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"*I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves, by way of amends, to be a help and ornament thereunto.*"
—BACON, in *Maxims of the Law* (*Preface*).

Vol. X. Tuesday, March 20, 1934 No. 5

Restrictions on the Sale or User of Goods.

The question sometimes arises as to the position in law of a vendor of goods who has not violated any contract but, being as free to deal with them as is an ordinary member of the public who has acquired possession of such goods, has become aware of conditions restricting trading in them as ordinary articles of commerce. Is he, in such circumstances, a restricted or unrestricted trader ?

It is the policy of many manufacturers and traders to endeavour to ensure that their proprietary goods shall be retailed to the public at a uniform price, or subject to other restrictions, and in cases where these goods pass through the hands of one or more factors or middlemen before the final sale to the private owner or consumer, rather difficult points confront the practitioner who is called upon to advise as to what steps shall be taken to ensure that the desired end is reached.

A consideration of some of the cases involved is interesting. In *Mattos v. Gibson*, (1858) 4 De G. & J. 276, a shipping case, the following dictum of Knight-Bruce, L.J., appears :—

> "Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose or in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

This dictum was applied in the decision of the Privy Council in *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A.C. 108, where it was held that a purchaser of a ship with notice of a charterparty can be restrained at the suit of the charterers from employing the ship in a manner inconsistent with the charterparty. The authorities were reviewed and the dictum of Knight-Bruce, L.J., was approved without any apparent qualification. Among the cited cases was the well-known decision of *Tulk v. Moxhay*, (1848) 2 Ph. 774, governing restrictive covenants in connection with land. Taking these cases alone it would appear that restrictive covenants can run with any chattel; but other decisions are definitely to the effect that this is not the case, and it seems that these cases must be confined to charterparties.

In *Taddy v. Sterious*, [1904] 1 Ch. 354, the defendant bought tobacco of the plaintiff's brand through a third party, with notice of a condition attaching to it that it should only be retailed to the public at a particular price. The defendant sold it below the price specified, but the plaintiffs failed in an action to restrain him, it being held by Swinfen Eady, J., that conditions attached to goods do not run with the goods. This decision has been followed in a number of cases, and finally in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co., Ltd.*, [1915] A.C. 847, where the law was stated by Lord Haldane as follows :—

> "In the law of England certain principles are fundamental; one is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quæsitum* by way of contract. Such a right may be conferred by way of property, as for example under a trust, but it cannot be enforced on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must be given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain foreign countries or of Scotland, but here they are well established. A third proposition is that a principal not named in a contract may sue upon it if the promisee really contracted as his agent, but again in order to entitle him so to sue he must have given consideration either personally or through the promisee acting as his agent in giving it."

In this case a firm of factors bought tyres from the plaintiffs at certain discounts, and agreed not to sell them below certain list prices. The factors sold tyres to the defendants and entered into a similar agreement with them, and the defendants sold to a member of the public below the agreed price. The plaintiffs sued as undisclosed principals on this agreement, and failed on the ground that even if they were parties to the agreement it failed for want of consideration.

There is an exception to the rule so definitely enunciated in the last case in the case of a sale of a patented article sold under a limited license. In *Incandescent Gas Light Co., Ltd. v. Cantelo*, (1895) 11 T.L.R. 381, it was held that the sale of a patented article carries with it the right to use it in any way that the purchaser chooses to use it, unless he knows of restrictions. If he knows of any restrictions, and he adverts to them at the time of the sale, he is bound by them; the principle being that the patentee, who has the sole rights of user and sale, has the right to do the lesser thing; to impose his own conditions, however absurd or unreasonable such conditions may be.

This judgment was approved by the Privy Council in the case of *National Phonograph Co. of Australia Ltd. v. Menck*, [1911] A.C. 336, 353. In the course of their business the appellants sold Edison phonographs, records, and blanks, made in accordance with, and under the protection of, the letters patent. They used to sell under jobbers' contracts to jobbers who had power to sell to dealers; but the dealers' contracts were made direct with the appellants. Mr. Menck, the respondent, was a dealer and had various dealers' agreements, and the appellants entered him in their dealers' lists. In the dealers' agreements it was provided that "dealers violating any of the foregoing conditions of sale or any other reasonable conditions that may from time to time be imposed" by the appellants ". . . may at once be withdrawn from the dealers' list." The dealer, on his part, undertook that

> "in the event of my name being removed from the dealers' list, I will in no way handle, sell, or deal in or use, either directly or indirectly, Edison Phonographs and parts thereof, Edison records and Edison blanks, unless authorized to do so in writing"

by the appellants. After considering whether the respondent had acted in breach of the appellants' rights as patentees in selling at prices less than the specified prices and after his name had been removed from the dealers' list, the law was laid down by their Lordships of the Judicial Committee, in a judgment read by Lord Shaw of Dunfermline, as follows:

> "It is demonstrated by a clear course of authority first that it is open to a licensee by virtue of his statutory monopoly to make a sale *sub modo* or accompanied by restrictive conditions which would not apply in the case of ordinary chattels . . . and thirdly the owner's rights in a patented chattel will be limited if there is brought home to him the knowledge of conditions imposed by the patentee or those representing the patentee at the time of sale."

This judgment was applied by Herdman, J., in *Thomas A. Edison, Ltd. v. Stockdale*, [1918] N.Z.L.R. 276, where a second-hand dealer who, as part of his business, bought and sold second-hand Edison phonographs and records at a price below that at which the plaintiff company's licensed dealers were authorized to sell. On learning this, the plaintiff company notified the defendant of its patent rights and its rights to fix the prices at which Edison goods might be sold in the Dominion; that if he sold any Edison phonographs or records at less than the notified price, he would be infringing the plaintiff company's patent rights and rendering himself liable to an action for damages. A subsequent sale by defendant at less than the notified price was proved, and His Honour applied the proposition of law enunciated in the *Incandescent Gas Light* case, and approved by Lord Shaw as above set out, and granted an injunction to restrain defendant from infringing the plaintiff's letters patent. The learned Judge held that the plaintiff's letter was sufficient notice to the defendant of the conditions upon which he was at liberty to sell the plaintiff company's patented wares—and he was bound by those conditions, and that it was immaterial that those wares had passed from the plaintiff company into other hands before reaching a second-hand dealer.

Similarly, Russell, J. (as he then was), in explaining the *National Phonograph* case said in *Colombia Graphophone, Ltd. v. Murray*, (1922) 39 R.P.C. 239, where the goods were sold secondhand by a pedlar,

> "The owner of a patented article is entitled to impose any condition he likes when he is granting a licence to somebody to use the patented article. There appears to be no limitation to the conditions that he may impose, and if he imposes conditions, and those conditions are brought to the knowledge of the person who uses the patented article, the person using the patented article must refrain from violating those conditions. It appears to me that the ground of the decision is that, if he violates the conditions imposed by the licence, then he has no licence at all, and he has committed a breach of the patentee's rights."

In the case, therefore, where the article in question is patented, it appears that sufficient notice of any restrictive conditions which it is desired to attach to its use or sale may be given by marking the article with the number or numbers of the patent or patents covering it, and an indication of the fact that it is sold under a limited license and by providing means whereby the user or seller is given notice of the conditions. This could be done by marking the conditions on the box, container, or wrapper enclosing the article or by means of a separate leaflet sent with it. Presumably the same method would be effective where the article is the subject of a registered design. The method would be defeated in the event of the patent or registered design being declared invalid.

In the case of an unpatented article* it is necessary to find a way whereby a valid contract may be concluded, binding all purchasers and sub-purchasers of the article to the restrictive conditions desired, and it is essential that the original vendor shall be a party to such contract and that a consideration shall flow from him. This can only be effected by ensuring that every trade purchaser signs an agreement binding him to observe the necessary conditions and also to take from every person buying from him, other than a member of the public, an undertaking, which must be expressed to include the original vendor as a party, binding such person to observe the conditions. Even then there still remains the difficulty of ensuring that an adequate consideration moves from the original vendor. However, in most trades wholesale dealers may be divided into different classes, such as those who are entitled to discounts of varying sizes according to the amount of business they transact or agree to transact over a given period, and such undertaking may provide that in consideration of their being placed in such class as will entitle them to a particular rate of discount, or to some other defined advantage, they will agree to be bound by the required conditions. The forms of undertaking may be issued in printed form for the sake of simplicity. This method or a modification to meet any particular circumstances would appear to satisfy the principles of law laid down in the cases decided up to the present time.

*Apart from such as comes within the provisions of the Commercial Trusts Act, 1910.

Judicial Appointments.

Recent Changes in England.

The Hon. Mr. Justice Maugham, one of the Judges of His Majesty's High Court of Justice (Chancery Division), has been appointed a Lord Justice of Appeal in the place of the Right Hon. Sir Paul Ogden Lawrence, who has resigned his appointment as Lord Justice; and Mr. Charles Stafford Crossman has been appointed one of the Justices of the High Court of Justice (Chancery Division) in the place of Sir Frederic Maugham.

Mr. Justice Maugham, who succeeds Lord Justice Lawrence in the Court of Appeal, was born in 1866. He was educated at Dover College and Trinity Hall, Cambridge, of which he was a Scholar and was also made an Honorary Fellow. In 1890 he was called to the Bar at Lincoln's Inn, took "silk" in 1913, and was made a Bencher in 1915. When he was appointed to be a Judge of the Chancery Division in 1928 he succeeded the then Mr. Justice Russell, who went to the Court of Appeal and is now Lord Russell of Killowen, one of the Lords of Appeal in Ordinary.

That with all his knowledge of law Lord Justice Maugham is no dry-as-dust lawyer may be seen in the *Law Reports*. The Judge who can illumine the darkness of Conflict of Laws and the *Renvoi* by treating them as part of the Law of Utopia (see *Re Askew*, [1930] 2 Ch. 259; 99 L.J., Ch. 466) will add interest and wit as well as weight of the decisions of the Court of Appeal.

Mr. Charles Stafford Crossman was called to the Bar at Lincoln's Inn in 1897, and was Junior Counsel to the Treasury in the Chancery Division.

Another judicial change is emphasized by Sir Sidney Rowlatt's taking his seat at the Board of the Judicial Committee.

Summary of Recent Judgments.

COURT OF APPEAL
Wellington.
1933.
Oct. 4.
1934.
March 8.
Myers, C.J.
Reed, J.
Smith, J.

WILLIAMS v. WILLIAMS.

Divorce and Matrimonial Causes—Deed of Separation—Provision therein that Agreement void if Husband proves Wife's Association with specified Persons, and that Wife to have control of children and Husband reasonable access—Alleged Breach of such Provisions 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*).

Appeals from the judgment of *MacGregor, J.*, reported [1933] N.Z.L.J. 151.

The appeals were dismissed by the Court of Appeal (*Myers*, C.J., and *Reed*, J., *Smith*, J., dissenting) on the grounds:

1. That the taking of the children out of New Zealand was not prohibited by the deed of separation, and was not a breach of the condition that the wife should not "molest, disturb, or annoy" the husband, which required proof of a personal molestation, done deliberately, with the intention of molesting, disturbing, or annoying him.

