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

" Amid the cross-currents and shifting sands of public life, the Law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice."

—VISCOUNT SANKEY, Lord Chancellor.

Vol. XI. Tuesday, February 5, 1935 No. 2

Proposed Company Legislation.

IN the course of their final report, the Commissioners who recently inquired into company-promotion methods, etc., suggested that a Bureau be established to be known as " the Corporate Investments Bureau," to be administered by a Controller and a Council of three members known as "the Corporate Investments Council." These members, it was suggested, should be nominees of the New Zealand Law Society, the New Zealand Society of Accountants, and the New Zealand Stock Exchange Association, respectively; and the Controller, as a Government officer, should have a skilled staff at his disposal, and be empowered, where necessary, to employ outside accountants and auditors.

As to the functions of the proposed bureau, the Commission, at p. 87 of the Report, say :

> *Prospectuses and other Publications.*—We consider it important that control over company promotion should be exercised at the source. This will be achieved, in large measure, by the provisions embodied in the Companies Act, but, as has been pointed out, this is not likely to be fully effective. In addition, therefore, we propose that the Corporate Investments Bureau should exercise supervision over prospectuses and other publications. Copies of these should be sent to the Bureau, which would examine them for inherent defects or obvious non-disclosures. The names of directors, promoters, and brokers would be compared with the register and their records searched. Further lines of investigation might be suggested thereby. For example, it might be considered desirable to search land transactions at the Land Transfer Office, agreements and other documents at the office of the company or of the company's solicitor, and entries in the company's books.
>
> Future procedure in relation to the prospectus would depend on the results of such inspection. In most cases amicable discussion would be sufficient to effect the necessary changes. In the exceptional cases where this did not suffice it would be a matter for the discretion of the Controller to decide whether or not an appeal should be made to the Courts for an injunction.
>
> We think that oversight exercised in the above manner would have a considerable moral effect on company promotion, and that the occasions when action was taken through the Courts would be rare.
>
> The prospectus would then be filed and made the basis of comparison when the statutory report and return were filed, or of further inquiry, if specific complaints should be made subsequently.

Last week, in the course of an address to the executive committee of the Associated Chambers of Commerce, Mr. J. S. Barton, S.M., who was chairman of the recent Companies Commission, explained the purpose of the proposed Corporate Investments Bureau. As reported in the *Dominion* (Wellington) of January 23, Mr. Barton said :

> " The Bureau will issue no certificates, minutes of approval, or licenses in relation to prospectuses. The only approval that a good prospectus will get will lie in the negative fact that the Bureau will do nothing. This will be the fate of 99 per cent. of the prospectuses filed.
>
> " In the case of the misleading prospectus, however, the Bureau may be expected to be active. It will respond to the invitations in the prospectus. It will examine preliminary agreements, options, memoranda of transfer, and agreements for sale and purchase, and all preliminary agreements between vendors and the company. It will examine carefully the transactions and proposed transactions on which the valuation of the promoters is based. All this will be done with the object of seeing that a fair and candid disclosure is made of such things as should be disclosed. . . .
>
> " It will be a function of the Bureau to prosecute in all cases of breaches of the Act. At the present time it is nobody's duty to prosecute, and in spite of the practices that have been in vogue for the last 10 years there have been practically no prosecutions or civil actions.
>
> " If an aggrieved investor goes to his legal adviser now he is usually invited to authorise his solicitor to endeavour to get his money back. This is done, and in this way promoters and directors manage to buy immunity from publicity in those comparatively rare cases where a dissatisfied investor's rights are pushed to the limit. Most of the questionable practices lie in a difficult legal territory between public wrongs capable of punishment by criminal proceedings and civil wrongs, the remedy for which may lie anywhere between an action for misrepresentation or for money had and received and a mere action for accounts. This fact tends to give immunity to unscrupulous company operators in a large percentage of their transactions.
>
> " It is this fact that principally operates to make a dead letter of a penal provision in the Crimes Act relating to the issue of misleading prospectuses. No public officer with the powers vested in him to-day can be expected on the complaint of an aggrieved shareholder to launch serious criminal proceedings in respect of a transaction which, if it could be investigated fully from both sides, might turn out to be one giving rise to rights of civil action only. The only body whose functions include inquiry into such matters is the police, and, in the very nature of things, they cannot be expected to embark upon and conduct such inquiries skilfully. In any event, they have no right at all to require any statement from the company or access to its books, and it may be safely taken for granted that in every case where there was real ground for inquiry the company's officials would refuse to supply any information to the police. I have discussed this matter with officials of the Crown Law Department, with Crown prosecutors, and with the Commissioner of Police, and they all acquiesce in this view.
>
> " The whole system tends to offer immunity to unscrupulous company operators. It can be changed without appreciable inconvenience to the 99 per cent. of honest companies."

We have no doubt of the excellent intentions which motived the Commission in its Report, and Mr. Barton in his explanation of it. But we fail to see the necessity for the elaborate machinery proposed to be set up for the examination of prospectuses and for prosecution for breaches of the Companies Act. If, as Mr. Barton says, " at present it is nobody's duty to prosecute," and " there have been practically no prosecutions or civil actions " for breaches in the past ten years, surely the Companies Act itself could be amended to give added requisite powers to the Registrar of Companies. Then, with the assistance of the Crown Law Office, and, if necessary, of Inspectors clothed with powers of search and inquiry similar to those given to the inspectors recently appointed under the Companies (Special Investigations) Act, 1934, the Registrar should be sufficiently equipped to carry out all the functions of the suggested Corporate Investments Bureau.

It is time that a halt was called to the creation of Commissions to do work that can reasonably, and should properly, be performed by a Government Department.

The cost of the Bureau, with its special staff and paid members, could, we think, be more effectively spent in providing the small addition to the staff of the Registrar of Companies which would be needed, and in appointing a specialist in Company Law to the staff of the Crown Law Office to advise the Registrar thereon.

This matter has not, so far as we know, been considered by the New Zealand Law Society. We suggest that an inquiry as to the need for the elaborate Bureau be made; and as to whether the work can be performed satisfactorily by the Government Departments indicated, with reinforcement of their powers by the passing of the necessary legislation.

Mr. Barton, in his address to the Chambers of Commerce executive said:

> "If the Bureau had been in operation in the last decade it would have prevented most of the bad practices of that period, and would have involved very little in the way of restriction on honest company promoters and directors."

We think that if the Registrar of Companies be given the extra powers that are necessary, and has competent legal advice always at his disposal, with inspectors provided where needed to make inquiry and search, there may be little concern that the bad practices of the past will be continued; and the expensive and cumbersome Corporate Investments Bureau may well be forgotten.

While we are on the subject of companies, we draw our readers' attention to some of the provisions of the Companies (Bondholders Incorporation) Bill introduced in the last session of Parliament. That some legislation is needed in this direction is unquestionable; but, as to the method and contents of this Bill, it seems to us to attempt to set up a "Star Chamber" of the most objectionable type, as we propose to show.

Another Commission is to be set up, this time with the title of "The Bondholders Incorporation Commission," to consist of three persons to be appointed by the Governor-General and to hold office during his pleasure, one of such persons to be Chairman of the Commission. The decision of a majority of the members present at a sitting of the Commission shall prevail; but if the members present are equally divided in opinion, then the decision of the Chairman shall be the decision of the Commission (Cl. 11). The appointment of the Chairman, or of a member, or of an acting-Chairman or acting member of the Commission, shall not be questioned on any ground whatsoever (Cl. 5 (1)); the following paragraphs of the same clause speak for themselves:

> (2) Whether the Commission at any sitting thereof is duly constituted as required by the provisions of this Act or has been duly convened for such sitting are matters to be determined by the Chairman, whose decision thereon shall be final and conclusive, and shall not be questioned in any proceedings before the Commission or in any Court.
>
> (3) The fact that a sitting of the Commission has been held shall be conclusive evidence of a decision by the Chairman that the Commission was properly constituted at and duly convened for that sitting.

Now we come to Cl. 13, which is startling in its implications:

> (1) The Commission may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter that in the opinion of the Commission may assist the Commission to deal effectually with the matters before it, whether or not the same would be legally admissible evidence in a Court of law.
>
> (2) Subject to the foregoing provisions of this section, the Evidence Act, 1908, shall apply to the Commission and to the members thereof and to all proceedings before it in the same manner as if the Commission were a Court within the meaning of that Act.

The following clauses then appear:

> 14. (1) The sittings of the Commission shall not be open to the public, and no report or account of any such sitting or of any evidence or proceedings before the Commission shall be published in any newspaper save with the consent of the Commission.
>
> (2) Every person who publishes any report or account in contravention of the provisions of this section shall be liable on summary conviction to a fine of *one hundred* pounds.
>
> 15. The procedure of the Commission shall, subject to this Act and to any regulations thereunder, be such as the Commission thinks fit.

Thus, the Commission, which may act on any evidence, sworn or unsworn, is given very wide powers for the adjustment of rights, termination of trusts, disposal of real and personal property, and other important, and, may be, far-reaching functions. No tribunal of a status lower than the Supreme Court should, we think, be given such powers.

As we have said, the appointment of the Commission's members may not be questioned, and the decision of its Chairman alone in some cases is final and the conclusive decision of the Commission. Now, as to the finality of such decisions of this secret tribunal, acting on anything it likes to call evidence:

> 29. Proceedings before the Commission shall not be held bad for want of form, nor shall the same be removable into any Court by certiorari or otherwise; and no order or proceeding of the Commission shall be liable to be challenged, appealed against, reviewed, quashed, or called in question in any Court on any account whatsoever.

Comment is superfluous! We feel sure that there is not one practitioner in the Dominion who will give his support to promote the creation of such a tribunal.

A further Commission, to be known as "The Land-utilization Companies Commission" is proposed, and a draft Bill—containing clauses similar to those referred to in regard to the Companies Bondholders Incorporation Bill—appears in the Commission's final report at p. 118 *et seq.*

Notwithstanding the investigations of the Companies Commission, and the extensive and valuable work it has done, and for which it deserves the country's gratitude, and its comprehensive Report, there is no need for panicy legislation. Moreover, there must be a limit of protection to be given to persons anxious to invest in hazardous or speculative enterprises; and, in a broad sense, most company investment, of its nature, has to be speculative. It is, of course, right and proper that unscrupulous promoters should be visited with appropriate penalties; but this investigation and the unmasking of such adventurers is, we repeat, the duty of a Government Department administering company legislation generally; and if that Department has not now the powers necessary to perform these functions adequately, then it should be given them. But we object strongly to this multiplication of Commissions, and entirely reprobate the "Star Chamber" characteristics embodied in the legislation to which we have referred, and the bureaucratic tribunal it proposes to set up. Especially, we emphasize that when it is a question of adjustment of property rights and the variation or termination of trusts and the disposal of property held subject to trusts, the Supreme Court, and it alone, should have the powers which the proposed Bills give to the Bondholders Incorporation Commission, and to the Land-utilization Companies Commission, respectively.

It is the duty of the profession to ensure that there should be no encroachment on the functions which in their nature belong to the Courts. In 1928 the Legal

Conference at Christchurch, after hearing an able paper on the subject by Mr. A. F. Wright, passed a resolution expressing "its strong disapproval" of giving "the power of deciding questions affecting private rights without allowing the constitutional right of appeal to the Courts."

