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

" This, my Palace of Westminster, in the mighty heart of our Empire, is the very cradle of our envied Parliamentary institutions. Here is the anvil on which our Common Law was forged, to become the joint inheritance of the United States of America and our community of peoples. Beneath these rafters of medieval oak, the silent witnesses of historic tragedies and pageants, we celebrate the present under the spell of the past."

—HIS LATE MAJESTY KING GEORGE V,
at Westminster Hall, Jubilee Week, 1925.

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An Appeal That Cannot be Dismissed.

AT this time of national celebration of the dedication of a new monarch to the service of his subjects, our minds naturally revert to the last crowned monarch, the well-beloved King George V. In recalling the momentous years of his reign, our thoughts are inclined to dwell upon the notable achievements of that period of our history, and, in a special way, to those that were then instituted for the well-being of his people. These are his memorials that live on in our hearts. When we come to consider a fitting public commemoration of King George V, it becomes clear to us that any permanent national memorial would be wholly inadequate and inappropriate if it overlooked the humanitarian features of his term of kingship which were dear to his heart. We recall that in the ancient home of the Common Law, Westminster Hall, two years ago, he spoke with feeling of " the slow accretion of centuries, the outcome of patience, tradition, and experience, constantly finding channels old and new for the impulse towards social improvement inherent in our people down the ages." Happily, our own Dominion has found a new channel of its own for this impulse. In the words of the Acting Prime Minister (Hon. P. Fraser) during the National Coronation Service on Wednesday last, the people of New Zealand will generously commemorate the memorable reign of King George V " with a fitting and worthy memorial, conceived with insight and a true understanding of the late monarch's concern for the welfare of children, and one that will confer inestimable blessings on our little ones." He was referring to the National Memorial to the newly-crowned King's father: the King George the Fifth Fund for the permanent establishment of Children's Health Camps in New Zealand.

The objective of the Memorial Fund may best be explained in the words of the Director-General of Public Health, Dr. M. H. Watt, when, after referring to the Health Camp Movement as a natural sequel of the Plunket Movement, he says:

" In the Health Camp Movement we have a link in the chain of measures for prevention of disease and active promotion of health. It takes the proper line of education of the young, while at the same time it fortifies them, and has the additional merit of showing their parents that always good results, and sometimes astonishing results, are produced by simple methods of right living.

" We have within our grasp very *useful means* for lessening the future inflow to our public hospitals, by taking children in hand before a constitutional breakdown occurs—before something has developed that the passing of years and even the best of medical treatment may fail to stem or eradicate. If only as a anti-tuberculosis measure—and it is very much more than that—health camp work fully justifies its existence.

" If a child falls a victim to disease or infection it cannot be taken into a health camp, but is already a candidate for hospital treatment. It is most important, therefore, that means be maintained to enable timely selection of children requiring prior treatment in a health camp and that we have more of these Institutions in order to widen their benefits.

" The time may come when all children will be afforded an opportunity of a stay in a health camp where they will receive a proper grounding in physical culture and personal hygiene, but for the present our chief concern is to get the Movement under way. The opportunity is now afforded citizens to contribute towards a national memorial to King George the Fifth, and to assist in a practical way towards pioneering a movement that is certain to continue growing and gaining in momentum."

When King George VI was told of the form in which it was proposed that the memorial to his royal father was to take in the Dominion, His Majesty's private secretary replied: " The King thinks that your proposed memorial in the form of a children's health movement could not be bettered." This was disclosed last evening by His Excellency the Governor-General (Lord Galway) in the course of a moving broadcast appeal on behalf of the King George V Memorial Fund, when, in recalling the lovable human qualities of the late monarch, he said that love of children, and especially of sick children, was an outstanding characteristic of King George and Queen Mary.

There is no section in the community which is brought so constantly into touch with human life in all its phases as the members of the legal profession. The fruit of the knowledge so gained is shown whenever any appeal is made to human sympathy, whether it be of a public or private nature. Their response is ever-ready and generous. It is not surprising, therefore, that when an appeal made to commemorate the reign of a greatly-revered monarch takes the form of assistance to suffering childhood, the names of lawyers have been found as eager donors in almost every published list of contributors to the King George V Memorial Fund.

Our present purpose is to express the hope that the already successful appeal of the Prime Minister and other public men and women will be augmented by further generous support from the legal profession. As Mr. Savage has said, the memorial to King George V is a matter altogether outside the realm of politics: what the present Government has done has been to recognize the national spirit of its predecessors and to carry on the work they began. We feel sure that those members of the profession who have delayed adding their individual contributions need only to be reminded of the Fund, its significance, and its human appeal, and they will emulate the public-spirited response already made by so many of their professional brethren. Their resolution in this regard should be strengthened, and their response accelerated, by the fact that His present Majesty, King George VI, has not only commended the proposal to commemorate his royal father's reign by this finely-inspired memorial, but he has approved the Fund as an object for a National Appeal in lieu of memorial of his Coronation.

Coronation Honours.

Sir Michael Myers, G.C.M.G.

Members of the legal profession were gratified on reading the announcement of honours conferred by King George VI, on the occasion of His Majesty's Coronation, to see that the distinguished public services of the Chief Justice, the Rt. Hon. Sir Michael Myers, had been recognized by the bestowal on him of the Grand Cross of St. Michael and St. George.

The President of the New Zealand Law Society, Mr. H. F. O'Leary, K.C., has already conveyed to the learned Chief Justice the congratulations of members of the profession throughout the Dominion on his receipt of this high honour, and their good wishes that he may long enjoy it.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1937.
April 5 26.
Myers, C.J.
Ostler, J.
Smith, J.
Fair, J.

A.P.A. UNION ASSURANCE SOCIETY v. RITCHIE AND BARTON GINGER AND COMPANY, LIMITED.

Insurance—Motor-vehicles (Third-party Risks)—Heavy Case loaded on Motor-lorry falling and killing Pedestrian—Judgment for Damages for Negligence against Lorry-owner—Statutory Indemnity Cover—Whether Death "Sustained or caused by or through or in connection with the use of" Motor-vehicle—Motor-vehicles Insurance (Third-party Risks) Act, 1928, ss. 3 (1), 6 (1), 16 (2).

The first defendant recovered judgment in an action against the second defendant company for damages for negligence on account of the death of her husband, who was killed when a large and heavy case fell upon him from a motor-lorry belonging to the company while it was being driven across the Pipe Bridge, Petone, during a gale of wind. The company was insured with the plaintiff under the statutory third-party cover created by s. 6 (1) of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, which is as follows:—

"(1) On payment of the insurance premium in respect of any motor-vehicle as aforesaid 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 (inclusive of costs) on account of the death of or of bodily injury to any person or persons, where such death or bodily injury is the result of an accident happening at any time during the period in respect of which the insurance premium has been paid, and is sustained or caused by or through or in connection with the use of such motor-vehicle in New Zealand."

An originating summons, removed into the Court of Appeal, was issued by the plaintiff for the purpose of determining whether the plaintiff was liable to indemnify the company in respect of its liability to pay the amount of the judgment to the first-named defendant as the result of an accident, "sustained or caused by or through or in connection with the use of such motor-vehicle" within the meaning of the said s. 6 (1).

The parties agreed upon a statement of facts which may be thus summarized: Two heavy cases one on top of the other were loaded on to a motor-lorry of the company at Wellington for cartage to Moera. The lorry so loaded was being driven by an employee of the company across the Pipe Bridge, Petone, when the two cases fell from the tray of the lorry, one of them falling upon Ritchie and killing him. Various grounds of negligence were alleged against the company, including loading and carrying the cases without due regard to weather conditions, omitting safeguards against the cases falling off by securing them with ropes or tarpaulins, permitting the lorry to proceed along a highway so laden, and omitting to drive the lorry over the bridge with sufficient care.

The evidence adduced at the trial set out in the statement of facts, justified the jury in finding that the day was windy; that before entering on the bridge the load had canted slightly and was unsafe; and that the result of acts of negligence of the company's servant was that a heavy gust of wind blew off the top case and killed Ritchie.

Leicester, for the plaintiff; **O'Leary,** K.C., and **Blundell,** for the first defendant; **O. C. Mazengarb,** for the second defendant.

Held, That the verdict being such as the jury might reasonably have arrived at only on the general issue of negligence put to it by the learned trial Judge, Ritchie's death was caused in connection with the use of the motor-lorry within the meaning of s. 6 (1) of the statute.

Stewart v. Bridgens, [1935] N.Z.L.R. 948, referred to.

Great Western Railway Co. v. J. Durnford and Son, Ltd., (1928) 44 L.T. 415; and **The Carlton,** [1931] P. 186, distinguished.

Semble per *Myers*, C.J.: Taking the provisions of ss. 3 (1) and 6 (1) of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, in conjunction with s. 16 (2) and other provisions of that statute, the word "use" in ss. 3 (1) and 6 (1) cannot be read in the restricted sense of driving.

Solicitors: Leicester, Jowett, and Rainey, Wellington, for the plaintiff; **Bell, Gully, Mackenzie, and Evans,** Wellington, for the first defendant; **Mazengarb, Hay, and Macalister,** Wellington, for the second defendant.

Case Annotation: *Great Western Railway Co. v. Durnford (James) and Sons, Ltd.*, E. & E. Digest, Supp. No. 11, 26 *title*, Guarantee, No. 1826*a*; *The Carlton, ibid, title*, Shipping, No. 8697*a*, 8698*a*.

COURT OF APPEAL.
Wellington.
1937.
April 8, 26.
Myers, C.J.
Ostler, J.
Smith, J.
Fair, J.

TIKI PAAKA v. MACLARN

Natives and Native Land—Alienation—Contract for Acquisition of Standing Timber on Native Land—Construction—Whether Sale or Contract of Agency—Native Land Act, 1931, s. 262.

A deed, not confirmed by the Native Land Court, between aboriginal Natives, owners of a block of Native land containing timber trees and a European sawmiller who wanted to acquire those trees for the purpose of turning them into sawn timber for profit, was drawn in the form of a contract of agency, the essential parts of which are set out in the judgments, with the object of evading the confirmation by the Native Land Court required by s. 262 of the Native Land Act, 1931, which is as follows:

"For the purposes of this Act a contract of sale of timber, flax, minerals, or other valuable thing attached to or forming part of Native land (other than industrial crops) shall be deemed to be an alienation of that land, unless the thing so sold or agreed to be sold has been severed from the land before the making of the contract."

Section 2 (1) of the Native Land Amendment Act, 1932, provides that,

"No alienation of Native land by a Native shall have any force or effect until and unless it has been confirmed by the Native Land Court."

On appeal from an interim judgment of *Callan*, J.,

M. H. Hampson, for the appellant; **Finlay** and **H. J. Butler,** for the respondent.

Held, *per totam Curiam*, allowing the appeal, That on the true construction of the document as a whole, it was a contract for the sale and purchase of standing timber, and the relationship of the parties was that of vendor and purchaser of such timber and not that of principal and agent.

Hutton v. Lippert, (1883) 8 App. Cas. 309, applied.

Inland Revenue Commissioners v. Duke of Westminster, [1936] A.C. 1, considered.