2. That the two casual meetings of the wife with R. did not amount to "association" with R. which carries an implication of something voluntary and regular, so as to make the agreement void.

3. That the deed was in full force, and the wife entitled both to a divorce and to receive the prescribed maintenance money for the support of the children.

Hunt v. Hunt, (1884) 28 Ch. D. 606, **Fearon v. Earl of Aylesford,** (1884) 14 Q.B.D. 792, and **Thomas v. Everard,** (1861) 6 H. & N. 448, 158 E.R. 184, followed.

Dormer v. Knight, (1809) 1 Taunt. 417, 127 E.R. 895, distinguished.

Held, *per Smith*, J., 1. That on the whole of the evidence (for an analysis of which see the learned Judge's judgment) the husband had proved association with R., the voluntary writing of one letter to or voluntarily taking one journey with a prohibited person on any one day sufficing for the purposes of the clause and this conclusion being strengthened by other circumstances.

2. That such proof avoided the whole deed from its commencement; that the separation under the deed, upon which the wife relied, did not exist and that each party was entitled to insist upon the resumption of the matrimonial relationship by the other.

3. That, therefore, the wife's petition for divorce and her action for maintenance should both be dismissed.

Dormer v. Knight, (1809) 1 Taunt. 417, 127 E.R. 895, applied.

Salaman v. Salaman, [1923] N.Z.L.R. 454, 472, 476, 477, **N.Z. Shipping Co., Ltd. v. Societe des Ateliers et Chantiers de France,** [1917] 2 K.B. 771, [1919] A.C. 1, and **Hoggett v. Hoggett,** [1926] V.L.R. 505, referred to.

Judgment of *MacGregor*, J., reported [1933] N.Z.L.J. 151, affirmed.

Treadwell and **James,** for the appellant; **Leicester** and **McCarthy,** for the respondent.

Solicitors: Treadwell and Sons, Wellington, for the appellant; **Leicester, Jowett, and Rainey,** Wellington, for the respondent.

Case Annotation: *Hunt v. Hunt*, 27 E. & E. Digest, p. 235, para. 2062; *Fearon v. Earl of Aylesford, ibid*, p. 231, para. 2019; *Thomas v. Everard, ibid*, p. 231, para. 2023; *Dormer v. Knight*, 39 E. & E. Digest, p. 192, para. 818; *N.Z. Shipping Co., Ltd. v. Societe des Ateliers et Chantiers de France*, 17 E. & E. Digest, p. 267, para. 801; *Hoggett v. Hoggett*, E. & E. Digest Supplement No. 8, to Vol. 27, title *Husband and Wife*, p. 18, para. note 2941 ii.

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. 821.

FULL COURT.
Wellington.
1934.
March 2, 8.
Myers, C.J.
MacGregor, J.
Blair, J.

ATTORNEY-GENERAL v. TONKS.

Contempt of Court—Newspaper—Publication of Photograph of Accused after Arrest and before Trial—Question of Identity involved.

Motion for an order that Neil Tonks be committed to prison for his contempt in publishing or causing to be published at Wellington on or about July 26, 1933, and on divers days subsequent thereto, a certain newspaper, called *N.Z. Truth*, containing on the front or title-page of the issue of July 26, 1933, a reproduction of a photograph purporting to be of one George Edward James, being a person who at the time of such publication had been charged before the Magistrates' Court at Wellington with the murder at Wellington on June 30, 1933, of Mrs. Cecilia Smith, and was then under arrest on such charge which was to be heard at Wellington; together with the following letterpress:

> "After being in the Wellington Hospital for three weeks, George Edward James (left), Wellington, engine-driver, fifty-seven years of age, has been charged with murdering Cecilia Smith on June 30. Mrs. Smith was found dead in a flat at Ohiro Road with a wound in her throat the same day as James was rescued from the harbour. James, who is represented by Mr. W. E. Leicester, will appear on remand at the Court next Friday morning."

In the alternative, the Attorney-General asked for an order authorizing him to issue a writ of attachment against the said Neil Tonks for his contempt aforesaid and that he be ordered to pay the Attorney-General's costs of the application; or such further or other order as the circumstances of the case may require.

The grounds for the application were that the publication of the said matter was a contempt of the Supreme Court, inasmuch as at the time of its publication it was calculated to prejudice a fair trial and to prejudice, obstruct, and interfere with the due administration of justice.

Solicitor-General, Fair, K.C., in support; **O'Leary,** with him **J. H. Dunn,** to oppose,

Held: That it is a grave contempt of Court to publish in a newspaper before trial the photograph of a person charged with a criminal offence, where it should have been apparent to the mind of any reasonable person that the necessity, or possible necessity, of proof of identity of the accused person with the criminal has arisen or may arise, and such publication is calculated to prejudice a fair trial.

Rex v. "Daily Mirror" (Editor and Proprietors), [1927] 1 K.B. 845, applied.

Printer and publisher fined £100 and ordered to pay thirty guineas costs.

Solicitors: Crown Law Office, Wellington, for the applicant; **Alexander Dunn,** Wellington, for the defendant.

Case Annotation: *Rex v. "Daily Mirror" (Editor and Proprietors)*, E. & E. Digest Supplement No. 8 to Vol. 16, p. 3, para. 283a.

SUPREME COURT
In Chambers.
Auckland.
1934.
Feb. 22, 23.
Smith, J.

JENNINGS, LTD. (IN VOLUNTARY LIQUIDATION) v. COLE.

Companies—Practice—Security for Defendant's Costs—Assets known to be Insufficient—Application delayed until after Interlocutory Proceedings and Setting-down of Action—Waiver—Companies Act, 1908, s. 155.

Summons for security for costs pursuant to s. 155 of the Companies Act, 1908, which is as follows:—

Where a limited company is plaintiff in any action or other legal proceeding, and there appears by any creditable testimony to be reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, any Court or Judge having jurisdiction in the matter may require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

Rudd, for the defendant, in support of summons; **Bagnall,** for the plaintiff, to oppose.

Held, That a defendant has waived his right to ask for security for costs under s. 155 of the Companies Act, 1908, when, although he knew at the time of the issue of the writ that the assets of plaintiff company would be insufficient to pay his costs if he should be successful, he delays his application for security until after discovery had been made, a third party had been added, and plaintiff had twice obtained fixtures for the hearing and had prepared for trial on both occasions.

Summons dismissed.

Solicitors: **R. D. Bagnall,** Auckland, for the plaintiff; **L. F. Rudd,** Auckland, for the defendant.

NOTE:—For the Companies Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 1, title *Companies*, p. 825.

SUPREME COURT
In Banco.
Wellington,
1934.
March 6.
MacGregor, J.

PUBLIC TRUSTEE v. FRASER AND OTHERS.

Local Authorities—Thames Borough—Loans authorized in One Sum, but raised by Instalments—Method of Application of Sinking Funds—Thames Borough Commissioner Act, 1932, s. 10 (1).

Section 10 (1) of the Thames Borough Commissioner Act, 1932, is as follows:—

"The Commissioners of the sinking fund (if any) of every existing loan shall, as soon as practicable after the appointment of the Borough Commissioner, apply the amount of the accumulated sinking fund, or so much thereof as the Borough Commissioner directs, in the repayment to the extent thereof of such loan by repaying an equal proportion of the principal secured by each debenture issued in respect of such loan."

Each of the following "existing loans," the Thames Borough Sanitary Works Loan of £98,000 and the Thames Borough Streets Improvement Loan of £70,350, was authorized by the ratepayers in one sum but raised by instalments at different times and with a separate sinking fund in respect of each instalment.

On originating summons to determine questions arising in respect of s. 10 (1) as above set out,

Broad, for the Public Trustee; **Hoggard,** for the defendants,

Held, That each instalment should be treated as a separate loan for the purposes of s. 10, and the accumulated funds in respect of that instalment distributed among the holders of debentures in respect of that instalment.

Solicitors: **The Solicitor, Public Trust Office,** Wellington, for the plaintiff; **Findlay, Hoggard, Cousins, and Wright,** Wellington, for the defendants.

SUPREME COURT
Auckland.
1934.
March 1, 3.
Ostler, J.

KAIPARA RIVER BOARD v. NARBEY.

Rating — River Board — Statutory Limitation on total Amount of Rates imposed—Classification of Lands and Imposition of Rates thereon on a graduated Scale—Rate on individual Lands exceeding Limit, but on Total Value of Rateable Property less than Limit—Whether Rate invalid—River Boards Act, 1908, s. 87 (1); Amendment Act, 1913, s. 9—Land Drainage Amendment Act, 1922, s. 12.

Section 87 (1) of the River Board's Act, 1908, provides that "the Board may from time to time as it thinks fit make and levy general rates within its district for carrying into effect the general purposes of the Act." Subsection 2 prescribes that "the total amount of such rates for any one year shall not exceed six farthings in the pound on the rateable value of property in the district." The River Boards Amendment Act, 1913, s. 9, requires River Boards to classify the rateable property in their respective districts in accordance with the benefit their land receives from the river works and provides that all rates are to be imposed on a graduated scale upon these several classes of land in such proportion as the Board in each case appoints.

Appellant Board classified lands within its district into three classes, "A," "B," and "C," and made and levied a general rate on the capital value of 3d. in the £1 on "A" lands, 2¾d. in the £1 on "B" lands, and one-third of a penny on "C" lands. The rate on the "A" and the "B" lands exceeded six farthings in the £1, but the total amount of the rate thus made was less than six farthings in the £1 on the total value of all rateable property in the district. Respondent owned and occupied lands of all three classes.

Meredith, for the Board; **McVeagh,** for the respondent,

Held, on appeal from and affirming the decision of a Stipendiary Magistrate, 1. That no rate under the statute could be made or levied on any property in the district at a rate exceeding six farthings in the £1 on the rateable value of that property and therefore the rate was invalid.

The learned Judge drew attention to the fact that the Land Drainage Acts are in *pari materia*, but s. 12 of the Land Drainage Amendment Act, 1922, empowers Drainage Boards to rate individual ratepayers at more than the maximum allowed so long as the total amount of the rate does not exceed the total maximum allowed on a uniform rate.

Solicitors: **Meredith and Hubble,** Auckland, for the appellant Board; **Russell, McVeagh, Mackay, and Barrowclough,** Auckland, for the respondent.

NOTE:—For the River Boards Act, 1908, and the River Boards Amendment Act, 1913, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 4, title *Land Improvement and Protection*, p. 463; for the Land Drainage Amendment Act, 1922, see *ibid.*

SUPREME COURT
Napier.
1934.
Feb. 15, 28.
Reed, J.

HAWKE'S BAY FINANCE AND INVESTMENT CO., LTD. v. WHITE.

Money-lenders—Place of Business—Removal from Place registered as Office to New Unregistered Office at another Address—Transaction at Latter Office—Registered Head Office in another Town—Transaction invalid and unenforceable—Money-lenders Act, 1908, s. 4 (b).

Appeal on a point of law from the decision of a Magistrate in a proceeding under the Money-lenders Act, 1908.