Professor Dicey, in several of his works, has uttered grave warnings against any infringement of that characteristic of our Constitution known as "the rule of law." And he has expressed the opinion that it may not be an exaggeration to say that in some directions in Great Britain the Law of England was being "officialized." (In New Zealand, we can now more appropriately apply the term "commissionized," if that expression may be allowed.) Such a transference of authority from the Courts, he says in the *Law Quarterly Review*, vol. xxxi, p. 150, "saps the foundation of that rule of law which has been for generations a leading feature of the English Constitution." As the Committee on Ministers' Powers, in their Report in 1932, said wisely: "It should always be remembered that Justice is not enough. What people want is security for justice; and the only security for justice is Law, publicly administered."

Summary of Recent Judgments.

SUPREME COURT
Hamilton.
1934.
Dec. 10, 13.
Herdman, J.

WATSON v. HINTON.

Motor-vehicles—Registration—Private Motor-car—Used for Personal Calls in relation to Business—Owner seeking to discover Suitable Agents for his Principals, but not soliciting Orders—Whether "commercial traveller"—Whether bound to Register under Cl. 5 of the Regulations—Motor-vehicles Insurance (Third-party Risks) Act, 1928, ss. 16, 17—Motor-vehicles Insurance (Third-party Risks) Regulations, 1932 New Zealand Gazette, p. 1145.

Appeal by way of case stated from the decision of a Stipendiary Magistrate.

The regulations under the Motor-vehicles Insurance (Third-party Risks) Act, 1928, *1932 New Zealand Gazette*, p. 1145, provide that for "private motor-cars" of Class 4 the premium is £1, provided that the car is used exclusively in, *inter alia*, the following ways:—

"(*b*) If used in person by the owner being an individual for the purposes of making personal calls in relation to his profession, business, or calling: Provided that such business, profession, or calling is not that of a commercial traveller, insurance agent, or inspector, land and estate agent, manufacturers' agent, stock agent, station agent, or salesman."

The owner of a motor-car registered under Class 4 as a "private motor-car" was, at the time of registration, in the employment of a petrol company. His duties were to travel and make personal calls with a view to the discovery of suitable agents for his principals. He had no goods to sell, and no authority to take orders. He used his car on business for the purpose of carrying out such duties.

Gilchrist, for the appellant; **Gillies,** for the respondent.

Held, That he was not a "commercial traveller," as he did not solicit orders, but that he came within subclass (*b*) of Class 4 and not within the excepted callings thereto, and that he had not committed an offence by using his car for business purposes and failing to register it under Class 5, which concerns "Private Motor-cars" used for any purpose not included in the purposes specified in Class 4.

Solicitors: Gilchrist, Son, and Burns, Te Aroha, for the appellant; **Gillies and Tanner, Hamilton,** for the respondent.

NOTE:—For the Motor-vehicles Insurance (Third-party Risks) Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 8, title *Transport*, p. 822.

SUPREME COURT
Wellington.
1934.
Dec. 11, 14.
Ostler, J.

IN RE A DEED OF SEPARATION, J. WITH J.

National Expenditure Adjustment—Jurisdiction—Maintenance—Deed of Separation made in February, 1933—Whether Court can reduce Amount agreed upon—National Expenditure Adjustment Act, 1932, ss. 27, 42—Finance Act, 1933, s. 5.

Motion under s. 42 of the National Expenditure Adjustment Act, 1932 (as amended by s. 5 of the Finance Act, 1933), for an order reducing the amount of maintenance payable to a wife under a deed of separation upon the grounds that the payments provided for in the deed cannot be made without causing undue hardship to the husband.

As the Legislature did not intend the provisions of s. 27 of the National Expenditure Adjustment Act, 1932, to be read into s. 42 thereof, an applicant for relief, so as to cut down the plain words of that section in order to succeed, must discharge the onus of showing that he cannot comply with the provisions of the instrument as to payment, or that he cannot do so without undue hardship; but it is not necessary that he should also prove that since the date of the deed his income has been reduced either by virtue of the statutes mentioned in s. 27 or otherwise. He must prove inability to pay, or inability to pay without undue hardship, and these are questions of fact depending on the circumstances of each particular case.

Counsel: C. A. L. Treadwell, in support; **Spratt** and **H. D. Taylor,** to oppose.

Solicitors: Treadwell and Sons, Wellington, for the husband; **Morison, Spratt, Morison, and Taylor,** Wellington, for the wife.

SUPREME COURT
Auckland.
1934.
Dec. 12.
Reed, J.

STANLEY v. SCOTT.

Municipal Corporation—By-law—Public Meetings—Limitations on Common-law Right—Power to regulate Public Meetings in Recreation-grounds and Public Places—Reasonableness of By-law requiring written Permission of Council—Municipal Corporations Act, 1933, ss. 364 (18), 368 (*a*)—By-laws Act, 1910, s. 13.

Appeal against a conviction for holding a public meeting in a public place without first obtaining a written permit from the City Council. It was admitted that, in order to test the validity of the relevant by-law, the appellant deliberately refrained from applying for permission before holding the meeting in question.

The common-law right to hold a public meeting in a public place vested in a Municipal Corporation is subject to any lawful regulation that the Council of such Corporation may by by-law impose.

The power to regulate the use of recreation-grounds and public places, given by s. 364 (18) of the Municipal Corporations Act, 1933, includes a power to regulate, by means of by-laws, meetings held there.

A by-law requiring that a public meeting may not be held in a public place without first obtaining a written permit from the City Council does not render the by-law indefinite and uncertain in its terms and so invalid, as it must be assumed that the City Council will act reasonably and will give due consideration to every application for permission to hold a meeting, and the permission will be granted except in cases where the general interests of the public otherwise require.

Counsel: Slipper, for the appellant; **Stanton,** for the respondent.

Solicitors: T. B. Slipper, Auckland, for the appellant; **J. Stanton,** Auckland, for the respondent.

NOTE:—For the By-laws Act, 1910, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 5, title *Local Government*, p. 512.

SUPREME COURT
Christchurch.
1934.
Dec. 7, 18.
Johnston, J.

TRILLO
v.
CHRISTCHURCH CITY CORPORATION.

Municipal Corporation—By-law—Licensing of Motor-vehicles—Whether Local Authority authorized to charge License Fees for Motor-vehicles "available for hire" but not "plying for hire"—Substitution of Schedule to By-law by Resolution only—Whether *ultra vires*—Municipal Corporations Act, 1933, ss. 364 (9), 367 (f)—Motor-vehicles Act, 1924, s. 12; Amendment Act, 1927, s. 9.

Motion asking for an order or orders quashing certain portions of by-law No. 19 of the Christchurch City Council dealing with the regulation and licensing of motor-cabs plying for hire or otherwise available for hire in the City of Christchurch.

The effect of ss. 364 (9) and 367 (*f*) of the Municipal Corporations Act, 1933, and s. 12 of the Motor-vehicles Act, 1924 (as amended by s. 9 of the Motor-vehicles Amendment Act, 1927), is that local authorities can charge license fees in respect of motor-vehicles plying for hire, and not in respect of those available for hire.

Where a by-law provides that the maximum and minimum fares should be those set out in the schedule to the by-law "or such other schedule as the Council may from time to time by resolution substitute therefor," such substitution by resolution of the Council is within the power of the Corporation and does not require to be made with the same formality as a by-law.

Munt, Cottrell, and Co., Ltd. v. Doyle, (1904) 24 N.Z.L.R. 417, and **Bremner v. Ruddenklau,** [1919] N.Z.L.R. 444, applied.

Counsel: Sargent, in support; **Lascelles,** to oppose.

Solicitors: Slater, Sargent, and Connal, Christchurch, for the plaintiff; **Weston, Ward, and Lascelles,** Christchurch, for the defendant.

NOTE:—For the Motor-vehicles Act, 1924, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 8, title *Transport*, p. 800; for the Amendment Act, 1927, see *ibid.*, p. 819.

SUPREME COURT
Palmerston North.
1934.
Nov. 6, 7, 8;
Dec. 14.
Blair, J.

BOTTCHER v. BOTTCHER.

Statute of Frauds—Whether Statute could be raised as Answer to Affirmative Defence—Part Performance—Referability to Contract—Work and Savings put into Farm by Son.

Action for possession of a small 20-acre farm, the title to which was in the name of the plaintiff, together with the stock and implements. There was also a claim for £100 alleged profits.

Defendant, employed by a dairy company, worked (together with his father) on a 20-acre farm—the title to which and to the stock and implements was in the name of the plaintiff, his mother—before he went to the factory and after he returned therefrom, and most of his earnings went into the farm, improving the property and reducing the mortgage thereon. When he became engaged to be married, plaintiff agreed with defendant that he should live on and manage the farm and receive the whole of the proceeds, pay all accounts, reduce the mortgage, and provide her and her husband with a home and keep until their deaths, and that after her death the property was to be defendant's subject to the payment to each of his two sisters of the sum of £100 each as their share of the property. Accordingly defendant brought his wife to the parents' home and continued to put his work and savings into the farm. Shortly afterwards plaintiff visited her solicitor and made a will providing for a gift to each of the two daughters of £100, left the residue of the estate after payments of debts and testamentary expenses to defendant, and appointed him sole executor. Friction was caused by the arrival on the farm of a married sister of defendant and her children and out-of-work husband, and plaintiff sued defendant for possession of the farm in respect of the defendant's occupation and retention of such portion of the premises as he occupied by himself and his family.

In his defence, defendant claimed to be in occupation pursuant to the agreement above set out and deposed to by him, which the learned Judge held to have been verbally made. Plaintiff did not raise the Statute of Frauds in the pleadings, but claimed that the agreement was not binding under the Statute for want of writing, and that, without its being specifically pleaded, the Statute could be raised as an answer to an affirmative defence.

J. M. Gordon, for the plaintiff; **H. R. Cooper,** for the defendant.

Held, That, assuming that it could be so raised, defendant's acts could not be referable to filial duty and that there was no explanation for what he did without supposing a contract; that the acts were not equivocal nor the contract uncertain, and the part performance was sufficient to enable the verbal contract to be proved.

Simpson v. Simpson, [1918] G.L.R. 12, distinguished.

Quaere, Whether the Statute of Frauds could be raised as an answer to an affirmative defence.

Miles v. New Zealand Alford Estate Co., (1886) 32 Ch. D. 266, 279; **Reeves v. Wheatley,** (1904) 24 N.Z.L.R. 839; **Hill v. Hastings Borough,** [1917] N.Z.L.R. 737, and **Elliott v. Williams,** (1913) 33 N.Z.L.R. 122, referred to.

Solicitors: J. M. Gordon, Palmerston North, for the plaintiff; **Cooper, Rapley, and Rutherfurd,** Palmerston North, for the defendant.

Case Annotation: *Miles v. New Zealand Alford Estate Co.*, E. & E. Digest, Vol. 26, para. 134, p. 24.

SUPREME COURT
Dunedin.
1934.
Aug. 29, 30, 31;
Nov. 21.
Kennedy, J.

KEESING AND OTHERS
v.
COMMISSIONER OF STAMP DUTIES.