Per *Myers*, C.J., *Ostler, and Smith*, JJ., with *Johnstone* J., concurring in *Ostler*, J.'s judgment, upon the ground that, though called an agency agreement, it was merely a cloak to conceal a sale and purchase of the standing timber.

Per *Fair* J. that s. 262 of the Native Land Act, 1931, must be considered in the light of its purpose and that, in order to avoid its effect, it is not sufficient to show that in form and legal effect a document is not a contract of sale, but it must be further shown that such document is not, in practical operation, in its predominant features and application, equivalent to a contract of sale. The parties, therefore, should be allowed, if so desired, to tender evidence to have the question considered whether the surrounding circumstances modified the inferences to be drawn from the document alone.

Solicitors: **Hampson and Davies,** Rotorua, for the appellant; **R. A. Potter,** Rotorua, for the respondent.

Case Annotation: *Hutton v. Lippert*, E. & E. Digest, Vol. 39, p. 284*r*.

SUPREME COURT.
In Chambers.
Wellington.
1937.
April 23, 29.
Ostler, J.

PRIEST v. MOUAT.

Practice—Joinder of Causes of Action—Claim for Damages for Personal Injuries and Damage to Property—Insured desiring to Counterclaim in respect of Latter—Defendant insured by different Insurers in respect thereof—Subrogation—Status of Insurer not Party to Action—"Conveniently"—Separate Trials—Code of Civil Procedure, R. 100.

Plaintiff claimed £1,056 damages for personal injury and £35 for damage to property from defendant, who was indemnified by different insurers against liability under the two causes of action.

Defendant applied for separate trials of these causes of action, on the ground that the insurer against the claim in respect of property, who was not a party in the action, would be embarrassed and prejudiced if the two causes of action were heard together, such insurer desiring to counter-claim against plaintiff for the loss it had suffered in paying for the repairs rendered necessary to defendant's car by the collision, which it claimed was caused by plaintiff's negligence.

Parry, for the defendant in support of summons; **Arndt,** for the plaintiff, to oppose.

Held, That the insurer having paid the claim of the insured, was subrogated to the latter's rights, and, therefore, was entitled to enforce in the name of the insured any right which the latter had against the plaintiff. No valid objection, therefore, could be taken to the summons in defendant's name upon the ground that it was issued in the insurer's interest.

On the facts set out in the judgment, and in the exercise of the Court's discretion under R. 100, separate trials of the two causes of action were ordered.

Castellain v. Preston, (1883) 11 Q.B.D. 380; **Mason v. Sainsbury,** (1782) 3 Doug. 61, 98; 99 E.R. 538; **North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.,** (1877) 5 Ch.D. 569; **Simpson and Co. v. Thomson,** (1877) 3 App. Cas. 279; **Dane v. Mortgage Insurance Corporation, Ltd.,** [1894] 1 Q.B. 54; and **King v. Victoria Insurance Co., Ltd.,** [1896] A.C. 250, applied.

Brunsden v. Humphrey, (1884) 14 Q.B.D. 141; **National Insurance Co. of New Zealand, Ltd. v. Geddes,** [1936] N.Z.L.R. 1004, and **Petherick v. Waters and N.I.M.U. Insurance Co., (No. 2),** *Ante*, p. 110, mentioned.

Solicitors: **Gifford, Moore, Ongley, and Tremaine,** Palmerston North, for the plaintiff; **Buddle, Anderson, Kirkcaldie, and Parry,** Wellington for the defendant.

Case Annotation: *Castellain v. Preston*, E. & E. Digest, Vol. 20, p. 514, para. 2424; *Mason v. Sainsbury, ibid*, Vol. 29, p. 309, para. 2557; *North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Corporation, ibid*, Vol. 3, p. 79, para. 171; *Simpson and Co. v. Thomson, ibid*, Vol. 29, p. 290, para. 2355; *Dane v. Mortgage Insurance Corporation, Ltd., ibid*, p. 413, para. 3244; *King v. Victoria Insurance Co., Ltd., ibid*, p. 53, para. 159; and *Brunsden v. Humphrey, ibid*, Vol. 17, p. 88, para. 63.

The Real Property Limitation Act, 1833.

Some Recent Modifications discussed.

By E. C. ADAMS. LL.M.

A very strong committee of English lawyers, under the chairmanship of the Master of Rolls, has recently reported to the Lord Chancellor, as to the present operation in England of the Statutes of Limitation, and "as to what amendments are necessary or desirable in those statutes, with a view to securing greater simplicity and uniformity, and to remove anomalies." A perusal of this report certainly convinces one of the numerous anomalies and complexities of the present English law, which in the main is still applicable in New Zealand, although I think in some respects (*e.g.*, actions to recover land not under the Land Transfer Act), our law is even more out of date than in England. The report, appears to contain a masterly and concise summary of the English law.* Legislation in England will probably carry out the recommendations of the committee, and then it is likely that our New Zealand Legislature will follow suit.

Mortgages of property other than land.—One rather remarkable point emphasized in the report is that at present there is in England no statute of limitation which applies so as to extinguish the right to personal estate other than land, held as security for the recovery of money whether for principal or interest. The position apparently is the same in New Zealand: *In re Kirton*, [1919] N.Z.L.R. 138. The committee recommends that the law be made uniform in this respect, for all mortgages whether affecting land or not, subject to two qualifications: (*a*) that time should not run in the case of a charge on a life insurance policy until the policy matures; and (*b*) that the right of the mortgagor to redeem mortgaged property after it has been in the possession of the mortgagee for twelve years (in New Zealand, twenty years: see the proviso to s. 70 (1) of the Property Law Act, 1908) should not be extinguished in cases of mortgages of property other than land.

Legal disabilities.—Another interesting topic discussed in the report is that of legal disabilities. As regards the recovery of land other than land under the Land Transfer Act, we in New Zealand still cling to the legal disabilities set out in the Real Property Limitation Act, 1833, subject to s. 79 of the Judicature Act, 1908, which abolishes the legal disabilities of absence beyond the seas, and imprisonment, with regard to actions for the recovery of money charged upon land, legacies, dower, and arrears of interest.

One of the legal disabilities protected by the Real Property Limitation Act 1833, is, as every New Zealand lawyer knows, that of absence beyond the seas. As regards actions to recover land in England, that legal disability was removed by the Real Property Limitation Act, 1874, but that statute does not apply in New Zealand. That legal disability, however, still applies in England in the case of actions falling within the purview of the Limitation Act of 1623 and its amending statutes, and the actions which are covered by the disability clause of the Civil Procedure Act, 1833.

* See [1937] W.N. 2, where the report is set out in full.

The Committee recommends that the disability of absence beyond the seas should be abolished; and it is to be hoped that somebody with sufficient courage and authority will be found in New Zealand to give this hoary excrescence on our legal system its well deserved "quietus."

This legal disability appears to have been first enacted in the reign of Queen Anne, when conditions of travel and legal redress were certainly far different from the more expeditious and certain methods prevailing to-day. To quote from the report:

> "Not only is it different in genus from the other existing disabilities (*i.e.*, infancy and insanity of the plaintiff), but it deals with circumstances which may at one time have created hardship but can rarely produce this result at the present day. Order XI of the Rules of the Supreme Court, in practice, enables process to be served abroad in most cases which would be likely to create hardship, but it was held in *Musurus Bey v. Gadban*, [1894] 2 Q.B. 352, that the Order had not the effect of annulling the disability. The arguments against the retention of this particular form of disability would seem to be, in the first place, that it is of very little practical value, and, secondly, that some difficulty has been experienced in deciding what will constitute a '*return*' from overseas."

Recent modifications in New Zealand.—There are three important recent modifications to the New Zealand law which appear as yet to have attracted very little attention and which came on us very quietly "unheralded and unsung." They are contained in the Land Transfer (Compulsory Registration of Titles) Act, 1924, and in s. 43 of the Statutes Amendment Act, 1936.

(*a*) *Alterations effected by the Land Transfer (Compulsory Registration of Titles) Act, 1924.*—1. Subject to the exceptions now created by the Land Transfer (Compulsory Registration of Titles) Act, 1924, and by s. 43 of the Statutes Amendment Act, 1936, the effect of s. 60 of the Land Transfer Act, 1915, is that no interest can be acquired by adverse possession in derogation of the title of the registered proprietor of any estate or interest under the Land Transfer Act. The Land Transfer (Compulsory Registration of Titles) Act, 1924, authorizes the issue of "limited" titles, and, whilst a title remains "limited," any person in adverse possession at the date of the bringing of the land under the Act, may lodge an application under the 1915 Act, and, if his title has ripened by operation of the Real Property Limitation Act, 1833, the District Land Registrar must cancel the "limited" title and issue a new fully-guaranteed one to the applicant.

The present position therefore is this. When a Land Transfer title is or becomes absolute, time ceases to run in favour of a trespasser; but, if a title is only limited, then time continues to run in favour of a trespasser provided that such trespasser was in adverse possession to the registered proprietor at the date of the bringing of the land under the Act by the District Land Registrar *proprio motu*: Land Transfer (Compulsory Registration of Titles) Act 1924, s. 16 (3). Owing to inadequate surveys and the natural reluctance of landowners to bear the expense of new surveys, the great majority of "limited" titles will remain "limited" for many years.

2. The Registrar, on bringing land under the Land Transfer Act by virtue of the 1924 Act (which is usually known as "the compulsory Act") may make requisitions of title; and these requisitions remain blots on the title until satisfied or until extinguished by effluxion of time. These requisitions, or Registrars' Minutes, may disclose some interest possibly vested in some person other than the registered proprietor. For example, they may be intended to protect some equitable interest which according to the deeds record has not been got in or validly extinguished on a sale of the land to the registered proprietor. Subject to the rights of a person in possession, all requisitions as to title are automatically extinguished on the expiration of twelve years from the date of bringing the land under the Act, *and no provision has been made for any extension of the term of twelve years in the case of persons under legal disability.*

The period of twelve years corresponds with the period fixed for the recovery of land in England by the Real Property Limitation Act, 1874, which, as previously pointed out, does not apply to New Zealand; but the removal of all legal disabilities is somewhat drastic, for the English Law Reform committee strongly recommends the continuance of the disabilities of infancy and insanity. But, perhaps, any provision tending to make land titles more certain will on the whole have a beneficial effect. It is expressly provided by s. 21 (2) of the Land Transfer (Compulsory Registration of Titles) Act, 1924, that the extinguishment of the Registrar's Minutes as to title after twelve years shall not operate so as to *extend* the period in which actions must be brought under the ordinary law.

(*b*) *Alterations effected by s. 43 of the Statutes Amendment Act, 1936.*—This section is as follows:—

> "43. (1) Notwithstanding anything to the contrary in section sixty of the Land Transfer Act, 1915, on application made in a summary way to the Supreme Court by the registered proprietor of any estate or interest in land that is subject to a registered mortgage the Court, if it is satisfied that any action by the mortgagee for payment of the moneys secured by the mortgage would be barred by the provisions of any Statute of Limitation, and that but for the provisions of the said section sixty the remedies of the mortgagee in respect of the mortgaged land would be likewise barred, may, in its discretion, make an order directing the mortgage to be discharged, and upon the production of an office copy of the order the Registrar shall enter a memorandum thereof in the Register and on the outstanding instrument of title, and when the entry is made the mortgage shall be deemed to be discharged.
>
> (2) Before making any order under this section the Court may direct such notice to be given by public advertisement or otherwise as it thinks fit, and may direct any person to be served with notice of the proceedings.
>
> (3) By the same or another order the Court may order any person in possesssion of an instrument of title to the mortgaged property to deliver the title to the registered proprietor on payment of such charges as the Court may, in its discretion, fix in the order."