Appellant, a registered money-lender, had its head office at Hastings, and a registered office at 6 Church Lane, Napier; but the latter office was removed in July, 1930, to Herschell Street, Napier. Registration of the removal was not effected

until January 29, 1931. In December, 1930, B. made an application for a loan at the Napier office, knowing at the time that the approval had to be made by the directors in Hastings. The promissory-note was signed and the cheque paid over at the Herschell Street office: it was a promise to pay by specified instalments at the appellant's office "Herschell Street, Napier." The endorser signed the bill at his own shop in Dickens Street, Napier. The cheque was drawn at appellant's Hastings office on the Bank of New Zealand at Napier, and was handed to B. at the Herschell Street office. At no time had B. any direct communication with the Head Office of appellant at Hastings, and the whole transaction was carried through by appellant's representative at Napier in its then unregistered office. The learned Magistrate found that the transaction was in direct contravention of s. 4 (*b*) of the Money-lenders Act, 1908, and that it was invalid and unenforceable.

On appeal,

Hallett, for the appellant; **McLeod,** for the respondent.

Held, dismissing the appeal, that there had been non-compliance with s. 4 (*b*) of the Money-lenders Act, 1908, and the contract was accordingly illegal and unenforceable.

Kirkwood v. Gadd, [1910] A.C. 422, **Balkind v. Batchelor,** [1923] N.Z.L.R. 1122, **H. Bowen and Co. v. Samuels,** (1918) 34 T.L.R. 487, **King v. Massey,** (1908) 24 T.L.R. 710, and **Levene v. Gardner and the Earl of Kilmorey,** (1909) 25 T.L.R. 711. distinguished.

Solicitors: Hallett and O'Dowd, Hastings, for the appellant; **Humphreys and Humphreys,** Napier, for the respondent.

Case Annotation: *Kirkwood v. Gadd,* 35 E. & E. Digest, p. 207, para. 324; *H. Bowen and Co. v. Samuels, ibid.* p. 208, para. 335; *King v. Massey, ibid.* p. 207, para. 329; *Levene v. Gardner and the Earl of Kilmorey, ibid.* para. 334.

NOTE:—For the Money-lenders Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 6, title *Money and Money-lending,* p. 3.

SUPREME COURT Auckland. 1934. Feb. 13, 23. *Herdman, J.*

BRIDGES AND OTHERS v. CARSON.

Contract—Restraint of trade—Sale of Business—Vendor undertaking "for himself or any of his family" not to compete—Severability of Words "or any member of his family"—Limit of Space—Reasonableness.

The contract for the sale of a butchery business contained this clause:

"The vendor will undertake for himself or any member of his family not to commence the same business or a similar business within a radius of four miles of the present place of business or to be interested directly or indirectly as master or servant or otherwise in any such business within such radius."

The vendor (defendant) and his son were employed by a rival butcher within the prohibited radius as servants at a weekly wage, neither having any financial or proprietary interest in the rival business.

On application for injunction to restrain the defendant from employment by the rival firm,

C. E. Clarke, for the plaintiffs; **Gould,** for the defendants,

Held, 1. That (in the absence of evidence of any authority) the vendor could not contract on behalf of his family, and, as the phrase "or any member of his family" was a separate and distinct covenant from his own undertaking, it could be severed from the rest of the clause.

Attwood v. Lamont, [1920] 3 K.B. 571, as to the doctrine of severance, applied.

2. That the vendor had committed a breach of the covenant.
3. That the restriction as to distance was reasonable.

Solicitors: Clarke and Molloy, Auckland, for the plaintiff; **Morpeth, Gould, and Wilson,** Auckland, for the defendants.

Case Annotation: *Attwood v. Lamont,* 43 E. & E. Digest, title *Trade and Trade Unions,* p. 20, para. 131.

The New Companies Act and the Legal Profession.*

By E. LESLIE BURGIN, LL.D. (London).

The Importance of Company Law.

From time to time the public conscience is shocked by some reverberating crash in financial circles and the conversation turns to the provisions of and the gaps in our company law.

Probably it is a truism to assert that every nation has the company law it deserves, and probably, taken broadly, British company law is far better than most. At the same time, it is no accident that in the United States of America more companies are registered in the State of Delaware than in any other, nor is it purely a matter of chance that the choice for registration of a holding company should be tolerably evenly divided between Switzerland and Eastern Canada. There are reasons for these geographical selections. Suppose, for instance, that a number of companies are housed under one roof and that some dominant spirit in that wonder-world of figures of finance is a director of them all, is it the task of company law to prevent what is *Meum* on Monday, *Tuum* on Tuesday becoming *Nostrum* after Wednesday? Can it be done merely by legislation—I think not. Can the profession to which we all esteem it such an honour to belong do something? I submit it can.

Were this a debate I should be tempted to phrase the motion in some such words as the following:—

"That in the opinion of this House the average solicitor is not adequately equipped with a knowledge of modern company law."

I should then expect to carry such a resolution with an overwhelming majority.

We are, however, not debating any such resolution, and it is no part of my task either to express opinions or still less to pass judgment on the knowledge, or lack of it, possessed by any of my colleagues in the profession. By company law I mean, of course, the law relating to the incorporation, management, and dissolution of companies, and also the body of rules governing transactions in which one of the parties is a company.

It would seem that the subject is not without serious importance.

For in any country, no matter what the legal system there prevailing may be, the company, usually a company limited by shares, is the accepted medium for trading purposes, for investment or Stock Exchange purposes, and in increasing measure for purposes of limiting or controlling the extent of taxation involved in any business transaction or operation.

It is a true maxim of business methods throughout the civilised world that *plus ca change plus c'est la meme chose,* in other words, a company by whatever name it may be called, according to the language of the different countries of the globe, possesses in essence the same characteristics, the same advantages, the same flexibility, and the same pitfalls for the unwary, all the world over.

* An address given at a meeting of the English Law Society, and applied by permission to the Companies Act, 1933.

If this be a true statement of the case, and I venture to predict that experience will tend to confirm it, is it prudent for the profession as a whole to take so little notice of the law relating to companies? Surely it cannot be, and does not the coming into force of the Companies Act provide a convenient point of departure for those who desire to embrace the subject more thoroughly than hitherto?

I am aware that in any branch of study there must be the general practitioner and the specialist, and am fully aware that the domain of company law has long been the happy hunting ground of the expert, but this does not in the least mean that the average lawyer can afford to treat the whole subject as so mysterious as wisely to be left out of his programme.

Is not the history of industrial development very largely the realisation of two great truths:—

(1) That an individual, however able, cannot of his own force achieve, produce, and create more than a comparatively limited result.

(2) That immediately the need or the demand for any given article or idea of process reaches any sort of proportion, co-operation is essential for its production, and the co-operation usually involves the idea of a corporation of one kind or another.

It is with these prevailing ideas that I desire to discuss in your hearing the question of the position of the solicitor under the new Companies Act.

The Solicitor's Responsibility.

The first suggestion I have to record is that the solicitor requires fully to assimilate the provisions of the new Act; to assimilate them, not merely in a desultory manner, but in the practical business-like way he would a new regulation relating to the issue of his season ticket or the admission of visitors to his golf club.

The acquisition of familiarity with a branch of the law is not, however, my main purpose in these observations, but rather the suggestion that there should be a very real sense of responsibility on the part of a solicitor in the case of any matter transacted by him in which a company is involved or concerned.

After all, the formation or constitution of a company is the birth of a new legal entity, a creation, and responsibility would seem to attach almost automatically from such a fact.

True, a solicitor can only tender advice, and at the most decline further to assist if his advice is not acted upon: he cannot in any way compel acquiescence.

But whilst this is patently obvious, it is equally true that whilst the operation is in a fluid state, strong advice, capably and tactfully given and considered, is an influence of enormous power, and experience tends to show that it is one comparatively rarely disregarded.

What responsibility, is it suggested, really attaches to the solicitor engaged in the formation of a company?

I suggest that due regard should be paid to considerations of this order.

First, that the average company is inadequately capitalized, that it starts with a self-imposed (or, on my thesis, very often a solicitor-imposed) handicap. A word of correction or even of caution from the solicitor would often avoid this pitfall.

Secondly, remember that a company is no robot equipped with mind and brain, but much more resembles a convoy or association of ships, with the result that the speed of the convoy is the speed of the slowest vessel, or, phrased differently, the company will have no greater aggregate wisdom than that possessed by the cleverest of its members—in fact, the tendency will be to dilute or water down this efficiency, as is the case in all committees or groups where responsibility and ideas are pooled.

Thirdly, a company intended to operate in some new and individual manner is worthy of more shaping and design than a somewhat hurried adaptation by a red ink pen of the Memorandum and Articles applicable to some wholly different corporation. If we consider the skill, care, and attention lavished upon any addition to the fleet of any well-known shipping company we may feel some twinges of conscience at recollections of the wholly original manner in which certain Memoranda and Articles have been rushed into print, and of how euphemistic a description the entry in the bill "Drawing Memo. and Arts." really is.

In my opinion, the time has long since arrived when the modern Memorandum of Association should be completely redrawn. The present-day habit of lopping and tailing a sort of universal provider's catalogue is far from being efficient, and has the definite demerit of being completely unintelligible to a layman and incapable of translation for a foreigner, and of being of wholly unnecessary advantage to those who are printers by trade.

It seems quite illogical that to carry on an artificial silk business at Manchester it should still be necessary to get power to erect a floating dock in Borneo.

Then, fourthly, I am inclined to think the solicitor wields, or should wield, a very great influence in the actual working life of many a big company, both as regards work behind the scenes, for instance, the phrasing of minutes, the keeping of records and the general internal machinery, and also the relationship of the company to the public, this latter feature being of literally enormous importance if the true relationship between the solicitor and the accountancy professions is to be maintained.

We must, in my judgment, as a profession very definitely decline to allow the whole chapter of the relationship of the company to the outside public to be relegated merely to a matter of balance sheet and auditors' certificate. Far more is involved than any valuation of assets, or any interrogation of directors and officers as to such matters as stock, book debts, or any specious phrasing of adroitly-worded certificates, the purpose of which is at least as much to avoid responsibility on the part of the signatory as it is to be a vehicle of information.

Whilst I in common with the whole of the profession have no quarrel of any sort with the sister profession of accountancy, I am quite confident that there are limits to the functions which an auditor can properly fulfil and that there remain abiding responsibilities on the part of the solicitor to the company, which our profession will be wise to recognise and wiser still most scrupulously to observe.

This is no exhaustive nor all inclusive list, but merely some reflections prompted by the opportunity

which is afforded to the profession by the coming into force of the new Companies Act.

The New Companies Act.

The new Act is the result of much labour, study, and deliberation and has been produced after very careful sifting of evidence. The Companies Act, 1933, is a Consolidating Act and contains within its 384 sections and its round dozen schedules much that is known and is merely re-enacted, some minor changes of a comparatively slight order, and at the same time some entirely novel provisions, which require detailed study and consideration.

The actual new provisions are capable of being grouped.

