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

"*Now for the Lawes of England (If I shall speake my Opinion of them, without partiality, either to my Profession, or Country,) for the Matter and Nature of them, I hold them Wise, Just, and Moderate Lawes: They give to God, they give to Caesar, they give to the Subject, what appertaineth. It is true, they are as mixt as our Language, compounded of British, Roman, Saxon, Danish, Customes. And surely, as our Language is thereby so much the richer, so our Lawes are likewise by that Mixture, the more compleat.*"

—BACON (An Offer to King James of a Digest to be made of the Laws of England).

Vol. XIV. Tuesday, December 6, 1938. No. 22.

Book and Other Debts as "Chattels."

THERE has recently been a divergence of judicial opinion as to the inclusion of book or other debts within the definition of "chattels" in s. 2 of the Chattels Transfer Act, 1924, and the construction of the phrase referring to "book or other debts" in s. 31 of that statute.

In *In re Burton, Smith v. Montgomery*, [1938] N.Z.L.R. 633, Mr. Justice Callan, in a judgment delivered on August 9, held that book and other debts, while not included in the definition of "chattels," were, nevertheless, "chattels" for purposes of the registration of a document assigning them by way of mortgage; while Mr. Justice Quilliam, a month later, in *In re Mooney and Hyde (Bankrupts), Official Assignee v. Martin*, [1938] N.Z.L.R. 766, held that book-debts were not on the same footing as "chattels" as defined in s. 2 of the statute.

The history of the definition of "chattels" in the Chattels Transfer legislation has a bearing on the question in issue; and their Honours reach different conclusions after tracing that history.

In s. 2 of the Chattels Transfer Act, 1889, choses-in-action were expressly excluded from the definition of "chattels"; but the Chattels Transfer Amendment Act, 1895, provided as follows in regard to "book and other debts":

> "2. The term 'chattels' includes 'book and other debts,' and the signification of 'choses-in-action' in section two of the principal Act is hereby limited accordingly.
>
> "3. Such chattels shall be deemed to be situate in the place where the grantor of the instrument comprising them longest resided or carried on business during the period of six months next before he executed such instrument.
>
> "4. In every instrument comprising book or other debts each debt shall be deemed to be a separate chattel, and shall be described in the schedule thereto by setting forth the name of the debtor or firm of debtors and the amount of the debt, so far as may be reasonably necessary to show by whom the debts are owing: Provided that nothing in this Act shall apply to any debt secured or charged on land."

In the consolidating statute, the Chattels Transfer Act, 1908, "chattels," as defined in s. 2, means, *inter alia*, "book or other debts" but excludes "choses-in-action (not being book or other debts)."

In replacing the 1908 statute, the Chattels Transfer Act, 1924—which, according to the *Hansard* record, was drafted by two very experienced counsel—by s. 2, redefined "chattels" and excluded from the definition choses-in-action; and it deleted the words "book and other debts" where they appeared in the previous definition. Consequently, for the purposes of registration, so far as the definition of "chattels" affects the position, an assignment of book and other debts is not subject to the restrictions and qualifications of an assignment of "chattels."

We now turn to ss. 3 and 4 of the Chattels Transfer Amendment Act, 1895, which, for the first time, included "book and other debts" in the definition of "chattels." These sections have already been quoted. They reappeared in the Chattels Transfer Act, 1908, as s. 27, which was as follows:—

> "27. (1) Book or other debts shall be deemed to be chattels situate in the place where the grantor of the instrument comprising them longest resided or carried on business during the period of six months next before the execution of the instrument.
>
> "(2) In every instrument comprising book or other debts each debt shall be deemed to be a separate chattel, and shall be described in the schedule thereto by setting forth the name of the debtor or firm of debtors and the amount of the debt, so far as is reasonably necessary to show by whom the debts are owing.
>
> "(3) Nothing in this section shall apply to any debt secured or charged on land."

This was re-enacted as s. 31 of the Chattels Transfer Act, 1924, with the addition to subs. 2 of the following words:

> "and every such instrument shall be void to the extent and as against the persons mentioned in section eighteen of this Act in respect of any such debt not so described."

The collocation of the definition of "chattels" (excluding "book and other debts") in s. 2 of the present statute, relating to assignments of "book or other debts," with s. 31 thereof, has caused the difference of viewpoint reached by their Honours.

In *In re Burton, Smith v. Montgomery* (*supra*), Mr. Justice Callan, at pp. 641, 642, says:

> "I am of opinion that an unregistered mortgage of future book debts is void as against the persons mentioned in s. 18. Section 31 (1) *deems* book debts to be chattels; and all the consequences follow that would have followed had book debts been within the express definition of 'chattels' in the interpretation section. As a matter of history, that was the way the legislation as to book debts used to proceed. This appears from s. 2 of the Amendment Act of 1895, and from the interpretation section (s. 2) of the 1908 Act. In that section 'book and other debts' were expressly taken out of the meaning of 'chose in action,' and expressly put into the meaning of 'chattels.' That has been dropped in the 1924 Act. But, in my opinion, this makes no difference in result. Because 'book debts' are 'deemed' to be chattels, what is enacted elsewhere in the Act as to chattels generally applies to them. Section 24 applies, and a mortgage of future book debts is void as against the persons mentioned in s. 18. This would clearly have been the position at any time between the enactment of the 1895 Amendment and the Act of 1924, because of the manner in which 'chattels' and 'chose in action' were respectively defined during that period.
>
> "I do not consider that the omissions now made from the definitions have altered the law, having regard to the continuance of the provisions now embodied in ss. 31 and 24. The Legislature has shown that it regards it as a mischief that a trader should be able to get credit on the strength

of his apparent position and yet be able to divest himself of his book debts by a secret undiscoverable document, to the detriment of those who give him credit. If this is the mischief which the Legislature aims at suppressing, it would be very imperfectly suppressed if by secret document a trader could divest himself of all his *future* book debts though as against creditors he could divest himself of existing book debts only by a registered document containing a scheduled list of the book debts assigned."

