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*"Every lawyer offends somebody sometimes, but the community should never forget the profound importance of the administration of justice or the extent to which the effectiveness of that system depends upon the right of a man to have his interests defended by a trained advocate."*

—Rt. Hon. Sir John Latham, Chief Justice of Australia, at the Australian Legal Convention, Melbourne.

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# Two Recent Legal Conferences.

IN view of the coming Dominion Legal Conference at Dunedin during Easter-week of next year, the recent Provincial Meeting of the Law Society of England at Hastings and the first Australian Legal Convention at Melbourne provide some suggestive material. While it is idle to say that the questions of interest exercising the minds of our professional brethren in England are similar in many respects to those now prevailing in New Zealand, there are points at which those interests touch. A closer parallel to our own conditions is provided in Australia. A brief consideration of the nature of the subjects claiming the attention of these two professional gatherings may, therefore, be of some use to us.

I.

From the Presidential Address, delivered by Sir Harry Goring Pritchard, at the English Law Society's meeting, it would appear that the subjects there discussed have in general been covered in New Zealand. The strengthening of the requirements as to character which an applicant has to satisfy before entering the solicitor's profession, which was said to be needed in England, has been dealt with in s. 14 of the Law Practitioners Act, 1931, and by the requirement of production of a certificate by the Secretary of the District Law Society of the applicant's district as to his fitness to be admitted. Delays in litigation are not a matter calling for redress in this country, and the Law Society's proposal to avoid delay by the typing of oral evidence or the employment of a shorthand writer, to replace note-taking in longhand by the presiding Judge, has no novelty for us.

Legal Education, and the cheapening of the Court-cost of litigation, seem points in the President's address that strike nearer home. He considered that litigation should be not necessarily self-supporting, but that the State should maintain the Courts as being for the benefit of the whole community. He thought that it is wrong that the State should make a profit out of the dispensation of justice, and illustrated his view by saying that most people pay their debts because they are honest, but a good many because they know, if they do not, they will be compelled by the process of the Courts to do so. Consequently, he thought that the whole community and not the litigants only should pay for the machinery provided for the administration of justice.

An innovation that was appreciated at the meeting was the circulation of papers to be read at the Conference prior to the gathering; and those who had prepared the papers were asked to restrict themselves to a summary of their printed addresses, so that ample time might be left for discussion.

Comment in the legal journals on the time taken to read papers at the previous meeting, the fiftieth held by the Law Society, appears to have brought about this change. It was pointed out last year by the *Law Journal* (London) that at the conferences of many other learned and scientific societies the important work of the meeting is the general discussion of the written papers. To give ample time for this, the papers themselves are often not read in full, but the openers speak for a given length of time on their papers in a general way. Otherwise, a great deal of the mental vigour and acumen available in the gathering could be wasted. The *Law Journal's* editorial comment went on to say: "With so little time to spare, it seems a pity to spend 80 per cent. of it following the speaker word by word . . . It is possible in five minutes with a printed paper to gain as good an idea of what it is all about as in twenty-five minutes spent in hearing it read aloud."

As a result, the discussions at this year's meeting proved more valuable than the papers themselves, without in any way disparaging the usefulness of the prepared material. This procedure might be considered worthy of adoption at the forthcoming Legal Conference, unless the Conference Executive does not feel disposed to adopt it without a direction from practitioners.

Legal Education was the subject of the first paper. In England, the subject is a perennial; it seems destined to become one here. The University Academic Board has, we learn, made considerable amendment to the Report of the Council of Legal Education: (1934) 10 N.Z.L.J. 220. The subject is sure to be a live one at Dunedin. The mixing of examination-preparation with practical work in the same years, results—according to the reader of the paper at Hastings—in the time of admission finding the student with far less practical knowledge than he should have. He suggested that, before entering on his practical work in an office, the law student should complete his examination in pure law. The quality of instruction at the School of Law came in for some criticism, and the necessity for so many well-known firms of tutors was questioned. In the ensuing discussion, it was made clear that changes were necessary. One speaker deplored that the Law Society did not know what the examiners were doing; and, while the teachers of law were trying to give their students a grounding in law and practice, the examiners were chiefly concerned in finding gaps in their knowledge. The discussion on the whole seemed to favour the preparation in law before its practical application in an office, thus avoiding distraction from practical work by the attendance at classes and facilitating a student's changing to another profession or career before becoming too deeply involved in law should he find himself unsuited to or bored by legal work. This aspect of legal education is, however, only incidental in the problem that confronts the profession in the Dominion.

A proposal that the legal profession should contribute its part towards the solution of traffic questions, in which local authorities, motorists' associations, traffic bodies, justices, the Courts, and the Ministry share in dealing with one or more aspects of the problem without any

co-ordination of their activities. The suggestion of a formidable scheme of traffic courts placed throughout the country, did not appeal to the Conference: the analysis of causation and the keeping of records and statistics, as proposed, were not judicial, but administrative, work, and this was certainly undesirable and probably impracticable.

The functions of the profession in giving free aid to the poor also came up for discussion, and it was shown that the centres in poorer districts, where solicitors serve on a rota of those willing to give their time and services, provide one of the media whereby practitioners can do much unobtrusive and effective service to the community, and so spread that understanding and respect for the law which are essential to national stability. The ensuing discussion favoured an extension of the Poor Person class to those whose means, though insignificant, disentitle them to legal aid under the Poor Persons Procedure provisions.

A plea for the abolition of imprisonment for debt was the subject of another paper, with the suggestion of an alternative system whereby salaries and wages could be attached. It was submitted that the present legislation imposes a hardship on the judgment creditor that is not shared by deserted wives or by local authorities in collecting rates. As a career for young solicitors, service in municipal offices was recommended in another paper, which showed that, in return for the mastery of local government law, a steady position and reasonable remuneration were offered with good working-hours and conditions and the certainty of a retiring-allowance in old age.

The usual social gatherings, including a banquet which was attended by the Lord Chief Justice (Lord Hewart), Mr. Justice Eve, and Mr. Justice Luxmoore, and many members of the Bar, terminated with a dance.

II.

In the early days of this month, a legal conference concluded nearer home—the first Australian Legal Convention, which had been arranged by the Australian Law Council to promote the study of law and to improve the sense of unity in the profession. This was largely a barristers' gathering, members coming from all the States. It was attended daily by the now-retired President of the Law Council, Rt. Hon. Sir John Latham, the recently-appointed Chief Justice of Australia, and several High Court, County Court, and District Court Judges. The attendant social gatherings included a Bar Dinner and a garden party.

The Convention was opened by the learned Chief Justice who gave a comprehensive address on "Law and the Community." Law, he said, should be dynamic and not static; and we should realize that we are living in a rapidly-changing world. He considered it to be the duty of the profession to serve the public; and there should be a real and a continuous endeavour to improve the legal instruments with which the profession works. He said:

> "It should be our aim, as men and as members of our profession, to make the voice of the laws and the administration of the law such that all willingly obey them."

A little later, His Honour touched a question of considerable local interest:

> "I take as an example the system of registration of titles to land. This is an Australian invention, but, having invented it, have we kept it up to date? Most practitioners could suggest some needed amendments. Does not the legal profession owe it to the public and, on a long view, to itself to formulate and submit to the proper authorities at least some of these amendments? Indeed, the whole law of real property might, with advantage, be the subject of radical revision."

Herein, there is a valuable suggestion for our own Conference next Easter. Practitioners have long felt the need for amendments of the Land Transfer Act. The hope has been expressed—in Wellington, at any rate—that the matter will be fully discussed at the Conference.

The papers to which the Australian Legal Convention directed its attention ranged over a variety of subjects. Mr. Justice Evatt, of the High Court of Australia, gave an address on "International Responsibility of States in the Case of Riots or Mob Violence," in which the law relating to foreign nations was fully considered in relation to conditions in the Dominions. "Moratorium Legislation" was the subject chosen by Mr. R. Clive Teece, K.C., of Sydney. He dealt incidentally with the effect of the legislation on the profession, and his paper evoked an animated discussion. A contrast in subject-matter was given in a paper read by Professor K. H. Bailey (known to our students as this year's examiner in International Law), as he discussed Anthony Trollope's novel, *Dr. Thorne*, and the legal problems therein created and dealt with.