Much of the Act is concerned with penalties for various defaults or irregularities in the management and conduct of a company's affairs. These penalties are to be taken seriously. Up to the present one arithmetical problem, which has been almost incapable of solution, has been by what process is the amount of the nominal fine to be reduced in order to arrive at the actual. A newspaper heading that the Magistrate observes that penalties totalling £25,000 were incurred and therefore he imposed a penalty of £2 and costs on such summons was a common incident.

A more rigorous supervision of directors, officers, secretaries, liquidators, will presumably be ushered in by April 1, next.

Another portion of the Act, and this already in force, aims at mitigating some of the scandals associated with offers of shares by sale upon the basis of some entirely unsupported letter from an official of the company in question. The tightening of such regulations was very desirable and indeed overdue.

The power to issue redeemable debentures, and still more so, redeemable preference shares, is a convenience which the commercial world has asked for and obtained.

We must all take early to heart the fact that a special resolution has changed its meaning, and that a resolution of an adjourned meeting is no longer ante-dated.

The very novel power to have the liability of directors unlimited contained in ss. 152 and 153 will probably be sparingly used, except perhaps in the larger corporations of almost national importance. The entire world will, I think, welcome the provisions as to payments to directors for loss of office. Section 156 contains much good sense and is only fair on minority shareholders, who are often dissentient.

The old indemnity clause goes by the board, and the limits of s. 158 require the considered attention of every draughtsman.

With regard to winding-up, much that is novel is introduced, both as to Courts and procedure.

The provisions as to undischarged bankrupts being unable to hold the office of director or manager of a company are far-reaching and important. They are all to the good. Section 149 is an important one, and the terms of it should be noted. The section should be read in conjunction with the wide powers given by s. 216 as to restraining fraudulent persons from managing companies. The division of voluntary liquidations into members' voluntary winding up and creditors' voluntary winding up is sensible and in accordance with a very real difference in fact.

The declaration of solvency in s. 226 will probably lead to interesting discussions where the directors' estimate for various reasons turns out to be inaccurate or over sanguine.

The calling of the meeting of creditors on a creditors' voluntary winding up by s. 234 is an interesting novelty, and will probably make for effective disclosure at a much earlier date than hitherto. The section will be welcomed by liquidators and should result to the advantage of creditors.

The greater assimilation of the rules of bankruptcy and companies winding up by giving to a liquidator the power to disclaim onerous property is all to the good, and s. 261 appears again to be a workmanlike performance of considerable utility.

The Act contains provisions of a very stringent character as to accounts, fraudulent trading, and what may be called offences by officers of companies, and the similarity to the bankruptcy provisions is again to be noted.

When all is said and done, however, it is not by sections and regulations that the reign of law is perpetuated, nor confidence in institutions maintained, but by the integrity of our own profession. It is the high standard of conduct in the care of the interests of others, the strictest recognition of the obligation to account for and to justify the expenditure of the money of others, which creates this effect.

The profession is singularly able to impress upon the commercial community the standard of an exemplary paterfamilias, and I venture to express the hope that our attitude towards the new Companies Act may show our appreciation of the fact.

Practice Notes.

Attestation Clause in Will.

The decision of Chapman, J., in *In re Eastwood (deceased)*, (1910) 29 N.Z.L.R. 1037, 13 G.L.R. 112, is an authority for the statement that if there be omitted from the attestation clause the words "present at the same time," then, an affidavit of due execution is required. This decision does not, as has sometimes been thought, insist on inclusion of the word "together," or of the word "both."

Owing to certain misconceptions as to the effect of *In re Eastwood*, Blair, J., after consultation with four of his brother Judges, said in *In re the Will of A.B.* that they agreed with him that *Eastwood's* case goes no further than is above stated. In the course of his note, His Honour said further:

> "An attestation clause in the following form, though not as full as some other forms, complies with s. 9 of the Wills Act:
>
> "Signed by the testator the said A.B. as and for his last will and testament in the presence of us present at the same time who in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses."

At the Bar.—A certain Professor of Law told his students last week that they should be distinct in answering the questions he put to them in class. "The chief thing to remember when you are at the Bar," he said, "is to open your mouth wide."

The New King's Counsel.

Called to the Inner Bar.

Before the general business of the sitting of the Court of Appeal on March 12, the ceremony of calling to the Inner Bar of the newly-appointed King's Counsel took place before a large gathering of the Wellington Bar. In addition, there were present the Hon. the Speaker of the House of Representatives (Sir Charles Statham) and the Minister of Justice (Hon. J. G. Cobbe). A large attendance of the public included a well-filled Ladies' Gallery. In turn, Messrs. A. H. Johnstone (Auckland), J. B. Callan (Dunedin), and C. H. Weston (Wellington), from their places with the Junior Bar, read the following declaration:

"I, , do declare that well and truly I will serve the King as one of his Counsel learned in the Law, and truly counsel the King in his matters when I shall be called and duly and truly minister the King's matters and sue the King's process after the course of the Law and after my cunning. For any matter against the King, where the King is party, I will take no wages nor fee of any man. I will duly in convenient time speed such matters as any person shall have to do in the Law against the King as I may lawfully do without long delay, tracting, or tarrying the party of his lawful process in that that to me belongeth. I will be attendant to the King's matters when I be called thereto."

Having each signed this declaration, which was witnessed by the Rt. Hon. the Chief Justice (Sir Michael Myers), the Patents of Appointment, which had been signed by His Excellency the Governor-General, were handed to the gentlemen concerned.

His Honour the Chief Justice, with whom were the Hon. Mr. Justice Herdman, the Hon. Mr. Justice MacGregor, the Hon. Mr. Justice Blair, and the Hon. Mr. Justice Kennedy, said to the three gentlemen concerned:

"His Excellency the Governor-General having been pleased to appoint you His Majesty's Counsel learned in the law, you will take your seats within the Bar."

The new King's Counsel then entered the front row, where the Solicitor-General (Mr. A. Fair, K.C.) was already in his place, sat down, then stood up, and made a deep obeisance to the Bench, then to their fellow "silk," and then to the Junior Bar in the back rows, and resumed their seats. The Chief Justice called on each of the four King's Counsel in turn, asking him if he wished to move. On their stating they did not so wish, the ceremony then concluded, and the business of the Court proceeded.

Mr. A. H. Johnstone, K.C.

Mr. A. H. Johnstone is Vice-President of the New Zealand Law Society, and a general character-sketch appeared last year in these pages (1933 N.Z.L.J. 182) on his attainment of that office. He was born in Milton, Otago, and was educated at the Tokomariro District High School. Having entered the Public Service at Wellington, he read his course for his Arts and Law degrees at Victoria University College, where he graduated in 1904, and he was admitted as barrister and solicitor in April, 1905.

Mr. Johnstone joined the firm of Malone, McVeagh, and Anderson at Stratford, later removing to New Plymouth to represent his firm until he was left in sole control of the practice in the latter town. In 1919, he sought the wider sphere of Auckland, joining Mr. J. Stanton in practice there, a partnership which has continued until immediately prior to Mr. Johnstone's taking silk.

The new Auckland King's Counsel has been President of both the Taranaki and Auckland District Law Societies; in addition he has been a member of the Council of the New Zealand Law Society for many years, until he became Vice-President last year. He is also a member of the Council of Legal Education, and has so acted since its inception, and has served as one of the Auckland representatives on the Council of Law Reporting.

While in New Plymouth, Mr. Johnstone took his part in local affairs, being a member of the New Plymouth Borough Council and of the High School Board.

The former practice of Messrs. Stanton and Johnstone is being carried on by Mr. Joseph Stanton.

Mr. J. B. Callan, K.C.

Mr. J. B. Callan, K.C., was born in Dunedin, in 1882. He is a son of the late Mr. J. B. Callan who founded the firm of Callan and Gallaway. After completing his primary and secondary education at the Christian Brothers' School in Dunedin, Mr. Callan graduated B.A. and LL.B. at the University of Otago. On the retirement of his father, Hon. J. B. Callan, in 1907, the new "silk" was admitted as partner of the firm of Callan and Gallaway, and practised in Dunedin until shortly before his admission as King's Counsel. He was lecturer in Torts at the University of Otago since 1912, and for the past ten years was Dean of the Law Faculty, and Chairman of the University's Discipline Committee.

Mr. Callan has been Vice-President and President of the Otago District Law Society, and, during the greater part of his professional life, a member of its Council. He has been a member of the Council of the New Zealand Law Society for some years, and a member of the Council of Legal Education since its foundation. This JOURNAL claims him as an appreciated contributor to its pages over many years.

During the Great War, Mr. Callan served in the Third Battalion of the N.Z. Rifle Brigade, and reached the rank of captain. During his years of overseas service, he was detailed by New Zealanders in other armies to defend them in important Courts-martial, and, his reputation having reached the Canadian Division, he acted as counsel for several Canadians. In addition, he was president of several Courts-martial.

Mr. Callan comes of a family with considerable legal traditions. The Chief Justice of Australia (Sir Charles Gavan Duffy) and his son, Mr. Justice Gavan Duffy of the Supreme Court of Victoria, are his cousins.

The new King's Counsel has taken Chambers in Wellington, where he will in future reside.

The New King's Counsel.