Public Revenue—Death Duty—Life Insurance—Exemption up to £1,000 from Estate Duty—Whether restricted by s. 29 of the Finance Act, 1930—Death Duties Amendment Act, 1925, s. 2—Finance Act, 1930, s. 29.

Appeal from an assessment by the Commissioner of Stamp Duties for the purpose of death duties.

The final balance of H.'s estate was over £100,000, and there was a life-insurance policy on deceased's life in excess of £1,000. The question arose whether duty was payable on the whole of the insurance moneys, or whether there was an exemption from estate duty of the sum of £1,000.

Callan, K.C., with him **A. N. Haggitt,** for the appellants; **F. B. Adams,** for the respondent.

Held, That s. 29 of the Finance Act, 1930, had not effected an implied partial repeal—by restricting exemptions in addition to altering the rate of estate duty—of s. 2 of the Death Duties Amendment Act, 1925, which directs that from the final balance of an estate there shall be deducted the value of any life insurance not exceeding £1,000, and estate duty shall be payable only on the residue after such deductions have been made; but the rate of such estate duty shall be determined by the total amount of the final balance without any such deduction.

The life-insurance moneys up to £1,000 were, therefore, exempt from estate duty.

Solicitors: Ramsay and Haggitt, Dunedin, for the appellants; **Adams Bros.,** Dunedin, for the respondent.

NOTE:—For the Stamp Duties Amendment Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Public Revenue and Expenditure*, p. 465; for the Finance Act, 1930, *ibid.*, p. 509.

The Motor-vehicles Insurance (Third-party Risks) Act, 1928.

The "Extension of Liability" of the Owner.

By S. D. E. WEIR, LL.M.

In a case where a person suffers bodily injury in an accident caused by the negligence of the driver of a motor-vehicle which at the time is being driven by someone other than the owner, it is of course necessary at common law for such person to prove that the driver of the vehicle was at the time the agent of the owner before he can succeed in a claim against the latter. It is, therefore, of interest to consider to what extent (if at all) such a plaintiff can rely upon the provisions of s. 3 (1) of the above-named Act as relieving him from the necessity of proving such agency and, further, whether in a case where there can have been no possibility of agency having existed in point of fact—as for example where the car was at the time being driven by a thief—the Act has created a liability on the part of the owner which did not formerly exist.

The opening portion of s. 3 (1) reads:

> "3. (1) Every person being the owner of a motor-vehicle shall, in accordance with this Act and subject to the exceptions and limitations specified in section six hereof, insure against his liability to pay damages on account of the death of any person or of bodily injury to any person in the event of such death or bodily injury being sustained or caused through or by or in connection with the use of such motor-vehicle in New Zealand. For the purposes of this Act and of every contract of insurance thereunder every person other than the owner who is at any time in charge of a motor-vehicle, whether with the authority of the owner or not, shall be deemed to be the authorized agent of the owner acting within the scope of his authority in relation to such motor-vehicle. . . ."

It has been claimed that the words "shall be deemed to be the authorized agent" are solely for the protection of the owner; that the purpose of these words is to free the owner as the insured from the obligation of proving against his insurer that the person in charge of the vehicle was his authorized agent; and that it is only in respect of the parties to the contract of insurance that the words quoted apply.

The sentence under consideration begins "For the purposes of this Act and of every contract of insurance." If the words "of this Act and" had been omitted it would seem clear (having regard to this section of the Act only) that the sentence applied only to the parties to the contract of insurance and not to the injured third party. Do, then, the words "For the purposes of the Act" so enlarge the meaning as to relieve third parties of the proof of authorized agency and even create a liability on the part of the car owner in circumstances where no such liability would exist at common law, bearing in mind, as one must, that "statutes which limit or extend common-law rights must be expressed in clear unambiguous language": *27 Halsbury's Laws of England, 150.*

To determine the purposes or object of a statute one may look at the title provided that nothing in it contradicts clear language in the body of the statute itself. Here the long title is "An Act to require the Owners of Motor-vehicles to insure against *their Liability* to pay damages on account of Deaths or Bodily Injuries caused by the Use of such Motor-vehicles." It certainly does not expressly refer to *any intended extension of the owner's common-law* liability, and does not purport to place on an owner the burden of paying damages for the act of an unauthorized driver. Judicial statements as to the purpose of the Act have from time to time been made. Thus in *National Insurance Co., Ltd. v. Joyes*, [1932] N.Z.L.R. 802, Kennedy, J., at p. 814, stated:

> "The scandal existing prior to the Act was the inability in some cases of those who had suffered bodily injury or in the event of the death of those claiming under the Deaths by Accidents Compensation Act, 1908, to recover the fruits of judgment which had been obtained."

and in *South British Insurance Co., Ltd. v. Feely and Soteros*, [1932] N.Z.L.R. 1392, Reed, J., at p. 1394, said:

> "The mischief that the Legislature has, *inter alia*, sought to remedy by this Act is the failure of persons suffering bodily injury through the negligent driving of a motor-vehicle to recover the fruits of a judgment for damages through the possible impecuniosity of negligent drivers and owners of vehicles . . ."

It is true that in neither of these cases did the point now under discussion arise for decision, but it may be urged in support of the limited meaning which it is suggested should be given to the second sentence in s. 3 (1) that in dealing with the purposes of the Act the learned Judges might have mentioned so important a purpose as that of making the owner of a vehicle liable for the acts of *any* person driving the vehicle at the time of the accident even if he should be a thief.

On the other hand, s. 6 (1) provides that on payment of the premium the insurance company nominated by the owner

> "shall be deemed to have contracted to indemnify him to the extent hereinafter provided from liability (*including any extension of liability incurred by reason of the operation of subsection one of section three hereof*) to pay damages . . ."

and the only possible "extension of liability" of the owner incurred by reason of that subsection is the liability for the negligence of an unauthorized driver.

It may further be pointed out that the tendency of the Act as a whole is to assist and protect injured third parties and not the owner who is compelled to insure. Thus ss. 8, 11, and 17 provide that the failure of the owner to comply with their requirements shall not affect the contract of insurance (so that the third party suffers no prejudice) although, after making payment as required by the Act, the insurance company has rights over as against the owner. Those sections—and also s. 10 dealing with the case of an insolvent owner—make it clear that the Legislature had prominently in view the interests of the injured third party and it is consistent with such a regard for his interests that the Legislature should have intended that he should have a claim against the owner (who in turn should be indemnified by the insurance company provided he has complied with the requirements of the Act) even though such owner's vehicle should have been driven at the time of the accident by a wholly unauthorized person.

There are indeed a number of cases in which it has been definitely stated that s. 3 (1) does extend the liability of an owner, although in some of the cases the statements referred to have been *obiter dicta.* The earliest reported of these cases appears to be *Anderson v. Lehrke*, [1931] 7 N.Z.L.J. 57, in which in dealing with a motion to set aside a judgment and to enter a judgment for the defendant or a judgment of nonsuit

on the ground, *inter alia*, that there was no evidence of the alleged negligence and where the question remaining was as to the liability of the defendant who was the owner for the acts of the driver of the motor-cycle who was killed, Adams, J., delivered a judgment the relevant portion of which is thus summarised in the report :

"The vicarious liability created by s. 3 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, was, however, conclusive against the defendant in this case. The purpose of the Act was clearly indicated in the long and short titles. The long title was 'An Act to require the owners of motor-vehicles to insure against their liability to pay damages on account of deaths or bodily injuries caused by the use of such motor-vehicles.' The short title was 'The Motor-vehicles Insurance (Third-party Risks) Act, 1928.' Section 3 (1) required every owner of a motor-vehicle (which included motor-bicycles), subject to the exemptions and limitations specified in s. 6, to insure against his liability to pay damages on account of the death of any person or of bodily injury to any person in the event of such death or bodily injury being sustained or caused through or by or in connection with the use of such motor-vehicle in New Zealand. It then proceeded 'For the purposes of this Act and of every contract of insurance thereunder every person other than the owner who is at any time in charge of any motor-vehicle, whether with the authority of the owner or not, shall be deemed to be the authorised agent of the owner acting within the scope of his authority in relation to such motor-vehicle.' The liability of the owner in cases of unauthorised user of his motor-vehicle was thus limited by the words above italicised, but such liability attached on every such user even if the person so using the motor-vehicle had stolen it, and in such case even the thief was indemnified under the insurance if he had a driver's license. The Legislature had no doubt considered it desirable and necessary for the protection of the public to cast upon the owner of a motor-vehicle a personal and direct liability to an action for damages in every case falling within the terms of s. 3. His Honour observed that in the Act passed in England in 1930, no such vicarious liability was created.

"Motion dismissed."

In commenting on this statement of the law one might point out that the second sentence of s. 3 (1) does not in express words render the owner liable for the acts of an unauthorized person only if the latter is the holder of a driver's license, although in the next sentence it is provided, in effect, that the driver of the vehicle (if he is not the owner) is himself entitled to be indemnified to the same extent as if he were the owner if such driver is in charge of the vehicle with the authority of the owner and is the holder of a driver's license.

Then, in *Findlater v. The Public Trustee and Queensland Insurance Co., Ltd.*, [1931] G.L.R. 403, Myers, C.J., after referring to the title of the Act and to the opening sentence of s. 3 (1), at p. 406, said :

The subsection then proceeds to extend in one direction and in one direction only the owner's common-law liability."

and the learned Chief Justice repeated the second sentence of the subsection above referred to, and continued :

"With the exception of the special provision in s. 3 (1) already mentioned I can find nothing in the Act which extends the owner's liability at common law."

The learned Chief Justice also in *National Insurance Co. of N.Z., Ltd. v. Joyes* (*supra*), at p. 810 said :

"It is not and cannot be suggested that the Act was intended (*except in one case referred to in s. 3* of the Act which excepted case has no application here) to extend the common-law liability of the owner of the car to third parties."

Similarly in *Antunovich v. Collins*, [1933] N.Z.L.R. 124, Smith, J., at page 128, after setting out the sentence in s. 3 (1) already quoted, said :

"This part of the section does not extend the meaning of the ownership contemplated by the Act; it only means that the owner contemplated by the Act is made liable for the purposes of the Act and of every contract of insurance thereunder for the acts of unauthorized persons."

In this case, by the way, an argument was presented (see p. 126) in favour of the restricted meaning which it has been suggested in the opening portion of this article might be given to the second sentence of s. 3 (1). From the passage quoted from the judgment of Smith, J., however, it is apparent that the argument was not upheld.

The most recent reported case dealing with this subsection is *Shirley v. Macdougall and Another and the Royal Insurance Co., Ltd.*, [1934] N.Z.L.R. 1059, a decision of the Full Court. In delivering the joint judgment of Myers, C.J., and Blair, Kennedy, and Fair, JJ., the learned Chief Justice referred (at pp. 1069, 1070) to his own decision in *Findlater's* case, and at the same time pointed out that the extension of liability of the owner of a car had to be limited :

"The Chief Justice explained in *Findlater v. The Public Trustee and Queensland Insurance Co., Ltd.* [1931] G.L.R. 403, 406, his view of s. 3 (1) of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, and we do not propose to repeat now what he said there. All we need add is that the extension of liability under s. 3 (1) is expressed to be 'For the purposes of this Act and of every contract of insurance thereunder' and must be limited accordingly."