This novel provision is obviously aimed at the ruling of the Court of Appeal in *Campbell v. The District Land Registrar of Auckland*, [1910] N.Z.L.R. 332, although, as I shall endeavour to show, it by no means completely abrogates that rule. Briefly, that case decides that a memorandum of mortgage duly registered under the Land Transfer Act is entitled to the protection of s. 60 of the Land Transfer Act, 1915, the mortgagee having an indefeasible title which cannot be defeated by operation of the Real Property Limitation Act, 1833. No principal or interest had ever been paid under the mortgage which was more than twenty years old, and no written acknowledgment had been obtained from the mortgagor. The mortgagee put up the land for auction at a Registrar's sale and bought it himself.

The Registrar of the Supreme Court executed a transfer of the fee simple to the mortgagee, but the District Land Registrar refused to register it on the grounds that the mortgagee's rights had become barred by the Real Property Limitation Act, 1833.

The real *ratio decidendi* of *Campbell's* case is the distinction made in the statute of 1833 between the two remedies which a mortgagee has, one against the land, the other against the mortgagor personally for the recovery of the debt. The right against the land is absolutely extinguished after the statute has run; but the mortgage debt is not extinguished, only the remedy to recover it is barred.

It is, therefore, rather surprising to find that a Court of first instance in England has recently held that, where a mortgagee's remedy against the land has been extinguished by operation of the Real Property Limitation Acts, the mortgagor is entitled to have the mortgage deeds delivered to him, including the particular mortgage-deed: *Lewis v. Plunket*, [1937] 1 All E.R. 530. This distinction is referred to by the English committee in its report but it does not recommend any alteration of the law in this respect.

It appears from the judgments in *Campbell's* case that a mortgagee under the Land Transfer Act has a charge upon the land only for the amount actually due on the mortgage. As Edwards, J., put it in his typically clear manner at p. 344:

> "The purchaser of the estate and interest under a mortgage knows that he is bound by the state of account between the mortgagor and the mortgagee, and that if he purchases a mortgage relying upon the register alone he may be purchasing merely the right and obligation to sign a release of the instrument."

If, therefore, the effect of s. 40 of the Real Property Limitation Act, 1833, were to extinguish the mortgage debt, s. 60 of the Land Transfer Act, 1915, would not assist a mortgagee. But the mortgage debt remains an existing debt notwithstanding the lapse of twenty years; and, if the mortgagee brought an action to recover the debt, he would be entitled to judgment, unless the mortgagor pleaded the statute (see the judgment of Williams, A.C.J., at p. 338).

The reason for enacting s. 43 of the Statutes Amendment Act, 1936, may perhaps be gleaned from the words of Edwards, J., at p. 345:

> "Nor can it be said that a mortgagee of land under the Land Transfer Act who has slept upon his rights for twenty years has any real grievance because the rule of law operates in his case, as it would admittedly operate if the land were not under the provisions of the Land Transfer Act.

And Chapman, J., at p. 350, concludes his dissenting judgment thus:

> "It is quite possible that the Legislature may have considered that it would be a source of danger, if, say, the personal representatives of a mortgagee who was long since dead, whose testator for more than twenty years had neither received nor asked for interest, and who knew nothing of the matter himself, could claim the land of some person who could no longer produce any positive evidence of payment to refute the claim."

But s. 43 of the Statutes Amendment Act, 1936, does not completely abrogate the rule in *Campbell's* case. The section refers only to applications by mortgagors to have the registration of the mortgage discharged. Until the actual vacation is registered, the mortgage remains indefeasible: *Suttie v. Te Winitana Tupotahi*, (1914) 33 N.Z.L.R. 1216. The mortgagee could effectively exercise power of sale, and in the absence of fraud could confer a good title to the fee simple on a purchaser, or have one conferred on him by the Registrar of the Supreme Court, as in *Campbell's* case: *Waimiha Sawmilling Co., Ltd. v. Waione Timber Co., Ltd.*, [1926] A.C. 101; *B. v. M.*, [1934] N.Z.L.R. s. 105. A case similar to *Campbell's* case on the facts would still be decided, as *Campbell's* case was; for in that case, the mortgagor was not before the Court. The litigation was caused by the District Land Registrar refusing to register the transfer exercising power of sale.

An interesting position would arise, if a mortgagee who had slept on his rights for more than twenty years, got wind of an application by the mortgagor to move the Court for an order under s. 43 of the Statutes Amendment Act, 1936, and hastened to exercise his power of sale. Probably a prudent counsel acting for a mortgagor under that section would seek an interim injunction restraining the mortgagee from acting and the District Land Registrar from registering any dealing, until the application by the mortgagor under the section had been disposed of by the Court.

And there is still another respect in which s. 43 falls far short of abrogating the rule in *Campbell's* case. The section, be it noted, does not say that the Court if satisfied, etc., *shall* make an order; it says instead that it *may in its discretion* make an order. The conferring of a discretion on the Court in statutes of limitation appears an entirely novel departure. Conceivably there may be cases where, although the mortgagee has slept on his rights for more than twenty years, the Court will think it unfair to prevent him from exercising his remedies against the land, such as by exercising power of sale. It will be interesting to see how the Judges will exercise their discretion under this section.

Finally, it is perhaps just as well that the Legislature has not fully abrogated the rule in *Campbell's* case, for if it had, the District Land Registrars would have to requisition where a mortgagee exercised his powers under a mortgage which had not been dealt with for twenty years.

Canada and the Privy Council.—The recent decisions of the Judicial Committee in what are called the "New Deal" cases, have evoked a good deal of hostile comment in Canada, which came to a head in the House of Commons at Ottawa. One speaker fastened in particular on the decision condemning three ameliorative Acts for workpeople which were passed to fulfil the promise given, when Canada adhered to the Labour Conventions of what we may call the Labour League of Nations. These Acts were defended by the Dominion as within the power of the central Parliament under Article 131 of the Constitution. It authorizes that Parliament to legislate "for performing the obligations of Canada as part of the British Empire." But, as Lord Atkin said, Canada's obligations under the Labour Convention were not contracted by her *as* part of the British Empire. She bound herself in the exercise of her own new semi-international powers. The proper legislative body to make laws to carry out the convention could not therefore be discovered by simple reference to Article 132. In the *Radio Case*, [1932] A.C. 304, the Provincial Parliaments were prevented by an express impediment in Article 92 from making the necessary laws. This was not the case in respect of the recently-condemned Labour laws.

Court of Review.

Summary of Decisions.*

By arrangement, the JOURNAL is able to publish reports of cases decided by the Court of Review. As decisions in this Court are ultimately determined by the varying facts of each case, it is not possible to give more than a note of the actual order and an outline of the factual position presented. Consequently, though cases are published as a guide and assistance to members of the profession, they must not be taken to be precedents.

CASE 29. Motion by a widow, as life tenant, for an order extending the time for her filing of an application for the adjustment of the liabilities of the estate of her late husband. It was submitted that, where trustees of a will comprising realty and personalty held the same upon trust to pay the income to a widow during her widowhood and thereafter to hold the property upon trust for the child of the marriage, the widow was entitled to apply for relief in respect of a mortgage over the real property held by the trustees, in the event of the trustees failing to do so.

Held, dismissing the application, That whether the widow in such case has a remedy against the trustees for their failure to make an application for relief was not a matter for this Court; the people who can apply for relief must be either mortgagors, lessees, or guarantors as defined by the Act; and, as the widow had no liabilities in respect of any mortgage over the lands in question and was not in the position of a mortgagee or lessor who could claim to have the liabilities of a mortgagor or lessee adjusted in the event of the failure of such latter persons to make application, her claim that the default of the trustees might cause her damage did not bring her within the definition of a "mortgagor" or make her the owner of the equity of redemption of the lands in respect of which the mortgage, which she desired to have adjusted, was given.

CASE 30. Appeal against the order of a Commission, which was in effect an application for interpretation of that order. The mortgagors were the owners of freehold and leasehold lands and of certain live-stock and chattels, respectively mortgaged to various mortgagees. Certain securities given to one mortgagor, were over some of the mortgagors' land, and by collateral instrument, over his live-stock and chattels, the amount owing being £2,185. The Commission had found the basic value of the lands affected by the mortgage to be £1,530, and it valued the live-stock and chattels subject to the collateral instrument at £427; and it made an order reducing the amounts secured respectively by the said mortgage and instrument as from March 1, 1937; varying the terms and conditions of the mortgage to provide that the amount, to which the principal and other moneys secured thereunder should be deemed to be reduced by the operation of s. 42 of the Act, was to be repayable by instalments of principal and interest as under a 40-year Table; and varying the terms and conditions of the said instrument to conform with the said mortgage as so varied.

Held, That, upon the construction of s. 42 (1) of the Act, which in effect, provides that the amount secured on an applicant's interest in any farm lands shall be *deemed* to be reduced to an amount equal to the basic value, once the Commission has determined the basic value, the reduction of the amount secured upon the lands automatically follows; and s. 42 (2) provides that "if the value as determined by the Adjustment Commission of any property of any applicant (other than farm lands) is less than the total amount of the principal and other moneys secured on that property . . . the amount so secured shall be *deemed* to be reduced to an amount equal to the value of that property determined as aforesaid," while s. 42 (4) provides that "if different portions of the applicant's property (including his farm lands) are subject to different adjustable securities, the foregoing provisions of this section shall apply with respect to each portion separately." Consequently, on application of these clear provisions to the facts, the total indebtedness of the mortgagors, so far as the mortgagee was concerned, now stood at £1,957 for principal, of which £1,530 is to be secured by mortgage, and £427 by an instrument over the live-stock and chattels.

Note:—The Court's decision in this case in no way affects the powers of Commissions to make orders apportioning mortgage-debts over various parts of a mortgagor's property pursuant to s. 67 of the Act. In the present instance, however, the Commission did not invoke the provisions of that section.

CASE 31. Motion for an order under s. 71 declaring that two persons, X. and Y. were "mortgagors" as defined by s. 4 under certain memoranda of mortgage, and not "guarantors" entitled, under s. 54, to apply for relief from liability under the covenants contained in the mortgages. In 1925, A. agreed to sell certain land to his son B. who, in 1927, agreed to re-sell the land to his brother C. Prior to the 1927 agreement for sale, a mortgage was arranged over the land in question by A., who was still the registered proprietor. The only parties to the renewal were A. and the mortgagees. C. still occupied the land under the agreement for sale, and no transfers had been executed. A. died in 1933, and X. and Y. (later referred to as "the trustees") are trustees of his estate.

Held, That both C. and the trustees were "mortgagors" within the meaning of the Act in relation to the mortgages; and that they were not guarantors. After referring to s. 4 (2), and (6), it was held that the trustees were the owners of the equity of redemption, and, therefore, were deemed to be the owners of the property, and, as such, qualified as "mortgagors" under the first portion of s. 4 (2); and that, being "mortgagors," they could not—in view of the exclusion of "mortgagors" in the definition of "guarantor" in s. 4 (1)—be also "guarantors."