His Honour held, therefore, that the unregistered security (termed " an assignment by way of mortgage ") before him was good in respect of goodwill, which he found was not within the definition of " chattels " ; but, as against the persons mentioned in s. 18 of the statute, that it was void in respect of moveable chattels and book debts because of lack of registration. The judgment necessarily implies that, if the security had contained a scheduled list of existing book-debts in compliance with s. 31 of the Act, and had been registered, it would have been good as against the persons enumerated in s. 18.

In *In re Mooney and Hyde* (*Bankrupts*), *Official Assignee v. Martin* (*supra*), Mr. Justice Quilliam, after reviewing the history of the legislation affecting chattels transfer, and quoting s. 31 (1) of the present statute, at p. 772, says :

" This subsection is almost identical with s. 3 of the 1895 Amendment Act, which, as I have said, was clearly not intended to do more than qualify the previous section. But s. 2 of the 1895 Amendment Act has ceased to have any effect, since choses-in-action and book and other debts are no longer included in the definition of ' chattels.' Furthermore, it is to be observed that s. 31 (1) does not state that ' book or other debts are deemed to be chattels,' but that they are ' deemed to be *chattels situate in the place*,' &c. In my opinion, the words ' situate in the place,' &c., are in apposition or complimentary to the preceding word ' chattels,' and I think it is clear that the section was intended merely to indicate (at a time when ' book and other debts ' were deemed to be ' chattels ') the place of registration of an instrument over such securities which have no fixed abode."

His Honour then refers to *In re Burton, Smith v. Montgomery* (*supra*), and he says that, with great respect, he differs from the conclusion arrived at by Mr. Justice Callan in that case. He continues :

" In my opinion the effect of s. 31 (1) is not that ' book or other debts ' are deemed to be ' chattels,' but it merely fixes the location of a particular class of chattels for the purpose of the registration of instruments affecting them. It follows that as book and other debts are not now included in the definition of ' chattels ' under the Act the section is of no effect."

It is clear from the foregoing that the position disclosed is unsatisfactory, and needs clarifying by appropriate legislation. Either there should be a reversion to the definition of " chattels " as it appeared in the 1908 statute, with retention of the words " book and other debts " ; or there should be a repeal of s. 31 (with a consequential amendment of s. 32). Whichever alternative is adopted depends, of course, on the view taken as to whether the protection of registration should or should not be required in respect of assignments of book and other debts. In the meantime, and until a definite meaning is given to the statute in this regard, practitioners will, for safety's sake, continue to register instruments containing such assignments.

No assistance is given by a consideration of the English legislation. Book debts are excluded as choses-in-action from the definition of " personal chattels " in the Bills of Sale Acts. Unless a general assignment, whether by way of security or otherwise, by any person engaged in trade or business, has been registered " as if it were a bill of sale given otherwise than by way of security for the payment of a sum of money," it is void as against the trustee in bankruptcy as regards any book debts which have not been paid at the commencement of the bankruptcy : for the exceptions and qualifications of this rule, see the Bankruptcy Act, 1914 (4 & 5 Geo. V, c. 59), s. 43 (1), (2). None of the legislation of the several Australian States is of value to the discussion.

While the Legislature is considering the suggested amendment to the Chattels Transfer Act, some attention could with advantage be given to s. 99 of the Bankruptcy Act, 1908 (the " election " section), to which Mr. Justice Quilliam has referred as being " an antiquated piece of legislation " since it was discarded from the bankruptcy law in England seventy years ago.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1938.
September 14, 15 ; October 22.
Myers C.J.
Blair, J.
Callan, J.
Northcroft, J.

TIMARU HERALD COMPANY LIMITED, v. COMMISSIONER OF TAXES.

Public Revenue—Income-tax—Deductions—One Newspaper Company equitable Owner of all Shares in and exercising Control by Nominal Directorship over Another Newspaper Company—Agreement by Former Company to pay Latter a Yearly Sum in consideration of Latter not raising Newspaper Price—Whether such Sum Capital or Income—Whether deductible as Expenditure or Cost incurred in the Production of Assessable Income—Conclusiveness of Facts in Case Stated under s. 35—Effect of Statements of Hearsay—Land and Income Tax Act, 1923, ss. 35, 80 (2), 170.

The members of the P. company, who were also its directors, sold by agreement all their shares to the appellant—both newspaper companies—and agreed to allow their names to be used as owners of the shares in trust for the appellant, retaining their positions as nominal directors and agreeing to pass such resolutions as the appellant should reasonably require, and irrevocably appointed the appellant its attorney. On a subsequent transfer of the shares of the P. Co., the transferees declared themselves trustees for the appellant and appointed the appellant their attorney on the same lines, the effect being that the appellant was the owner in equity of all the shares in the P. Co., and exercised a certain control over the latter.

The appellant and the P. Co., subsequently on May 7, 1931, entered into an agreement (hereinafter called " the May agreement "), by personal negotiations between the respective managers of the two companies, as the respondent was informed by the appellant—as appeared in the case stated under s. 35 of the Land and Income Tax Act, 1923. By this agreement, in consideration of the P. Co. undertaking not to advance the price of its paper without the appellant's consent, the appellant agreed to pay the P. Co. £100 per calendar month for five years from April 1.