In a separate judgment Herdman, J., considered the subsection at some length. It should first be mentioned that in *Shirley's* case the relation of the owner and driver was that of bailor and bailee and the claim was made by a passenger in the vehicle against the driver and the owner, the Royal Insurance Co., Ltd., the statutory indemnifier of the owner of the car, being later joined as defendant. The first matter decided by the Court was that, in the circumstances disclosed, the car was not a " vehicle plying for hire or used in the course of the business of carrying passengers for hire " within the meaning of s. 6 (4) (*c*) of the Act. After dealing with that point the learned Judges proceeded to discuss the meaning, effect, and purpose of s. 3 (1) and the position of the owner thereunder. At p. 1071, he says :

"If the vehicle at the critical time was in the control of his servant or authorized agent, no difficulty would arise. He would be liable, and the person injured would have a right to compensation. This situation would occasion no difficulty. But if the car happened to be in the charge of a person who was not an authorized agent, say, by one who had borrowed it to go about his own business, and an injury was done, how would the injured person fare ? In such circumstances the owner of the car would not be liable, and the driver of the car would not have the benefit of any indemnity, unless special provision was made. Such provision has been made and it is contained in s. 3 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928. A person so situated is deemed for the purpose of the statute to be the agent of the owner of the vehicle. . . .

"The object of this section is to place beyond question the liability of, as it were, the motor-vehicle which does the injury whether it be controlled by the owner or by someone who is not the owner. For insurance purposes a person in the position that Macdougall was in is deemed to be his mother's agent. But an important limitation is placed upon the responsibility of indemnifying insurance companies. In certain circumstances they are expressly exempted from liability. Subsection 4 of s. 6 provides for this."

This, then, would appear to be the last word on the subject. At least six of our Judges have expressed the opinion that s. 3 (1) does " for the purposes of the Act and of every contract of insurance thereunder " and within the limits thereof extend the liability of an owner ; although *Shirley's* case emphasizes strongly

the limits of that extension of liability. A claim coming within any of the paragraphs (*a*) to (*d*) of s. 6 (4) of the Act is not within the purposes of the Act or of any contract of insurance thereunder; consequently, a plaintiff pursuing such a claim is not entitled to rely on s. 3 (1) as extending the common-law liability of the owner of the vehicle or relieving him from proving that the driver was in fact and in law the authorised agent of such owner. A further matter that may need to be considered by a litigant seeking to avail himself of the statutory extension of liability is that the term "owner" may have a limited meaning in the circumstances of the case: see *Antunovich and Another v. Collins and Others* (*supra*).

That the "extension of liability" of an owner may prove to be a real extension should be apparent when one considers, for example, the effect of his failure to comply with s. 11 of the Act dealing with the giving of prompt notice of an accident affecting the insured vehicle. In such a case the insurance company is entitled—s. 11 (4)—to recover from the owner as a debt due to it an amount equal to the total amount including costs paid by the company in respect of any claim made under the Act. Where, then, s. 3 (1) operates to compel an insurance company to settle a claim made by an injured third party, the owner may find, if he fails on his part to comply with the requirements of the Act that his "extended liability" is a liability indeed.

In conclusion, it should be mentioned that this article has proceeded throughout on the assumption that at all material times there has been a contract of insurance in existence within the meaning and contemplation of the Act. In a case where the owner may have delayed to pay the insurance premium in respect of the motor-vehicle and to nominate an insurance company so that no contract of insurance of the type contemplated by the Act can be said to exist, and an accident happens in the meantime while the vehicle is being driven by an unauthorized person, it is conceived that there is no statutory extension of the liability of the owner under s. 3 (1) since it is only "for the purposes of this Act and of every contract of insurance thereunder" that the person other than the owner who is at the time in charge of the motor-vehicle is to be deemed to be the authorized agent of the owner.

An Existing Practice Condemned.

The attention of practitioners generally is drawn to the following letter which the Council of the Wellington District Law Society recently received from the Solicitors to the Council of Fire and Accident Underwriters' Associations of New Zealand:—

***Re* Assignment of Fire Insurance Policies.**

"We have been instructed by the Council of Fire and Accident Underwriters' Associations of New Zealand to draw your attention to what they fear is an irregular practice that is increasing amongst many of the law practitioners in Wellington, and, indeed, beyond the City.

"It appears that many solicitors and, indeed, their clerks are executing the transfers of interest on fire policies without the legal authority to do so. In many cases these assignments have been executed by law clerks who it is thought could not have the necessary authority to execute such documents, and indeed instances have occurred where payment of a claim has been made to the assignee without the assignor having been aware that his interest in the policy had been transferred. The risk consequently of Insurance Companies having to make a double payment in view of this practice is by no means remote.

"The Council desires to bring this matter before your Society in order that it might, if it is willing to do so, help our clients by issuing a warning against the practice. Our clients would appreciate your co-operation upon the lines indicated, for they are well aware that your Society would look upon a practice with disfavour that might tend to bring about such consequences as indicated in this letter."

The Test of a Judge.

Sir John Harvey's Farewell.

On the retirement of the Chief Judge in Equity for New South Wales (Sir John Harvey), he was given a farewell by his brother Judges and the members of the Sydney Bar. The Chief Justice (Mr. Justice Jordan), who spoke for the Judges, present and retired, and the Court officers, in the course of a moving address concluded as follows:

"Sir John Harvey's influence in maintaining and elevating the best traditions of justice in New South Wales has been profound upon the present generation of practising lawyers, and will be powerful in moulding succeeding generations. It is for us, the lawyers of New South Wales, to endeavour to maintain the standards which His Honour has had so large a part in establishing, and we may well be content if at length it may be said of us in our time *et quasi cursores vitai lampada tradunt* (and like runners, they hand on the torch of life)."

The Attorney-General (Mr. Manning, K.C.) spoke for the members of the Bar, and the president of the Incorporated Law Institute, Mr. Gosling, for the solicitors.

Sir John Harvey, in his reply, said:

"One must trust to the verdict of posterity to judge of one's position as a Judge, and in the last resort it is at the bar of one's own conscience that one has to answer the question of how one has performed his judicial oath. Ever since I was first brought into contact with legal matters here, shortly after I arrived in 1889, I was obsessed with the idea that the administration of justice was not a machine, however hallowed by antiquity, for the purpose of earning a livelihood, or a little more for members of the legal profession; but that it should be kept as a well-tempered and sharp instrument for aiding the business of the community.

"To all of you I owe an enormous debt of gratitude—to the Bar and to the solicitors, and to my brother Judges and the officers of the Court. One could have done nothing without their help, sympathy, and assistance, and I feel that it is to them really that a large part of the applause which is now being given to me should have been given. It is happy to look back and feel that I never had, as far as I can recall, any quarrel or disagreement during my career. I think I can conscientiously say that I have always been on good terms with every practitioner who has been practising either with or before me. That is, I think, due as much to their qualities as to my own. It is what, in my opinion, the public expects of the administration of justice, and I trust it will always be a tradition of the Bench of New South Wales."

Flogging as a Retributive Punishment.

A Recent Court of Appeal Decision Considered.

The late Sir John Salmond in his text-book on Jurisprudence classified the purposes of criminal punishment as being :—

(1) Deterrent : to warn others of the consequences of committing a similar crime.

(2) Preventive : to put it out of the convict's power, permanently or for a period, to repeat his offence ; as by capital punishment, imprisonment, or exile.

(3) Reformative : to cure the convicted person of his criminal, or, as it is now called, " anti-social " tendencies.

(4) Retributive : to satisfy " that emotion of retributive indignation which in all healthy communities is stirred up by injustice."

This classification has little to do with law ; it is a matter of logical analysis, and with great deference it is observed that it appears to be complete and exhaustive. Each of the grounds enumerated may expressly or implicitly be invoked in a suitable case by a rational tribunal in justification of its sentence ; and no other rational ground for inflicting a public penalty, as distinguished from a compensation awarded to an injured person, can well be suggested. (The Mikado's " object all sublime " of selecting a punishment to fit the crime was more æsthetic than rational.)

The order of arrangement of the different purposes is immaterial for purposes of analysis. In an historical arrangement, retribution would come first and reformation last. The Howard League might put reformation first in order of importance, the police (from the point of view of preserving order) prevention, and the man in the street deterrence. Every now and then an event occurs which reminds us that the Courts are prepared on occasion to put retribution first, and that notwithstanding modern theories of criminal anthropology, the retributive purpose of punishment cannot in practice be overlooked.

Some years ago a conviction for wounding—castration of a seducer in circumstances of some provocation—was followed by a sentence of four years' imprisonment. The preventive effect of such a sentence, reducible according to the usual prison rules, was of course not very long-acting ; the particular offence is so rare that no deterrent sentence was called for ; and the circumstances suggested that the prisoner was unlikely to offend in a similar way again, or had been anything but law-abiding in his past life, so that the case could hardly be considered one needing reformative treatment. The main justification for the sentence lay obviously in the element of retribution.

At a later date a conviction for murder produced the not infrequent sequel of a public petition for clemency. An interesting rejoinder, however, was a counter-petition from friends of the murderer's victim, praying that the sentence of the Court be not interfered with.

A recent instance is *R. v. John Christie Spence*, an appeal against sentence decided by the Court of Appeal on December 10 last. Prisoner was convicted on two charges of rape, and sentenced by Mr. Justice Kennedy to seven years' imprisonment and a flogging. The appeal was directed largely against the flogging, which the Court of Appeal sustained, reducing the term of imprisonment to five years. Flogging, of course, is not by itself any preventive of crime. Counsel's citation of convictions for rape and attempted rape for the six years 1927-1932 as being respectively 12, 9, 8, 7, 7, and 2 suggests that a deterrent penalty was not required. It is generally accepted that flogging is not to be relied on as having a reformative effect—there is indeed a body of opinion strongly to the contrary. Though the views of the Court of Appeal cannot be gathered from the terms of the judgment (as reported in the newspapers), they must be deduced from the decision as amounting to an implicit pronouncement that the retributive purpose of punishment is still valid in this country.

The views of those who have, individually or in societies dealing with criminology, made a special study of the matter, may be difficult to assess. At the time of writing the decision does not appear to have been the subject of such respectful discussion as is, of course, permissible and even advisable when the decisions of the Courts affect underlying social principles. It may be submitted that the apparent view of the Court is in accord with that of the bulk of uninformed lay opinion. This, of course, is as it should be ; in a matter which is, in effect, one of social instincts, and where the Legislature has not interfered with judicial discretion the Courts cannot seek to lead the community.

In other respects the reports of the case are of interest as disclosing some judicial doubt as to whether, in the form now inflicted, flogging (to be distinguished from the whipping that s. 27 of the Crimes Act, 1908, permits to be inflicted on males whose age does not exceed sixteen years) produces permanent scars. The regular physical effect of his sentence is a matter on which a Judge might fairly require to be informed, before imposing it. The Act requires that flogging be inflicted " with a cat-o'-nine-tails of the description prescribed by the Minister of Justice." No formal publication in the *Gazette* or elsewhere of the Minister's prescription appears to have been made. The Act does not indicate whether the instrument of flaggellation must retain the design, material, and construction usual in the nineteenth century—to go no further back—or may be varied, either by omitting the traditional three knots in each cord, or in other ways.