CASE 32. Appeal by mortgagee against a Commission's declaration that applicant was entitled to be retained in the use and occupation of his farm. The evidence established that applicant produced 2,000 lbs. less butter-fat than when he purchased the farm in 1919; that the farm and dairy herd had deteriorated during his occupation; and that ragwort had been allowed to spread practically unchecked over the farm and was in places breast-high.

Held, allowing the appeal, and setting aside the Commission's order, That leave be granted to the mortgagee to exercise his power of sale on condition that, in the event of a deficiency on sale, no claim for such deficiency be made against applicant.

*Continued from p. 111.

Malice—"That Slippery Word."

A Consideration of Christie v. Davey, and Hollywood Silver Fox Farm, Ltd. v. Emmett.

By T. A. Gresson, B.A. (Cantab.)

Malice has two distinct meanings in law. It may mean the intentional doing of a wrongful act without just cause or excuse. As such it is of the greatest importance in criminal law, particularly in cases of murder (*Russell on Crimes*, 9th Ed. p. 339). Or it may mean simply improper motive (*Salmond on Torts*, 9th. Ed. p. 29). The purpose of this article is to examine how far Malice, meaning improper Motive, is relevant in the Law of Torts, more especially in Nuisance by Noise.

The general principle was laid down in the celebrated case of *Mayor of Bradford v. Pickles*, [1895] A.C. 587, in which Edward Pickles was held entitled to be "churlish, selfish and grasping" if he wished. The fact that purely selfish motives had induced him to dislocate the Corporation of Bradford's water supply by lawfully intercepting their flow of underground water (*Chasemore v. Richards*, (1859) 7 H.L.C. 349; 11 E.R. 140) did not make his act actionable; as Lord Macnaghten, at p. 601, said:

> "It is the act not the motive for the act, that must be regarded. If the act, apart from motive gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element."

This decision was re-affirmed by the House of Lords, three years later, in *Allen v. Flood*, [1898] A.C. 1, 95.

Thus in our English Law of Torts, motive is in general irrelevant.

This principle has been criticised by Dr. Gutteridge, as being "the consecration of the spirit of unrestricted egoism," (5 Camb. L.J. 22), and compares unfavourably with French, German, Swiss, and Soviet law.

In the following torts however, motive is relevant: Malicious Prosecution; Defamation, where qualified privilege or fair comment is pleaded; Injurious falsehood; Conspiracy; and Nuisance by Noise and possibly also where a public authority attempts to shelter behind a statutory limitation upon its liability (*G. Scammell and Nephew, Ltd. v. Hurley*, [1929] 1 K.B. 419, 420, per Scrutton, L.J.) The existence of malice may also aggravate damages.

That Malice is relevant in Nuisance by Noise has been doubted (*Salmond on Torts* 9th. Ed. 237); and some authorities consider that *Christie v. Davey*, [1893] 1 Ch. 316 has been over-ruled by *Mayor of Bradford v. Pickles*, [1895] A.C. 587. That this is not so, however, is clear from the recent case of *Hollywood Silver Fox Farm Ltd. v. Emmett*, [1936] 1 All E.R. 825; [1936] 2 K.B. 468.

The facts in *Christie v. Davey*, *supra*, were as follows: Mr. J. F. Holden Christie and Mr. H. Fitzer Davey were neighbours in "semi-detached" villas. Mrs. Christie was a teacher of music and singing, and took private pupils at the house. Her daughter, a medallist of the Royal Academy of Music, also gave lessons on the piano and violin. Likewise a contralto, Miss Kennedy, also a medallist of the Royal Academy was a guest in the house; and the son presumably in self-defence—"was in the habit of playing the violoncello up to eleven at night." Mr. Christie, in the words of North, J., "was perhaps fortunately for himself very deaf." Not so, however, Mr. Davey, who was tempted to write the following rather unforunate letter:

> "During the week we have been much disturbed by what I at first thought were the howlings of your dog, and knowing from experience that this sort of thing could not be helped, I put up with the annoyance. But the noise recurring at a comparatively early hour this morning, I find I have been quite mistaken, and that it is the frantic effort of someone trying to sing with piano accompaniment, and during the day we are treated by way of variety to dreadful scrapings on a violin, with accompaniments. If the accompaniments are intended to drown the vocal shrieks or teased catgut vibrations, I can assure it is a failure, for they do not . . . . Allow me to remind you of one fact, which must surely have escaped you—that these houses are only semi-detached. . . . It may be fine sport to you, but it is almost death to, Yours truly. . . ."

As this letter failed to solve the problem, Mr. Davey wrote again, this time threatening reprisals:

> "It is my intention during these winter months to endeavour to perfect myself on the following instruments—viz., flute, concertina, cornopean, horn, and piano, which my child is learning to accompany me. I used to play them at one time, both in a church band and an amateur troupe; but I have been out of practice lately, but hope soon to regain my former proficiency."

Mr. Davey proved as good as his word, and, as a result of his "mock concerts," the Christies sought an injunction to restrain him from making such noises.

North, J., granted the injunction, being satisfied that the noises were excessive and unreasonable, made deliberately for the purpose of annoying the plaintiffs; and at pp. 326, 327, he made it quite clear that in his view it was the intention to annoy, i.e., the motive, which made the act actionable.

Any unlawful interference with another's enjoyment of land or premises is a nuisance: *Sic utere tuo ut alienum non laedas.* And in each case the test is, "Was defendant's act a reasonable and ordinary user of property?" (*Bamford v. Turnley*, (1862) 3 B. & S. 67; 122 E.R. 27; *Matania v. National Provincial Bank, Ltd.*, (1935) 154 L.T. 103).

In *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E.R. 825 the plaintiffs were breeders of silver foxes. The defendant, thinking a certain notice-board advertising the plaintiff's farm was detrimental to his own property, asked the Plaintiffs to remove it. The plaintiffs refused, whereupon the Defendant instructed his son on several occasions during the breeding season to fire off bird-scaring cartridges as near as possible to the breeding pens. As a result of such firing one vixen would not mate, and another devoured her cubs. The plaintiffs brought an action for damages for nuisance and for an injunction. Macnaghten J. granted the injunction, and awarded the Plaintiffs £250 damages. He was of opinion that to shoot for the purpose of annoying or injuring the plaintiff was an actionable wrong, and it is clear from the two following passages in his judgment that he regarded the motive of the defendant as all important. At p. 829, he said,

> "I think the fact that the shooting took place intentionally for the purpose of injuring the plaintiffs made it actionable."

and, again, at p. 830, he said:

> "In my opinion, the authorities to which I have referred support the view that a person who shoots on his own land, for the purpose of annoying or injuring his neighbour, does, by the common law, commit the actionable wrong of nuisance."

It is submitted therefore that malice, meaning improper motive, is relevant in Nuisance by Noise, for its presence may either render substantial damage which would otherwise be unsubstantial (*Christie v. Davey*), or it may make unreasonable what would otherwise be a reasonable user of property (*Hollywood Silver Fox Farm, Ltd. v. Emmett*).

These principles certainly appear to conflict with the decision in *Pickle's* case, but it must be remembered that in *Chasemore v. Richards*, *supra*, it had been laid down that a land-owner had an absolute right to extract all underground water. On the other hand, a man has merely a qualified right to make a reasonable amount of noise, and malice vitiates this privilege: 52 L.Q.R. 461.*

London Letter.

By Air Mail. Strand, London, W.C.2., April 2, 1937.

My dear EnZers,

Interest in the Coronation preparations is growing daily. All over town, along the processional routes, the noise of hammering and the depositing of timber add to the city's din. The immemorial quiet of the Temple is not disturbed, however, for the nearest points of the processional route on the great day will be the Admiralty Arch, on the way to the Abbey, and Northumberland Avenue on the great return to Buckingham Palace, both being about a mile away at the other end of the Strand. Already some familiar New Zealand faces are seen about, especially in the Strand where New Zealand House will be the focal point of our interest for the next few weeks. I hope, later, to let you know of anything I can observe of interest regarding legal personalities in the course of the celebrations.

Mr. Justice Eve Retires.—As indicated in my last letter to you—in fact four days after I had dispatched it—Mr. Justice Eve resigned from the Chancery Bench, of which he was senior Judge, "after nearly thirty years of remarkably valuable services to the public," as the Council of the Law Society put it in a resolution of appreciation of his judicial work and of his many and unostentatious acts of kindness to the profession, and expressing its regret at the announcement of his retirement from the Bench. Genial and humorous, both on the Bench and off it, he was always a welcome guest and speaker at legal dinners. It is agreed that his judicial career was, as you no doubt have gathered from his judgments, singularly successful. A sound Judge, and withal most courteous to counsel and litigants, he bore the burden of his eighty years lightly. Now, as a new member of the Judicial Committee to which he goes on his appointment as a Privy Councillor, he should continue, we hope for many years, to give evidence of his hale judicial age.

Mr. Justice Simonds.—Mr. Gavin Simonds, K.C., one of the leaders of the Chancery Bar, has been appointed to the place vacated by Sir Harry Eve—I do not say, to fill it. Knighted on his appointment to the Bench, as is the pleasant custom hereabouts, the new Judge is considered well worthy of his elevation. As he is now in the middle fifties, he should have many years of useful work before him. An equity lawyer of considerable ability, he is deservedly popular with his brethren of the Bar. He is a member of the Chancery Inn, which called him in 1906, and he has been a King's Counsel since 1924. Last year, his quality was made known to a wider public when he was one of the Tribunal of Inquiry into the Budget leakages, over which Porter, J., presided. It was then confidently foretold by the *cognoscenti* that both he and his colleague, Roland Oliver, K.C., were destined for preferment.

Entertainment Tax.—Some of the brethren are exercising their minds as to whether the proprietors of coronation stands are liable to pay entertainment tax on the cost of seats. Judging by the prices, they should be able to do so without considerable difficulty; but the question is whether they must. When recently asked in the Commons, for an opinion on a matter of interpretation of a statute, the Under-Secretary for the Home Office very commendably replied that his Department (the particular matter had to do with the Shops Act) "had no authority to interpret the law." (Thereby surely earning for himself a free seat at all the future junketings of the profession). The official answer to the conundrum about entertainment tax is that Royal processions are not entertainments. This was provided by the Financial Secretary to the Treasury, who did not share the worthy reticence of his colleague. I think you will agree that the matter might be taken a little further; but, where the taxing folk are concerned, the less said the soonest mended, *coram publico*, at any rate. There is no telling what the Treasury might do; they might even yet put the procession on to the education rates, as being a lesson in history and constitutional development; and then we would all be worse off than we were left by the income-taxgathers of very recent memory.