For four years the appellant paid the P. Co. £1,200 a year in pursuance of the May agreement. In its income-tax returns for these years the appellant deducted from its assessable income as " Sales Maintenance Account " the sums paid to the P. Co. Notwithstanding the inclusion of the P. Co. of these sums in its income-tax returns, such returns showed that the P. Co.'s operations for those respective years had resulted in a loss. The Commissioner of Taxes disallowed as a deduction from the appellant's income the sum of £1,200 paid in each of such four years by the appellant to the P. Co.

On appeal from the order of *Quilliam*, J., [1938] N.Z.L.R. 978, 984, on a case stated under s. 35 of the Land and Income Tax Act, 1923,

James, for the appellant ; **Broad,** for the respondent.

Held, per Curiam, 1. That in the case to be stated by the Commissioner of Taxes under s. 35 of the Land and Income Tax Act, 1923, he should ascertain and set forth all the facts and not leave any to be found by the Supreme Court.

2. That the Commissioner, having set out in the present case that so stated that the respondent had informed him of such and such a fact without more, the Court must assume that he had found the facts of which the respondent had informed him.

Held, further, 1. That the two companies were separate legal entities, neither was the agent of the other, and each had an independent directorate.

2. That the May agreement was a *bona fide* business agreement, that the payments made by the appellant were revenue and not capital expenditure, part of its ordinary commercial expenditure deductible under s. 80 (2) of the Land and Income Tax Act, 1923.

3. That s. 170, voiding agreements altering the incidence of income-tax or releasing from liability to pay it, had no application.

Semble, per *Myers,* C.J., That s. 170 cannot, so far as income-tax is concerned—save perhaps in some special or exceptional circumstances—apply to a contract, agreement, or arrangement made in good faith for adequate consideration in the ordinary course of business so as that it is in the true sense an ordinary business operation.

Gramophone and Typewriter, Ltd. v. Stanley, [1908] 2 K.B. 89, applied.

Jaques v. Federal Commissioner of Taxation, (1924) 34 C.L.R. 328, referred to.

Aspro Ltd. v. Commissioner of Taxes, [1932] A.C. 683, N.Z. P.C.C. 630, and **Ward and Co., Ltd. v. Commissioner of Taxes,** [1923] A.C. 145, N.Z.P.C.C., 625, distinguished.

Judgment of *Quilliam,* J., [1938] N.Z.L.R. 978, 984, reversed.

Solicitors: Tripp and Rolleston, Timaru, for the appellant; **Crown Law Office,** Wellington, for the respondent.

Case Annotation: *Gramophone and Typewriter Ltd. v. Stanley,* E. and E. Digest, Vol. 28, p. 30, para. 153; *Jaques v. Federal Commissioner of Taxation, ibid.,* Supp. Vol. 28, para. sd.; *Aspro Ltd. v. Commissioner of Taxes, ibid.,* para. o, vii.

COURT OF APPEAL.
Wellington.
1938.
June 21, 22, 23;
Oct. 7.
Myers, C.J.
Kennedy, J.
Johnston, J.

HALL v. GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED.

Parent and Child—Purchase of Land by Father in Son's Name—Whether Advancement or Resulting Trust—Evidence—Subsequent Declarations and Acts by Father and Son—Whether admissible—Sufficiency to rebut Presumption of Advancement—Letter by Son to Father acknowledging that Land in his Name belonged to Father and undertaking when called on to execute Transfer or other Document—Whether Declaration of Trust, Imperfect Gift, or Evidence of Resulting Trust.

F.H., in 1910 and 1911, when a wealthy man, purchased in the name of the appellant, his son, certain properties. The son resided in a house on the properties and paid no rent thereon. His father collected in respect of the balance of the properties the rents and profits and paid the outgoings in respect of the whole. In 1926, the father became involved; and the banks to which he was indebted required a blanket mortgage, but were prepared to refrain from immediately calling up their overdrafts upon condition that all the members of the family who held properties in their names gave a statement acknowledging that they held them for their father. Their father first objected to the son signing, but eventually the son signed the following letter:—

"Gisborne,
"August 26, 1927.

"F. Hall Esq.,
"Gisborne.

"DEAR SIR,—

"Referring to the undermentioned properties, the titles of which are in my name, I write to record the fact that although in my name the properties in fact belong to you, and that you have full power and authority to deal with any or all of the properties either by sale by public auction or otherwise, or by mortgage or lease, or in any other manner whatsoever, and I hereby undertake and agree that I will, when called upon so to do, execute such memorandum of transfer, or mortgage or lease, or agreement for sale and purchase, or other documents as may be necessary to give effect to any mortgage or other alienation which you may make.

[*The list of properties followed.*]

"Yours faithfully,
"F. T HALL."

Mortgages were given to two banks by the son over the properties referred to in the letter, the son undertaking no personal liability.

The father died in 1935, leaving a will, probate of which was granted to the respondent and another, and later an order was made appointing the respondent administrator under Part IV of the Administration Act, 1908. The son claimed the ownership of the lands referred to in the letter, and refused to sign a transfer to the respondent.

The respondent in an action against the son asked for a declaration that the said lands were held by the son for and on behalf of the estate of the father.

On appeal from the order of *Blair,* J., that the said lands were so held by the son,

Held, per **Curiam,** dismissing the appeal, That, on the evidence, the presumption that the original purchase was a gift for the advancement of the son with no resulting trust for the benefit of the donor had not been rebutted, and that up to August 26, 1927, the said lands were the property of the son.