The Judge knew his Man.—Of the Hon. Henry Erskine many stories are told. He was once defending a client, a lady of the name of Tickell, before one of the Judges who was an intimate friend ; and he opened his address to his lordship in these terms : " Tickell, my client, my lord." But the Judge was equal to the occasion, and interrupted Erskine by saying : " Tickle her yourself, Harry ; you're as able to do it as I am."

When the autocratic reign of Henry Dundas as Lord Advocate was temporarily ended, Erskine succeeded him in the Whig interest. Dundas proposed to lend Erskine his embroidered gown, suggesting that it would not be long before he (Dundas) would again be in office. " Thank you," said Erskine, " I am well aware it is made to suit any party, but it will never be said of me that I assumed the abandoned habits of my predecessor."

Tactics in Court.

By WILFRED BLACKET, K.C.

I.

Desperate Defences.—In New South Wales from 1861 to 1884 "squatters" held very large areas of unfenced land, and any selector on any Thursday could begin to be a "sturdy yeoman" by paying £10 as a deposit on a 40-acre selection, and could forthwith impound any of the squatters' stock found thereon, and thus obtain some cash towards housekeeping expenses. These were not usually heavy; although it was quite untrue, as stated by a member of Parliament, that a selector's outfit included only "a harness cask and a bullet-mould," and he deservedly lost his seat for his indulgence in such slanderous sarcasm.* Still, as selectors in many instances found difficulty in stocking their holdings, charges of stealing stock were frequent, and a favourite defence was that the cattle or their hides had been "planted on" the prisoner: to use the modern phrase, that the charge was a "frame-up" that the squatter by himself and his equally nefarious agents had "faked" the brands of his cattle and put them into the prisoner's branding-yard or otherwise into his possession. This was an infamous defence, for it was only resorted to when the guilt of the prisoner was manifest to his advocate, and was therefore an abomination as declared in the *Courvoisier* case. It is more than thirty years since I have heard this defence suggested, the more modern expedient being for the prisoner to swear that he bought them from a perfect stranger who had a long red beard and was riding a bay horse with black points and a white star on its forehead, and that he thought they were O.K., which in the bush means "onestly kome by."

A "Rude Forefather."—Here is an interesting question of tactics. I had a brief to defend an old ruffian who must long ago have gone to the world that he was steering for when I met him. He was charged with rape, the prosecutrix being his own daughter—a girl of eighteen. He was a sub-normal, dull, and stupid almost to the level of imbecility, and the only information he could give me in consultation was that he had ulcers on both legs, which, although a misfortune, could not be put forward as a defence. The depositions showed that he for two years previously had been guilty of incest with the girl, and "Teddy" Scholes, Crown Prosecutor, in opening the case started to assert this fact. I shrieked loudly and with waving arms protested against any evidence of this kind being given. "Teddy" was astounded for he said to me that this former misconduct was my best defence. However, I persisted in refusing to allow evidence of any acts on any date other than that of the offence charged. I am still certain that I was right, for if the jury had known what the poor girl had had to endure they would joyously have convicted the prisoner. Also they might well have taken what really was my own view of the case, and that is, that always reluctant, the girl's aversion had at last driven her to desperation, and had made her put up a fierce fight for her outraged honour. He was acquitted on a "jump in and splash about" sort of a defence.

The Unwanted Babe.—Ginxby had the plaintiff's brief in a breach of promise case. She was very pretty, and her appearance guaranteed her modesty: she looked as if she had won all the good-conduct championships that life had ever offered; but you can never tell—at least I never can—and her proof showed that quite early in the engagement she and the defendant had attended a gipsy supper for two which lasted from curfew to milkman, and thereafter they had frequently sought to free themselves from the madding crowd after the shades of night had fallen. Also there was a baby of the kind usually described as "bouncing." Now of course the usual thing would be to parade the babe as proof of the plaintiff's damages and the defendant's heartlessness, but Ginxby adopted other tactics. He thought that the jury might be inclined to think that the defendant might have been influenced by the reasoning against a marriage that guided Tennyson's vilest villain, Philip Edgar—"she that gave herself to me so easily will yield herself as easily to another," so he gave a miss in baulk to the plaintiff's frailties and the large baby and came home with a verdict for £350. Defendant's counsel had been ready for fierce attack on the plaintiff, but did not dare to mention the babe because that would have given Ginxby the smashing retort that the defendant, not content with wrecking the girl's life, had revealed and paraded in Court the shame he had brought upon her, as a means of depriving her of the compensation that was her legal right. Ginxby would have revelled in such denunciation for righteous indignation was the biggest gun in his battery.

An Alibi for the Prosecutrix.—Years ago in a country town there was a dance in active progress, and one young man, hereinafter usually referred to as the "accused," had persuaded his dancing-partner, sometimes hereinafter referred to as the "prosecutrix," to sit out the Caledonians with him on a log in a vacant allotment adjoining the hall. Presently there was a call for help from the prosecutrix and two men passing on a nearby footpath ran up to the rescue. They caught and held the accused, but did not see the girl for she ran away at once to the ladies' dressing-room. The accused, not having time to "prepare his defence," made a statement which fully admitted an indecent assault but did not name the girl, and on the depositions two of the dancers who were called contradicted one another on the point whether it was during the first or the second Caledonians that the accused went out of the hall. (The mention of this ancient dance is a guarantee of the antiquity of the story, and the "first or second Caledonians" sounds like something out of the New Testament, doesn't it?) The attorney for the defence saw that the accused was dead to the world on his admissions, and an *alibi* was impossible, so conceived the brilliant idea of providing an *alibi* for the prosecutrix. He obtained the evidence of one lady who was certain that the prosecutrix danced the first Caledonians—"opposite me and Fred"—and the evidence of two others that she was up in the second, and the resulting confusion was sufficient to cause the jury to doubt whether the prosecutrix had been present at the time she was assaulted, and there was an undeserved acquittal—as indeed there generally is when an indecent assault is the crime charged. I wonder if there would be more convictions if women

* (The "harness cask" was that which was kept on the deck of an emigrant ship to hold the salted meat for daily use and the term was then "well understanded of the people.")

were jurors. Frankly I think there would be fewer, for a woman does not usually place implicit reliance on anything that is said by any other women. Women seem always to allow for exaggeration and inaccuracy in respect of such statements. I don't know why but it is so.

"Is Visions About"?—Casually looking in at a country Police Court one day about thirty years ago, I had a shock from which I have not even yet fully recovered. Under New South Wales law a forest inspector may claim for the Government and brand with a broad arrow any logs which he believes to have been cut without license on Crown Lands, and the logs so marked become Government property unless the timber-cutter obtains at a Police Court within a time limited an order that he is entitled to them. In the case then proceeding, an application for such an order had just been called on and counsel for the axeman to my utter astonishment as a preliminary objection contended at great length and with much vehemence, that the Court had no jurisdiction! If it had no jurisdiction it could make no order and the applicant would lose his logs. However the Magistrate was so much impressed by the argument that he called upon counsel for the Crown to show that there was jurisdiction, and following the example of his opponent he argued against his own client's interest that the matter was properly before the Court. Finally the P.M. ruled in favour of jurisdiction and proceeded to try the case but I did not wait to hear the evidence for I felt that I needed solitude to enable me to understand the weird and wondrous things I had heard.

Counsel for the Other Side.—Another strange case of "save me from my friends" occurred out West when Docker, J., was on that circuit. Plaintiff sued to recover a very substantial sum for commission on sale of a farm. Caphipps for the plaintiff, Smiffkins for the defendant (both of these names are fictitious). When the plaintiff's case closed, the Judge said: "I don't want to hear you Mr. Smiffkins." "Oh, but I want to go into my case and call the defendant and his witnesses," expostulated Smiffkins. "Very well you can do so," said Docker, J. At the end of the case he said: "When Mr. Caphipps closed his case I was about to enter a nonsuit for there was no evidence whatever of retainer and employment from which an agreement to pay commission could be inferred. Fortunately, however, Mr. Smiffkins insisted on my hearing the defendant and his witnesses and their evidence clearly established the employment and thus enabled me to give the plaintiff a verdict for the full amount claimed. I must thank you Mr. Smiffkins and your clients for having made it possible for me to do complete justice in the case, at your client's expense." "He was a most sarcastic man," Judge Docker. On one historic occasion he referred to a solicitor who was also a member of Parliament as "an attorney not yet struck off the rolls," and in another case he said to a jury "The accused has made a statement to you which I think you will look upon as a tissue of lies. In the first place she tells you that on the day in question she went and consulted 'a lawyer' and now it is shown that the person whom she saw was Mr. X.Y. who to-day appears here to defend her."

(To be continued monthly.)

Hospitals as Disseminators of Disease.

Isolation or Sterilization.

The abandonment of the system of isolation for infectious diseases gave rise to the recent case of *Vancouver General Hospital v. McDaniel*, [1934] W.N. 171. The infant respondent, having contracted diphtheria was admitted to a room on the third floor in the Infectious Diseases Hospital on January 17, 1932. In the following twelve days seven other patients were admitted (to rooms on the same floor, and in charge of the same nurses as the respondent), and it transpired that they had smallpox. At the request of her own doctor, who was still attending her, the respondent was therefore moved to the second floor, where there were no smallpox patients and different nurses. On February 3 the respondent was discharged cured (from diphtheria), but, on February 12, she was suffering from smallpox. She accordingly claimed damages for negligence, but the defence was that the technique in the hospital was in accordance with approved modern practice, and had been adopted on competent medical advice. Nevertheless, the Supreme Court of British Columbia awarded $5,000 to the respondent as damages for disfigurement, and $545 to her father for medical expenses.

This judgment was upheld by the Court of Appeal of British Columbia, but not by the Privy Council (Lords Blanesburgh, Thankerton, Russell of Killowen, and Alness, and Sir Sidney Rowlatt). The judgment of the Board (given by Lord Alness) contained a disclaimer of any opinion as to the relative merits of the unit system, as opposed to the isolation system, for smallpox treatment. The only evidence of negligence, however, had been given by the respondent's own doctor, who distrusted the modern system of sterilisation, and preferred the old method—viz., isolation in a separate building.

It was made clear in the judgment that the defence that the system had been adopted upon competent medical advice was not definitely established, but the appellants' technique, in material particulars, was endorsed by every medical witness called by them. Dr. McEachern, associate director of the American College of Surgeons, who was responsible for an annual survey of 3,464 hospitals in the United States and Canada (and who has made a similar survey of New Zealand hospitals) had affirmed that the appellants' technique, of which he had knowledge, was in accord with the most approved hospital practice, and that it was the best system known to medical science to-day. He stated that the proximity of smallpox patients to other patients in an infectious diseases hospital was quite an accepted procedure in the modern method of handling infectious disease. As regarded a common nursing staff, he described that as also accepted procedure in all modern systems.

In their Lordships' opinion, the result was that the appellants' technique was condemned only by the respondent's own doctor, who, having experience of Vancouver alone, gave no instance of any hospital still following the procedure he advocated. It was, therefore, held that there was no evidence of negligence, as appellants had acted in accordance with general and approved practice; and the appeal was allowed, with costs.