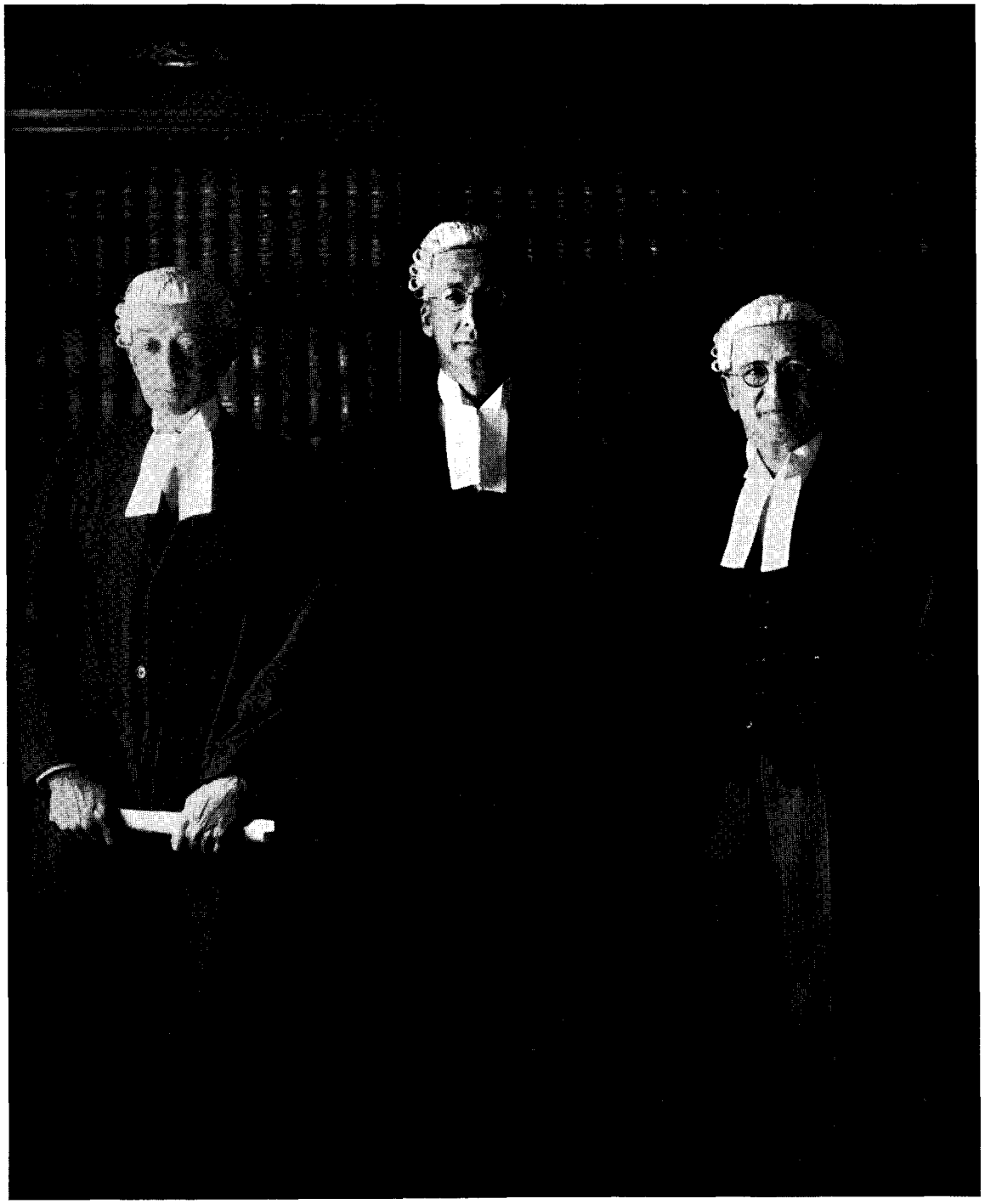

Photo by S. P. Andrew.

Left to right :

Mr. J. B. Callan, K.C.
Mr. A. H. Johnstone, K.C.
Mr. C. H. Weston, K.C.

Mr. C. H. Weston, K.C.

Mr. C. H. Weston was born at Hokitika in 1879. His father was at some time a District Judge (serving in that office in Hawke's Bay and Westland). Educated at Christ's College, Christchurch, he entered Canterbury College, where he graduated LL.B. in 1901, and began practice with his brother, the late Hon. T. Shailer Weston, at New Plymouth in the same year. He became a partner with his father as Weston and Weston at New Plymouth, and remained with the firm from 1903 until 1912. For the next eight years he continued on his own account, after which he was joined in partnership by Messrs. H. R. Billing, G. Ball, and F. S. Grayling, and the firm carried on business under the style of Weston and Billing from 1920 until 1931, when it became Weston, Ball, and Grayling.

Mr. Weston was Crown Solicitor at New Plymouth from 1912 until 1931, in which year he began practice in Auckland as a barrister only. Last year, he took Chambers in Wellington, where he now resides. He was for many years a member of the Council of the Taranaki District Law Society, of which he was President.

Long before the War, the new King's Counsel took a keen interest in defence matters, and he was captain of the Taranaki Rifle Volunteers at New Plymouth in 1901. He served with the Wellington Regiment during the Great War in Gallipoli, Egypt, and France, attaining the rank of lieutenant-colonel and obtaining the D.S.O. During his period of active service, his reputation as president of Courts-martial extended to the British and Australian forces, and he was honoured by being requested to preside over several military tribunals set up by the authorities of these armies.

Mr. Weston is a noted pedigree-stock breeder. He has taken an active interest in public affairs, and among the many offices he held was also Chairman of the New Plymouth Repatriation Committee, president of the Taranaki Chamber of Commerce and of the New Plymouth Rotary Club. He is the author of *Three Years with the New Zealanders* and *Workmen's and Contractors' Liens*, now in its second edition, and he has often contributed valued papers to this JOURNAL.

The "Mind" of the Legislature.

In his *Autobiography*, Lord Haldane tells of an interlude in the Court of Appeal in which two prominent legal figures appear:

"Lord Justice Rigby, an old and valued friend of mine, had entered the House of Commons late in life. He never quite understood its ways and was not appreciated to the extent which his sterling qualities of a non-political kind warranted. I was opening an appeal on the construction of an Act of Parliament and I was arguing that the Statute must be read as a whole in order to collect from within its four corners what I called the 'mind' of the Legislature in the controlling purpose which the section indicated.

"'Mind of the Legislature,' cried out Lord Esher to me from the Bench, 'and you, Mr. Haldane, have been twenty years in the House of Commons and yet speak of it.'

"'Yes,' thundered out Lord Justice Rigby, 'and the House of Commons is a place where if a man talks sense they call him a lawyer.'"

The Mortgagors and Tenants Relief Act, 1933.

The Basis of Relief.

By C. E. H. BALL, LL.M.

The acts and powers the exercise of which by a mortgagee is restricted by Part I of the Mortgagors and Tenants Relief Act, 1933, are those set out in subs. 2 of s. 5. Paragraph (*a*) relates to powers in respect of the mortgaged property, and paras. (*b*) and (*c*) refer to acts against the mortgagor personally. Subsection 1 of s. 10 sets out the nature of the relief which may be granted by the Court. Paragraphs (*a*) to (*e*) describe forms of relief which, while they affect the liability of the mortgagor, are primarily directed to relieving the mortgaged property from the mortgage burden. Paragraph (*f*), on the other hand, provides a form of relief, which, if granted alone, does not relieve the mortgaged property, but affects the enforcement of the personal liability of the mortgagor under his covenant.

It therefore follows that in actual practice, in the great majority of cases, if the mortgagor, being in control of the mortgaged property, desires to obtain relief both for himself and the property, he applies for relief under paras. (*a*) to (*e*) of s. 10 (1). It is usually where the mortgagor has disposed of the mortgaged property that he applies for personal relief under s. 10 (1) (*f*).

For this reason, it is convenient, after looking at the definition of "mortgagor" in s. 2 of the Act, to consider, first, paras. (*b*) and (*c*) of s. 5 (2) with subss. 1 (*f*), 3, and 4 of s. 10, which in practice usually involve the consideration, principally, of personal liability; and, secondly, para. (*a*) of s. 5 (2) with paras. (*a*) to (*e*) of s. 10 (1), which involve the granting of relief to the mortgagor, both in respect of his ownership of the mortgaged property and also in respect of his personal liability.

It is necessary in the consideration of each type of relief mentioned to commence by an examination of the definition of "mortgagor" in s. 2, which is as follows:—

> "Mortgagor" means a person liable under the provisions of a mortgage; and includes any person who has guaranteed the performance by the mortgagor of any covenant, condition, or agreement expressed or implied in the mortgage, whether such guarantee is expressed in the mortgage or in any other instrument; and also includes any person against whom a mortgagor has a legal or equitable right of indemnity in respect of any liabilities under the mortgage.

It will be observed that, to come within the definition, the applicant for relief must either be liable under the provisions of a mortgage, (*a*) as the person who covenanted, or (*b*) as the person who guaranteed the performance of the covenant; or be a person against whom the covenantor or guarantor has a legal or equitable right of indemnity. Outside these clearly defined classes, no relief can be granted.

It now becomes necessary to examine in detail the provisions relating particularly to the postponement of the personal covenant. Paragraph (*f*) of s. 10 (1) is as follows:—

> (*f*) Where application for relief is made by a mortgagor under a mortgage of any estate or interest in land, the Court, in addition to or in lieu of any other relief, may postpone for

such period as it thinks fit the right conferred on the mortgagee by virtue of any covenant expressed or implied in the mortgage, or in any instrument of guarantee in respect of the mortgage, to sue for or recover as a debt from the mortgagor, by action in any Court, the principal moneys or any part of the principal moneys or any interest or other moneys then or thereafter becoming payable under the mortgage.

Subsections 3 and 4 are as follows :—

(3) Any application or order under the said paragraph (*f*) may be made to or by the Court either before or after the mortgagee has exercised any powers of sale or other disposition of the mortgaged property.

(4) For the purposes of the said paragraph (*f*) the term "mortgagor" includes a former mortgagor, and "mortgagee" includes a former mortgagee, although the relationship of mortgagor and mortgagee may have in fact been terminated either before or after the passing of this Act.

The first case in which para. (*f*) (*supra*) was considered was *In re a Mortgage, S to M*, [1932] N.Z.L.R. 1228. In this case the mortgagee had given the mortgagor notice under the Act, and the mortgagor made no application for relief. The mortgagee then obtained judgment for the full amount of principal and interest. It was held that the Court had then no jurisdiction to make an order postponing the mortgagee's right to sue for or recover the moneys. MacGregor, J., in his judgment said :

"That right has already been exercised by the mortgagee here. She has, according to law, sued for and recovered by action in this Court all moneys payable to her by the mortgagor under the mortgage. It is impossible now to 'postpone' a legal right which has already been exercised. The amount that fell due under the mortgage has been transformed into a judgment debt."

A few days later a second judgment in a somewhat similar case, *In re a Mortgage, H. to L.*, [1932] N.Z.L.R. 1231, was delivered by Reed, J. The mortgagee, who held a second mortgage, had bought in at the first mortgagee's sale to protect his security. At this time the mortgagor had abandoned the farm and the stock, the latter being taken possession of by the stock mortgagee. The mortgagee then gave the mortgagor notice under the Act that he proposed to apply to the Magistrate to issue a warrant of distress on a judgment which he had obtained in the meantime, for overdue interest under his second mortgage, and the mortgagor then applied for relief, not, as *In re a Mortgage, S. to M.* (*supra*), under the provision now found in para. (*f*) (*supra*), but under s. 4 (1) (*b*) of the Mortgagors Relief Act, 1931 (now 5 (2) (*b*) of the Mortgagors and Tenants Relief Act, 1933). His Honour said that the matters to be considered by the Court as set out in provisions similar to those now found in s. 9 of the 1933 Consolidation Act, and the nature of the relief that could be granted by the Court, as set out in provisions now replaced or re-enacted by paras. (*a*) to (*e*) of s. 10 (1) of the 1933 Act, showed clearly that the relationship of mortgagor and mortgagee must exist at the time of the application, and that the relief that could be granted was only to a mortgagor whilst in fact he was a mortgagor. His Honour said that in the present case the mortgagor's title had been extinguished by the exercise of the power of sale by the first mortgagee before the present application for relief was filed, and that there was no provision conferring authority upon the Court to grant relief under s. 8 of the Mortgagors Relief Act, 1931 (now s. 10 (1) (*a*) of the 1933 Act), such as was provided in the case of applicants for relief under s. 5 of the Act of 1932 (now para. (*f*) of subs. 1, and subss. 2, 3, and 4 of s. 10), where by subs. 4 it is provided that for the purposes of that section "mortgagor" includes a former "mortgagor" and "mortgagee" a former "mortgagee." His Honour summed up by stating his opinion that relief under s. 8 (now 10 (1) (*a*)) could only be granted to a person who, at the time of his application, was in fact and law a mortgagor. If he had ceased to hold that status, his rights had gone.