Admissibility of evidence to rebut presumption of advancement discussed.

Held, also, per *Myers,* C.J., and *Kennedy,* J., *Johnston,* J., dissenting, That the document signed by the son on August 26, 1927, amounted to a declaration of trust for the father who thereby became entitled to the beneficial ownership of the land.

Per *Myers,* C.J., That s. 64 (*f*) of the Administration Act, 1908, requiring in respect of every estate as to which an order under Part IV of the Act is made that "proceedings to avoid or set aside any voluntary settlement shall be taken with leave of the Court" referring to a voluntary settlement made by a debtor, was inapplicable because the respondent was not seeking to avoid anything but to enforce against the son the trust claimed to have been declared by the document.

Per *Johnston,* J. (dissenting), 1. That as the objective of the respondent's action was to establish the character of the purchase of the father in the son's name, the respondent's original case needed the leave required by s. 64 (*f*) of the Administration Act, 1908, and he should be confined to it, as he did not ask leave to amend, although the case he eventually presented did not require such leave.

2. That the document signed by the son was not a declaration of trust, and the only purpose for which it was available was to rebut the presumption of advancement, in which it failed.

3. That the assumption upon which the document was based was a mistaken view of the son's title, being a mistake as to a private right, it was a mistake of fact and that in the circumstances such mistake should not be perpetuated to the detriment of the appellant.

Sidmouth v. Sidmouth, (1840) 2 Beav. 448, 454, 455, 48 E.R. 1254, 1257; **Christy v. Courtenay,** (1850) 13 Beav. 96, 51 E.R. 38; **Grey v. Grey,** (1677) 2 Swans. 594, 36 E.R. 742; **Commissioner of Stamp Duties v. Byrnes,** [1911] A.C. 386; **Moffett v. Squires,** (1913) 32 N.Z.L.R. 607; **Richards v. Delbridge,** (1874) L.R. 18 Eq. 11; **Milroy v. Lord,** (1862) 4 DeG. F. & J. 264, 45 E.R. 1185; and **Park v. Dunn,** [1916] N.Z.L.R. 761, G.L.R. 619, applied.

Scoones v. Galvin and the Public Trustee, [1934] N.Z.L.R. 1004, G.L.R. 777, distinguished.

Order of *Blair,* J., affirmed.

Counsel: Lysnar, for the appellant; **Cooke,** K.C., and **J. G. Nolan,** for the respondent.

Solicitors: Beaufoy and Maude, Gisborne, for the appellant; **Nolan and Skeet,** Gisborne, for the respondent.

Case Annotation: *Sidmouth v. Sidmouth,* E. and E. Digest, Vol. 25, p. 512, para. 83; *Grey v. Grey, ibid.,* p. 511, para. 71; *Commissioner of Stamp Duties v. Byrnes, ibid.,* p. 517, para. 119; *Milroy v. Lord, ibid.,* p. 530, para. 206; *Richards v. Delbridge, ibid.,* p. 537, para. 259; *Moffett v. Squires, ibid.,* Vol. 43, p. 652, para. 866 vii.

COURT OF APPEAL.
Wellington.
1938.
September 21;
October 11.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. HALL.

Land Transfer—Caveat—Removal—Legatee of Share in Unascertained Residue of Deceased Estate—Guarantor of Testator—Whether a Person "entitled to or beneficially interested in" Lands of which Administrator Registered Proprietor—Caveat lodged against Other Lands of which a Partner and the Administrator of a Deceased Partner Registered Proprietors—Administrator's Right to apply for Removal of Caveat therefrom—Land Transfer Act, 1915, s. 146 (*b*).

Until the residue of a deceased estate has been ascertained, a beneficiary entitled to a share in such residue is not "entitled to or beneficially interested in" land forming part of that estate, within the meaning of those words in s. 146 (*b*) of the Land Transfer Act, 1915.

Lord Sudeley v. Attorney-General, [1897] A.C. 11; **Dr. Barnardo's Homes National Incorporated Association v. Special Income-tax Commissioners,** [1921] 2 A.C. 1; and **Corbett v. Inland Revenue Commissioners,** [1937] 3 All E.R. 808, applied.

In re Bielfield (deceased), (1894) 12 N.Z.L.R. 596, distinguished.

The fact that a person has given an unlimited guarantee to protect the indebtedness of another, and had mortgaged certain of his own land to protect such guarantee, and has filed an application under s. 29 of the Mortgagors and Lessees Rehabilitation Act, 1936, does not confer on him the character of a person "entitled to or beneficially interested in" such land, and as such, to lodge a caveat against the land of the person so guaranteed.

Ex parte Brett, In re Howe, (1871) L.R. 6 Ch. 838, applied.

Where a caveat has been lodged against the lands of a registered proprietor and against other land of another registered proprietor, it may be removed by one of them if he is entitled to such removal, even though the other has not applied or may not be entitled to do so with success.

Counsel: Cooke, K.C. and **Nolan,** for the appellant; **Lysnar,** for the respondent.

Solicitors: Nolan and Skeet, Gisborne, for the appellant; **Beaufoy and Maude,** Gisborne, for the respondent.

Case Annotation: *Lord Sudeley v. Attorney-General,* E. and E. Digest, Vol. 8, p. 422, para. 13; *Dr. Barnardo's Homes National Incorporated Association v. Special Income-tax Commissioners, ibid.,* Vol. 23, p. 394, para. 4653; *Corbett v. Inland Revenue Commissioners, ibid.,* Supp. Vol. 28, para. 673e; *Ex parte Brett, In re Howe, ibid.,* Vol. 4, p. 386, para. 3541.