"The Need for Simplicity in Statute Law," demonstrated by Mr. G. G. Ligertwood, K.C., of Adelaide, was a vigorous denunciation of the amendment of statutes in the haphazard manner with which we are unfortunately familiar. The speaker attributed much of the vagueness and lack of sequence of a number of statutory provisions to the fact that legislation is so much a matter of political-party compromise, and thereby suffers from the vagueness and inconsistencies attending all compromise. He deplored the "buried amendment," and in this connection referred to a solicitor's lengthy search in South Australian legislation to find whether the driver of a motor-car causing an accident was bound to report the occurrence to the police. After exploring all the statutes dealing with motor-vehicles and traffic and police, he ran the section to earth in the Public Hospitals Act. We know, sometimes from bitter experience, that the same kind of thing is prevalent in our own legislation, *e.g.*, the provision giving an Education Board authority to terminate the employment of married teachers, to be found in s. 39 of the Finance Act, 1931, (No. 4), illustrates the farce of amending various statutes in so-called Finance Acts. Mr. Ligertwood remarked that even these amendments could be forgiven if they all provided practitioners with the joyful feeling generated by the discovery of the following section in the Statute Law Revision Act, passed in South Australia last year: "After the line commencing 'sulphur-crested cockatoo' insert 'warbling green parrot.'"

Mr. Justice Dixon, of the High Court of Australia, provided a learned and, at the same time, provocative paper on "The Law of Homicide." This was largely a critical examination of the House of Lords decision, *Woolmington v. Director of Public Prosecutions* (considered in these columns, *Ante*, p. 181). Sir Robert Garran, K.C., formerly Commonwealth Solicitor-General and Parliamentary Law Draftsman, chose as his subject, "The Law of the Territories of the Commonwealth," in which he reviewed the differences in the law and in the conditions to which it was applied in the Federal Capital Territory, Papua, New Guinea, Nauru, Norfolk Island, parts of Antarctica, and outlying islands. It was an illuminating study in the government of Native races. Other valuable papers were read by Mr. Neal W. Macrossan, Queensland (The Development of the Law relating to the Compulsory Acquisition of Chattels in

Australia) and Mr. W. F. Dennis Butler, Tasmania (Some Aspects of Statute Law Revision in Australia).

We have considered these two recent legal conferences in summary form in the hope that we may thus provide some material for consideration by practitioners at the Dominion Legal Conference of 1936. If we may be permitted to draw on editorial experience, we suggest to the Conference Executive that there are many among us who are able and willing to make valuable contributions on various topics to the common-fund of legal knowledge, criticism, and helpful suggestion; but their difficulty is the choice or determination of the subject on which they will write. Consequently, the suggestion of subjects brings quicker response than a mere leaving of the choice to the individual. We trust, however, that this passing observation will not deter any one from offering, through the Secretary of his District Law Society, to prepare and read a paper on a subject of his own selection. It is, moreover, desirable that there should be no delay in making the offer.

The value of legal conferences was frequently stressed during the three days in which our Australian brethren were together in Melbourne. The remarks of several of the speakers stressed the importance of such a conference in its wider public aspect. Our coming Conference, too, can consider the profession of the Law in regard to its value to the community at large, that is to say, in its national aspect; and we venture to suggest that its lasting success will be in proportion to its measuring up to that standard. As Sir John Latham said, in relation to the duty of the profession to the public:

> "Law is intimately related to national ideals, and it should be regarded (as in fact it is), as a powerful social instrument for the advancement of the people, and not as a set of technical rules by the understanding and application of which the profession earns its living. We are apt to pay too much attention to the forensic or litigious aspect of law. This catches the public eye more than the work of the solicitor in his office. Such work, however, is of the greatest importance. It affects the organisation of human relationships in many aspects, and, when well done, is a real contribution to the ordered life of the community. It should be actively recognized that, in this sphere and in others, it is the duty and the function of the profession to serve the public."

# Summary of Recent Judgments.

SUPREME COURT
New Plymouth.
1935.
Nov. 12, 14.
*Reed, J.*

**LETHBRIDGE v. SCOTT.**

**Slaughtering and Inspection—Abattoirs—Fees payable before Exposing for Sale Meat from Stock slaughtered at another Abattoir—Whether such Fees to be prepaid—Slaughtering and Inspection Amendment Act, 1927, s. 4.**

The fees payable under s. 4 of the Slaughtering and Inspection Amendment Act, 1927, must be prepaid before exposing for sale (in a district for which an abattoir has been established) meat from stock slaughtered at another abattoir.

**Young v. Thompson,** (1904) 23 N.Z.L.R. 845, distinguished.

**Counsel:** **Sheat,** for the appellant; **A. A. Stewart,** for the respondent.

**Solicitors:** **Syme and Weir,** Eltham, for the appellant; **Stewart and Hill,** Eltham, for the respondent.

NOTE:—For the Slaughtering and Inspection Amendment Act, 1927, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 1, title *Animals*, p. 309.

COURT OF APPEAL
Wellington.
1935.
Oct. 1, 2, 25.
*Myers, C.J.*
*Reed, J.*
*Smith, J.*
*Johnston, J.*
*Fair, J.*

**McKINNON AND OTHERS v. GLEN AFTON COLLIERIES, LTD.**

**National Expenditure Adjustment—Lease—Royalties payable under Lease of Land for Coal-mining—Whether "rents payable in respect of land or of any interest in land"—National Expenditure Adjustment Act, 1932, s. 31.**

Originating summons for determination of the question, Whether the royalties payable by the defendant to the plaintiffs under the terms of a lease made between the plaintiffs as lessors and the defendant as lessee, dated July 15, 1929, are "rents payable in respect of land or of any interest in land" within the meaning of s. 31 of the National Expenditure Adjustment Act, 1932?

By consent, the originating summons was removed into the Court of Appeal for argument and determination.

The royalties payable under a mining lease are "rents payable in respect of land or of any interest in land" in s. 31 of the National Expenditure Adjustment Act, 1932.

**So Held** by the Court of Appeal, *Myers*, C.J., *Reed*, *Smith*, and *Johnston*, JJ., *Fair*, J., dissenting.

The majority of the Court of Appeal, *Myers*, C.J., *Reed* and *Johnston*, JJ., further held that the National Expenditure Adjustment Act, 1932, in so far as it deals with the reduction of interest on mortgages and rent, is *in pari materia* with the Mortgagors and Tenants Relief Acts.

*Dictum* of *Herdman*, J., in *In re A Mortgage, G. to W.*, [1933] N.Z.L.R. 772, 785, disagreed with.

**Counsel:** **Johnstone,** K.C., with him **Macarthur,** for the plaintiffs; **North,** for the defendant.

**Solicitors:** **Hesketh, Richmond, Adams, and Cocker,** Auckland, for the plaintiffs; **Earl, Kent, Massey, and North,** Auckland, for the defendant.

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SUPREME COURT
New Plymouth.
1935.
Nov. 11, 12.
*Reed, J.*

**BLACKHALL v. NEARY.**

**Criminal Law—Police Offences—Sunday Trading—Carrier Conveying Racehorses on Sunday by Motor Horse-float—Whether liable to Conviction—Police Offences Act, 1927, s. 18 (3).**

It is an offence under s. 18 (1) of the Police Offences Act, 1927, to work at a trade or calling on Sunday in view of any public place, but, by subs. 3, nothing in subs. 1 shall apply to "works of necessity or charity, the driving of livestock," etc.

B., the driver of a motor horse-float owned by his father, loaded racehorses on the horse-float in view of a public place at New Plymouth on a Sunday, and forthwith conveyed them to Trentham racecourse. On appeal from a conviction under the abovenamed section by a Stipendiary Magistrate,

**Brokenshire,** for the appellant; **R. H. Quilliam,** for the respondent.

**Held,** allowing the appeal, That the facts brought the case within the exemption of the "driving of livestock" in s. 18 (3) of the Police Offences Act, 1927.

*Dictum* of *Brett*, M.R., in **The Dunelm** (1884) 9 P.D. 164, 171, and **R. v. Hall,** (1822) 1 B. & C. 123; 107 E.R. 47, applied.