In *In re a Mortgage, W. to McN.*, [1933] N.Z.L.R. s. 110, the mortgagee obtained judgment against a mortgagor who had transferred the property subject to the mortgage, and then served on him notice of his intention to levy execution. Reed, J., decided that the Court had no power to grant relief, stating "when a judgment on the personal covenant has been obtained against a mortgagor who has parted with the property, there is no further liability, so far as the judgment debtor is concerned, *under* the provisions of the mortgage."

These three cases require careful comparison. In *In re a Mortgage, S. to M.*, and in *In re a Mortgage, W. to McN.*, judgment had been obtained for the full amount owing under the mortgage, the applicant for relief in each case was no longer "liable under the provisions of a mortgage" but was liable under a judgment in which the liability under the mortgage had merged : *Patterson v. Williams*, (1834) L. & G. *temp.* Plunkett 95 ; *In re European Central Railway Company, Ex parte Oriental Financial Corporation*, (1876) 4 Ch. D. 33, C.A.

In *In re a Mortgage, H. to L.*, however, although the mortgagee had obtained judgment for overdue interest, and to that extent liability under the mortgage had merged in the judgment, the mortgagor was, in respect of the principal moneys outstanding, still liable under the provisions of the mortgage. His Honour considered, however, that an examination of the matters to be considered by the Court (see s. 9 of the 1933 Act) showed clearly that the relationship of mortgagor and mortgagee must exist at the time of an application for one of the forms of relief now set out in paras. (*a*) to (*e*) of s. 10 (1), and it is solely on this ground that the decision rests.

It may be remarked in passing that, on the other hand, it seems clear that the Court would in no case have jurisdiction to grant relief to the proprietor of land subject to a mortgage—that is, to one who is in fact a mortgagor—if there is in the mortgage no personal covenant, as in *Public Trustee v. Bank of New Zealand*, [1926] N.Z.L.R. 789, [1927] G.L.R. 1. The same principle would apply, too, where, for any reason, the proprietor of the land was not liable on the covenant, or to indemnify. This latter question has been dealt with at some length by Mr. J. P. Kavanagh and the writer recently (*The New Rent and Interest Reductions and Mortgage Legislation*, 2nd Ed., pp. 38, 39), but possibly one more word remains to be said ; the discharge in bankruptcy of the original mortgagor, though it releases him from all liability under a prior mortgage, may not effect a complete discharge of the liabilities of the transferee, since on bankruptcy of the mortgagor the right of indemnity is an asset in his estate and passes to the Official Assignee, *Official Assignee v. Jarvis*, [1923] N.Z.L.R. 1009, [1923] G.L.R. 321, C.A.

To return again to *In re a Mortgage, H. to L.*, His Honour, by implication, interpreted what is now s. 10 (3) (*supra*) in such a way that the word "mortgagor" where used in that subsection is equivalent to the Land Transfer Act definition of "mortgagor" as "the proprietor of any estate or interest charged

with a mortgage." It is obvious, of course, that, if the word were interpreted by the definition in the Mortgagors and Tenants Relief Act, it would mean that relief could be given to one who had formerly been "liable under the provisions of a mortgage," but such liability was, at the time of the application then before the Court, merged in a judgment.

From the foregoing, some indication will be obtained of the difficulties of this aspect of the matter. To consider it fully would involve an exhaustive treatment of the effect of the interpretation clauses of statutes, the merger of lower securities in judgments, and the creation, nature, and devolution of the transferor's right of indemnity on the transfer of land subject to a mortgage.

Correspondence.

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

Equality of Members of the Bar.

To the Editor,
"N.Z. Law Journal."

Sir,

The excerpt from *Wig and Gown* quoted in your issue of March 6 is of more than ordinary interest to members of the profession on the subject of etiquette. Our Bench and Bar are founded on the English model, and we like to feel that the English traditions in matters of legal etiquette should properly form the basis of our own conduct. It would be most interesting to have the views of our Judges and senior barristers on the point; are we to follow what is apparently the London practice, and carefully avoid using deferential titles to our seniors, and to our Judges when they are no longer sitting in the red plush chair?

It is, I think, most improbable that a junior barrister should refrain from using the courteous "Sir" when addressing a Judge at a dinner party, and inconceivable that the Judge should take him to task for the politeness. Moreover, many a senior member of our Bar would be distinctly annoyed if a twenty-one-year-old barrister handling his first case should address him as "Jones" or whatever his name might be. A New Zealand K.C.—unless he were a most unusual K.C.—would, I suggest, regard it as rank impertinence to be called by his surname, without prefix, by such a junior barrister. In the Law Library one hears the title "Mr." used frequently and as a matter of course.

Perhaps some acknowledged authority on legal etiquette in New Zealand might be prevailed upon to give his opinion as to whether these courtesies by the juniors might properly be discontinued. It is very unlikely that any barrister, however senior, would have the temerity to say that a Judge should be treated, when off the Bench, as a fellow member of the Bar. It would hardly be consistent to be so offhanded with one of the very few gentlemen in the Dominion to whom we respectfully doff our hats in the street.

Yours, etc.,
CAVEAT JUNIOR.

Masterton,
March 7, 1934.

Bench and Bar.

Mr. J. C. Mowat, LL.B., has been admitted to partnership by Mr. G. Gallaway, Dunedin, on dissolution of the latter's partnership with Mr. J. B. Callan, K.C.

Messrs. Findlay and Coles, of Petone, have dissolved partnership. Each will practise in future at Petone on his own account.

Mr. A. G. Ward, formerly Managing Clerk to Messrs. King and McCaw of Hamilton, has commenced practice in that town on his own account.

Mr. R. B. G. Chadwick, LL.B., who was formerly with Messrs. Webb, Richmond, Swan, and Bryan, of Wellington, has now commenced practice on his own account in Napier.

Mr. J. A. Johnston, barrister and solicitor, formerly of the staff of Messrs. Helmore, Van Asch, and Walton, Rangiora, has commenced practice in Christchurch on his own account.

Mr. W. N. Matthews, having recovered from his recent illness, resumes the practice of his profession at Macarthy Trust Buildings, Lambton Quay, Wellington.

Messrs. Downie Stewart and Payne, of Dunedin, have taken into partnership Messrs. W. F. Forrester and W. S. Armitage. The firm will be carried on under the style of Downie Stewart, Payne, and Forrester.

Mr. W. S. Armitage is the third generation of his family to be a member of the firm founded by his grandfather, the late Mr. Downie Stewart, prior to 1870. Mr. Armitage has recently been its managing clerk.

Mr. G. M. Lloyd, LL.B., for some years partner in the firm of Messrs. Callan and Gallaway, has commenced practice in Dunedin on his own account as a barrister and solicitor in the Capitol Buildings, 33-37 Princes Street, Dunedin.

Mr. J. G. D. Ward, son of Sir Cyril Ward, Bart., and grandson of the late Rt. Hon. Sir Joseph Ward, Bart., has been admitted as a barrister and solicitor by Mr. Justice Johnston, on the motion of Mr. Roy Twyneham.

Mr. W. F. Forrester, who has joined Messrs. Downie Stewart and Payne in partnership, was their managing clerk for some years prior to 1923 when he entered practice on his own account, only to relinquish it to join his former principals.

Mr. Mervyn H. Mitchel, Invercargill, accompanied by Mrs. and Miss Mitchel, left Wellington by the *Wanganella* on March 15, to connect with the *Orsova* at Sydney on a nine-months' visit to England and the Continent.

Mr. G. P. Finlay has been briefed to represent the Native race before the Native Commission, to which Mr. R. H. Quilliam has been appointed counsel. Mr. John Alexander is a member of the Commission over which the Hon. Mr. Justice Smith presides. Mr. R. F. A. Gray, LL.M., is Secretary.

Aspects of Legal Education.

By F. A. DE LA MARE, B.A., LL.B.

It appears from Professor Algie's Report that the Auckland School of Law is a School of Cram, naked and unashamed. Its teaching is determined by the financial needs of students, by a demoralising examination system, by a senseless competition for "results." It is, moreover, unfortunate that student journals at two of the Colleges had already demanded Reform before this Report was issued.

A discussion of the present situation discloses two interests: that of the University and that of the legal profession. For some purposes it is useful to treat these as separate, although they are ultimately identical. The interest of the University in law is simply the pursuit of abstract truth in relation to the facts of social life; that of the profession, the pursuit of well-trained recruits. The University is not directly concerned with vocational training. The profession, however, although its objective is purely vocational, has cherished the illusion that the University would give more than night-school cramming. Quite clearly, if the University allows its teaching to be "determined" by external pressure, it is prostituting its high estate and, in that case, the sooner it hands its law teaching to the Technical Schools the better it will be for all concerned.

From the point of view of the profession, recruits must be fit for the vocation to which they will be "called." If our Bench is to fulfil a great tradition and our practitioners are to be held in respect by the public, something is required of more importance than the mere knowledge of principles and cases. The recruit will be called upon to deal with vital confidences —confidences which go to the basis of our domestic, social, and economic life; to accept trusts; to give advice in which his client's interest must come before his own; even, without recourse to the Courts, to weigh and determine causes and administer justice. The only safeguard available may be summed up in the word "culture." The recent stream of peculations, which has brought shame upon us all, affords evidence of failure. The practitioner has some right to look to the University. He looks for bread, and the University is not ashamed to offer a stone.

Beyond the routine of the profession, lawyers must be called upon to draft, to criticize, and to mould our laws. Our legal system is itself part of a social system, and it would be curious indeed if its vitality and utility were not shown more by its adaptability to changing conditions than by its static acceptance of established rules. Where are we to look for critical insight, for free and independent thought, for constructive synthesis, if not towards the University?

Clearly there is no intelligible solution of the problem of Legal Reform except by fundamental alteration of the system. The qualification for practice is not primarily a University concern; but, if the University accepts responsibility, it should make no fundamental concession to weakness and should be perfectly honest concerning results. It is no direct concern of the University, for instance, whether students should be "articled" before receiving a practising certificate, but the Government should be informed unequivocally whether the passing of the required examinations is reasonably sufficient for the purpose.

The appeal to the Senate of the New Zealand University to appoint the Professors of Law the future examiners will be received with sympathy by all University reformers. Even in this matter, however, the report does not fairly and adequately meet the whole difficulty, and the remedy can only be properly applied by a revision of the whole system. The University must be free and subject to no restraints either from the Government or from the legal profession. In England and in Germany the University does its own job, which is cultural. In England, admission to the profession has a qualification outside the University, even to the holder of a law degree. In Germany, the State Examination gives the final practising qualification. Thus the legal profession in the one case and the State in the other say that, apart from the University culture and theoretic study, certain hard professional facts must be known, and certain experience gained. In New Zealand we have a wretched compromise. Our law degree and professional examinations afford the sole qualification for "admission." There are good reasons, inside a University, for trusting the Professor, but, where the practice of a profession and the special interests of the State are concerned, a position arises which quite probably cannot be harmonized with our present system. The most that can be said in favour of Professor Algie's appeal at the moment is that the Professor, with an external assessor, would make a better compromise. Reform must begin, it is submitted, with some form of "articling." If a period of practical work and experience were completed by external examinations in evidence, procedure, conveyancing together with Statute Law and interpretation, a rational solution might be found.