SUPREME COURT.
Wellington.
1938.
October 13, 27.
Reed, J.

STANDEN v. WELLINGTON HARBOUR BOARD AND ANOTHER.

Harbours—Statutory Limitation of Time for bringing Action—Worker's Action for Damages for Injuries—Whether One Month's Notice necessary—Harbours Act, 1923, s. 248 (1)—Statutes Amendment Act, 1933, s. 31.

A worker is not precluded from bringing an action against a Harbour Board for damages suffered in the course of his employment by reason only of the month's notice of action, as required by s. 248 (1) of the Harbours Act, 1923, not having been given before the issue of the writ therein.

Counsel: Hardie Boys, for the plaintiff; **J. F. B. Stevenson,** for the second defendant.

Solicitors: Hardie Boys and Haldane, Wellington, for the plaintiff: **Izard, Weston, Stevenson, and Castle,** Wellington, for the second defendant.

"One Court, One Judgment."

An English View.

On October 11, the *Times* (London) in a leading article, made the new third Court of Appeal, which is now staffed for work when its services are required, the occasion for a discussion of law reporting, and of the practice of Judges, where several sit together, to give, save in the Judicial Committee and the Court of Criminal Appeal, separate judgments. Or this latter point—the giving of separate judgments—the hope is expressed that "one Court one judgment" will become the rule. The present practice savours on the contrary of *Quot judices, tot sententiae.* As to which produces the more interesting results there can be no doubt. With all respect to the Judicial Committee, its single judgments—and how much difference of opinion they cover may not be revealed—are very much inferior in interest to the varied judgments of the House of Lords. And since the two tribunals have largely the same personel, the inferiority is due solely to the different methods of announcing the result. The majority judgments in the House of Lords give the decision; but we can see the conflicting principles which have been tested, and the understanding of the law gains by the conflict, even though the result cannot be disputed. The House of Lords are always right, because, as Lord Justice Scrutton is reported to have said, there is no one to tell them they are wrong. The House cannot even go back on their own decisions and reverse them, as can the Judicial Committee and the United States Supreme Court in a later case. That this should be so may be unfortunate, but the rule was decisively affirmed by Lord Halsbury, L.C., in *London Street Tramways Co., Ltd. v. London County Council,* [1898] A.C. 375.

It is not too much to say, the *Law Journal* adds, that the House of Lords reports would lose half their interest if dissent was not admitted. Of course, in the Court of Appeal the plan would not work at all. There would have to be not three but ten Courts if the Lords Justices had to sit, like jurymen, till they could agree on a judgment. Indeed, without a dissentient judgment, such as that of Lord Justice Moulton in the *in camera* Scott case, [1913] A.C. 417, how would the House of Lords get its cue to reverse the Court of Appeal? So for the present we shall be content to see judicial divergence recorded in the law reports, the majority judgment prevailing, and in a Court of two, the junior Judge, withdrawing his judgment. The reporting of decisions is, of course, a necessity, as much so as the printing of Acts of Parliament, for case law is a more prolific source of law than legislation, though Parliament is a good second. Moreover, no small part of case law is devoted to deciding what Parliament meant. Of course, it is said that Judges do not make law; they only apply old principles to new circumstances. The matter is discussed by writers of repute: *Grey on The Nature and Sources of Law*; *Allen on Law in the Making*; and we need not pursue it here. For practical purposes it is sufficient that lawyers have to go for the law to the reported cases even more than to the statutes, and though there is no gainsaying an Act of Parliament when it is to the point and clear, advice is more often given, and a case won, on the strength of an apt decision.

Rights of Way.

A Consideration of Flavell v. Lange.

By E. C. ADAMS, LL.M.

These notes have been prompted by a consideration of the recent Supreme Court case of *Flavell v. Lange*, [1937] N.Z.L.R. 444, where the relevant facts are set out and the effect of the judgment correctly summarized.

In *Garrow's Law of Real Property in New Zealand*, 3rd Ed. 309, there is a very useful chapter on Easements and Profits, but no detailed exposition of the New Zealand law of rights of way appears to have been published. The purpose of this article is to examine certain New Zealand statutes affecting rights of way, and to discuss how they may possibly affect the English authorities.

General Principles of Construction.—Many of the English cases on the construction of grants of way arise under special statutes, such as the Inclosure Acts, or statutes incorporating railway companies; and the Courts have often taken into consideration the intention of the Legislature in authorizing the creation of the rights of way; therefore it appears to the writer that such cases are not always strictly relevant in construing a New Zealand grant of a right of way. Two New Zealand cases, *Paterson and Barr, Ltd. v. University of Otago*, [1925] N.Z.L.R. 191, and *Flavell v. Lange*, (*supra*), deal with grants of rights of way over land under the Land Transfer Act, but both cases were decided by applying general principles of the English law of easements, it not being necessary to consider the effect of the Land Transfer provisions as to indefeasibility of title. In *Bevan v. Tatum*, [1927] N.Z.L.R. 909, however, the owner of the servient tenement unsuccessfully sought to avoid a right of way on the grounds that his certificate of title was indefeasible, the said right of way, through a mistake in the Land Transfer Office, not having been noted against his certificate, although it was noted against the certificate for the dominant tenement; it was proved that the servient owner knew of the existence of the right of way, and really purchased to defeat the right.

Professor Garrow said (*op. cit.*, 321):

> "In practice it is usual to define with precision the extent of the right of way as to width and location, the nature of the right of way, whether for foot-passengers only or for carriages, and the persons entitled to use it."