**Triggs v. Lester,** (1866) L.R. 1 Q.B. 259, distinguished.

**Solicitors:** **Standish, Anderson, and Brokenshire,** New Plymouth, for the appellant; **Crown Solicitor,** New Plymouth, for the respondent.

**Case Annotation:** *The Dunelm*, E. and E. Digest, Vol. 42, p. 624, para. 253; *R. v. Hall, ibid.*, Vol. 33, p. 402, para. 1123; *Triggs v. Lester, ibid.*, Vol. 42, p. 842, para. 1.

NOTE:—For the Police Offences Act, 1927, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 2, title *Criminal Law*, p. 500.

# Company Directors and Managers.

## Remuneration by Percentage of Net Profits.

By D. J. Dalglish, LL.B.

I.

When a company appoints a managing director or a manager, provision is frequently made whereby the company pays, in addition to a salary, a commission on the net profits of the company. As an illustration of the type of clause that might be used the following is taken from the *Encyclopaedia of Forms and Precedents* (2nd Ed.), Vol. 5 at p. 673 :—

> "The manager shall be entitled by way of remuneration for his services to an annual salary of £———— to be paid quarterly on the usual quarter days and also to a commission of £———— per cent. on the net profits of the company in each year. Such net profits shall be certified by the auditors of the company and their certificate shall be conclusive."

It is the writer's intention to consider one or two points with reference to the interpretation of clauses of this nature when there is not sufficient provision as to the method of arriving at "net profits."

The phrase "net profits of the company in each year" is sometimes varied by substituting the phrase "net profits available for distribution." It has, however, been held in a number of English authorities that "net profits" *prima facie* means "profits available for dividend" : see, for example, *Patent Castings Syndicate, Ltd. v. Etherington*, [1919] 2 Ch. 254, and in particular the judgment of Eve, J., at p. 275, where he states :—

> "It [*i.e.* 'net profits'] means, in my opinion, the residuum of profit after the discharge of all current expenses and outgoings in respect of the period under consideration. In other words, it is the ultimate balance of the gross profit which is capable of being lawfully divided as dividend. Although I do not think that any additional force is given to the expression by the addition of such a phrase as 'available for distribution' . . . the addition of such a phrase . . . demonstrates that the expression is intended to be used in its primary sense."

Furthermore, it has been held, in *Vulcan Motor and Engineering Co., Ltd. v. Hampson*, [1921] 3 K.B. 597, that the words "profit earned by the company" mean the same thing.

One question arising for consideration is whether in arriving at "net profits," for the purposes of ascertaining the commission payable under such a clause as that quoted above, income tax should be deducted.

The English authorities are quite definite as to the position in England. In *Johnston v. Chestergate Hat Manufacturing Co., Ltd.*, [1915] 2 Ch. 338, the manager of a company was entitled to receive a salary and "so soon as the profits for the year shall have been ascertained and certified by the auditors of the company," certain stated proportions "of the net profits (if any) of the company." It was also provided that for the purposes of this clause the term "net profits" should be taken to mean "the net sum available for dividends as certified by the auditors of the company." It was held that income tax was not to be deducted in arriving at "the net sum available for dividends" on which the amount payable to the plaintiff was calculated.

The learned Judge in the last-mentioned case adopted the reasoning of Buckley, J., as he then was, in *Attorney-General v. Ashton Gas Co.*, [1904] 2 Ch. 621, where, in a judgment subsequently approved by the House of Lords, [1906] A.C. 10, he stated :

> "The income tax is part of the profits—namely, such part as the Revenue is entitled to take out of the profits. A sum which is an expense which must be borne whether profits are earned or not, may no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves."

These cases and *Rathbone v. The Public Trustee*, (1904) 24 N.Z.L.R. 801, might be thought to settle the position so far as New Zealand is concerned. It is submitted, however, that, where a New Zealand company agrees to remunerate an employee by a percentage of the "net profits of the company," income tax should be taken into account and deducted in arriving at the amount on which the percentage is to be calculated.

*Rathbone v. The Public Trustee* (*supra*) was a case in which Stout, C.J., following a line of reasoning similar to that of Buckley, J., in *Attorney-General v. Ashton Gas Co.* (*supra*), held that income tax was not a proper deduction to be made in calculating the commission to which the plaintiff was entitled on the net profits of a business. That case, however, was not a case in which a company was the employer. It is submitted that it is still applicable to the interpretation of a contract between an employee and a private individual or firm, but that it is not, in view of the meaning of "net profits" referred to above and what is said below concerning New Zealand income tax, applicable where a company is the employer.

Income tax as levied in New Zealand against the profits of a company is clearly a debt due by the company to the Crown and is payable in respect of the profits of the business, and not in respect of the profits which a shareholder derives from the business. In England, on the other hand, income tax is ultimately payable by the person who is entitled to receive the profits ; a company pays income tax on behalf of the shareholders and the income tax payable on his dividend is treated as part of his dividend, so that if he is in fact entitled to exemption he can recover the amount of the tax from the Revenue authorities.

In *Patent Castings Syndicate, Ltd. v. Etherington* (*supra*) the defendant had been appointed by the company as works manager at a salary and he was to receive at the end of each year and within seven days after the annual general meeting a further sum by way of commission calculated on "the net profits for the year." The question which arose for decision was whether excess profits duty, which was a duty assessed not on the persons entitled to divide the profits but on the company, should be deducted in ascertaining the net profits for the purpose of calculating the defendant's commission. It was held by the English Court of Appeal that excess profits duty was a debt payable by the company to the Crown and that for the purposes of ascertaining what was payable to the shareholders of the company it was an outgoing which had to be paid to a third person as a debt of the company, before the amount of the profits distributable amongst the shareholders of the company by way of dividend could be ascertained.

Income tax in New Zealand is, in its incidence, similar to the excess profits duty referred to in *Patent Castings Syndicate, Ltd. v. Etherington* (*supra*) and that case is relied on as authority for stating that in calculating the "net profits of a company" for the purpose of ascertaining the commission payable under a clause such as that set out at the beginning of this article income tax should be deducted.

This is the view taken by the Full Court in Victoria. where the incidence of income tax is the same as in New Zealand, with reference to income tax under the Victorian Act: *Tilt v. Tilt's Cafés Ltd.*, [1930] V.L.R. 31,

II.

The Victorian case, *Tilt v. Tilt's Cafés Ltd.*, [1930] V.L.R. 31, raises an interesting question as to whether in calculating the commission payable to a managing director the amount of the commission itself should be taken into account. The contract in that case was that the managing director should be entitled to a commission of 10 per cent. on "the net profits of the company in each year," and did not materially differ from the contracts which have come before the English Courts for consideration.

In delivering the judgment of the Court, Mann, J., at p. 34 said:

> "We are of opinion that the commission payable to the managing director is to be deducted, in ascertaining the net profits under this agreement, for precisely the same reason that his salary is to be so deducted, viz., that it is part of the cost of management. Under the contract he is not given 10 per cent. of the net profits of the company as a participant with the shareholders in the profits available for distribution, but a commission of 10 per cent. on the net profits. In other words the net profits are merely taken as affording a measure for his annual remuneration."

The Court held in effect that the commission should be one eleventh and not one tenth of the total net profits of the company.

The question whether the commission payable to a managing director or manager on the net profits of a company is to be regarded as an expense incurred in earning those profits does not appear to have been considered in England. Having regard, however, to the dicta in *Patent Castings Syndicate, Ltd. v. Etherington*, [1919] 2 Ch. 254, it would appear that the Court of Appeal there regarded "net profits" as the amount which would have been available for dividend but for the provision that a commission thereon was payable. In his judgment, at p. 274, Duke, L.J., said of the agreement in that case:

> "The agreement was one between the works manager and the representatives of the shareholders of the company for an apportionment of a certain fund at the time of the annual general meeting of the company . . . I think the fund which was to be apportioned between the works manager and the shareholders was a fund which represented in truth the residue of the earnings of the company in the year which was available for distribution as between the company and its works manager, in such a sense that the part retained by the company should be capable of distribution among the several shareholders, . . . and that the 5 per cent. which was to go to the works manager was to be equally his property. I think it was to be a distribution in fact of a divisible residue of profits, and that it was to be a rateable distribution."

