a fortnight, he could hardly have been convicted, for the Vagrancy Act does not require that he should have sufficient means of support but only that his means of support should be lawful and visible. One might call in aid the preamble of the Act which recites that it is for the punishment of "idle and disorderly" persons, for if a man has a certain employment of twelve hours a fortnight and can get no more he would hardly be denounced as "idle" within the meaning of the phrase cited. On the other hand it seems absurd to speak of the dole as a "means of support," and to do so recalls the story of the optimist from Milparinka where the average rainfall if liberally estimated is 5 in. per annum. He owned a wooden cottage in that torrid township, and applied to a Sydney office for £1,000 fire insurance upon it. The clerk inquired what means of extinguishing fires there were at Milparinka. "Well," he said, "there's the rain."

Jurors and Motorists.—In sentencing Harry Reid to twelve months' imprisonment upon his conviction for hitting a woman very hard with the front end of his motor-car, Judge Curlewis in commending the verdict spoke of the "stupidly sentimental" juries he had encountered who acquitted motorists even when the evidence was absolutely conclusive. He mentioned one such case where a prisoner who admitted having had "ten or twelve drinks," had driven his car on to a footpath, and killed two little girls. "Sentimental" is a very kindly word in this behalf, for the verdicts regretted by His Honour may, more than probably be in part at least due to the fact that in Sydney the Jurors are special Jurors having a property qualification, which property would very likely include a motor-car and therefore there would be that fellow-feeling with the prisoner which is apt to make us wondrous kind. The remedy obviously would be to try these cases with a jury of pedestrians.

The present state of affairs reminds me of Tommy Williamson's stereotyped peroration: "Gentlemen of the jury, look at the 'pore' prisoner in the dock on trial on this charge. It is his fate to be tried to-day: it may be the fate of any one of you or my fate gentlemen, to be tried like him on some other day." This was what he called his "personal appeal," and it had its uses in ordinary cases; but when he used it for the defence on a charge of crime *non nominandum inter Christianos* each juror looked upon him and all the other jurors with mingled feelings of pity and contempt.

Practice Precedents.

Judgment by default—on Motion.

In the Supreme Court, judgment may be obtained (*inter alia*) by Default. See Stout and Sim's *Supreme Court Practice*, 7th Ed. 179.

Rule 226 of the Code of Civil Procedure provides for judgment by default for liquidated demands, and the *note* thereto gives examples of cases wherein a plaintiff may sign final judgment by default. (See also Rules 227-231 inclusive.)

Rule 232 (*a*) provides that in all *other actions* than those referred to in the foregoing rules, judgment by default may be obtained by :

(*a*) Motion ;
(*b*) Trial.

Attention is directed to R. 393 which provides for service of the notice of motion (*a*). The *Court may give plaintiff leave* to proceed without giving the defendant the notice required by R. 393 when personal service cannot be made.

These forms following are for judgment by default *on motion*, leave to dispense with personal service of the motion having already been granted. The motion should clearly set out what is prayed for in the statement of claim.

IN THE SUPREME COURT OF NEW ZEALAND.
.....District.
.....Registry.

BETWEEN A.B. etc. Plaintiff
AND
C.D. etc., Defendant.

NOTICE OF MOTION FOR JUDGMENT BY DEFAULT.

TAKE NOTICE that Mr. of counsel for the plaintiff will move this Honourable Court at the Supreme Courthouse at on Wednesday the day of 19 at the hour of 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard for an order in pursuance of R. 232 (*a*) of the Code of Civil Procedure that Judgment be entered for the plaintiff in terms of the prayer of the plaintiff's statement of claim filed herein.

(*a.*) That the agreement dated the day of 19 between the plaintiff and the defendant be rescinded.

(*b.*) That the defendant be ordered to repay to the plaintiff the sum of £ together with interest thereon at the rate of £6 per cent.

(*c.*) That the defendant be ordered to refund to the plaintiff the sums of £ and £ .

(*d.*) That the defendant be ordered to pay the costs of and incidental to the action and this notice of motion to be fixed by this Honourable Court together with disbursements to be fixed by the Registrar of this Court.

UPON THE GROUNDS that the writ of summons and statement of claim herein were duly served upon the defendant on the day of 19 and that the time limited by the said writ of summons for filing a statement of defence has expired and that no statement of defence has been filed or other proceedings taken by defendant in regard to the said writ and statement of claim.

Dated at this day of 19 .
Solicitor for Plaintiff.

To the Registrar and to C.D. the defendant.