It is true that in the two precedents in *Goodall's Conveyancing in New Zealand*, 150, 152, the grants of the rights of way are set out with great precision, but the writer thinks that the late Professor was too kind to many New Zealand conveyancers. It is quite common for one in searching titles to encounter grants of rights of way in most general terms—*e.g.*, a right of ingress, egress, and regress, without any indication as to the nature or extent of the right, or a mere grant of a right of way (as in *Flavell v. Lange* (*supra*)), without any indication as to whether it is to include all items of Justinian's famous classification, *iter*, *actus*, *via* (footpath, bridleway, and roadway), or only one or two of them.

It is these grants in general terms which are so fruitful of litigation. They are to be interpreted in accordance with the principles laid down by Jessel, M.R., in *Cannon v. Villars*, (1878) 8 Ch.D. 415, 420, where he said:

> "As I understand, the grant of a right of way *per se* and nothing else may be a right of footway, or it may be a general right of way—that is, a right of way not only for people on foot but for people on horse-back, for carts, carriages, and other vehicles. Which it is, is a question of construction of the grant, and that construction will of course depend on the circumstances surrounding, so to speak, the execution of the instrument. Now one of those circumstances, and a very material circumstance, is the nature of the *locus in quo* over which the right of way is granted. If we find a right of way granted over a metalled road with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage not only of foot-passengers, but of horsemen and carts. Again, if we find the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used."

It may be added that if user by carriage traffic is permissible, this will ordinarily include motor traffic: *11 Halsbury's Laws of England*, 2nd Ed. 323; *Attorney-General v. Hodgson*, [1922] 2 Ch. 438.

Now the writer has often encountered, as appurtenant to Land Transfer titles, rights of way which have been shown on the plans put in on the bringing of the dominant and servient tenements under the Land Transfer Act; they are not created by express grants, but the early District Land Registrars have noted the existence of the rights of way on the certificates, apparently on the mistaken notion that the doctrine of implied grant applies to Land Transfer titles. These rights of way undoubtedly have a legal existence, which is State-guaranteed, if the dominant tenement has been dealt with in the meantime, and apparently they must be construed in accordance with the above principles enunciated in *Cannon v. Villars* (*supra*).

> "*Prima facie* the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used."

Grants of rights of way in general terms, whether under the Land Transfer Act or not, are to be interpreted similarly.

Section 179 of the Land Transfer Act, 1915, creates a statutory right of way:

> "The deposit of a plan of subdivision of any land shall not operate as a dedication for public purposes of roads shown on such plan, but a right of way over all such roads shall be appurtenant to every portion of the land in such subdivision, unless expressly excepted."

Although deposit of a plan does not *ipso facto* operate as a dedication, it is nevertheless evidence of an intention to dedicate: *Walker v. District Land Registrar*, [1923] G.L.R. 456.

The widest possible grant of a right of way is one which grants the right "in the same manner and as fully as if the same were public roads": *Nicol v. Beaumont*, (1883) 53 L.J. Ch. 853. It is submitted that, as there is the intention to dedicate, the rights of way created by s. 179 of the Land Transfer Act,

1915, are of this wide nature. In fact it has been held by the Supreme Court that this is the position even when the subdivision is of land under the "old system," and the plan has been deposited under the Deeds Registration Act: *Churton v. Walker*, (1895) 15 N.Z.L.R. 601; see, also, *Baird v. Jackson*, (1884) N.Z.L.R. 2 C.A. 271, which, however, was a case under s. 107 of the Land Transfer Act, 1870, which was worded differently from s. 179 of the Land Transfer Act, 1915, which is identical with s. 173 of the Land Transfer Act, 1885. Of course, many roads shown on plans deposited in the Land Transfer Office before the coming into operation of the Public Works Amendment Act, 1900, have now become public roads, although no instrument of dedication has ever been executed or registered. This was the case in *Walker v. District Land Registrar* (*supra*), and the remarkable feature there was that the road in question was a *cul-de-sac*, and the law will not readily presume dedication of a *cul-de-sac*. Subdivisions made since October 20, 1900, would scarcely be affected by s. 179 of the Land Transfer Act, 1915, for since that date a subdividing owner must give a road frontage to each part sold: see *Goodall's Conveyancing in New Zealand*, 105. And the District Land Registrar should not now deposit a plan of subdivision until all roads shown thereon have been duly dedicated.

The Native Land Acts (which often reverse the usual property law) give the Native Land Court wide powers of laying off road-lines and rights of way over Native land, and over European land which has ceased to be Native land since December 15, 1913, and these rights of way are not always set out with particularity. (The right of way in *Bevan v. Tatum* (*supra*) had its origin in an order of the Native Land Court.) Part XX of the Native Land Act, 1931, appears to differentiate between road-lines and rights of way. Section 487 provides that any road or road-line laid out under Part XX may by Proclamation become a public highway, but that, until so proclaimed, it shall remain Native land held in common ownership as if no order had been made, but subject to *full* rights of way thereover (if any) as shall be stated in the orders. As regards these roads and road-lines, the writer thinks that each partitionee would have a right of way thereover for all purposes, unless there were restrictive words inserted by the Court. As regards the rights of way, the position is probably different. Unless set out in detail by the Court, they would probably be construed in accordance with the principles enunciated in *Cannon v. Villars* (*supra*). The width of the way would probably be a factor to be taken into consideration. (The Court of first instance in *Newcomen v. Coulson*, (1877) 5 Ch.D. 133, took such a factor into consideration.)