The view of the Court of Appeal in *Etherington's* case apparently was that the commission was to be calculated after ascertaining the net profits for the year and that the effect of an agreement to pay a commission of 5 per cent. on the net profits was that only 95 per cent. was ultimately distributable to the shareholders.

It is, with respect, submitted that without something to show that the commission is to be regarded as an expense of earning the net profits, the correct method is to calculate the percentage on the net profits without making any deduction for commission, and not, as decided in *Tilt v. Tilt's Cafés Ltd.* (*supra*), to provide for the deduction of the amount of the commission payable with the result that the percentage is calculated on a lower figure.

It is usually provided in clauses relating to commission that the auditor shall ascertain the amount payable under the contract and that his certificate as to the amount of the net profits or as to the amount of the commission shall be conclusive.

In *Johnston v. Chestergate Hat Manufacturing Co., Ltd.*, [1915] 2 Ch. 338, it was provided that the auditor should certify the amount of the net profits. Referring to the question whether the certificate given by the auditor made any difference, Sargant, J., at p. 344, said:

> "In my opinion, if I can see that a certificate is given on a wrong principle, then I am not precluded by it from dealing with the matter. . . . It is not even as if this amounted to an arbitration. It is something entirely different, namely, an agreed machinery or method for arriving at a particular sum."

In a note to a clause similar to that quoted *ante* at p. 312, the *Encyclopaedia of Forms and Precedents* (2nd Ed.), Vol. 5, at p. 671, points out that in *Johnston v. Chestergate Hat Manufacturing Co.* (*supra*) the agreement did not state that the auditors' certificate should be conclusive, and *Kelly's Draftsman* (7th Ed.), p. 628 contains the same comment. This would seem to raise some doubt as to whether the Court could go behind an auditor's certificate given under an agreement providing that such a certificate should be conclusive.

In *Palmer's Company Precedents*, 14th Ed., Pt. I, p. 394, it is stated on the authority of *Johnston v. Chestergate Hat Manufacturing Co., Ltd.* that such a provision does not bind the Court when the auditors' certificate is made on the wrong principle.

It is submitted that this is the correct view, though the case quoted is not a direct authority for the proposition. There is no reason why a provision making the auditor's certificate conclusive should render that certificate any more immune from attack than an arbitrator's award. An award may be set aside if in the award or in any document incorporated therewith there can be found some legal proposition which is the basis of the award and which is erroneous, (see *2 Halsbury's Laws of England*, 2nd Ed., p. 680); and where the auditor's certificate is appended to a balance sheet or is made up in such a way that it is apparent that he has proceeded on a wrong view of the meaning of the term "net profits," there seems to be no reason why, in appropriate proceedings, the matter could not be rectified by the Court.

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**On Circuit by Aeroplane.**—Probably for the first time in the British Dominions one of His Majesty's Judges has gone on circuit by air. This record was established by His Honour Mr. Justice Smith when he and his Associate travelled from Napier to open the criminal and civil sitting which commenced at Gisborne on November 5. When Gisborne was principally approached by sea, many a learned Judge was delayed in the roadstead, sometimes for days, by stormy weather. More recently, the Judges have proceeded from Napier by motor-car. In adopting the latest method of travel, in both going to and coming from Gisborne by air-service, Mr. Justice Smith found a more expeditious, and, at the same time, a cheaper manner of fulfilling circuit engagements in Poverty Bay than was available to his predecessors.

# Incorrigible Rogues.

## The Crown's Burden of Proof.

By T. P. McCarthy, LL.M.

The daily Press of New Zealand has given considerable prominence to the direction of Mr. Justice Callan to the jury on the trial of one Scott at Auckland on October 22, on a charge of being an incorrigible rogue as defined by the Police Offences Act, 1927. Though the prominence given this matter—prominence denied to matters which the Chief Justice and other Judges have indicated as needing urgent reform—is indubitably open to the suspicion that it was prompted by the knowledge that criticism of the police makes good newspaper copy, the remarks of His Honour have for the readers of this Journal a deep interest, particularly in view of the stress laid by His Honour on the burden of proof as it falls on the prosecution in charges of this nature, a burden which in the Magistrates' Court is often too lightly discharged.

It is true that His Honour, despite his directions to the jury that their duty was merely to enforce the law as they found it, indicated that the section relating to the charge before the Court, s. 55 of the Police Offences Act, 1927, was in some measure distasteful to him. He said:

> "Now, it may occur to you that it is a rather queer sort of thing, and not altogether in conformity with our general conception of English criminal law, that a person should be brought before you and that you should be asked to convict him, with the knowledge that if you do convict him, he will be put in prison, and yet no attempt be made to show that he has done anything which is a breach of the law, or has stolen, or anything of that sort, but the attempt is to prove that he is such a dangerous person that it is better to put him away before he has a chance to offend."

And again:

> "It is a fundamental principle of our law that a man accused and put on trial should be deemed innocent—that if there is a doubt about it, it is better to let him escape rather than run the risk of putting an innocent man in gaol. That is a fundamental principle of ours, and it seems rather in conflict with that that there should be a piece of law which enables persons to be brought before you with the object of putting them in prison before they have done anything at all that has been proved against them."

The genesis of the sections in the Act relating to idle and disorderly persons, rogues and vagabonds, and incorrigible rogues, is, as His Honour pointed out, to be found in the Vagrancy Act, 1824, passed in England prior to the establishment of the Police Force by Sir Robert Peel in 1829, an action necessitated by the then existing conditions of the country. The Napoleonic Wars had come to an end early in the nineteenth century. With the cessation of these wars, there were released in England huge bodies of men unable to obtain work who roved the countryside, living by crime and terrifying the inhabitants throughout the length and breadth of England. These conditions necessitated the stringent methods adopted by the Legislature in the passing of the Act referred to. Darling, J., in *Mathers v. Penfold*, [1915] 1 K.B. 514, referring to its origin at p. 519, said:

> "It is not a statute which stands by itself. It is the result of a number of statutes dealing with persons who were a danger to society, persons wandering about the country without work. I am not in the least saying that when they were first passed, the persons at whom these statutes were aimed were without work by their own fault, but they were without work, and being without work and without means, no doubt, they were dangerous people, and it was necessary to deal with them. How they came to be in such a state is a matter of history, and one need not go into it, but they were; and there having been these masses of persons around the country for many years, the Vagrancy Act, 1824, was passed to deal with them as other statutes had been."

Section 49, defining idle and disorderly persons, was amended in 1901 to include in para. (*d*) a class not included in the English Act, a person "who habitually consorts with reputed thieves or prostitutes." It will be remembered that a conviction for so consorting makes the offender an idle and disorderly person under s. 49, a repetition of the offence a rogue and vagabond under s. 52, and a third conviction an incorrigible rogue under s. 55. Scott was so charged and consequently the reputations of the persons with whom he was said to have consorted were directly in issue. It is in connection with the establishment of this reputation, that Callan, J.'s, direction is most helpful:

> "But I have no hesitation in directing you that, having regard to the whole scope and style of the Act of Parliament we are dealing with, it is your duty to watch those words 'habitually consorting with reputed thieves' with considerable care, knowing as we now know that the object and effect of this sort of thing is to lead to a man's being classified first as an idle and disorderly person, secondly as a rogue and vagabond, and thirdly as an incorrigible rogue—a standing menace to society. We have to use our intelligence in interpreting these few words. The subject was discussed in New Zealand by a late Chief Justice of this country, Sir Robert Stout. He discussed it in a case known as *O'Connor* v. *Hammond*, (1902) 21 N.Z.L.R. 573."

His Honour then quoted the judgment of Stout, C.J., as follows:

> "A 'consort' has been defined (see *Skeats's Dictionary*) as 'a fellow, companion, mate, partner.' Consorting would be proved by companionship. The term 'habitually' is used often as an antithesis to 'occasionally.' It would have to appear that it was the habit of the person accused to consort with the kind of persons mentioned—'thieves' or 'prostitutes,' &c. 'Consort' has in a sense the meaning of frequent companionship, but I must assume that the Legislature, in placing the word 'habitually' before 'consorts,' meant to require proof of a companionship other than one that was merely occasional. The companionship must have been so constant as to have created a habit. It need not be associating with the same person or persons. If a person consorted with one thief on one day, with another on another, and so on, that would be consorting with thieves. A question was raised as to the meaning of 'reputed.' In my opinion, if persons had been several times convicted of theft, and this was known, they would be properly classed as 'reputed' thieves. They might, however, obtain that unenviable reputation without conviction. Nor need their character be known to all the community. It would be sufficient if several in the community believed it, or if the police believed it and acted on their knowledge, and persons who associated with them knew of this repute amongst the police."