The proposal that Roman Law, Public International Law, and Jurisprudence should either be cut out or relegated to minor positions in the syllabus is a counsel of despair and an admission of futility. Our LL.B. course, the idea must be, is purely vocational, true University work is impossible, examiners complain, therefore let us drop the subjects! It may be said that no language or literature can be fully understood, its history and genius comprehended, without another language and another literature for comparison. The same is true of law. The genius of English Law requires for its due appreciation another and a different system. Roman Law, the basis of continental codes, of Scots Law, and the origin of portion of our own system should be part of the equipment of a student who is to be more than a tradesman. Public International Law provides a different, a speculative, and a vitally living system, whilst Jurisprudence provides the synthesis and the philosophic background. The student critics have a nobler perspective than appears in this Report.

Our system as a whole and its methods of working are in the melting-pot, and we have some right to look for guidance from the University teachers. The Report under discussion lacks courage and vision. No system will work unless it has teachers who can forget that there are examinations, who have the courage to march single-mindedly towards a cultural goal, men who see so clearly the wide and spacious horizons that the narrow vocationalism symbolized by cram-notes and verbal memorization shall be at once and forever impossible.

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Transfers in Exercise of Power of Sale under a Mortgage—I.

Subject to the provisions of the Mortgagors Relief Act, 1933, and the Soldiers' Protection Regulations, 1919 (as continued in force by the War Regulations Continuance Act, 1920), a mortgagee of land on default by the mortgagor may sell the mortgaged property, or any part thereof, either altogether or in lots. The sale may be by public auction or by private contract. The mortgagee has power to buy in at any sale at auction which is conducted by the Registrar of the Supreme Court.

In the event of the mortgagee being declared the purchaser at any such sale conducted by the Registrar, then that official is bound on demand to execute a transfer of the land to the mortgagee: The Land Transfer Act, 1915, s. 112 (1) and (2). Under s. 112 (4) a transfer in pursuance of such sale may be made by the Registrar to any person appointed in writing by the mortgagee. This provision seems to apply only where the mortgagee has first bought in at the sale; and his appointee may be either a mere nominee (the mortgagee may not desire to take title in his own name), or a subpurchaser to whom the mortgagee has resold the land subsequent to the mortgagee's own purchase at the Registrar's sale. The provisions of this subsection are not mandatory and the Registrar may refuse to transfer to the appointee.

On the other hand, if the land is purchased at the Registrar's sale by a third party it is the mortgagee who executes the transfer in favour of the purchaser, and the Registrar is no party to the instrument.

Precedents.

1. Transfer by Registrar of Supreme Court to mortgagee who has bought in at the sale by auction.
2. Transfer by mortgagee in exercise of power of sale to purchaser.
3. Declaration by mortgagee (in respect of No. 2) in proof of compliance with statutory restrictions upon exercise of power.

1.—Transfer by Registrar of Supreme Court to Mortgagee.

Under the Land Transfer Act, 1915.

Memorandum of Transfer.

Whereas A.B. of etc. (hereinafter called "the Mortgagor") is registered as proprietor of an estate of inheritance in fee simple (or as lessee under and by virtue, etc.). Subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed herein in

All that piece of land situated etc.

Subject to Memorandum of Mortgage Number upon the security whereof there is due and owing to C.D. of etc. (hereinafter called "the mortgagee") the principal sum of £ and interest thereon from etc. as therein provided.

And whereas by the said mortgage it was expressly provided [*recital of power of sale*].

And whereas on or about the day of 19 the mortgagor made default in payment to the mortgagee of the principal sum (or interest on the principal sum) as in the said recited mortgage provided and such default has continued ever since and still continues.

And whereas by order of the Supreme Court of New Zealand made at before the Honourable Mr. Justice on the day of 19 in the matter of the Mortgagors Relief Act 1933 and in the matter of the said recited mortgage it was ordered that the Mortgagee do have leave to sell the said land in exercise of the power of sale thereby conferred upon him.

And whereas the mortgagee applied in writing bearing date the day of 19 to the Registrar of the Supreme Court of New Zealand at in the Judicial District (hereinafter called "the Registrar") to conduct the sale of the said land comprised in the said recited mortgage and in such application estimated the value of the said land at £ .

And whereas the Registrar having duly given notice of the sale by advertisement and having approved of proper conditions of sale did cause the said land to be offered for sale at auction on the day of 19 by a duly licensed auctioneer at his auction rooms at .

And whereas the Mortgagor did not before such sale pay to the mortgagee either the value of the said land as so estimated by the mortgagee or the amount due and owing under the said recited mortgage with the expenses incurred by the mortgagee in connection with the sale.

And whereas at such sale the mortgagee was the highest bidder for and was declared the purchaser of the said land at the price of £ .

Now therefore in consideration of the premises and of the sum of £ credited to the mortgagor by the mortgagee in mortgage account between them The Registrar at the request of the mortgagee and in pursuance and exercise of the powers and authorities reposed in him by s. 112 of the Land Transfer Act 1915 doth hereby transfer unto the mortgagee all that the said recited estate and interest of the mortgagor in the said land above described freed and discharged from all liability on account of the said recited mortgage.

Provided always that no covenant shall be implied herein on the part of the Registrar.

In witness etc.

(*To be concluded.*)

Represented by Counsel.—Jenkins (*angrily*): "I'll take you to the Supreme Court."

Judkins (*smirkingly*): "I'll be there."

Jenkins (*furiously*): "I'll take you to the Court of Appeal."

Judkins (*tantalizingly*): "I'll be there."

Jenkins (*beside himself*): "I'll take you to the Privy Council."

Judkins (*enjoying the torture*): "I'll be there."

Jenkins (*out of all bounds*): "I'll take you to hell!"

Judkins (*quietly*): "My lawyer will be there."

London Letter.

Temple, London,
January 29th, 1934.

My dear N.Z.,

A decision of considerable importance to companies operating in the Dominions was given in the House of Lords last month in *Adelaide Electrical Supply Co. Ltd. v. Prudential Assurance Co. Ltd.*, in which the House allowed an appeal by the Adelaide Electric Supply Co., Ltd., and overruled the recent decision of the Court of Appeal in *Broken Hill Proprietary Co., Ltd. v. Latham* [1933] 1 Ch. 373. The question was whether the Prudential Assurance Co., Ltd., as holders registered in London of preference stock in the appellant company, could claim to be paid their dividend in England in English legal tender without deduction in respect of exchange. In this case the business of the company had formerly been managed from England and dividends had been paid in England in English currency, but in 1921 the company had by special resolution transferred the entire business (except for formal business connected with the register of English shareholders) to Adelaide, and dividends had since then been paid in Australia. The case originally came before Mr. Justice Farwell who, holding that he was bound by the Broken Hill case, gave judgment for the Insurance Company, and his decision was affirmed by the Court of Appeal. The House of Lords, however, took the view that the obligation to pay dividends on the part of a company in the position of the appellant company was discharged by payment in Australia in Australian currency, and allowed the appeal. In the course of the case some discussion took place as to the identity of the English and Australian "pound." Lord Atkin said that without expressing a final opinion he was inclined to think that at the present day the English pound and the Australian pound were not the same. Lord Warrington, however, came to the conclusion that merely as a unit of account the pound was one and the same in both countries, and that the difference in the currencies merely concerned the means whereby an obligation to pay so many of such units was to be discharged.

Testator's Family Maintenance in England.—More than once previously has New Zealand given the lead to England in legislation, witness, for instance, the legislation relating to compulsory third-party insurance for motor-car owners, and now it seems we are to follow you with a variety of testator's family maintenance. A Bill has recently been introduced into Parliament, the operative clause of which is couched in terms remarkably similar to those of Part II of your Family Protection Act, 1908, although the title of the Bill—the Powers of Disinheritance Bill—somehow sounds quite different.

Obituary.—I very much regret to have to note the death of two well known members of the English Bar. Mr. Alexander Macmorran, K.C., died last month at the age of eighty-one. He had been Master Treasurer of the Middle Temple and Recorder of Hastings, and had a very large practice at the Bar, but he was probably best known as an authority on the law relating to public health and local government, and as the editor of no less than eight editions of *Lumley's Public Health*.

Sir Henry Dickens, K.C., passed away recently in somewhat tragic circumstances as the result of an accident. He was knocked down on the Chelsea Embankment by a motor-cyclist about a week previously. It seems that he did not hear the approach of the motor-cycle, the rider of which has been acquitted of culpable negligence. Sir Henry was, as I have no doubt you are aware, the last surviving son of Charles Dickens and had had a long and distinguished career at the Bar culminating in the position of Common Sergeant of the City of London, which he held for fifteen years. He was eighty-four years old.

More Law Reforms?—The Committee which was appointed by the Lord Chancellor last year and which issued an interim report early last summer has just issued another interim report with further recommendations. There has as yet been little time for the digestion or discussion of this new report, but it must be confessed that at first sight some at least of the recommendations seem unlikely to be popularly received or to achieve what might be thought to be their principal object—namely, economy of money or time.

One suggestion is to abolish the Probate, Divorce, and Admiralty Division as such and to tack Probate business to the Chancery Division and Divorce and Admiralty business to the King's Bench Division, the Admiralty Court being more or less combined with the Commercial Court.

Another proposal is to change the composition of the Court of Appeal by appointing no new Lords Justices of Appeal and by drawing the members of that Court from the Puisne Judges of the High Court. A suggestion which has so far been received with greater favour is the abolition of the Divisional Court and the Transfer of most of its business to the Court of Appeal. You, I think, have no Court exactly corresponding to the Divisional Court, and there would not seem to be any need for such a Court in modern times. Moreover, it has never been a very satisfactory Court over here, and few would regret its disappearance.

Other proposals concern the arrangement of Assizes and Quarter Sessions and certain modifications in criminal procedure. No doubt the adoption of some of these proposals would effect a certain economy, but it is probably a matter of regret to the man in the street that no reform has yet been suggested which will materially reduce the cost of litigation in ordinary cases. As Lord Justice Mathew said, "justice is open to all, like the grill room at the Ritz Hotel."

Yours ever,
H.A.P.

Sounding in Damages.—In the Court of Appeal last week during the hearing of a plaintiff's appeal in an action for slander, the following bright colloquy took place:

Counsel for appellant: "The defendant shouted loudly, 'He is a rogue . . .' Then he shouted it more loudly still, . . ."

Mr. Justice Kennedy: "Do you suggest that the louder he shouted the greater should be the damages?"

Mr. Justice Herdman (presiding): "Is that what is meant by 'sounding in damages'?"

Counsel: ". . . and then he thumped the desk."

Mr. Justice MacGregor: "That must have been the sounding board!"

Practice Precedents.

The Property Law Act, 1908.

Petition for Removal of Restraint on Anticipation.