The only English authority with regard to the liability of hospital authorities in similar circumstances is *Evans v. Liverpool Corporation*, [1906] 1 K.B. 160, in which

scarlet fever had been spread by the premature discharge of a patient. A boy, aged six years, had been removed to the fever hospital, and thence to a convalescent home, from which he was discharged a month later. Within a few days, three of his brothers developed scarlet fever, and their father claimed the consequent expense—viz., £55—as damages for negligence. At Liverpool Assizes the jury found that the defendants had undertaken that their visiting physician should act with reasonable care and skill in discharging the patient; that there had been a lack of such care and skill by the physician (but not by the matron or nurses), whereby the plaintiff had suffered loss. Mr. Justice Walton held that there was no absolute duty on the defendants, irrespective of any negligence, not to discharge a patient who might possibly cause contagion. In other words, the doctrine of *Rylands v. Fletcher* was not applicable, even though the defendants brought upon their premises a person who, being in a condition of infection, was dangerous to others. The doctor was also not the servant of the defendants, and they were not liable for his negligence (if any), as the terms of his appointment showed that he was responsible for the treatment of the patients, and for their freedom from infection when discharged. Although he was paid a salary, the doctor was actually a medical adviser to the defendants, who had done all that the boy's parents could have done, in his own home. As there was no evidence to support the finding of an undertaking, judgment was therefore given for the defendants, with costs.

The principles of this judgment have now been upheld by the Privy Council, although in the *Vancouver* case the complaint was not directed against any individual, but against the whole system employed. It is to be noted that the Privy Council declined to express an opinion on the merits of the two systems, in the same way that the Court, in trade-mark cases, will not allow itself to be used as a tribunal for deciding which is the better of two rival products.

The decision in the *Vancouver* case (*supra*) may cause difficulty in enforcing the Public Health Act, 1920, s. 84, which authorizes the removal of infected persons to hospital. In *Warwick v. Graham*, [1899] 2 Q.B. 191, a removal order was upheld on the ground that, although a boy was properly cared for (as regards food and medical attendance), it was impossible to isolate him. This is apparently no longer a valid reason for removal, and a further objection may now be taken that, however bad the conditions at home, worse may befall the patient in hospital. Whatever the teachings of modern medical science, popular tradition dies hard, and—if the Vancouver procedure becomes general—a removal from home to hospital may come to be regarded as a transfer from the frying-pan to the fire. The average family will

> " . . . rather bear those ills we have
> Than fly to others that we know not of."
> —*Hamlet*, Act iii, scene 1.

Contempt of Court.—Mr. Oswald, Q.C., was noted for his caustic wit and defiance of the Bench. Yet, strange to say, he wrote *Oswald on Contempt of Court*. Speaking of that work, Mr. Justice Hawkins, as he then was, said its statements could always be relied upon, as it was written by an expert. Mr. Oswald once said in Court: "The proposition is one with which no reasonable man can disagree." "I beg your pardon," said the Judge, "I disagree with it." "I said 'no reasonable man,' my Lord," was Oswald's polite rejoinder.

Legal Literature.

The Yearly Supreme Court Practice, 1935. Being the Judicature Acts and Rules and other Statutes and Orders relating to the practice of the Supreme Court, with practical notes. By P. R. SIMNER, a Master of the Supreme Court; H. HINTON, of the Central Office, and F. C. ALLAWAY, of the Chancery Division. Butterworth & Co. (Publishers), Ltd.

The *Yearly Practice* appears for the thirty-seventh time, retaining its familiar features, and remaining a complete and reliable guide to the practice of the Supreme Court. It again appears under the experienced editorship of Master Simner, Mr. Hinton, and Mr. Allaway.

Lunacy Practice, by GERALD E. MILLS, O.B.E., of the Inner Temple, Barrister-at-Law, and A. H. RONALD W. POYSER, of the Middle Temple, Barrister-at-Law. London: Butterworth and Co. (Publishers), Ltd. Shaw & Sons, Ltd.

This timely publication will be welcomed by the legal profession and all others concerned with practice under the Mental Defectives Act. It is essentially a practitioner's book, and representing as it does the joint labour of two high officials in the management and administrative department, who are also members of the Bar, it is naturally and necessarily an authoritative work.

An up-to-date text-book on this branch of the law has been needed for a long time. The administration of mental patients' estates by the Public Trustee has reached considerable proportions in the care and control of estates, comprising property of all descriptions, and entailing the management of large landed estates and the running of every class of business. The authors point out that this state of things is primarily due to the increasing number of persons under mental disability, and further to the fact that it has become universally recognised that a Government department alone has the requisite organisation and machinery for ensuring that the property, however small, of persons under mental disability is applied in a manner best calculated to alleviate the sufferings of the patient, and that it will be managed with a view to the restoration of the property to the patient in the event of his recovery.

With these facts and considerations in mind the learned authors, whose experience of lunacy administration extends respectively to thirty-nine and twenty-three years, decided to publish "the complete and up-to-date practice book" now before us, which is divided into twelve chapters, with eight appendices.

The learned authors have accomplished their task with thoroughness and skill, and have succeeded in producing what must be recognised as a standard work, the value of which is materially increased by the excellent print and general "get up" of the volume.

All facilities demanded.—A solicitor in one of our cities recently received a letter from a country client, a storekeeper, asking him if he would undertake the collection of accounts and asking the terms on which he would do the work. The letter concluded: "If you decided to do this work for me, kindly let me know the distance you can cover."

London Letter.

Temple, London,
November 29, 1934.

My dear N.Z.,

At the moment of writing London is in a ferment over the marriage of the Duke of Kent to Princess Marina of Greece. The streets are gay with flags and other decorations. Excited crowds are to be seen everywhere. Only the sky above is dull and grey, for November this year is living up to its reputation as the foggy month. But all this has nothing or little to do with law, so away with frivolity and down to business!

Law Reform again.—Some further subjects have lately been referred by the Lord Chancellor to the Law Revision Committee which was established last January to consider and report on the desirability of modifying various legal doctrines and principles. They are the question of amending or repealing s. 4 of the Statute of Frauds, the Statute of Frauds Amendment Act, 1828, the Mercantile Law Amendment Act, 1856, and s. 4 of the Sale of Goods Act, 1893; the question of modifying the doctrine of consideration, particularly with respect to the rule in *Pinnel's* case, (1602) 5 Rep. 117, the rule that a promise to perform an existing duty is no consideration, the rule that consideration must move from the promisee, including the attitude of the common law towards the *jus quaesitum tertii*, and the need for consideration to make simple contracts enforceable; and the question whether the statutes and rules of law relating to the limitation of actions requires amendment or unification having regard particularly to the rules relating to acknowledgments, part payments, disabilities of plaintiffs, the circumstances affecting defendants which prevent the periods of limitation from beginning to run, and the rules as to concealed fraud. This is a formidable list, and as the Committee have not yet published their report on the last of the subjects originally referred to them for consideration (that of the liability of a husband for the torts of his wife and the liability of a married woman in tort and contract) some time may be expected to elapse before we hear any more of these matters.

As if there were not already enough Committees considering the questions of law reform, a new Royal Commission has just been appointed to consider the state of business in the King's Bench Division. The Commission is asked to consider reforms with a view to a greater desptach of the business of the Courts, the judicial strength necessary for such purpose, and whether there should be any further subdivision of the Supreme Court; also whether any further alterations are desirable in the Circuits, the devolution of work from the High Court to the County Courts, and the question of a retiring age for High Court Judges. The Commission is under the Chairmanship of Lord Peel and its other members include Lord Hanworth (the Master of the Rolls), Sir Claud Schuster, K.C., and Walter Monckton, K.C.

The New Judges.—As you have no doubt already heard, the new Judges, who were appointed shortly after I wrote my last letter to you, are Mr. Justice Singleton and Mr. Justice Porter. Both appointments are extremely popular. Singleton, J., who is forty-nine years of age, comes from Lancashire. He was called to the Bar in 1906, and took silk in 1922. He had a very considerable common-law practice in London and on the Northern circuit, and has been Recorder of Preston and a Judge of Appeal for the Isle of Man. He also represented the Lancaster Division of Lancashire in Parliament as a Conservative in 1922-23. He is unmarried and so provides the Bench once again with a bachelor Judge. The new Judge has a charming personality and is liked by all who have come into contact with him.

Porter, J., was called to the Bar by the Inner Temple in 1905, and took silk in 1925. His practice was almost entirely in the Commercial Court and his services on the Bench will therefore be greatly appreciated in the trial of cases in that Court. He was made Recorder of Newcastle-under-Lyne in 1928, and of Walsall in 1932, and has frequently sat as a Commissioner of Assize. In fact he was engaged in this duty when his appointment to the Bench was announced, and since he paid only a flying visit to London to be sworn in and immediately returned to his duties on circuit, we have not yet had the pleasure of seeing him in his new position in London.

The Old Bailey Centenary.—The centenary of the Central Criminal Court as now constituted was celebrated on November 1 last at the Old Bailey, and a great and distinguished company gathered there to witness the unveiling by the Lord Chancellor of a mural tablet commemorating the event. Besides the Acting Lord Mayor of London and the various City functionaries, there were present the Lord Chief Justice, Mr. Justice Avory, Mr. Justice Talbot, Mr. Justice Goddard, Mr. Justice Swift, Lord Darling, and many other well known figures of the Bench and Bar.

The history of the Old Bailey dates back, of course, to far more than a hundred years ago, but the Central Criminal Court, as we now know it, was not constituted until 1834, when the Central Criminal Court Act, 1834, was passed. Even since then great changes have taken place, as was pointed out by the Acting Lord Mayor, and by the Lord Chancellor, in speeches made at the Centenary celebration. Not only has the work of the Court increased enormously owing to the increase in the population subject to its jurisdiction, but also owing to changes that have taken place in the Criminal law make the work of the Court very different from what it was a century ago. Death sentences were common in those days, and there are records of cases where even children of tender years were sentenced to death for petty thefts. Nowadays the death sentence is comparatively rare, while the systems of poor prisoners' defence and probation of offenders help to give those who are unfortunate enough to be charged with criminal offences not only a scrupulously fair trial, but also a fair chance of reforming themselves should they be convicted.

A Great Occasion.—There was once an unfortunate Judge who consistently came to a wrong decision. He lived in the days when children were brought up under such discipline as is rarely encountered to-day, and, in accordance with these principles, the Judge's children were accustomed on all normal occasions to take only plain bread and butter for their tea. One day there was jam on the table, and the children naturally inquired the reason for that unexpected treat. "Your father" was the reply, "has been upheld in the Court of Appeal."

Yours ever, H. A. P.

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

The Mortgagee's Power of Sale and the "Long Term" Agreement for Sale and Purchase.

(*Concluded from page 20.*)

It follows that a mortgagee upon appropriate default by his mortgagor (subject to the statutory provisions as to relief) may now grant a lease pursuant to the Property Law Amendment Act, 1932, and may in exercise of a general power of sale sell the mortgaged land by means of a compulsory purchasing clause. If the power of sale is the statutory one, or a special power in similar terms, then, applying the principle of *Wright's* case, the mortgagee will apparently give credit in the mortgage account for the purchase-money as and when received only, and not from the date of the lease which incorporates the compulsory purchasing clause.