*O'Connor v. Hammond* was followed in 1909 by *Stevens v. Andrews*, 28 N.Z.L.R. 773, where Chapman, J., held that there was sufficient proof of the "repute" of the persons with whom the accused was charged with habitually consorting if the evidence showed that those persons had the necessary reputation with the Police and that that reputation was well-founded and known to the accused. Callan, J., referring to this point, said:

> "It would be a terrible state of things for a police constable, who may be a thoroughly honest man but possibly young and inexperienced and perhaps a little led away by over-keenness, to get up in the witness-box and say a person is a reputed thief, and for nobody to be able to inquire into the grounds and basis he had for such reputing. I direct you without hesitation that it is your right and your duty to consider and investigate the grounds given by the police officers in this case for reputing as thieves these various persons who have been so named in this case, and if you

think the grounds upon which the police appear to repute them as thieves are unsatisfactory, and should not have led the police to repute them as thieves, then you are not to regard them as reputed thieves."

In a democratic country such as ours, it is not infrequent that we find ourselves sitting or standing next to or even talking with those who already have a reputation with the police. Similarly, it is not improbable that many of the associations of an accused person with persons of unfavourable repute are just as casual. Callan, J., did not forget that; he warned the jury accordingly:

"Be on your guard, therefore, about certain portions of the evidence in which the association may have arisen by chance of a casual nature. We had evidence given by some of the police officers as to seeing Scott coming out of an hotel at 6.5 p.m. in company with one of those persons the police say is a reputed thief. You are entitled in the discharge of your duty to use your common-sense and knowledge of life. Even if you never happen from your habits to be leaving hotels at 6 p.m. it may happen that you are walking home on the opposite side of the street at that time and you see a stream of persons coming out as great and jostling as those coming out of a church or from the pictures. Even if you have no experience of coming out of hotel bars, you may know from your other experiences that at such moments there may be all kinds of chance associates. You may speak to a person who jostles against you, but that sort of thing ought not to be regarded by you as any evidence whatever as to habitual choice of associates.

"In the same way, suppose a police officer walks into an hotel bar where there is a number of men standing against the counter and sees A. standing next to B. and perhaps engaged in casual conversation with B., who is regarded as a reputed thief. There again from your knowledge of life it may occur to you that at crowded times you may in the most casual way fall into conversation with a person with whom you did not enter the bar. Evidence that the accused had chosen as his associates persons who were validly and properly reputed as thieves, or was seen going into the bar with them, would be evidence of his choice of associates. But mere evidence as to whom he stands next to in a bar or even to whom he is observed speaking there, is, I should imagine, evidence of nothing at all."

There is no new law in this charge to the jury. In principle it is all covered by the judgments in *O'Connor v. Hammond* (*supra*) and *Stevens v. Andrews* (*supra*), but by reason of its amplification of certain points in those judgments and its careful insistence on the Crown proving its case in every particular, it deserves to be placed on record. His Honour added:

"Your plain duty is to determine for yourselves on the evidence you have heard in this Court whether Scott is guilty of associating with persons whom the police say they regard as thieves; and whether this police repute is on good grounds and 'well founded,' using the language of Mr. Justice Chapman.

"If you find when subjecting the matter to care and scrutiny in this manner, that there is a considerable body of repute which you are satisfied is not flimsy or not any mere rule of thumb idea, . . . if you find the persons were reputed at the time to be thieves, or potential thieves, and if you further find that Scott has gone out of his way voluntarily and habitually to consort and make companions of such persons, then it is your duty to find him guilty. If, on the other hand, you are not satisfied of that, and of the whole of it, you must acquit him."

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"The advent of the modern lawyer in China does not mean merely the rise of a new profession, but also the coming of a new age in the administration of law and justice."—Dr. Hu Shih, of the National Peking University.

# The late Professor Garrow.

## A Tribute to his Memory.

By Former Students now in Auckland.

There are in Auckland to-day a number of practitioners who in their time had the advantage, not to say the privilege, of studying under the late Professor Garrow. On the occasion of his passing, these have been drawn together by the recollection of that tie which existed between the late Professor and, it can truly be said, every one of his students. In the result, these members of the profession have been moved by a desire to express their regard for him from whom they received much of their early legal training and to associate themselves with Mr. G. G. G. Watson in his eloquent and feeling tribute in the Journal, *ante*, p. 272.

Most of us, many years since, have known the last of our student days with the late Professor, but there have ever lingered with us the happiest memories of those times. The loss we feel at the Professor's passing is no ordinary one, rather it is the sadness of parting with a true and noble friend. To all alike of his students, Professor Garrow was an example of high scholarship—a teacher of infinite sympathy and understanding of the student mind: a gentleman in the truest sense of the word. His methods were such as to enable that true co-operation (without which no success can be really gained) of master and pupil in an endeavour to achieve the goal which the student had set for himself in undertaking the study of law.

The inspiration to acquire knowledge at the hands of the Professor became a natural result of association with him. His was no simple task, with an ever-changing body of students, yet the distinction of finding the real solution of the difficulties besetting each individual student can be proclaimed as his alone. Tact, courtesy, patience, ability in his chosen work—all these qualities he possessed in a high degree, and withal a marvellous fund of energy for research and an intensive application to the tasks he set about. In a man better physically endowed, this last characteristic would have been regarded as outstanding; in the late Professor, constantly handicapped as he was by physical ailments in later years, it can only have been due to the highly remarkable and undaunted courage of the man himself. Sheer love of work gave him that courage which, to those who knew him best, must always command their profound respect and unstinted admiration.

As a Professor of Law his mark has been indelibly made in his teaching, but greater still were his achievements. For all time, may we hope, his standard works on several legal subjects will be regarded as monuments to his greatness. Their appeal is not to the student alone: their worth is to-day admitted by the practising profession in full measure of recognition to an earnest, scholarly gentleman, who applied his talents for the benefit of his fellows. The sacrifices which he made to produce these works when engaged on his professorial duties must have been enormous; and in his retirement from active life his zeal in that direction remained unabated, so that we who follow on have the guidance of his master-hand.

With due reverence, we ask peace for the ashes of our beloved Professor.

Auckland.
November 25, 1935.

# London Letter.

[By Air Mail] Temple, London,
November 1, 1935.

My dear N.Z.,

Seldom can there have been a month in which so many changes have taken place among the higher ranks of the legal profession in this country. Some, alas, have occurred by reason of death. Thus we have lost Lord Carson and Lord Wrenbury, and, only two days ago, Stuart Bevan. Of Lord Carson and Lord Wrenbury you will doubtless have read much elsewhere. Suffice it to say here that Lord Carson, besides being a brilliant lawyer, was probably the most striking character of recent times, while Lord Wrenbury was better known to us all as Lord Justice Buckley. Stuart Bevan, although he did not occupy such an exalted position, was a silk of long standing, and a Member of Parliament who by his charming manner and attractive personality had endeared himself not only to all members of the Bar with whom he came into contact, but also to the Bench. Lord Justice Greer spoke truly when he said on Monday last in the Court of Appeal that his death was a great loss to all who wished for the candid and honourable assistance of members of the Bar.

**New Appointments.**—The term opened with the news of the retirement of the Master of the Rolls, Lord Hanworth, who had for some little time been unfit and had recently been obliged to undergo an operation. It may well be that he overtaxed his own energy, for, in addition to his ordinary duties in the Court of Appeal, he not only took an active interest in the maintenance of the Records but also spent much time in directing the deliberations of what has come to be known as the Hanworth Commission on Law Reform. His place has been taken, as you no doubt already know, by Lord Wright. To some it would appear to be a step down for a Lord of Appeal to take office as Master of the Rolls, but in reality this is not so. Moreover Lord Wright is also possessed of remarkable energy, and I feel no doubt that the duties of his present office are much more to his liking than the comparatively leisured life of a Law Lord.