It is interesting to note that in *Bevan v. Tatum* (*supra*), the owners of the servient tenement had at first actually issued a writ against the owner of the dominant tenement for an injunction restraining him from forming a road along the right of way, on the ground that he had only a right of passage, and no right to disturb the surface of the way. But this action was discontinued. It would appear, therefore, as if the owners of the servient tenement had been advised that the right of way conferred the three-fold right of *iter*, *actus*, and *via*.

(*To be concluded*).

Mr. Phineas Levi.

Eightieth Birthday.

On November 18, Mr. Phineas Levi, Treasurer of the New Zealand Law Society, attained his eightieth birthday. On that day, messages of congratulation and good wishes from members of the profession in all its branches were showered on him from all parts of New Zealand.

Mr. Levi has been admitted for sixty-four years, for fifty-two of which he has been practising in Wellington. He was born in Sydney and came to New Zealand when he was eleven years of age, and has lived in New Zealand practically ever since. Mr. Levi refers to himself as an "old Dunedinite," for he received his education in Dunedin. For nearly ten years he was in the late Sir Robert Stout's office in Dunedin. He was in practice for two years in the South Island, and then came to Wellington. He is one of the oldest legal practitioners in New Zealand. At one time he was in partnership with the late Mr. F. G. Bolton, for between twenty and twenty-five years he was a partner of Sir Thomas Wilford, and he is now senior partner in the firm of Messrs. Levi, Yaldwyn, and Neal.

Apart from his legal work, to which he attends regularly every day, Mr. Levi is well known as chairman of the Victoria University College Council, which position he has occupied for many years. He is a member of the New Zealand University Senate, and a member of the board of Massey Agricultural College, in which he is keenly interested. For two years he was Mayor of Eastbourne, and for over forty years he has been a member of the Masonic Order. Mr. Levi takes a great interest in bowls, having been a member of the Eastbourne Bowling Club since its inception. The theatre and music also claim his attention and interest. He has been able to play the piano since he was five years of age.

As his activities indicate, Mr. Levi subscribes to the poet's dictum,

Age is opportunity no less
Than youth itself, though in another dress.

As he told a recent interviewer, work is his secret of youthfulness: "Never retire. Always keep active." And, he added, "The people who think they have made enough money to retire and to enjoy themselves, never do."

Mr. Levi was the guest of honour at a function which the Wellington Hebrew community held to mark his eightieth birthday, and his fellow practitioners in Wellington are arranging a gathering to honour him during the coming week.

Three Judges in a Boat.—Lord Maugham, L.C., Lord Romer, and Judge Dumas of Westminster County Court, when undergraduates at Cambridge, all rowed in the Second Trinity Hall boat in 1887, when it won the Ladies' Plate and the Thames Cup on the same day at Henley. It may be declared with certainty of acceptance by rowing men young and old that during the races not one of them guessed, or wondered, thought or cared, whether in the future he would be Lord Chancellor, County Court Judge, or Law Lord; and that the Henley of 1887, viewed retrospectively, was at least as pleasant and joy-giving as any later day of triumph in their respective careers.

Current Legislation.

Its Influence on the Common Law.

By R. G. Palmer, LL.M.

This article is academic. It is submitted that, at the present time, the lawyer who devotes his time exclusively to the minutiae of already existing law is like a man tinkering with the engine of the proverbial ambulance at the bottom of the precipice while from over the unfenced edge above all sorts of further casualties, including inadequately insured motor-cars, rain down upon him. It is proposed therefore to consider briefly the theoretic side of current law-making.

Quite apart from politics, it is obvious that the lawyer's share of the work in any change of law by legislation must be large. The programme of improvement may well be left to political and social investigators, but it is the lawyer who best knows the materials that are to be reshaped, and it is he who must fit the new garment according to the patterns drawn by philosophy or social science. It is a matter of some wonderment how little effective notice is taken by the lawyer of prospective legislation compared with the continuous headache it often gives him after being put into operation.

Everyone now admits that the law must change and it may be interesting to look for some standard by which legislation can be judged, other than that of self or class interest. From the point of view of the law itself is a certain measure good or bad? Is it a logical and harmonious development of the existing body of law or is it incongruous and discordant? This involves a grasp of what the law stands for to-day; not what any particular Government thinks about it, but what the State, acting through the Legislature, actually does and should do for its members, taking into consideration the whole of the common law and the enacted law in relation to conditions within the territory.

The Necessity for Legislation.

Two preliminary points should be noted. First, statute law of any sort is undesirable in some instances. Sir John Salmond pointed out that such law suffers from rigidity; it speaks in words which must be strictly construed resulting perhaps in a decision quite contrary to the reason and spirit of what was intended. Only where the law is headed in the wrong direction or is moving too slowly is statutory help necessary; for instance, the Courts provided adequately that there should be no clogging of a mortgagor's equity of redemption, but they would have needed centuries to develop a theory of adjusting liabilities. Secondly, the fact that New Zealand has no written constitution limiting the powers of Parliament makes it easier, and consequently a matter of more immediate serious import, to pass unusual measures, than in, say, the United States where the Courts are likely to declare them *ultra vires*.

Fundamentally it has been the social interest in the general security of a tribe or State that has caused law to grow and flourish down the ages. In Anglo-Saxon and early Roman times the law was a substitute for revenge; it mitigated friction. Under the developed Roman Law it prevented friction and preserved the *status quo* by elaborate definition of rights and interests. Justinian's precepts were to live honourably, not to injure another, and to give everyone his due, and these were the ideals down to the Middle Ages. In 1625 Grotius wrote of the so-called natural rights of human beings and the law became individualistic. The Puritan said he made "a willing covenant of conscious faith" to abide by the law which in turn would secure his rights but would in no way coerce his individual conscience. Rudolph von Ihering in the 19th century was the first legal writer to base his conception of law not on individual rights in opposition to society, but on individual rights which society would recognize as necessary for its own development. That is where we are to-day.