Speeding up the Courts.—The conservatism of the English Courts resists the practical advantage enjoyed in New Zealand of having evidence taken down by an Associate on a typewriter. Here, as you probably know, the Judge in longhand laboriously keeps the only record of what a witness says. I told you the other day how a microphone with dictaphone recording had been introduced in a colonial Court, whereby the whole of the proceedings are preserved on records after the evidence has been typed from them. Now, at long last, as the Attorney-General indicated in the House of Commons recently, the official taking of shorthand notes of the evidence in the King's Bench and Chancery Courts is to be introduced. For years this has been advocated by the official bodies of the profession, as well as by Judges. The Lord Chief Justice has said that the number of Judges could be reduced by one, and the procedure speeded up as well, if this reform be instituted. In addition, he showed that greater attention could be given by the Judge to the demeanour of the witnesses and the course of the trial generally, if he did not have to be a mere writer. He would, of course, still take such

* And see the article by Sir William Holdsworth, K.C., with reply by Professor Goodhart in 53 L.Q.R. 1, which reached New Zealand after the above article was in type.

brief notes as occurred to him for his own convenience. Mr. Justice Atkinson has been chairman of a Committee appointed by the Lord Chancellor to deal with the question of the cost; and it is on this Committee's recommendations that the Attorney-General doubtless made the statement referred to.

People in the News.—There were some good speeches at the City of London Solicitors' Company annual dinner, held at the Mansion House. The Lord Mayor, after remarking on the Corporation Courts, said that the Central Criminal Court was the greatest assize court in the world, and spoke of the Mansion House where the Aldermen and Lord Mayor sat alone as magistrates. He said that most of the cases that came before the City Bench dealt with motoring offences, and he was reminded of the motorist who was told that if he was sociable with the magistrates he would get off, and who therefore, on appearing in court, said: "Good morning, your Worship. How are you to-day?" The magistrate replied: "Fine, five pounds."

Lord Macmillan, in reply to the toast of Parliament, said that no one could be more unfitted than himself to say anything on behalf of the hereditary branch of the Legislature, because he was in the House of Lords entirely on merit! "A life Peer is like an army mule: he has neither pride of ancestry nor hope of posterity." He referred to the privilege of infallibility with which the Law Lords were clothed. Some time ago it had happened that a Scottish local Court had preferred a Scottish decision to a decision of the House of Lords. The matter came before Lord Sands and his colleagues in the Inner House of the Court of Session of Scotland. After praising the local tribunal for its patriotism, His Lordship said: "In a technical sense the judgments of the House of Lords may not be binding upon us, but there is one thing which is binding upon us, and that is the law; and the House of Lords is an infallible interpreter of the law." Accordingly (said that eminent senator of the College of Justice), if the House of Lords says that this is the proper interpretation of the statute, then it is the proper interpretation of the statute. The House of Lords has a perfect legal mind. Law Lords may come or go, but the House of Lords never makes a mistake. "Occasionally," proceeded the Judge, "to some of us two decisions of the House of Lords may seem inconsistent, but that is only a seeming. It is our frail vision that is at fault." Lord Macmillan strongly recommended any man who was thinking of entering public life or any of the other professions, to spend a year or two in a good solicitor's office and learn to write a legible hand, and really to keep papers in order and arrange his engagements, and acquire some of the discipline of business life. His Lordship then mentioned the output of legislation from Parliament, saying: "I sympathize with you very much, but it is the House of Commons which produces most of the legislation. I would quote for your consolation that great Chief Justice, Lord Tenterden: 'God forbid that it should be imagined that an attorney, a counsel, or even a Judge, is bound to know all the law.'"

Sir Kingsley Wood, a solicitor who is also Minister of Health, said that he initiated more legislation than any other single Department, as a Member of Parliament he helped to amend it, and as a solicitor he knew the difficulty of interpreting it. "A literal-minded bandsman," he narrated, "once disturbed the harmony of his orchestra with a discordant blast. The conductor inspected his score and pointed out that the bandsman had attached undue significance to a dead fly which was impressed on the music. 'I knew it was a fly,' replied the man, 'but it was there, and I played it.' His Majesty's Judges may often be conscious of the dead fly on the Statute Book, but if it is there thay conceive it their duty to give effect to it.' The presence of His Grace the Archbishop of Canterbury called to mind an example of the legislation of a simpler and a happier age which we once cited to a Royal Commission. A cook in the kitchen of a 13th-century Bishop of Rochester was found putting poison in his master's food. Parliament proceeded to pass an Act providing that poisoning should be treason and that the cook in question should be boiled to death. Here is law-making at its simplest." Sir Kingsley, in conclusion, praised solicitors for the faithful and effective manner in which they undertook the invidious task of being scapegoats for the barristers and having to point out to disappointed litigants the reason both for the law and for the Court's decision.

The Archbishop of Canterbury proposed the health of the legal profession, and felt the more fitted to do so because he had once very nearly been called to the Bar: he had only realised on Call Day that his vocation lay elsewhere, and so had saved his call fees by a last-minute telegram to the office of the Inner Temple. In spite of this treatment the Inner Temple had elected him an honorary Bencher, an honour which gave him more sincere pleasure than any other. After chaffing lawyers in general and Parliamentary draftsmen in particular for habitually using fifty words when five would suffice, he expressed admiration and awe for the formidable dignity of the Bench, and welcomed Lord Justice Greene as a Fellow of the same College as himself—"that College of all unique in the world in that it is not contaminated by the presence of undergraduates: the College of All Souls at Oxford." Until recently, he continued, when the fetish of research began to attract worshippers, we were liberated from performing any duties. It was still in his mind that a guide was taking a party over All Souls and an innocent member, looking at the apparently sumptuous rooms, asked: "What do these gentlemen do?" The guide indignantly replied "Do? Why, them's Fellows!"

Lord Justice Greene, in reply, said he envied the Archbishop the chance he had had of learning the art of continuous oratory. "When I was at the Bar I was always subjected to the constant and irritating interruptions of the Bench. Since I have been on the Bench I have been subjected to the constant and irritating interruptions of the Bar. Accordingly, if I try to string together more than one and a half sentences, I find myself coming to a full stop and waiting for the inevitable interruption. That is what makes it so difficult to speak in an assembly like this, because however long I wait I shall not be interrupted. The legal profession has many duties apart from its everyday duties to its clients and those who appear before it. It has a duty to be vigilant to see that it will always command the respect of the man in the street, because upon that respect its position depends, and once it fails the legal profession will fall under a cloud. It is for us to be vigilant always to see that any informed criticism of our methods or our practice

is attended to and considered, and that wherever any abuse looks like creeping in, it must be stopped, and that wherever any reform is possible it should be welcomed."

Mr. E. A. Rehder, the Junior Warden, proposed the health of the guests, and the Marquess of Reading, K.C., in a sparkling reply, said: "Successive annual visits to Mr. Bertram Mills's circus have somewhat blunted my childhood's sympathy for the prophet Daniel. This evening my compassion for that sorely tried man has returned with redoubled force, for here am I, a hopeless and forlorn member of the Bar, thrown into the solicitorial lions' den, and though it is some comfort to me to realise that they have been recently and magnificently fed, the ordeal is still a formidable one. This antiquated theory about the Bar being the higher branch of the profession has long ago sunk into bitter mockery. Have you ever heard the tone of voice in which a soldier refers to the Navy as the senior service? I can only assure you that for sheer supreme, overweening, transcendent arrogance there is nothing equal to a solicitor describing himself as, 'of course, only belonging to the lower branch of the profession.' In that short dissyllable he contrives to concentrate more of what used to be called in our schooldays *hybris* than can be discerned in the whole of Greek literature. For to us at the Bar the solicitors are the storks of the legal world. We sit and watch them flighting towards the Temple with new-born bundles of papers, carefully swaddled with tape, dependent from their purposeful beaks. If they so much as hover over our particular chambers we already see in our mind's eye the announcement on the front page of next day's *Times*: 'On such-and-such a date, to Mr. So-and-So, of Thingummy Court, Temple, the gift of a brief: counsel and clerk doing well.'" Space forbids further reference to the scintillations of a brilliant father's promising son. Referring to the fact that he had been called on unexpectedly to reply to the toast, he said, in conclusion, that there was at least balm in the reflection that for a brief span he was answerable for a Lord Mayor, an Archbishop, and six Judges. He would say, on behalf of his clients, that, deeply conscious as they were of their unfortunate position, they desired to be given an opportunity of discharging their debt of gratitude by instalments over the next twelve months; and they trusted that, if they gave evidence of their desire to meet their obligations, they might have liberty to apply to be joined as parties to the next annual dinner, if they were still alive; and they offered, should they no longer be alive, to pay the costs here and below.

F.E. and The Bench.—You may not have heard this one about the late Lord Birkenhead, when a junior. The County Court Judge, wishing to supress the bright young man before him, said, "You remind me, Mr. Smith, of that saying by the great Bacon: 'Youth and discretion are ill-wedded companions.'" F.E. was ready for him. "Speaking of Bacon," he said, "Your Honour reminds me of that saying of the great man that 'a much talking judge is like an ill-tuned cymbal.'" "You are offensive, sir," retorted the Judge. "We both are," Smith replied. "The difference is that I am trying to be, and you can't help it. I, who have been listened to with respect by the highest tribunal in the land, am not going to be browbeaten by a garrulous old County Court Judge,"

Yours as before, APTERYX.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Agreement between a Sawmilling or Timber Company and Sawmillers for Milling of Logs and delivery of Timber: a "Milling Agreement."

AGREEMENT made this day of 1937 BETWEEN A. B. AND CO., LIMITED a company duly incorporated under the Companies Act 1933 and having its registered office at (hereinafter called "the company") of the one part AND M. N. O. P. and R. S. all of &c. (hereinafter called "the sawmillers") of the other part

WHEREAS the company is the owner of the land more particularly described in the Schedule hereto having thereon sites for a mill and mill-skids respectively.

AND WHEREAS the company has let or is about to let a contract to certain bush contractors for the delivery of logs at the said mill-skids

AND WHEREAS the company is desirous of letting and the sawmillers are desirous of undertaking the work of sawing and milling the same and delivering to the company the timber resulting from such milling operations.

NOW THEREFORE it is agreed by and between the parties hereto as follows:—

1. The sawmillers acknowledge that they have inspected the said sites for a mill and mill-skids and the company's plans and specifications for the erection of the said mill and mill-skids.

2. (1) The sawmillers shall forthwith commence to erect and equip on the said mill-site and complete the erection and equipment of a sawmill having a minimum daily average or output of [*ten*] thousand superficial feet of sawn timber.

(2) The said mill shall be erected generally in accordance with the said plans and specifications with proper mill-skids to receive the logs which shall be brought and delivered there by the company's bush contractors for the time being and also proper skids to take and receive the sawn timber output of the said mill and the said mill and all the said skids of both kinds that is to say logging skids and sawn timber skids shall be completed and ready to commence milling operations not later than the day of 19 .

(3) For the purposes of this clause time shall be deemed to be the essence of the contract.

3. The sawmillers shall receive and take delivery of all logs which shall be delivered by the company's bush contractors or otherwise on or handy to the said mill-skids.

4. (1) The sawmillers shall check the bush contractors' measurements of each log so delivered and shall enter in a log book which the sawmillers shall keep for the purpose all such measurements and in particular they shall enter therein the identification number of each log its length and centre girth measurement and its kind and the date of delivery.

(2) The company shall be entitled to inspect this log-book at any reasonable time and the sawmillers shall permit the company's representatives to make such inspection and take copies thereof and extracts therefrom and shall deliver to him the said log-book for those purposes.