Section 24 of the Property Law Act, 1908, provides that it shall be lawful by will to provide that any estate or interest in any property devised, bequeathed, or given to any beneficiary, whether male or female, shall not, during the life of such beneficiary, be alienated or pass by bankruptcy or be liable to be seized, sold, attached, or taken in execution by process of law. It is also provided that nothing in that section shall prevent any lawful restraint on alienation of property from being imposed by will.

The Court may in any case where it appears to be for the benefit of the person subject to any restraint on alienation either wholly or partly remove such restraint.

As to construction of this section, see *Kidd v. Davies*, [1920] N.Z.L.R. 486, G.L.R. 289; *In re Brown, Stephens v. Brown*, [1926] N.Z.L.R. 170, at page 174. Reference should also be made to s. 112 of the Property Law Act, 1908; and for further illustration see Stephens's *Supreme Court Forms*, p. 315.

The Petition in the form following is addressed "To the Supreme Court of New Zealand" because the jurisdiction is vested in the Supreme Court. A petition concludes with the phrase: "And your petitioner will ever pray, etc."

In practice the Motion is usually to a Judge in Chambers, though the order is drawn as a Court Order.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE MATTER of The Property Law Act, 1908,

AND

IN THE MATTER of the "A.B." Trust constituted by the Will of of deceased.

PETITION FOR REMOVAL OF RESTRAINT ON ANTICIPATION.

To the Honourable the Supreme Court of New Zealand.

THE HUMBLE PETITION of of married woman SHEWETH AS FOLLOWS:—

1. That late of , , died on or about the day of 19 leaving a will dated the day of 19 probate whereof was granted by this Honourable Court at on the day of 19 to the executor and trustee in the said will named.

2. That by clause 9 of the said will the said directed his trustee to stand possessed of the whole of his residuary trust estate UPON TRUST as to one-half thereof (hereinafter referred to as "The A.B. Trust Fund") for the petitioner for the term of her natural life unless and until she should marry a second time for her sole and separate use free from the control debts and engagements of her present husband and so that she should not have power to deprive herself of the benefit of the said trust by anticipation and from and after the death or second marriage of the petitioner UPON TRUST for all the children of the marriage of the said [*husband*] and the petitioner who being sons or a son should attain the age of twenty-five years or being daughters or a daughter should attain that age or marry in equal shares PROVIDED that if any such child should have died or should die in the lifetime of him the said [*the deceased*] or of the petitioner leaving issue him or her surviving then such issue living at the death of the petitioner should take equally *per stirpes* the share which their his or her parent would have taken had he or she survived the petitioner.

3. The petitioner is now of the age of fifty-two years.

4. There has been issue of the marriage of the petitioner and her husband the said one child namely born on the day of 19 and who is now of the age of years.

5. That the said [*son*] qualified as a medical practitioner in the year since which time he has been undertaking a special course of training at Hospital in the City of London in England.

6. That the said [*son*] is without means and has not received any payments or emoluments or salary up to the present time.

7. That the husband of the petitioner is an accountant but is partially paralysed and the income derived from his calling amounted to the sum of £104 only for the year ended the day of 19 .

8. That owing to the present economic depression the petitioner has lost most of her savings.

9. That a statement of receipts and liabilities of the petitioner for the years ending the day of 19 and the day of 19 is attached hereto and marked "A."

10. That [*son*] desires to set up in practice as a medical practitioner at the City of in New Zealand and the petitioner has requested the trustee to advance to [*son*] the sum of £ for the purchase of equipment out of the capital of the A.B. Trust Fund.

11. That the trustee of the said Trust Fund has consented to the request provided this Honourable Court will consent to the removal of the restraint upon alienation and upon anticipation of the income of the A.B. Trust Fund in order that the petitioner may consent to the advance of the said sum of £ to the said [*son*] out of the capital of the said A.B. Trust Fund.

THE PETITIONER THEREFORE PRAYS:—

That pursuant to the powers conferred by the Property Law Act 1908 this Honourable Court will make an order as follows:—

(*a*) Removing the restraint on alienation.

(*b*) Binding the petitioner's interest in the A.B. Trust Fund notwithstanding the said restraint on anticipation so far as is necessary to enable the said payment of £ to be made.

(*c*) Approving the said payment on behalf of all persons who may in the event of the said [*son*] predeceasing the petitioner become entitled to the share of the said son in the A.B. Trust Fund.

(*d*) Conferring on the petitioner and on the said trustee such power of advancement out of the capital of the A.B. Trust Fund as may be necessary to enable the said payment to be made.

(*e*) For an order that the costs of and incidental to this application be taxed as between solicitor and client by the Registrar of this Honourable Court and paid out of the said A.B. Trust Fund.

(*f*) For an order for such further and other relief as may be just.

AND THE PETITIONER will ever pray etc.

Witness:

Petitioner.

VERIFYING AFFIDAVIT.

I of married woman the within petitioner make oath and say that so much of the foregoing petition as relates to my own acts and deeds is true and so much as relates to the acts and deeds of any other person I believe to be true.

Sworn etc.

MOTION IN SUPPORT OF PETITION TO REMOVE RESTRAINT ON ANTICIPATION.

(*Same heading.*)

Mr. of Counsel for the Petitioner of married woman TO MOVE before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Courthouse on the day of 19 at 10 o'clock in the forenoon or so soon there-

after as Counsel can be heard for an order in terms of the prayer of the petition filed herein—

(*a*) Removing the restraint on alienation.

(*b*) Binding the petitioner's interest in the A.B. Trust Fund notwithstanding the said restraint on anticipation so far as is necessary to enable the payment of the sum of £ to be made.

(*c*) Approving the said payment on behalf of all persons who may in the event of the [*son*] predeceasing the petitioner become entitled to the share of the said [*son*] in the A.B. Trust Fund.

(*d*) Conferring on the petitioner and on the Trustee such power of advancement out of the capital of the A.B. Trust Fund as may be necessary to enable the said payment to be made.

(*e*) For an order that the costs of and incidental to this application as between solicitor and client be taxed by the Registrar of this Honourable Court and paid out of the A.B. Trust Fund.

Certified correct pursuant to rules of Court.

Counsel for Petitioner.

Reference:

His Honour is respectfully referred to sections 24 and 112 of The Property Law Act, 1908.

Counsel for Petitioner.

ORDER REMOVING RESTRAINT.

(*Same heading.*)

the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the motion and petition and affidavit verifying the said petition filed herein AND UPON HEARING Mr. of counsel for the petitioner and for the trustee of the A.B. Trust Fund IT IS ORDERED that pursuant to the powers conferred by ss. 24 and 112 of the Property Law Act, 1908, and of any and every other power in that behalf enabling the restraint on alienation imposed upon the A.B. Trust Fund by the will of deceased BE AND THE SAME IS HEREBY REMOVED and the interest of the said [*petitioner*] in the A.B. Trust Fund be and the same is hereby bound NOTWITHSTANDING the restraint on anticipation thereof imposed by the said will so far as is necessary to enable the petitioner to consent to the advance and the said trustee to make the advance of a sum of £ to [*son*] who has attained the age of years AND IT IS FURTHER ORDERED that the said payment of £ shall be made out of and charged to that part of the A.B. Trust Fund which represents the share therein of the son of the said [*petitioner*] AND THIS COURT DOTH APPROVE the said payment on behalf of all persons who in the event of the said [*son*] predeceasing the said [*petitioner*] may become entitled to the share of the said [*son*] in the A.B. Trust Fund AND THIS COURT DOTH HEREBY CONFER upon the said petitioner and upon the trustee of the will of the said deceased such power of advancement out of the capital of the A.B. Trust Fund as is necessary to enable the said payment to be made AND IT IS ORDERED that the costs of and incidental to this application as between solicitor and client be taxed by the Registrar of this Honourable Court and paid out of the said A.B. Trust Fund.

By the Court.

Registrar.

Rules and Regulations.

State Advances Act, 1913. Additional Regulations.—*Gazette* No. 11, Feb. 22, 1934.

Public Revenues Act, 1926: Justices of the Peace Act, 1927. Crown Legal Business Regulations 1932, Amendment No. 1.—*Gazette* No. 11, Feb. 22, 1934.

Sales Tax Act, 1932-33. Sales Tax Regulations, 1933, Amendment No. 1.—*Gazette* No. 11, Feb. 22, 1934.

Dairy Industry Act, 1908. The Dairy-produce General Regulations, 1933, Amendment No. 2.—*Gazette* No. 11, Feb. 22, 1934.

Dairy Industry Act, 1908. Dairy-factory Managers Regulations, 1934.—*Gazette* No. 11, Feb. 22, 1934.

Money-lenders Act, 1908. The Money-lenders Regulations, 1934.—*Gazette* No. 11, Feb. 22, 1934.

Electrical Wiremen's Registration Act, 1925. Electrical Wiremen's Registration Regulations, 1929, Amendment No. 1.—*Gazette* No. 12, March 1, 1934.

Customs Amendment Act, 1921. Trade Arrangement (New Zealand and Belgium) Ratification Act, 1933: Order in Council applying the duties and exemptions from duty provided for in the Trade Arrangement (New Zealand and Belgium) Ratification Act, 1933, to goods from certain countries.—*Gazette* No. 12, March 1, 1934.

Sales Tax Act, 1932-33. Exempting certain goods from Sales Tax.—*Gazette* No. 12, March 1, 1934.

Hawke's Bay Earthquake Act, 1931. Hawke's Bay Earthquake Regulations *re* Land Agents' and Auctioneers Licenses.—*Gazette* No. 12, March 1, 1934.

Reserve Bank of New Zealand Act, 1933. Notification by Minister of Finance *re* Incorporation of Bank as from 1st April, 1934.—*Gazette* No. 12, March 1, 1934.

New Books and Publications.

Provincial Assessment Committees. By Edwin Austin, Barrister-at-Law, Town Clerk to the Borough of Battersea, with a Foreword by Sir James Curtis. (Butterworth & Co. (Pub.) Ltd.). Price 10/6d.

Laws of India and Burma. By A. Eggar. Parts 22, 23, and 24, Movable Property. (Johnson Univ. Press.) Price 21/-.

Easements of Light. Vol. 2, by J. Swarbrick, Architect. Introduction by G. H. B. Keurich, K.C., LL.D. (Wykeham Press.) Price 34/-.

Rating and Valuation Acts, 1925-1932. By G. P. Warner Terry. 3rd Edition, 1934. (Knight.) Price 83/-.

Woodfall's Landlord and Tenant. By A. J. Spencer, 23rd Edition. (Sweet & Maxwell, Ltd.) Price 68/-.

The Civil Law of Palestine and Trans-Jordan. Vol. 1, 1933. By C. A. Hooper. (Sweet & Maxwell, Ltd.) Price 34/-.

Real Property Law. By C. R. Y. Radcliffe, M.A. (Oxford University Press). Price 21/-.

An English Translation of the Brazilian Bankruptcy Act, 1929. (Sweet & Maxwell Ltd.) Price, 7/-.

Brazilian Consular Invoices Regulations, 1933. (Sweet & Maxwell, Ltd.). Price, 1/6d.

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