The appointment of Lord Wright as Master of the Rolls and the death of Lord Tomlin last month left two gaps in the Judicial Bench in the House of Lords, and these were filled first by Lord Justice Maugham and later by Lord Justice Roche. The corresponding vacancies in the Court of Appeal have been filled by the appointment as Lord Justices of Appeal of Wilfred Greene and Sir Leslie Scott. The former is no doubt well known to you, at any rate by name, by reason of his frequent appearances before the Judicial Committee of the Privy Council. But his practice was more extensive than that. He has been described as the leader of the Chancery Bar and is reputed to have been earning something in the neighbourhood of £40,000 a year. Lord Justice Greene, as he is now, is fifty-two years of age. He was called to the Bar in 1908 by the Inner Temple, but his legal career was interrupted by the War, when he joined the Oxford and Bucks Light Infantry and served in France, Flanders, and Italy. He distinguished himself almost as much as a soldier as he has as a lawyer, for he held more than one appointment on the Staff and was awarded the O.B.E., the M.C., and the Croix de Guerre, and he was made a Cavalier of the Order of the Crown of Italy. After the War he returned to the Bar and acquired a big practice and took silk in 1922. His pleasing manner and easy delivery have probably contributed to his wonderful success as an advocate and will stand him in good stead on the Bench.

Lord Justice Scott has already had a distinguished career and it has long been a matter of surprise to many that his appointment to the Bench should have been so long delayed. He is just sixty-six years of age and was Solicitor-General no less than thirteen years ago. In 1917 he became Chairman of the Acquisition of Land Committee, which paved the way for the great scheme for the reform of our property law, culminating in the Law of Property Act, 1925. Besides taking part in this vast and complicated undertaking, Sir Leslie Scott rendered no inconsiderable services to India, particularly in matters affecting the Indian Princes, while from 1910 to 1927 he represented the Liverpool Exchange Division in Parliament.

This list of appointments grows long, but I must mention one other, and that is the appointment of Sir George Rankin as a member of the Judicial Committee of the Privy Council in the place of Sir Lancelot Sanderson, K.C., who has retired. Sir George Rankin now occupies one of the only two salaried seats on the Judicial Committee. He was formerly Chief Justice of the Calcutta High Court, as was Sir Lancelot Sanderson.

**The General Election.**—I see that you, like ourselves, are at the time of my writing, in the midst of a General Election. A General Election took place during the time that I spent in your country a few years ago, but I do not recollect that it created so much interest among the members of the legal profession as it does here. I think I may say a majority of members of our Bar take an active interest in the contest, if not by actually standing as candidates, at least by addressing political meetings on behalf of candidates. Both the Liberal and Labour causes find quite a number of supporters among members of the Bar, but I suspect that some of these gentlemen are actuated by the desire to say something somewhere on behalf of some cause, rather than by their real political opinions.

**The War.**—The war between Italy and Abyssinia, which at first caused so much excitement in London, has now become of so little interest that it has almost ceased to be a subject of conversation, while the newspaper placards in Fleet Street have almost entirely reverted to announcements of murders and divorce cases. I do not know what is the general view in New Zealand as to the respective merits of the combatants, but over here one finds that most people are quite strongly pro-Abyssinia, though they do not all like to say so. On the other hand, I met an Army Officer the other day who had had considerable experience on the Abyssinian border and who was so definitely pro-Italian that I now feel that neither side really deserves to be favoured.

I must not conclude this letter without adding my best wishes to you all for a happy Christmas, an enjoyable holiday, and success in the New Year.

Yours ever, H. A. P.

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**No Lawyer, But Business Man.**—After terrific struggle, the law student finally finished his examination paper, and then at the end wrote:

"Dear Professor: If you sell any of my answers to the funny papers I expect you to split 50-50 with me."

# New Zealand Conveyancing.

By S. I. Goodall, LL.M.

## Proof of Re-entry by Lessor.

1. Declaration in Proof of Re-entry by Lessor and Recovery of Possession of Leasehold Premises for Non-payment of Rent.

In the matter of section 99 of the Land Transfer Act 1915
and
In the matter of a certain Memorandum of Lease bearing date the day of 19 and registered in the Land Registry Office at under Number .

I A.B. of etc. do solemnly and sincerely declare as follows:

1. I am the lessor named and described in the above-mentioned memorandum of lease and C.D. of etc. is the lessee therein named and described.

2. The said lessee made default on the day of 19 in payment of the sum of £ for rent reserved by and then due and payable under the said lease and the said lessee has further made default in payment of all subsequent instalments of rent accruing due and payable under the said lease and the said respective defaults by the lessee have continued ever since and still continue.

3. By reason of the first said default by the lessee in payment of the said rent having continued for the prescribed period of days the express power of re-entry into possession of the premises and land comprised in and demised by the said lease became exercisable on or about the day of 19 .

4. No demand of payment of the said rent by the lessee was or is necessary in terms of the said express power but notwithstanding that provision demand in writing therefor was made by me upon the said lessee before exercise of the said power of re-entry.

5. The exercise of the said power of re-entry was and is in no way affected or restricted by the operation of the Mortgagors and Tenants Relief Act 1933 or the Rural Mortgagors Final Adjustment Act 1934-35.

[OR 5. Proof of Order of Court authorising re-entry.]

6. On or about the day of 19 I did in person pursuant to the said express power of re-entry into possession contained in the said lease re-enter upon the said premises and land comprised in and demised by the said lease and did recover possession thereof.

7. The said re-entry was effected peaceably and the lessee who was then present surrendered to me the keys of the dwelling-house and outbuildings respectively upon the said land and at the same time vacated the said premises and land but refused to sign and execute any surrender of the said lease.

8. I have since let the said premises and land to one E.F. upon a monthly tenancy and have given to the said E.F. possession of the said premises and delivery of the said keys.

9. Notice in writing of my intention to apply for registration of such re-entry and recovery of possession of the said premises and land was served by me personally on the said lessee on the day of 19 .

10. I hereby apply to have notice of such re-entry and recovery of possession of the said premises and land notified upon the Register accordingly.

AND I MAKE this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act 1927.

Declared etc.

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2. Declaration in Proof of Re-entry by Lessor and Recovery of Possession of Leasehold Premises for Breach of Covenant.

In the matter of section 99 of the Land Transfer Act 1915
and
In the matter of a certain Memorandum of Lease bearing date the day of 19 and registered in the Land Registry Office at under Number .

I A.B. of etc. do solemnly and sincerely declare as follows:

1. I am the registered proprietor of the fee-simple of the land comprised in and demised by the above-mentioned memorandum of lease and successor in title to C.D. the lessor named and described therein and as such am and have been entitled to exercise the power of re-entry and incidental powers conferred upon the lessor thereby.

2. E.F. of etc. is the registered proprietor of the said lease and successor in title to G.H. the lessee named and described therein and as such is and has been liable upon the covenants and subject to the provisions expressed or implied therein.

3. The said E.F. (hereinafter called "the lessee") on or about the day of 19 made default and breach in the observance and performance of the covenants and conditions in the said lease expressed or implied and on his part to be observed and performed particulars of which default and breach are as follow:

(1) . . .
(2) . . .

4. By reason of the said default and breach by the lessee I did on the day of 19 duly serve upon the lessee a notice under section 94 of the Property Law Act 1908 specifying the particular breaches complained of and requiring the lessee to remedy the breaches and make compensation therefor in money.

5. A copy of the said notice so served on the lessee is hereunto annexed and marked "A."

6. The lessee failed and still continues to fail to remedy the said breaches and the lessee has not to my knowledge commenced or taken any proceedings for relief against forfeiture of the said lease.

7. By reason of the said default and breach by the lessee the express power of re-entry into possession of the premises and land comprised in and demised by the said lease became exercisable.

8. The exercise of the said power of re-entry was and is in no way affected or restricted by the operation of the Mortgagors and Tenants Relief Act 1933 or the Rural Mortgagors Final Adjustment Act 1934-35.

[OR: 8. Proof of Order of Court authorising re-entry.]

9. On or about the day of 19 I did in person pursuant to the said express power of re-entry into possession contained in the said lease re-enter upon the said premises and land comprised in and demised by the said lease and did recover possession thereof.