5. (1) The sawmillers shall mill all logs delivered at or near the said mill-skids by the company's bush contractors or otherwise in accordance with the instructions and directions which shall from time to time be given to the sawmillers by the company or by its representative.

(2) In addition to such instructions and directions the following conditions must be strictly observed and adhered to by the sawmillers in connection with all milling done by them for the company namely :—

(*a*) All timber shall be cut and sawn true to size in respect of both width and thickness and the ends shall also be properly docked or trimmed and squared.

(*b*) The sawmillers shall cut each and every log delivered to them by the company's bush contractors or otherwise for milling in such manner that the best results obtainable as to class in accordance with the best milling practice shall be obtained from the logs sawn.

(*c*) The sawmillers shall also cut with a minimum of slabs dockings and waste all marketable timber out of every log which shall be so delivered to them.

(*d*) Save where otherwise specially ordered and excluding [*Rata*] the minimum size of timber which shall be cut under this contract shall notwithstanding any trade custom to the contrary be not less than [*three*] inches in width and [*one*] inch in thickness and the minimum length shall not be less than [*ten*] feet.

PROVIDED HOWEVER that off-cuts shall be accepted down to one-half inch in thickness :

PROVIDED FURTHER that the sawmillers shall fulfil all special orders of the company in accordance with the conditions of such special orders.

6. The following additional conditions shall apply in respect of all [*Rata*] sawn by the sawmillers for the company namely :—

(1) All [*Rata*] shall be treated as for special orders and shall be sawn accordingly.

(2) Except in compliance with any special order relative to [*Rata*] the same shall be sawn to and shall comply in every particular with the following conditions namely :—

(*a*) As to [*Rata*] to be supplied to any Department of the New Zealand Government the same shall comply in every respect with the specifications and diagrams for the time being issued by such Department.

(*b*) As to [*Rata*] to be supplied to any Local Authority Board Council Company or specified person the same shall comply in respect of freedom from defects dimensions and size with the specifications and diagrams supplied by the said Local Authority Board Council Company or specified person.

(3) All [*Rata*] requiring seasoning shall be carefully seasoned in accordance with the New Zealand Government's various specifications or in accordance with the directions of the company or its representative and shall for such purpose be uniformly stacked and spaced on a firm dry foundation of sufficient height to permit the free circulation of air under and through each stack.

(4) All [*Rata*] which shall be stacked for seasoning shall be stacked in a position which is reasonably convenient for loading by the company's cartage contractors.

(*To be continued.*)

Unprecedented Practices.

Sauce for the Gander.

Counsel for plaintiff in a running-down case neglected to take within the prescribed time the most propitious step such plaintiffs can take—the filing of a jury notice. Counsel for the insurance company promptly took the equally propitious, but far less frequently available, step for defendants in such actions, of setting the case down before a Judge alone.

Not unnaturally, counsel for plaintiff, like the Consul who heard the cackling of the sacred geese, was considerably alarmed in body and spirit, for it appeared *prima facie* from the brief that his crafty opponent had bloodlessly disposed of the dozen geese who were scheduled to lay the golden eggs. So he filed a motion to enlarge the time for issuing a jury notice, and appeared, indignant yet doubtful, in support.

The Judge listened to his appeal, and, not wishing to stick too much to the letter of the law, turned to counsel for defendant and inquired whether there was any sufficient reason why the obvious slip should be taken advantage of.

Counsel for defendant hastened to refer to an unreported case in which he, acting for the plaintiff, had made exactly the same slip, and brought before this very same and just Judge a motion seeking the precise relief now supplicated ; which motion, counsel plaintively intimated, was dismissed with costs. "Well," said the Judge, "it certainly looks as though it would be unfortunate if you were to lose both ways ! "

* * *

A deed of family arrangement in a large estate had just been approved by the Court, and, as costs were happily to come out of the estate, the beneficiaries were tremulously speculating how little the Judge could award the six counsel without offending the Bar, and the six counsel were just as anxiously contemplating how much he could award without offending their clients.

Only one counsel had done any actual preparation. Turning to him, the Judge said, "I suppose you did a fair deal of work on this, Mr. X.? "

"Yes, sir."

"But that doesn't help me much. How much time did you spend on it ? "

After a momentary pause counsel replied that he couldn't exactly say.

"Well, was it one day—two days—or what ? "

Another short pause, and counsel declared, "Well, sir, I think I'll compromise on a day and a half ! "

* * *

At the end of the first day of a criminal trial, counsel for the accused made an application that his client should be allowed out on bail over night. The Judge, not wishing to refuse in front of the jury, asked counsel to make the application in Chambers after the Court rose.

Counsel, with the Crown Prosecutor, duly appeared and renewed the application.

"I don't say it would happen in this case, Mr. Y.," said the Judge, "but if an accused is let out on bail half way through a trial, there is always a great temptation for him to approach the jury, and I don't think I ought to let him go."

"But I want to make a special plea, Your Honour," persisted counsel. "My client doesn't know any of the jury and will promise not to see any of them."

"No, I'm afraid not."

"But, Your Honour has power and precedent to grant bail in such circumstances," urged the indefatigable one, making a supreme final effort, "and I would ask that you consider whether you could not possibly allow bail on this occasion. My client is quite unknown in the district."

"No, Mr. Y. In the public interest I simply couldn't allow bail in this case. Good afternoon."

"Oh well," said counsel, naively, as he departed, "I'm not surprised, Your Honour!"

Legal Literature.

Cunningham and Dowland's Land and Income Tax Law and Practice, Supplement, with Special Sections on Employment Tax and Income-tax Practice. Supplement No. 1 (1937), by T. A. Cunningham. Pp. xv + 119 and Index. Butterworth & Co. (Aus.), Ltd.

Since the original volume, which was found to be of great value to solicitors and others, was published in 1933, there have been a large number of statutory amendments to the Land and Income Tax Acts, many of them of considerable importance. In addition, there have been numerous judicial decisions relating to Land and Income-tax. The present Supplement is, therefore, of double value in this respect, especially as it summarizes a large number of important decisions which are to be found only in series of Reports not readily available to practitioners.

A new section has been added to the subject-matter of the original work: this deals with Employment Tax and is the first comprehensive annotation of the statute as consolidated in 1936. It is appropriate that the law relating to this special form of income-tax should be available alongside that affecting all similar taxation.

A very useful addition, too, is a section dealing with Income-tax Practice. This provides an authoritative statement by Mr. E. F. Casey, one of the senior officers of the Land and Income Tax Department, as to the practice of the Department.

The Supplement follows the method of the original work, and its numbered paragraphs correspond. The law throughout is stated as at January 1, 1937. A Table showing rates of tax on incomes from £50 to £8,950, both for individuals and companies, under the Annual Act of last year, is of particularly useful assistance.

New Zealand Law Society.

Annual Meeting.

(*Continued from p. 115.*)

Solicitors' Fidelity Guarantee Fund—Annual Report.—The Management Committee of the Solicitors' Fidelity Guarantee Fund presented their annual report, setting out the position of the Fund and expressing their pleasure at its sound position.

Extension of Land Transfer Assurance Fund to Cover Claims Due to Forgery.—The following report was received:—

"We have been asked to consider and report upon the suggestion that the Land Transfer Assurance Fund should be open to claims for losses due to forgery of Land Transfer documents.

The claims of registered proprietors who have been dispossessed of their registered titles through forgery are already sufficiently protected by the provisions of the Land Transfer Act, 1915. It is open to them to have the Register rectified—ss. 74 and 199, and they may resort to the Assurance Fund for the appropriate indemnity, s. 186.

Mr. Warrington Taylor's address to the Legal Conference in Dunedin was directed to give indemnity to an innocent purchaser for value who without negligence on his or his solicitor's part is registered as proprietor of an estate or interest in land and subsequently loses it by rectification.

In the present state of the law in the Australian States and New Zealand such purchaser has no remedy, *Gibson* v. *Messer*, [1891] A.C. 248, and on principle, there seems to be little foundation to his claim for assistance. There has been no error on the part of the Registrar, his officers or his clerks, and his case does not vary much from that of the man who has paid over his money on the faith of a forged instrument but has not registered his instrument before the forgery is discovered. But as Mr. Warrington Taylor points out the position in England is different from that in Australasia. Section 7 of the 'Land Transfer Act, 1897' (Eng.) did not vary much from s. 186 of the present New Zealand Act; and in 1906 the Court of Appeal decided in *Attorney-General* v. *Odell*, [1906] 2 Ch. 47, that a person in the plight of the client whom Mr. Warrington Taylor would seek to protect took no benefit from the section. However, the Land Registration Act, 1925, now contains s. 85, which considerably modifies the provisions of the former s. 7. Subsection 4 of s. 85 reads as follows:—

> 'Subject as hereinafter provided a proprietor of any registered land or charge claiming in good faith under a forged disposition shall, where the Register is rectified, be deemed to have suffered loss by reason of such rectification and shall be entitled to be indemnified under this Act.'

In practice, and apart from principle, there is much to be said in favour of amending our Act in this direction, and it has the added advantage of protecting the sanctity of the Register. We recommend that this course be followed.

We think Mr. Currie's suggestion is sound—that should the amendment be made, documents should be personally certified as correct for the purposes of the Act by the purchaser or mortgagee or other the party taking the interest. The Registrar would then have a specimen signature to act as a check on forgery.

We also approve of the suggestion made by Mr. J. Blair in his letter of September 14, 1936. In view of the decision of *Rex* v. *Registrar-General of Land*, 24 N.Z.L.R. 946, legislation would be necessary. It is there held that the Surveyor-General and his officers could not be regarded as officers of the Registrar-General within the meaning of s. 186. It seems to us reasonable that the Surveyor-General must be deemed to assume the final responsibitily for the accuracy of the Land Transfer plans just as the Registrar-

General finally adopts the work of solicitors in preparing instruments and the statutory guarantee should extend to the area of the parcels as well as to the title thereto.

Dated at Wellington this 18th day of March, 1937.

CLAUDE H. WESTON.
E. F. HADFIELD.
R. HERBERT WEBB."

As the report had just come to hand, it was decided to circulate it for comments.

Scale of Costs under Mortgagors' and Lessees' Act.—The Secretary reported that this Scale had been settled after a conference with the Minister of Justice, and a copy had been forwarded to all practitioners.

Solicitor for Private Company—If Qualified Clerk so Appointed must pay Guarantee Fund Levy.—The Taranaki Society wrote as follows :—

"I am directed by my Council to request a ruling from the New Zealand Law Society on the following question :—

A solicitor-clerk employed by a legal office was appointed by resolution of a Private Company to be its solicitor and accepted that position. Is he, by reason of this fact, a solicitor practising on his on account within the meaning of s. 72 of the Law Practitioner's Act, and is he therefore liable to pay the annual levy to the Solicitors' Fidelity Guarantee Fund ?"

After some discussion, the Council decided that, if the fees received by the clerk were payable to his firm, he was not practising on his own account.