Whether the same advantage accrues to the mortgagee operating under a general power of sale, or whether he would be compelled himself to take the risk of default in completion by a purchaser holding under an agreement for sale and purchase or a lease with a compulsory purchasing clause is yet to be decided in New Zealand. In Canada it has been held that a general power of sale does not carry any such advantage, and that a mortgagee, who, selling under general powers of sale in a mortgage of land and a collateral chattel security and so having no special power to that effect, sold the mortgaged property on credit, was chargeable with the purchase price as if it had been recovered by him in cash: *Mendels v. Gibson*, (1905) 5 O.W.R. 233, 9 O.L.R. 94. The instrument containing the terms of the agreement for sale between the mortgagee and the purchaser provided for payment of the purchase-money by three instalments payable (approximately) nine, fifteen, and twenty-seven months after the agreement with interest from date, and provided further for the conveyance of the property on payment of the purchase-money and interest. Possession was to pass under the agreement. The purchaser re-sold, the sub-purchasers removed part of the freehold, and neither the purchaser nor the sub-purchasers on his behalf paid anything on account of either purchase-money or interest.

In the Court below, Anglin, J. ((1904) 4 O.W.R. 336), came to the conclusion that "the contract for sale to Mitchell (the purchaser) and the giving to him of possession did not amount to an exercise of his power of sale by the plaintiff (mortgagee) sufficient to extinguish the defendant's (mortgagor's) equity of redemption"; that the defendant was not entitled to credit for the purchase-money on the footing of a completed sale to Mitchell; and that the defendant being therefore entitled to redeem and the plaintiff not being in a position to reconvey the security as it was when he took possession or when he gave possession was not entitled to sue on the mortgage covenant.

The plaintiff (mortgagee) appealed, and in the Divisional Court, Meredith, C.J., delivering the judgment of the Court, said ((1905) 9 O.L.R. 94, at p. 102): "I am of opinion, however, that the appellant is bound to account for the whole of the purchase price which was to have been paid by Mitchell. The appellant was not entitled according to the terms of the powers to sell on credit, but a sale made by a mortgagee on credit, if a real sale, is, according to the decided cases a valid exercise of the power if the mortgagee stands ready to account to the mortgagor for the price as so much money received by him in cash: *Thurlow v. Mackeson*, [1868] L.R. 4 Q.B. 97, and cases there cited. See also *Kennedy v. De Trafford*, [1896] 1 Ch. 762; [1897] A.C. 180; *Beatty v. O'Connor*, (1903) 5 O.L.R. 731.

"It is not, I think, open to the appellant to contend that the sale was an invalid one, and having been made for a price less in amount than was owing upon his mortgage he must be taken to have received the whole of the agreed purchase-money or at least to have taken upon himself the risk of the failure of the purchaser to pay."

The view of that Court obviously is to the effect that a general power of sale does not enable a mortgagee to sell under an agreement for sale and purchase merely without immediate conveyance, and so obtain in settling his accounts the benefits exemplified in *Wright's* case.

Bench and Bar.

Mr. J. K. Lusk, who has been for some years on the staff of Messrs. Buddle, Richmond, and Buddle, Auckland, has commenced practice on his own account at Tauranga.

Mr. H. J. Butler, LL.M., formerly of the staff of Messrs. Stanton and Johnstone, and recently of the office of Mr. J. Stanton, Auckland, has commenced practice as a barrister at Selborne Chambers in that city.

Mr. Robert Munro, LL.B., late of Hamilton, was recently admitted to the Fiji Bar by His Honour the Chief Justice of Fiji, Captain Sir Maxwell Maxwell-Anderson, C.B.E., K.C., R.N. (retd.), upon the motion of Mr. S. H. Ellis.

Mr. S. S. Preston, of Te Awamutu, has taken into partnership Mr. C. O. Edmonds, who has been practising at Opunake for the past fourteen years. The new firm will be known as McCarter, Preston, and Edmonds. It will be remembered that Mr. E. W. McCarter died a few months ago.

Mr. Robert Gilkinson, who has recently retired from the position of Secretary of the Otago District Law Society, which he has held since July, 1923, was admitted as barrister and solicitor in July, 1886. He practised on his own account at Clyde for sixteen years, and in Dunedin for eighteen years. After leaving the goldfields, he wrote *The Law of Gold-mining in New Zealand* (1905). In 1931 his valuable contribution to New Zealand History, *Early Days in Central Otago*, had an immediate success. Mr. Gilkinson has been an active member of the Tramping Club and the Field Club, Dunedin, and the results of his expeditions have from time to time been recorded in interesting articles from his pen in the daily press. He proposes to commence his period of retirement with an early visit to Great Britain. The good wishes of his numerous friends, to whom he has endeared himself by his genial and kindly disposition, will accompany him abroad.

Obituary.

Mr. R. C. Hughes, New Plymouth.

Oldest Practising Solicitor in New Zealand.

Mr. Robert Clinton Hughes, the last surviving member of the old Taranaki Provincial Council, died on January 18, at the age of eighty-seven. He was the oldest practising solicitor in New Zealand, having been admitted to the Bar in 1870. Born at Auckland in 1847, Mr. Hughes went to New Plymouth at an early age, and entered the office of the late Judge Weston, while the latter was in practice. He was admitted as a solicitor in September, 1870, and at once commenced practice on his own account; this he continued until his death—a period of over sixty-four years.

The late Mr. Hughes attended the three annual Legal Conferences, and took an active part in the deliberations.

To the last Mr. Hughes gave public service to several bodies that always had his stout allegiance. One of these was the Pukekura Park Committee, another the New Plymouth Beautifying Society, and a third the S.P.C.A. The guardianship of the inheritance of nature for future generations was always his especial care. He was one of the prime movers in the acquisition of Pukekura Park for the borough, and occupied a seat on the first board, which he retained for more than fifty years.

The late Mr. Hughes's funeral was the most representative ever seen in New Plymouth, and the affection and regard in which he was held by the whole community was shown by the comprehensive and touching public references to his life and worth.

An Appreciation.

With the passing of Mr. R. C. Hughes of New Plymouth goes a figure not only entitled to mention because of mere longevity. Endurance in a marathon of practice at the Bar may earn us tributes of various kinds: the quality of our arteries, our digestion, denial of invitations to dine; uninteresting in themselves and accidental in their results, as we see from the boastings of nonagenarians. Mr. Hughes all through life arrested attention. He belonged to another generation and was loyal to it to the end. Whether Dickens fashioned the men of his time or their age moulded them is debateable, but Robert Clinton Hughes remained as if he had just alighted from one of Dickens's stage coaches. It is strange, because in the sixties of last century when Dickens was at his zenith, he was only a boy. Courteous he was, to a degree that we hardly know to-day, modest, witty with a kindly humour, and gallant in his support of lost causes and the under dog. Although actively immersed in the life of a growing town for seventy years he lived in an atmosphere in some measure above and beyond it. Ambitious to do the right thing always, and to excel in his profession, he had no care for material gain. He was a knightly gentleman whose constant acts of kindly consideration made more pleasant the lives of many.

Mr. Henry McSherry, Pahiatua.

The death occurred in the Lewisham Hospital, Wellington, on January 24, of Mr. Henry McSherry, partner in the legal firm of Messrs. Smith, McSherry, and Rawson, of Pahiatua.

The late Mr. McSherry, who was sixty-three years of age, was born at Ross on the West Coast and completed his education at St. Patrick's College, Wellington. He was a prominent citizen of Pahiatua, where he had resided for thirty-two years. For some years he was choirmaster of St. Brigid's Church, Pahiatua, and was always prominently associated with the welfare of that church.

In 1903 Mr. McSherry went to Pahiatua and with Mr. G. Harold Smith formed the legal firm of Smith and McSherry. In 1931 Mr. N. G. Rawson was admitted to the partnership. Mr. McSherry was prominently associated with all forms of sport and was a steward of the Pahiatua Racing Club. He was appointed a vice-president of the club and filled the office of treasurer. In 1931 he was elected president, but last year he was obliged to decline nomination for re-election on account of his health. However, he accepted the position of a vice-president. He was an active member of the Pahiatua A. and P. Association and acted as treasurer up to the time of his death. He was actively associated with tennis, bowling, and golf clubs in the district while his health was good. He was president of the Pahiatua Bowling Club and held a similar position in the Pahiatua Competitions Society for many years. Mr. McSherry leaves a widow, one son, Mr. J. H. McSherry, and two daughters, Miss Mary McSherry and Mother McSherry of the Convent of the Sacred Heart, Rose Bay, Sydney.

Mr. J. H. Parr, Auckland.

The announcement of the death of Mr. John Howard Parr, of the firm of Messrs. Parr and Blomfield, Auckland, came as a shock to his many friends in the profession. He was the only son of Sir James Parr, High Commissioner for New Zealand, who founded the firm whose office his son entered on leaving school. He joined up with the Expeditionary Force on the outbreak of war, and, after the conclusion of hostilities, completed his legal studies. On Sir James Parr's retirement from practice, his son was admitted as junior partner. The deceased, who was only thirty-eight years of age, leaves a widow and a son aged four years. His death came with tragic suddenness after a day's illness. At his funeral there was a large attendance of members of the profession in Auckland with whom he was deservedly popular.

New Zealand Decisions to the Fore.—It is not often that New Zealand decisions are reported to have been cited by the English Courts three times in fifty pages of one volume of the Reports. In Volume 151 of the *Law Times Reports*, at page 398, MacKinnon, J., in the case of *Staffordshire Motor Guarantee, Ltd. v. British Wagon Co., Ltd.*, referred to *Mitchell v. Jones*, (1905) 24 N.Z.L.R. 932. At page 428, Du Parcq, J., in *Miller v. London County Council* cited *Anderson v. Tuapeka County Council* (1900) 19 N.Z.L.R. 1. At page 432, the Privy Council in *Abigail v. Lapin*, an appeal from the High Court of Australia, mentioned *Honeybone v. National Bank of New Zealand*, (1890) 9 N.Z.L.R. 102.

Practice Precedents.

Interpleader.

Cases on Interpleader fall either under R. 482 or R. 487 of the Code of Civil Procedure. These forms deal with a case under R. 482.

Rule 482 (see *Stout and Sim's Supreme Court Practice*, 7th Ed. 310) provides that where two or more persons claim the same chattels or the performance of the same duty from another person who has no interest in the chattels claimed, or is willing to perform the duty claimed, to whichever claimant is by law entitled to such performance, such other person, whether either claimant has commenced an action against him or not, may issue a summons to such adverse claimants to appear before a Judge in Chambers. The rule further sets forth the manner in which the summons may be disposed of: see the notes to the Rule, *loc. cit.* 312.

Rule 483 provides that if either claimant has commenced an action, an application under the last preceding rule must be made before a statement of defence has been filed.

Rule 484 provides that the power given by R. 482 may be exercised though the titles of the claimants have not a common origin, but are adverse and independent of each other.

Rule 489 sets out what an affidavit in support of an application under R. 482 must state.

As to costs: see *Shaw v. Weldon* (1884) N.Z.L.R. 2 S.C. 395; and see also *Cababe on Interpleader*, 92 *et seq.*, and *1935 Annual Practice*, 1406.