10. There are no buildings upon the said land the said land is completely enclosed by boundary fences including gates and there are no chattels or stock belonging to the lessee remaining or depasturing on the said land.

11. After the said re-entry by me I informed the lessee thereof and asked him to sign and execute a formal surrender for the purposes of registration but the lessee while not disputing that the said re-entry was effectual declined to sign any document.

12. I have now full possession of the said land and my own stock are at present depasturing thereon.

13. Notice in writing of my intention to apply for registration of such re-entry and recovery of possession of the said premises and land was served by me personally on the said lessee on the day of 19 .

14. I hereby apply to have notice of such re-entry and recovery of possession of the said premises and land notified upon the Register accordingly.

AND I MAKE this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act 1927.

DECLARED etc.

# Bench and Bar.

Mr. E. P. Todd, of Messrs. Blenkhorn and Todd, Levin, was admitted as a barrister on October 31.

Mr. F. Clive Henry, formerly of the staff of Messrs. MacDiarmid, Mears, and Gray, has commenced practice on his own account in Hamilton.

Recent Christchurch admissions as solicitors include Mr. R. K. Styche, on the motion of Mr. F. W. Johnston; Mr. N. S. Bowie, on the motion of Mr. C. S. Thomas; and Mr. A. G. Van Asch, on the motion of Mr. H. C. D. Van Asch.

Messrs. Stead and Prichard, of Waitara, have dissolved partnership consequent on the retirement of Mr. Stead, who in 1910 founded the practice, which will be carried on by Mr. Prichard who was admitted to the partnership in 1924. Mr. Stead intends to live in Auckland.

There are eight lawyers in the recently-elected House of Representatives. They are Messrs. H. G. R. Mason (Auckland Suburbs), W. E. Barnard (Napier), F. W. Schramm (Auckland East), all members of the successful Labour Party, and Messrs. W. P. Endean (Parnell), W. J. Broadfoot (Waitomo), W. A. Bodkin (Central Otago), and Sir Apirana Ngata (Eastern Maori), all of the Nationalist Party. A new member, Mr. A. C. A. Sexton (Franklin) is the sole Independent Country Party member. In the last Parliament there were ten members of the profession, but Sir Charles Statham and Mr. W. H. Field did not seek re-election, and the Hon. W. Downie Stewart, a former Attorney-General, was defeated in Dunedin West.

# Supreme Court of New Zealand.

## Origin of the District System.

By THE HON. SIR FREDERICK R. CHAPMAN.

*What follows is an extract from a very long letter written by Mr. Justice Henry Samuel Chapman to his father dated, "On Board the Victoria in the Bay of Plenty, January 26th, 1844." Governor Fitzroy and the Judge with their families had come out by the Bangalore, which, as was customary in those days, had called at Bahia, Cape Town, and Sydney. He wrote this letter when on his way to Wellington, so that although the Judge knew when he left England that he was appointed a Judge for New Zealand, he was not told to what Court he would be assigned. That was left to the Colonial authorities.*

In earlier letters he describes his visit to Cape Town and Sydney, where he met people he already knew. At the latter place he derived much advantage with reference to his future career from the fact that he was the guest of the Chief Justice, Sir James Dowling.

All these letters are highly interesting, but the present point is that which the heading indicates:

"You will recollect that when I left England I hardly knew on what footing my office would be placed. The Company at first asked for a Chief Justice for Wellington. Next in their despatch to the Colonial Office they spoke of 'a Judge with exclusive jurisdiction for Wellington'—saying nothing of Nelson, etc. Lord Stanley answered that what they asked would require an Ordinance of the Governor and Council of New Zealand, but that anticipating arrangements to that end he would forthwith send out a person properly qualified. When we reached Sydney, Fitzroy asked me to enquire of the Chief Justice on what footing the Resident Judge of Port Phillip is placed. I did so and the position I hold is based on that of the Port Phillip Judge. Martin remains Chief Justice of the Supreme Court of New Zealand. I am a Judge of that Court. In making Rules of Court both must concur.

"For the practical administration of justice, the Colony is divided into two districts, the Northern and the Southern. A line running East and West through the peaks of Tongariro and Mount Egmont divides the two. By the proclamation the North is assigned to Martin, the South to me. For the former, the sittings of the Supreme Court will be at Auckland, for the latter, at Wellington, where all the business of the Court (similar to the business of the Courts at Westminster) will be transacted. For *Nisi Prius* trials and for criminal trials Courts will be held at Nelson, Russell (Bay of Islands), and New Plymouth . . . the first being in my district, the latter two in Martin's.

"There is no appeal or writ of error from one Judge to the other, for that would be inconsistent with the spirit of English law. Neither have we initiated the absurdity of a Court sitting *in banco* and consisting of two Judges. That has been tried in Van Diemen's Land and is a failure. A Full Court therefore cannot be had until we have three Judges. But by a contrivance of our own we shall give the public the benefit of a *Curia advisare vult*, and that, too, at

no cost to the parties, for we have agreed to meet once a year at New Plymouth to consult on the improvement of our machinery, to revise Rules, and so forth. I think, therefore, that as regards the public the administration of the law is placed on as good a footing as possible with two Judges and in a Colony with several isolated settlements."

With reference to this programme it may be claimed that it has worked satisfactorily. There are now ten Judicial Districts, in four of which Judges reside. No sitting at Russell was found necessary. Sittings at Nelson have been held from the first. The vessel taking the Judge there might be blown about for days before reaching its destination. Otago and Canterbury are settlements of later date.

# Practice Precedents.

## Leave to Trustees to Spend and Borrow.

Section 91 of the Trustees Act, 1908, provides that, with the leave of the Court, the trustees under any deed or will may from time to time expend a portion of the capital of the trust property on the improvement or development thereof, and may, with the like leave and for the like purpose, borrow moneys on the security of the trust property or any part thereof. It is provided, however, that the total amount so borrowed shall not exceed in any case one-half of the value of the trust property.

In *O'Neill v. Public Trustee*, (1915) 34 N.Z.L.R. 723, the trustee under a settlement deed, where the Court considered expenditure for the preservation of the trust property was within the section, was held to be justified in expending specified moneys for such purpose, and he was given authority to raise the amount by a mortgage or charge on the property. *In re Mackay, deceased, Mackay v. Mackay*, [1928] N.Z.L.R. 185, was a case where a will contained no express power to mortgage but authorized the trustees to expend money on repairs without mentioning improvements. The trustees, wishing to convert a house into flats and thus necessitating capital expenditure for improvements, applied by originating summons for determination of the question whether their powers could be construed to include their expenditure on improvements. The Court considered s. 91 to be wide enough, and made the authorizing order as if the application had originally been made under that section.

Ex-parte motions introduce petitions, and the grounds should be adequately set out in the motion: see note to R. 401 of the Code of Civil Procedure in *Stout and Sim's Supreme Court Practice*, 7th Ed., 267; and also R. 597B, *Ibid.*, 384.

In the following forms an affidavit other than a simple verifying affidavit is not given, as consents are filed: see R. 415 of the Code of Civil Procedure, *Op. cit.*, 273; and *In re The Mercantile Finance and Agency Co., Ltd.*, (1894) 13 N.Z.L.R. 472, 484, where it was held by the Court of Appeal that the Court cannot treat the formal affidavit of verification as evidence: "all allegations of fact in the petition unsupported by affidavit of a person professing to know the fact must, *unless admitted by the opponent*, be treated as not proved."

PETITION.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.
.....Registry.

IN THE MATTER of the Trustee Act, 1908
AND
IN THE MATTER of the will of A.B. etc. deceased.

To
the Supreme Court of New Zealand.

The humble petition of C.D. of clerk sheweth:

1. Your petitioner is the trustee of the will of the abovenamed A.B. late of farmer deceased probate whereof was on the day of 19 granted out of this Honourable Court at to C.D. your petitioner. A copy of the will of the abovenamed deceased is hereunto annexed and marked with the letter "A."