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

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

1. That I am a solicitor in the employ of solicitor for the above-named plaintiff having the conduct of this action.

2. That by an order of this Honourable Court made on the day of 19 it was ordered that personal service of the notice of motion for judgment by default be dispensed with and that service of the said notice of motion for judgment by default be effected by enclosing a copy of the said notice of motion in a registered letter addressed to the defendant at .

3. That on the day of 19 a copy of the said notice of motion hereunto annexed and marked "A" was duly despatched by registered letter to the above-named defendant at .

4. That the receipt of the post-office at for the despatch of the said notice of motion is hereto attached and marked "B."

Sworn etc.

JUDGMENT.
(*Same heading.*)

Wednesday the day of 19 .
Before the Honourable Mr. Justice .

UPON READING the notice of motion filed herein and the affidavit filed in support thereof AND UPON HEARING Mr. of counsel for the plaintiff and there being no appearance by or on behalf of the defendant IT IS ADJUDGED—

(*a*) That the agreement dated the day of 19 between the plaintiff and the defendant be rescinded.

(*b*) That the defendant do repay to the plaintiff the sum of £ together with interest thereon at the rate of £6 per centum per annum.

(*c*) That the defendant do refund to the plaintiff the sum of £ and £ .

(*d*) That the defendant do pay to the plaintiff the sum of £ for costs and disbursements.

By the Court.
Registrar.

(A memorandum setting out the disbursement is attached to the Judgment sealed.)

Recent English Cases.

Noter-up Service
FOR
Halsbury's "Laws of England."
AND
The English and Empire Digest.

BANKRUPTCY AND INSOLVENCY.

Bankruptcy—Proof—Affidavit—Unstamped—BROWN, *In re ex parte* BORIANI *v.* TRUSTEE (Ch. D.)

A proof of debt should not be dealt with by the trustee unless the affidavit is duly stamped.

As to proof of debts in bankruptcy: See HALSBURY, 2nd Edn. Vol. 2, para. 407 *et seq*; DIGEST Vol. 4, p. 243.

COMPANIES.

Foreign Company—Dissolution by Foreign Law—Stay of Proceedings—Winding-up Order in England—RUSSIAN AND ENGLISH BANK *v.* BARING BROS. & Co. (No. 2) (Ch. D.)

A foreign company which has been dissolved by foreign law is not revivified by the making of a winding-up order under sec. 338 of the Companies Act, 1929.

As to the winding-up of unregistered companies: see HALSBURY, 2nd Edn. Vol. 5, para. 1461: DIGEST Vol. 10, p. 1193, *et seq.*

CONTRACT.

Debt—Foreign Bond—Payable in Gold of Specified Standard —FEIST *v.* SOCIETE INTECOMMUNICALE BELGE D'ELECTRICITE (H.L.)

A contract to pay a debt of £x in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on a stated date requires payment in sterling of a sum equal to the value of £x if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the stated date.

As to the requisites of a valid tender: see HALSBURY, 2nd Edn. Vol. 7, para. 277; DIGEST Vol. 12, p. 321 *et seq.*

Company—Registered in England—Business in Australia only—Dividends—Shareholders in England—English and Australian—Currency—ADELAIDE ELECTRIC SUPPLY CO. *v.* PRUDENTIAL ASSURANCE CO. (H.L.)

An obligation to pay dividends to preference shareholders of a company carrying on business exclusively in Australia is satisfied by payment in Australian currency, whether the shareholder resides in Australia or in England.

As to the requisites of a valid tender: see HALSBURY, 2nd Edn. Vol. 7, para. 277; DIGEST Vol. 12, p. 321 *et seq.*

COPYRIGHT.

Copyright — Gramophone Record Public Performance — GRAMOPHONE CO. *v.* STEPHENSON, CARWARDINE & CO. (Ch. D.)

The maker of a gramophone record has an exclusive right of performing it in public, assuming that there is no such copyright in the owner of the original work.

As to performance in public of copyright works: see HALSBURY, 2nd Edn. Vol. 7, para. 888 *et seq.*; DIGEST Vol. 13, p. 176 *et seq.*

COURTS.

Privy Council—Practice—Appeal—Forma Pauperis—GRANT *v.* AUSTRALIAN KNITTING MILLS, LTD. *v.* JOHN MARTIN & CO., LTD. (J.C.)

A professional man making a substantial income and having outstanding book debts cannot be said not to be worth £25 within Rule 8 of the Judicial Committee Rules, 1925.

As to appeals *in forma pauperis* to the Judicial Committee: See HALSBURY, 2nd Edn. Vol. 8, para. 1228; DIGEST Vol. 16, p. 170.

DISCOVERY.

Evidence—Statements to Police—Production of—Public Interest—SPIGELMANN *v.*————————, (K.B.D.)