INTERPLEADER SUMMONS.

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

Between A.B. etc. plaintiff
and
The C.D. Insurance Company etc. defendant
and
E.F. etc. claimant.

Let the plaintiff and the above-named claimant their solicitors or agents appear before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Courthouse on day the day of 19 at the hour of 10 o'clock in the forenoon or so soon thereafter as counsel can be heard on the hearing of an application on the part of the defendant that the plaintiff and the claimant appear and state the nature and particulars of their respective claims to the moneys the subject-matter of this action and maintain or relinquish the same And that it be referred to the Registrar of this Court to tax the defendant's costs of this action and that such costs when so taxed be paid to the defendant out of the said subject-matter of this action and that all further proceedings in this action be stayed And that the said claimant be restrained from commencing any proceedings against the defendant in respect of the subject-matter of this action And that such other order may be made herein as may be deemed fit.

Dated at this day of 19 .

Registrar.

This summons is issued by solicitor for the defendant whose address for service is at the office of Messrs. of the City of solicitors.

To the said plaintiff A.B. and to the claimant E.F.

AFFIDAVIT IN SUPPORT OF SUMMONS.

(*Same heading.*)

I G.H. of manager make oath and say as follows:—

1. That I am the manager for the said defendant company at .

2. That on the day of 19 a writ of summons was issued herein to recover the sum of £ being moneys due under a policy of insurance in the said defendant company on the contents of a residence as mentioned in paragraph 1 of the statement of claim which said contents were totally destroyed by fire as mentioned in paragraph 3 of the said statement of claim.

3. The defendant company has not delivered a statement of defence to the said claim.

4. The defendant company is willing to pay the said moneys to the person entitled thereto.

5. The right to the subject-matter of this action has been and is claimed by one E.F. by letter dated the day of 19 . Such letter is attached hereto and marked "A." The said E.F. has not yet commenced proceedings against the defendant company.

6. I do not nor does the defendant company collude with the said E.F. or with the above-named plaintiff.

7. The defendant company is ready to bring into this Honourable Court or to pay or dispose of the said moneys in such manner as may be ordered.

8. That the defendant company offered to pay the said moneys to the plaintiff on his giving an indemnity in respect of any liability to the said claimant E.F. but this offer was refused.

Sworn etc.

NOTE:—No form of affidavits of service is submitted herewith, as it is not deemed necessary to do so.

ORDER ON INTERPLEADER SUMMONS.

(*Same heading.*)

day the day of 19 .

UPON READING the interpleader summons sealed herein and the affidavit of G.H. filed in support thereof and the affidavits of service of copies of such summons and affidavit filed herein AND UPON HEARING Mr. of counsel for the above-named defendant and Mr. of counsel for the above-named plaintiff and the said claimant not appearing either in person or by counsel I DO ORDER that all proceedings by or on behalf of the said claimant against the defendant company in respect of any claims upon or concerning the moneys the subject-matter of this action be and the said claims and proceedings or any of them ARE HEREBY BARRED. AND I DO FURTHER ORDER that the said claimant do pay to the said defendant company its costs hereof in the sum of AND that the said defendant company do pay to the said plaintiff for his costs hereof and of the issue and service of the writ of summons and statement of claim herein the sum of .

Judge.

Of Lord Halsbury.—Although of Hiberno-Devonian stock, the editor of *Halsbury's Laws of England* was once called a Welshman by a famous Judge. As Hardinge Giffard, Lord Halsbury had built up a large practice on the Welsh Circuit. Denying the nationality wrongly attributed to him, he said, "No, I am not a Welshman, though it is true that I have made a lot of money out of Welshmen in my time." "Then," replied the Judge, "you may be called a Welshman by extraction."

Towards the end of his long reign as Chancellor he could say with pride (or remorse) that there were only three Judges on the Bench who did not owe their appointment to his powers of discrimination. Two had been chosen by Lord Selborne: Wills, J., in 1889, Mathew, L.J., in 1881. Kennedy, J., appointed in 1892, was Lord Herschell's only appointment. The rest: twelve Judges of the K.B.D., six of Chancery, the Master of the Rolls, four Lords Justices, the President of the P.D. and A. Division, and Barnes, J., all had their judicial origin in the days when Lord Halsbury reigned as Chancellor. There were also about forty County Court Judges of his creation.

Recent English Cases.

Noter-up Service

FOR

Halsbury's "Laws of England."

AND

The English and Empire Digest.

LANDLORD AND TENANT.

Landlord and Tenant—Covenant—User—Breach—RUGBY SCHOOL GOVERNORS *v.* TANNAHILL (C.A.).

A covenant not to permit premises to be used for immoral purposes, if broken, is not capable of remedy; and it is not necessary to require the breach to be remedied before forfeiture proceedings are commenced.

As to forfeiture for breach of covenant: see HALSBURY 18, para. 1036 *et seq.*; DIGEST 31, p. 483.

MINES AND MINERALS.

Mines and Minerals—Conveyance of surface subject to—Damages—SNOWDON *v.* ECCLESIASTICAL COMMISSIONERS (Ch.D.).

Where a conveyance of land reserving mines and minerals contains a covenant of indemnity in respect of damage to the surface caused by the working of the minerals, a subsequent purchaser is only entitled to damages for injury caused after he purchased, unless he has an express assignment of the previous owner's rights under the covenant.

As to remedies for the disturbance of the surface of land by mining: see HALSBURY 20, para. 1460 *et seq.*; DIGEST 34, p. 700 *et seq.*

MORTGAGE.

Mortgage—Leaseholds—Powers of Sale—Contract—WARING *v.* LONDON AND MANCHESTER ASSURANCE CO., LTD. (Ch. D.).

Where a mortgagee sells in exercise of his power of sale, the mortgagor is bound as soon as contracts are exchanged.

As to the exercise by a mortgagee of his power of sale: see HALSBURY, 21, para. 436 *et seq.*; DIGEST, 35, p. 489, *et seq.*

NEGLIGENCE.

Negligence—Damages—Shortened Expectation of Life—FLINT *v.* LOVELL (C.A.).

In assessing damages for personal injuries any shortened expectation of life may be taken into account.

As to damages for personal injury: see HALSBURY, 21, para. 807; DIGEST, 36, p. 122 *et seq.*

Negligence—Runaway Horse—Police Officer—Duty of—HAYNES *v.* G. HARWOOD & SON (C.A.).

The doctrine of volenti non fit injuria *does not apply to a police officer who intervenes to stop a runaway horse.*

As to *volenti non fit injuria*: see HALSBURY 21, para. 798 *et seq.*; DIGEST 36, p. 135 *et seq.*

PRACTICE AND PROCEDURE.

Practice—Appearance—Duty of Solicitor to Enter—PRACTICE NOTE (Ch.D.).

It is the duty of a solicitor who in exceptional circumstances instructs counsel to appear for a defendant on a motion before entry of appearance, to correct the irregularity without any delay.

As to entry of appearance: see HALSBURY, 23, para. 216 *et seq.*; *cf.* DIGEST, 42, p. 334 *et seq.*

PUBLIC AUTHORITIES, ETC.

Public Authorities—Protection—Act of 1893—Infants—SHAW *v.* L.C.C. (C.A.).

The limitation imposed by sec. 1 of the Public Authorities Protection Act, 1893, applies to claims by infants as well as to claims by persons sui juris.

As to sec. 1 of the Public Authorities Protection Act, 1893: see HALSBURY, 23, para. 688 *et seq.*; DIGEST 38, p. 106. *et seq.*

Rules and Regulations.

Slaughtering and Inspection Act, 1908. Amending Regulations relating to the Inspection of Meat.—*Gazette* No. 94, December 20, 1934.

Stock Act, 1908. Amending Regulations for the Prevention of the Introduction into New Zealand of Diseases affecting Stock.—*Gazette* No. 94, December 20, 1934.

Fisheries Act, 1908. Prohibiting the use of Danish Seine Nets in Port Fitzroy and Port Abercrombie Harbours, Great Barrier Island.—*Gazette* No. 94, December 20, 1934.

Fisheries Act, 1908. Regulations as to the taking of Quinnat Salmon (*onchorynchus tschawytscha*) in the Rakaia River.—*Gazette* No. 94, December 20, 1934.

Customs Act, 1913.—Customs Amendment Act, 1921. Restricting the Exportation from New Zealand to the United Kingdom of Carcasses of Porker Pigs.—*Gazette* No. 1, January 10, 1935.

Orchard-tax Act, 1927. Fixing the amount of Special Orchard-tax in Marlborough.—*Gazette* No. 1, January 10, 1935.

Motor-vehicles Act, 1924. Amending Regulations relating to Registration Plates.—*Gazette* No. 2, January 17, 1935.

Customs Act, 1913. Prohibiting Importation of "Wristlets" and "Anklets"; also Advertising-matter relating thereto.—*Gazette* No. 2, January 17, 1935.

Harbours Act, 1923. General Harbour Regulations.—*Gazette* No. 2, January 17, 1935.

Patents, Designs, and Trade-marks Act, 1908. Prohibiting the Importation of Certain Goods.—*Gazette* No. 2, January 17, 1935.

Agriculture (Emergency Powers) Act, 1934. Dairy Board Election Regulations, 1935.—*Gazette* No. 3, January 17, 1935.

Defence Act, 1909. Financial Instructions and Allowance Regulations amended.—*Gazette* No. 5, January 24, 1935.

Land and Income Tax (Annual) Act, 1934. Income-tax payable February 11, 1935.—*Gazette* No. 5, January 24, 1935.

New Books and Publications.

Yearly Supreme Court Practice, 1935. Edited by P. R. Simner, C. H. Hinton, and F. C. Allaway. (Butterworth & Co. (Pub.), Ltd.) Price 60/-.

Lunacy Practice. By Gerald E. Mills and A. H. R. Poyser. (Butterworth & Co. (Pub.), Ltd.) Price 55/-.

Journal of the Society of Public Teachers at Law. Part 9. By H. F. Jollwicz, M.A., LL.B., 1934. (Butterworth & Co. (Pub.), Ltd.) Price 6/-.

The Law of Contracts in a Nutshell. Second Edition. By A. J. Conyers. (Sweet & Maxwell, Ltd.) Price 5/6d.

The Old Bailey, History, Constitution, Functions, Notable Trials. By A. Crew, 1934. (I. Nicholson Watson, Ltd.) Price 24/6d.

Cordery's Law Relating to Solicitors. Fourth Edition. Edited by J. T. Edgerley, M.A., 1934. (Butterworth & Co. (Pub.), Ltd. Price 60/-.

Michael and Wills' Law Relating to Gas and Water. Edited by F. T. Villiers Bayley and H. I. Wills. (Butterworth & Co. (Pub.) Ltd.) Price 83/-.

Municipal Election Law for Layman. By W. Heap, 1934. (Local Government Journal.) Price 2/9d.

Summary of Auditing Case Law. By E. M. Taylor and V. H. M. Bayley. (Macdonald.) Price 4/6d.

Roscoe's Evidence in Civil Actions. 20th Edition. 2 vols. by J. S. Henderson. (Stevens & Sons.) Price 79/-.