2. That the abovenamed deceased died on or about the day of 19 and at the time of his decease the assets of his estate were as follows:—

| | |
|---|---|
| Cash in hand .. .. .. .. | £ |
| Furniture and personal effects .. | £ |
| Rents due .. .. .. .. | £ |
| Mortgages .. .. .. .. | £ |
| Realty .. .. .. .. .. | £ |
| Stock and shares .. .. .. | £ |
| | £ |

3. That your petitioner has paid all debts owing at the death of the said deceased and all duties payable in respect of the estate and has made capital distributions in accordance with the terms of the said will aggregating £ .

4. That the assets of the estate of the said A.B. still held by your petitioner are as follows:

| | |
|---|---|
| Realty .. .. .. .. .. | £ |
| Shares .. .. .. .. .. | £ |
| Mortgages .. .. .. .. | £ |

5. That the present assets of the said estate are shown on the last balance-sheet prepared to the day of 19 the valuations being those placed on the assets for death duty purposes. A copy of the said balance-sheet is attached hereto and marked "B."

6. Under the will of A.B. deceased your petitioner is required to retain the property situate at number street in the city of and known as " " during the life of the widow of the said A.B. for the use of the said widow free of all rates taxes and other outgoings which are to be paid by the estate.

7. That erected on the said property at is a ten-roomed dwellinghouse.

8. That your petitioner has applied to the Corporation at for an advance by way of mortgage of the sum of £ to be secured by way of mortgage over the said property and the said Corporation has agreed to advance the said sum provided the prayer of the petition is granted by this Honourable Court.

9. That your petitioner considers that it is in the best interests of the estate that the existing building on the property be altered and converted into two self-contained flats and your petitioner considers that by so doing the income from such property will be as follows: [*Insert particulars and amount.*]

10. That there is in the estate of deceased the sum of £ only and it is considered that the said alterations will make the property self-supporting.

11. That the rates taxes and other outgoings amount to £ per annum.

12. Plans and specifications for such alterations have been prepared by Messrs. of architects and a copy of same is attached hereto and marked "C." The cost of carrying out the said alterations is estimated at £ .

13. Attached hereto and marked "D" is a report by Messrs. of estate agents and valuers who have duly inspected the said property.

14. Your petitioner considers that it is in the best interests of the estate not to sell the said property.

15. That all the beneficiaries who are *sui juris* consent to the prayer of the petition being granted and attached hereto is a consent by the said beneficiaries marked "E." The only beneficiary who is not *sui juris* is . She is the youngest daughter of deceased and of the life tenant.

WHEREFORE your petitioner humbly prays—

1. For an order granting to your petitioner leave to expend a sum not exceeding £ in effecting such alterations to the existing building on the property of the said estate situate at .

2. For an order granting leave to your petitioner to borrow a sum not exceeding £ on the security of such property and to execute such mortgage as may be required by the mortgagee for the purpose of securing such loan and to pay all reasonable costs and expenses incurred by your petitioner in borrowing such sum.

3. For an order that the costs of your petitioner of and incidental to this petition and any order made hereon be paid out of the estate.

4. For such other order as in the circumstances may seem just AND your petitioner will ever pray etc.

Signed by the said C.D. in the presence of .

Signature.

Name :

Address :

Occupation :

AFFIDAVIT VERIFYING PETITION.

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

Sworn etc.

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CONSENT.

This is the consent marked "E" referred to in the within petition of .

We and do hereby consent to the trustees in the estate of A.B. etc. deceased borrowing from Corporation the sum of £ for the purposes and upon the security mentioned in the petition to the Honourable the Supreme Court of New Zealand at .

Dated at this day of 19 .

Signed by the said in the presence of .

Name :

Address :

Occupation :

NOTE :—Where the matter is not contentious it is not usual to file an independent affidavit as to the facts set out in the petition.

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MOTION IN SUPPORT OF PETITION.

(*Same heading as in petition.*)

Mr. of counsel for the petitioner C.D. TO MOVE before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Court on day the day of 19 at o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER granting the petitioner C.D. leave to borrow in terms of the petition of C.D. filed herein UPON THE GROUNDS that it is in the interests of the estate of the abovenamed A.B. deceased that such order be made and upon the further grounds set out in the petition of C.D. and the verifying affidavit filed herein.

Dated at this day of 19 .

Certified pursuant to the Rules of Court to be correct.

Counsel for petitioner.

Memorandum for His Honour : His Honour is respectfully referred to s. 91 of the Trustees Act, 1908.

The beneficiaries are the widow and three children, one of whom is a minor. All those *sui juris* consent to the order.

Counsel moving.

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ORDER.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the motion and the petition filed herein and the affidavit verifying the same and the consents of and filed herein AND UPON HEARING Mr. of counsel for the petitioner IT IS ORDERED that the petitioner C.D. of clerk DO HAVE LEAVE to expend a sum not exceeding £ in effecting alterations and additions (in accordance with the plans and specifications attached to the said petition) to the building erected on that piece of land situate etc. forming part of the estate of the late A.B. etc. AND IT IS FURTHER ORDERED that for such purpose the said petitioner C.D. do have leave to borrow a sum not exceeding £ AND to execute such mortgage or mortgages as may be required by the mortgagee for the purpose of securing such loan AND to pay all costs and expenses incurred by him as trustee in borrowing any such sum AND IT IS FURTHER ORDERED that the costs of and incidental to the said petition and this order be taxed by the Registrar of this Court and paid out of the estate of the said A.B. deceased.

By the Court.

Registrar.

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# Rules and Regulations.

**Post and Telegraph Act, 1928.** Radio-telegram Regulations.—*Gazette* No. 84, November 14, 1935.

**Health Act, 1920.** Regulations as to Drainage and Plumbing applied to the County of Inangahua.—*Gazette* No. 84, November 14, 1935.

**Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act, 1933.** Notification pursuant to the Foreign Arbitration Rules, 1935.—*Gazette* No. 84, November 14, 1935.

**Statutory Rules and Orders, 1935, No. 850.** Load-line Certificates for Finnish Ships.—*Gazette* No. 84, November 14, 1935.

**Statutory Rules and Orders, 1935, No. 851.** Load-line Certificates for German Ships.—*Gazette* No. 84, November 14, 1935.

**League of Nations Sanctions (Enforcement in New Zealand) Act, 1935.** Regulations *re* the Importation of Goods. Prohibiting the Importation of Goods of Italian Origin. Prohibiting the Exportation of certain goods. Enforcement of Sanctions in Samoa and the Cook Islands.—*Gazette* No. 85, November 18, 1935.

**Mortgage Corporation of New Zealand Act, 1934-35.** Amendment of Rules.—*Gazette* No. 86, November 21, 1935.

**Land Act, 1924.** Crown Land Fire-prevention Regulations.—*Gazette* No. 86, November 21, 1935.

**Tobacco Act, 1908.** Regulations under the Act.—*Gazette* No. 86, November 21, 1935.

**Trade Agreement (New Zealand and Canada) Ratification Act, 1932.** Extending Duration and Modifying Provisions of Agreement.—*Gazette* No. 86, November 21, 1935.

**Scaffolding and Excavation Act, 1922.** Regulations under the Act.—*Gazette* No. 86, November 21, 1935.

**Naval Defence Act, 1913.** Regulations amended.—*Gazette* No. 86, November 21, 1935.

**Public Service Act, 1912.** Regulations amended.—*Gazette* No. 86, November 21, 1935.

**Extradition Treaty with Poland.**—*Gazette* No. 86, November 21, 1935.

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# New Books and Publications.

**Questions and Answers on Police Duties.** By Cecil C. H. Moriarty, O.B.E., LL.D. (Butterworth & Co. (Pub.) Ltd.). Price 3/6d.

**Gibson's Probate and Divorce,** 12th Edition. By A. Weldon, H. G. Rivington, and L. C. Warmington. (Law Notes). Price 28/-.

**Income Tax Law and Practice,** 8th Edition. By G. A. Newport and R. Staples. (Sweet & Maxwell, Ltd.). Price 15/-.

**Supplements to the Institutes of Gaius.** By F. de Zulueta, D.C.L., F.B.A. (Oxford University Press). Price 2/3d.

**The Law of Housing.** By W. Ivor Jennings, 1935. (Chas. Knight & Co.). Price 47/-.

**Secretarial Practice.** Prepared under the authority of the Council of the Institute of Chartered Secretaries, Fifth Edition, 1935. (Heffer). Price 17/6d.