Documents in the hands of public authorities which would otherwise be liable to disclosure in evidence are not exempted from production unless it is shown that the particular document ought not in the public interest to be disclosed.

As to refusal to produce documents on grounds of public policy: see HALSBURY, 2nd Edn. Vol. 10, para. 479; DIGEST Vol. 18, p. 112.

DIVORCE.

Divorce—Discretion—Practice—Non-Disclosure of Adultery—Perjury—BAINBRIDGE *v.* BAINBRIDGE (P.D. & A.)

Where a petitioner asking for the exercise of the Court's discretion wilfully suppresses material facts as to his or her own conduct, a decree will normally be refused.

As to the discretion of the Court in divorce where the petitioner has committed adultery: See HALSBURY, 2nd Edn. Vol. 10, para. 1018 *et seq.*; DIGEST Vol. 27, p. 359 *et seq.*

Divorce—Decree Nisi—Separate Claim for Damages—Defences open—HOPKINS *v.* HOPKINS AND CASTLE (P.D. & A.)

Where a petition claiming damages comes on for hearing after a decree nisi has been made absolute, the co-respondent is estopped from pleading connivance but may allege conduct conducing to adultery.

As to claims for damages in divorce: See HALSBURY, 2nd Edn. Vol. 10, para. 1168 *et seq.*; DIGEST Vol. 27, p. 452 *et seq.*

EXECUTORS AND ADMINISTRATORS.

Probate — Practice — Administration — Intestacy — Foreign Grant—English Grant—IN THE ESTATE OF HUMPHRIES DECEASED (P.D. & A.)

Where a grant of administration of the estate of a person who dies domiciled abroad has been made by the Court of the domicile, a grant with regard to English assets will be made to the administrator no matter on what ground the foreign grant was made.

As to representation to persons domiciled abroad: See HALSBURY Vol. 14, para. 319 *et seq.*; DIGEST Vol. 23, p. 174.

NEGLIGENCE.

Negligence—Accident on Highway—Collision—Contributory Negligence—TIDY *v.* BATEMAN (C.A.)

Questions of negligence or contributory negligence are to be decided as matters of fact.

As to contributory negligence: see HALSBURY Vol. 21, para. 758 *et seq.*; DIGEST Vol. 36, p. 109 *et seq.*

Legal Literature.

Mortgagors and Tenants Relief and Interest and Rent Reduction.

The New Rent and Interest Reductions and Mortgage Legislation, by J. P. Kavanagh, Editor of THE N.Z. LAW JOURNAL, and C. E. H. Ball, LL.M., Barristers and Solicitors. Second Edition; pp. xii + 116. Butterworth and Co. (Aus.), Ltd., Wellington.

More than half as large again as the original edition, this valuable work now comes from the Publishers. A demand has thus been fulfilled. Judging by the detailed attention which has been paid to their task, the authors have spared no pains to provide fellow-practitioners with a comprehensive text-book based primarily on the consolidated Mortgagors and Tenants Relief Act, 1933. The manner in which the former edition has been used in the Courts and before Commissions as the recognized *vade mecum* of those concerned in the legislation, gives proof of the success which must attain this enlarged and more ambitious work.

Glancing through the pages of "The Little Red Book," which has grown with the passing of time, we find a Table of Cases which runs in small print to three full pages, thus showing thorough treatment of the subject in relation to case-law. A comparative table of the former Act and its four amendments with the sections of the consolidated Act is a great convenience to those who have now to re-learn section numbers hitherto made familiar by constant practice. The Act itself is copiously annotated under sections, subsections, and paragraphs—a most useful arrangement. A very striking feature is the manner in which the pooling-arrangement agreements in the Schedule to the new Act have been compared, analyzed, explained, and dealt with historically. Among others, the note on the effect of orders by consent is very well done. The authors have followed, without comment or question, judicial interpretations of the legislation: this may be as well for practical purposes, but some of the decisions could have been explained or criticized in the opinion of this reviewer.

The Part dealing with the reduction of interest, rent, and other fixed charges has been lavishly annotated, and all relevant statutes are provided. Regulations on the subject-matter and a fuller Index than in the first edition complete a satisfying bit of work.

In a foreword, the Minister of Justice (Hon. Mr. Cobbe) whose Department administers the moratory legislation, says:

"Although the legislation has now been consolidated, and in this respect reduced the text to a form more convenient and practical, I have no doubt that all concerned with the administration of the legislation will find this annotation by Messrs. Kavanagh and Ball, with its liberal references to determined cases, a most helpful supplement to their statutes."

—"PRACTITIONER."