Solicitor as Liquidator.—The following letter was received from the New Zealand Society of Accountants :—

"The attached advertisement has been forwarded to me by the Canterbury Branch of the Society and by direction of the Executive Committee I was instructed to send it to you with the request that the solicitor concerned be instructed to refrain from accepting appointment as liquidator in future as it is understood between your Society and this Society that endeavours will be made to prevent members of one Society undertaking work which rightly belongs to members of the other Society.

Yours faithfully,
D. G. JOHNSTON,
SECRETARY.

Copy of Advertisement Attached :—

COMPANY NOTICE.
THE A.P. CO., LTD.
(In Liquidation).

NOTICE is hereby given that the Company has passed a special resolution to wind up voluntarily.

Solicitor,
Christchurch,
Liquidator.

Mr. Gresson explained that the Canterbury District Law Society had looked into the matter, and had found that the company in question was a very small one, which the solicitor concerned had undertaken to liquidate as a matter of convenience to the four shareholders.

It was resolved that the Accountants' Society should be informed that the Council in general discourages any encroachment on the work of accountants, but that the facts in the case mentioned showed that the matter could hardly be regarded in a serious light.

Accountant Holding Himself out as Barrister and Solicitor.—The Otago Society wrote as follows :—

"My Council has had difficulty with an accountant who uses the words 'Barrister and Solicitor' on his name board and who therefore, in their opinion, holds himself out to the public as a Barrister and Solicitor.

The delegates from this Society have been asked to submit the matter to the New Zealand Law Society at its next meeting and would be glad if you could arrange to gave it put on the order-paper. They are bringing with them a letter from the accountant together with photographs of his name board which he has supplied."

A letter which had been received by his Society from the accountant mentioned was produced, enclosing a photograph of his notice board, and explaining that the reason he used the words "Barrister and Solicitor" was because, though he had passed the subjects of the LL.B., he was unable to obtain that degree owing to a technicality and had no other means of showing he had passed the examination.

After some discussion, it was decided that, in the opinion of the Council, the accountant was holding himself out as practising.

Practice Precedents.

Arbitration : Appointment of Umpire or Third Valuer.

Where there is a submission to arbitration, whether in pursuance of a clause in a deed or other instrument or arising out of a matter in dispute between parties, and an appointed arbitrator fails to act or is or becomes incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and parties or the arbitrators do not supply the vacancy ; or, where the parties or two arbitrators are at liberty to appoint an umpire or appoint a third arbitrator* and they do not appoint one, any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire or third arbitrator.

If the appointment be not made within seven days after the service of the notice, the Court may, on application by the party who gave the notice, appoint an arbitrator or umpire or a third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties : Arbitration Act, 1908, s. 6 (2) as amended by s. 2 of the Arbitration Amendment Act, 1915.

It is necessary that the person proposed to the Court for appointment as umpire should appear from the affidavits in support to be one, who, from training and actual experience in the class of business in reference to which the arbitration is to take place, is competent to review the matters to be arbitrated upon, and that he is impartial and has no interest in the matter in question ; and, further, that if the arbitrators disagree, he is competent from such experience and knowledge, to act as sole judge in determining the rights of the parties : *In re an Arbitration between W. E. Clouston and Co., Ltd. and Corry*, (1904) 23 N.Z.L.R. 597 ; and *In re a Lease, Auckland City Corporation to Grey Buildings, Ltd.*, [1933] N.Z.L.R. 184, 191, 192.

As to the position of valuers appointed to determine a value or a price, one appointed by each party and they to choose an umpire, see *In re Coleman and Royal Insurance Co.*, (1905) 24 N.Z.L.R. 817, where the relevant English authorities are reviewed ; and see, also, generally, the cases in the *English and Empire Digest*, Vol. 2, pp. 407, 408, and last *Annual Supplement* thereto.

* This may be exercised in the form provided in *Goodall's Conveyancing in New Zealand*, p. 83.

The following forms are applicable to the appointment of an umpire or third arbitrator, but they are particularly adapted to the appointment of a third valuer in pursuance of a lease-clause, approximating to that set out in cls. 4 and 5 of the First Schedule to the Public Bodies Leases Act, 1908, which provide for a valuation to be made by two indifferent persons as arbitrators, one of whom is to be appointed by the lessor and the other by the lessee, and such arbitrators before commencing to make the said valuation are together to appoint a third person to be an umpire between them.

SUMMONS FOR APPOINTMENT OF AN UMPIRE.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE MATTER of the Arbitration Act, 1908, and its amendments

AND

IN THE MATTER of a certain lease between A. B. &c. as Lessors and C. D. &c. as Lessees and registered under number (Registry).

Let and being the arbitrators appointed under the lease bearing date the day of 19 and registered in the Land Registry Office at as No. for a valuation of the fair rent of the land comprised in the said lease by the lessees and lessors respectively and the above-mentioned lessors or their respective solicitors or agents appear before the Right Honourable Sir Chief Justice of New Zealand in Chambers at the Supreme Court House at at in the forenoon on the day of 19 or so soon thereafter as counsel can be heard TO SHOW CAUSE why an order should not be made upon the application of the above-mentioned lessees under s. 6 (2) of the Arbitration Act 1908 as amended by s. 2 of the Arbitration Amendment Act 1915 appointing either of the persons mentioned in the affidavit of filed herein or such other person as the Court shall deem meet as an umpire for the purpose of the above-mentioned valuation and ordering that such person so to be appointed do have the like powers to act in the above-mentioned valuation and to make an award or valuation in the premises as if he had been appointed an arbitrator as provided by the said lease by the above-named arbitrators and with the consent of all parties UPON THE GROUNDS that the above-named arbitrators have neglected and omitted to appoint an umpire for the purposes of the above-mentioned valuation in accordance with the provision in that behalf contained in the said lease within seven days after being called upon so to do by notice duly given by the said lessees in accordance with s. 6 (1) (c) of the Arbitration Act 1908 as amended as aforesaid or at all AND UPON THE FURTHER GROUNDS that each of such persons hereinbefore mentioned and submitted for appointment as an umpire is a fit and proper person so to be appointed AND UPON THE FURTHER GROUNDS appearing in the affidavits of and filed herein and why the costs of and incidental to this summons should not be paid by the above-mentioned .

Dated at this day of 19 .

Registrar.

This summons is issued by .

AFFIDAVIT IN SUPPORT.

(*Same heading.*)

I make oath and say as follows:—

1. That I am a clerk in the employ of Messrs. solicitors and as such have knowledge of the facts herein deposed to.

2. That in accordance with the above lease and by written notice dated the day of 19 and served on the lessor the lessees appointed to be their arbitrator under the provisions of the said lease for a valuation of the fair rent to be payable throughout the whole of the term of the said lease.

3. That in pursuance of the provisions of the said lease and by written notice dated the day of 19 and served on the lessees the lessors duly appointed to be their arbitrator for the purposes of making such valuation.

4. That in accordance with such lease the said valuers so appointed are empowered and required to appoint an umpire by writing under their hands before commencing to make the said valuation.

5. That no such umpire had prior to been appointed.

6. That on I served on the said and written notices requiring them to appoint an umpire.

7. That annexed hereto and marked "A" is a true copy of such notices so served by me with acknowledgement of service endorsed thereon by .

8. The said [*Lessees' arbitrator*] has no power under the provisions of the said lease to appoint an umpire without the concurrence of the said [*Lessors' arbitrator*].

9. That more than days have elapsed since the service of the notice hereunto annexed marked "A" and no umpire has yet been appointed in compliance with such notice.

Sworn &c.

AFFIDAVIT BY ONE OF ARBITRATORS.

(*Same heading.*)

I make oath and say as follows:—

1, 2, 3. [*Here set out submission to arbitration clause in the lease and reference to the lease, registered number, &c., and that lessees desire a valuation and that they have given notice, &c.*].

4. That according to the terms of the lease it is necessary for myself and to agree on an umpire before proceeding with the valuation of the fair rent of the demised land throughout the whole of the term of the said lease.

5. That I met the said and discussed the question with him but from my conversation with him I gathered that it would be impossible for us to agree upon an umpire.

6. That the said has suggested that should be the umpire. I submit that in the circumstances that would not be a proper valuer. [*Give reasons.*]

7. That I have suggested as the umpire but informs me that he does not agree to the appointment of the said .

8. That in my opinion the umpire should be an independent business man who is not an interested party. [*Give reasons.*]

9. That in my opinion either of the following gentlemen would be proper persons, viz. E. F. &c. and G. H. &c.

10. That the said E. F. has been a member of the firm of Messrs. of the City of Land and Estate Agents for the past twenty years.

11. That the said G. H. has carried on the calling of a Land Agent and Valuer in the City of for the past fifteen years.

12. That by virtue of experience and reputation either the said E. F. or the said G. H. is competent to act as an umpire. They have no interest in the said proceedings.

Sworn &c.

ORDER.

(*Same heading.*)

Before the Right Honourable the Chief Justice &c.

Tuesday the day of 19 .

UPON READING the summons for the appointment of an umpire sealed herein and the affidavits filed in support thereof AND UPON HEARING Mr. of Counsel for the above-named lessees and Mr. of Counsel for the above-named lessors and it appearing that of has agreed to act as such umpire if so appointed I DO ORDER that the said of be and he is hereby appointed the umpire for the purposes of the valuation of the fair annual rent throughout the term of renewal of the above-mentioned lease AND I DO FURTHER ORDER that the said of do have the like powers to act in the above-mentioned valuation and to make an award or valuation in the premises as if he had been appointed as provided by the said lease by the two arbitrators heretofore appointed thereunder by the lessees and lessors respectively and with the consent of all parties AND I DO FURTHER ORDER that the costs of and incidental to this application be taxed by the Registrar as between solicitor and client and form part of and be included in the costs of the said valuation.

Chief Justice.

NOTE.—By direction of the Right Honourable the Chief Justice (Sir Michael Myers, G.C.M.G.) all applications made on summons *must* be drawn as a Judge's order; and see also R. 417A of the Code of Civil Procedure.

Legal Literature.

The Australian Companies Acts. Reconciled and Annotated by His Honour Acting-Judge N. G. Pilcher, B.A., LL.B., Allan H. Uther, B.A., LL.B., formerly Chief Parliamentary Draftsman and one of the Examiners of Titles of New South Wales, and William J. Baldock, LL.B., all of New South Wales; and, in addition, a separate Editor for each other State. With a Foreword by the Rt. Hon. Sir John Greig Latham, G.C.M.G., Chief Justice of the High Court of Australia. Pp. cvi + 1354. Sydney: Butterworth & Co. (Australia), Ltd.

In his foreword to this extensive work, the learned Chief Justice of Australia says that he is satisfied that it will be of real service not only to members of the legal profession, but also to many other members of the community. "I congratulate the authors and their assistants upon the knowledge and skill that are displayed, both in the substance of the work and in the convenient arrangement of the material," he adds; and he refers to the importance and magnitude of the undertaking.

The Australian Companies Acts comprehensively deals with the company law of the various States of the Commonwealth by a cleverly-designed scheme of reconciliation of the sections in the various State statutes relating to company law. But it has this further advantage, which is a very real one: it gives the corresponding section of the English Companies Act, 1929, as well. The well-compiled notes which follow this collocation of statutory references deal accordingly with the same section in the several State statutes and in the English Act. It is possible, therefore, for a New Zealand practitioner to take his comparative table of sections in the Companies Act, 1932 (N.Z.) and the Companies Act, 1929 (Eng.), and, with the use of the work under notice, find himself in touch with all the relevant decisions on sections corresponding with the New Zealand section given by the Courts in England and in all the States of the Commonwealth, while all New Zealand cases of assistance to the text are also included.

It is unnecessary to add that the convenience of the method employed by the authors extends the value of their work beyond Australian shores. The merit of having this up-to-date, and well-compiled, encyclopedia of company law available when any point relating to the law of companies comes up for consideration, needs no elaboration; suffice it to say that reference is made to over 7,500 judicial decisions, including Canadian, South African, and Indian cases, in the course of the twelve hundred odd pages of the text. The index, which covers 235 pages, is very complete in its detailed references, and leaves nothing to be desired. Altogether this is a most useful and valuable contribution to the literature of the law.

The learned authors are to be congratulated on the care and conciseness with which they have completed an onerous task. They are also to be commended for their having taken advantage of the local experience of their State editors, whom they have brought into collaboration with them, Mr. J. B. Tait, of the Victorian Bar, Mr. L. A. Whittington, of the South Australian Bar, both of whom are experts in Company law and practice, and Mr. J. S. McInnes, of the well-known firm of Accountants, Messrs. Valentine and McInnes, of Brisbane, another company law expert, who is their Queensland editor.

Sutton and Shannon on Contracts. By Ralph Sutton, K.C., Reader in Common Law to the Council of Legal Education, and N. P. Shannon, of Gray's Inn, Barrister-at-Law, Lecturer at the University College of Wales, Abertstwyth. Second Edition. Pp. lxx + 389, and Index. London: Butterworth & Co. (Publishers), Ltd.

This concise summary of the law of contract is distinguished for its handy arrangement, which makes it an ideal text-book for students, or a book of quick reference for practitioners. Each principle dealt with is set out in large type; then follows an explanation in a series of paragraphs in smaller type; and, lastly, the referable leading cases are summarized in still smaller type. In this usefully practical way, a large amount of ground is covered by the authors, who have brought the work up to the present year, including the necessary modifications of the text and explanations consequent on the passing of the Law Reform Statutes of England, which are incorporated in the Law Reform Act, 1936 (N.Z.). The authors have avoided the mistake of too much compression, while giving a most useful exposition of the subject in all its main features by shortly stating rules and principles accompanied by helpful illustrations.

Recent English Cases.

Noter-up Service.

FOR

Halsbury's "Laws of England."

AND

The English and Empire Digest.

COMPANIES.

Companies — Winding Up — Voluntary Winding Up — Remuneration Voted to Liquidator—Compulsory Winding Up Superseding Voluntary Winding Up.

The court has power, in any case where voluntary winding up is superseded by a compulsory order, to review the remuneration which the members in a members' voluntary winding up, or the committee of inspection or the creditors in a creditors' voluntary winding up, have fixed as payable to the liquidator.

Re MORTIMERS (LONDON), LTD., **[1937] 2 All E.R. 364. Ch.D.**

As to remuneration of liquidator: see HALSBURY, Hailsham edn. 5 par. 1304; DIGEST 10, pp. 992, 993.

Winding Up—Private Company—Transfer of Shares—Directors' Power to Refuse Registration—Decease of Shareholder—Refusal to Register Transfer to Executors.

Where in a private company the directors have power in their absolute discretion to decline to register any transfer of shares, a refusal to register a transfer to the executors of a deceased shareholder is no just and equitable ground upon which the company ought to be wound up.

RE CUTHBERT COOPER AND SONS, LTD., **[1937] 2 All E.R. 466, Ch.D.**

As to "just and equitable": see HALSBURY, Hailsham edn., 5, par. 885; DIGEST, 10, pp. 821-828.

HIGHWAYS, STREETS, AND BRIDGES.

Highways—Improper Use—Injunction.

A frontager in an unadopted road may be protected as a private person against the improper use of the the owners of vehicles and may obtain an injunction restraining such use.

MEDCALF AND ANOTHER *v.* R. STRAWBRIDGE, LTD., **[1937] 2 All E.R. 393. K.B.D.**

As to damage to support action without joinder of A.-G.: see HALSBURY, Hailsham edn. 16, par. 488; DIGEST 26, pp. 452-454.

INCOME TAX.

Assessment of Non-Resident—War Loan Interest and Bank Interest Receivable by Wife—Wife Resident in United Kingdom—Wife Living with Husband Within All Schedules Rules, r. 16—Husband in United Kingdom Part of Each Year—Place of Assessment.

Sched. D, Misc. Rules, r. 4, is not exhaustive as to the place of assessment, and persons who are not resident in the United Kingdom are liable to assessment under the Income Tax Act, 1918, sec. 102, whenever they come into the United Kingdom.

DUCKWORTH *v.* LOWE (INSPECTOR OF TAXES), **[1937] 2 All E.R. 418, K.B.D.**

As to persons assessable: see HALSBURY, Hailsham edn., 17, par. 8; DIGEST, 28, pp. 95-97.

Profits from Employment or Vocation—Professional Golfer—Bets on Private Games.

In the absence of any organisation to support the view that a professional golfer is carrying on a business of betting on private games of golf, he will not be assessable to tax on the balance of gains over losses arising out of such betting.

DOWN (INSPECTOR OF TAXES) *v.* COMPSTON, **[1937] 2 All E.R. 475. K.B.D.**

As to assessment of speculative transactions: see HALSBURY, Hailsham edn., 17, par. 194; DIGEST, 28, p. 22.

PRACTICE.

Jurisdiction—Court of Appeal—Appeal from Judge at Chambers in King's Bench Division—Matters of Practice and Procedure—Order for Committal.

An order for committal for disobedience of an order of the Court is a matter of practice and procedure within R.S.C. Ord. LIV, r. 23, and an appeal against such an order will therefore lie to the Court of Appeal.

LEVER BROTHERS, LTD. *v.* KNEALE, **[1937] 2 All E.R. 477. C.A.**

As to appeals from Judge at chambers: see HALSBURY, 1st edn., 23, pars. 233, 234; DIGEST, Practice, pp. 706-708.

Practice—Costs—Running-down Action—Payment into Court.—Admission of Negligence—Denial of Liability—Costs.

Payment into Court by a defendant of a sum which is greater than the amount recovered by the plaintiff does not give the defendant a conclusive right to costs after the date of such payment in.

BROWN *v.* NEW EMPRESS SALOONS, LTD., **[1937] 2 All E.R. 133. C.A.**

As to costs where payment is made: see HALSBURY, 1st edn. 23, pp. 149, 150; DIGEST Practice, pp. 874, 875.

SALE OF GOODS.

Sale of Goods—Transfer of Title—Pledge by Vendor in Possession—Possession of Agent.

A disposition by a vendor in possession may give the purchaser a good title under the Sale of Goods Act, 1893, sec. 25 (1), even where the vendor is in possession only by an agent.

CITY FUR MANUFACTURING CO., LTD. *v.* FUREENBOND (BROKERS), LONDON, LTD., **[1937] 1 All E.R. 799. K.B.D.**

As to sale by vendor in possession: see HALSBURY, 1st edn., 25, par. 339; DIGEST, 39, p. 535.

WILL.

Will—Construction—Devise of Realty to "Heir-at-Law" of Survivor of Two Beneficiaries.

A devise of realty to the "heir-at-law" of a named person may refer to the common law heir and not to the statutory next-of-kin.

MACLEAY *v.* TREADWELL, **[1937] 2 All E.R. 38. J.C.** (*ante*, p. 192.)

As to heir by purchase: see HALSBURY, Hailsham edn., 10, par. 855; DIGEST, 44, pp. 861-868.

Will—Construction—"I Forgive and Release All Sums Owing to Me"—Loan to Company.

The words "forgive and release" in a will do not apply solely to debts of a personal nature.

MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* YARNERS COFFEE, LTD., **[1937] 2 All E.R. 54. Ch.D.**

As to construction of particular terms in will: see HALSBURY, 1st edn., 28, par. 1332; DIGEST, 44, p. 736.

WORKERS' COMPENSATION.

Course of Employment—Interruption of Employment—Railwayman in Lodgings Away from Home—Accident Between Lodgings and Railway Station.

Where a railway employee is compelled by his employment to spend alternate nights away from his home station, an accident sustained on his way from or to the station on such alternate nights is not necessarily an accident arising in the course of his employment.

ALDERMAN *v.* GREAT WESTERN RAILWAY CO., **[1937] 2 All E.R. 408. H.L.**

As to temporary cessation of work: see HALSBURY, 1st edn., 20 par. 362 and Supp.; DIGEST, 34, pp. 283, 284.

Workmen's Compensation — Industrial Disease — Silicosis — Process—"Any Operation Underground in Any Coal Mine"

The amendment of the Various Industries (Silicosis) Scheme, 1931, by the scheme of 1934, by the inclusion in the processes in par. 2 of "any operation underground in any coal mine," created a substantive new sub-paragraph to par. 2 and is not a part of sub-par. (iii) and subject to the proviso thereto.

WRAGG *v.* SAMUEL FOX AND CO., LTD., **[1937] 2 All E.R. 157. H.L.**

As to silicosis as an industrial disease: see HALSBURY, Supp. Master and Servant, par. 346; DIGEST, Supp. Master and Servant, Nos. 3811*a*-3811*m*.

New Books and Publications.

Australian Companies Acts. Reconciled and Annotated by N. G. Pilcher, Allan H. Uther, and William J. Baldock. Butterworth & Co. (Aus.) Ltd. 70/-.

Stone's Justices Manual, 1937. Edited by, F. B. Dingle. Sixty-ninth Edition. (Butterworth & Co. (Pub.) Ltd.) 50/-.

The Law of Damages. By Frank Gahan, M.A., B.L.L., LL.B. (Sweet & Maxwell). 21/-.

Tables of Conveyancing Scale Charges. Including Land Registry Scales. By T. O. Carr. (Sweet & Maxwell). 8/6d.

The Public Health Act, 1936. By David J. Beattie, LL.M. (Solicitors Law Stationery Society). 53/-.

Law relating to Shops. By H. Samuels M.A. (Sir Isaac Pitman & Sons). 10/6d.

The County Court Pleader. By Alec Cairns. (Sweet & Maxwell). 42/-.

The Tithe Act, 1936. By S. G. G. Wilkinson, B.A. (Bar) (Estates Gazette Ltd.). 15/-.

The Law of Housing (including Housing Act, 1936). By S. Pascoe Hayward and C. Kent Wright. Third Edition. (Estates Gazette Ltd.). 47/-.

Estates Gazette Digest of Cases, 1936. Editor Donald McIntyre, B.A., LL.B. (Estates Gazette Ltd.).

The Public Health Act, 1936. By the Hon. Dougall Meston. (Sweet & Maxwell). 42/-.

Cripps on Church and Clergy. By Kenneth M. MacMorran. Eighth Edition. (Sweet & Maxwell). 51/.

Valuation of Real Property. By Clarence A. Webb. Sixth Edition. (Technical Press). 28/-.

Questions and Answers on Equity. By Clifford A. W. Rivington, B.A. (Sweet & Maxwell). 7/-.