Present-day Trends.

The method of present-day jurisprudence is to look upon the State as it actually exists in concrete fact, not in terms of the abstract claims of abstract human beings. Then it proceeds to catalogue individual claims, individual wants, and individual desires; but it does not assume that each of these claims is entitled to recognition. It goes on to ask what claims, what demands, are involved in the collective society by such individual demands; how far may the individual demands be put in terms of the social interests or identified with them, and if and when they are admitted to form part of such social interests, then what will give the fullest effect to such social interests? It is a continual weighing of the individual claims with reference to the general well-being.

To illustrate the method we may take the suggested reform of bringing the motor-car within the *Rylands v. Fletcher* doctrine. Thinking in terms of the old individual rights it would seem impossible to throw any responsibility for damage upon a blameless driver who runs over a careless pedestrian. But if one thinks, on the one hand, of the security of acquisitions and the individual life of the owner, with its incident of free exercise of his faculties by owning and driving a car, and, on the other hand, of the general security of life and limb, and then asks what rule will secure the most for society with the least sacrifice, the matter looks very different. It is submitted that the latter view must prevail.

Fallacies of Thought.

Professor Roscoe Pound, to whose works I am indebted for some of the arguments used herein, stated in the year 1921 in a series of lectures delivered at Harvard University the following fact regarding the jurists writing at the beginning of this century: "The older juristic theory of law as a means to individual liberty and of laws as limitations upon individual wills to secure individual liberty, divorced the jurist from the actual life of to-day." That sentence, if correct, deserves some consideration to-day. Then again the learned Professor states: "When the lawyer refuses to act intelligently, unintelligent application of the legislative steam-roller by the layman is the alternative."

It is easy for the layman to confuse social interests maintained for the benefit of individuals with abstract social interest. Much danger lies here. It is forgotten that the chief aim of law is to promote the individual well-being. Social legislation becomes an end in itself; it is assumed that only certain interests or those of certain classes are in need of help or worthy of recognition. Social thinking is not class-thinking;

if it is, then it is confused thinking. The individual with his own will and personality is still the pawn with which any game of legal reform is played.

THE VIGOUR OF THE COMMON LAW.

In any period of transition in history, there has always been a swing away from the Courts of law towards a newly revived government executive wielding arbitrary powers, such as occurred in the 16th century with the rise of the Star Chamber, the Court of Requests, and the Court of Chancery. The common law was assailed but not overcome, and survived triumphantly with the new liberal impulse embodied within itself.

In such a time a mass of legislation is apt to flood the statute-book. Again and again in history class interest or economic pressure have threatened the sound and harmonious development of the law, but the more extreme measures have been largely nullified by the insistence of the Courts that the law should be developed logically from existing analogies, and in the general realization that law should embody eternal truths rather than ephemeral theories. And it still remains true that the law is not made entirely, even in these self-conscious days, by conscious effort; a certain amount just "droppeth as the gentle rain from heaven" upon the Law Report beneath and can only be found by diligently reading between the lines of any one judgment.

So far as current legislation is concerned, it must be remembered that in order to proceed by the method outlined above all the relevant social phenomena must be studied, and must be available to all parties; no one can be dogmatic as to the validity of a social measure unless all the facts are clearly set out without bias.

It is amusing to speculate what the jurist of fifty years ahead will say of present government measures, of the doctrine of absolute liability applied to motor-cars, and of the recommendation of the Law Revision Committee to vary the rule established in the case of *Fender v. Mildmay*, to take a few examples at random. If our State is still a democracy, then it is any odds at all that his judgment will be based on some such method as the one outlined above.

Pre-Trial Courts.—"In four centres of population in the United States, Pre-Trial Courts have been established, or rather Judges have been allocated for that special work," said Mr. W. N. Ponton, K.C., Registrar of the Canadian Bar Association, in his annual report. "Judges with a metier qualifying them for that particular service have been functioning with a measure of success in settling actions or clearing the decks for actions and trial by eliminating cumbersome technicalities, by saving the expense of unnecessary witnesses, and generally by making crooked paths straight. This the lay mind calls common sense; in other words, people say of this progressive step, 'Justice shifts into high.' But we must confess we have heard it irreverently described as the tiger clearing up the jungle."

"I regard a motor car very often as evidence of poverty in these days."

—*Judge Sir T. Artemus Jones, K.C.*

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 NO. 121. Appeal from an order of an Adjustment Commission granting relief to an applicant who purchased a property, subject to the mortgages in respect of which she applies for relief, in December, 1936. The transfer was registered on January 14, 1937. The purchase was, therefore, made after the coming into operation of the Mortgagors and Lessees Rehabilitation Act, 1936.

The application for adjustment was, however, filed before January 31, 1937, so that, if the applicant is a "mortgagor" within the purview of the Act, the application was in time. The mortgagees at the hearing before the Commission questioned applicant's right to apply for relief. The Commission decided that applicant was entitled to apply, and application was then made to have the terms of a voluntary settlement approved without prejudice to the mortgagees' right to have decided by this Court the question as to whether applicant was entitled to the benefit of the Act.

Held, That there was no ground for the application, as the purchase of a property selling between October 1, 1936, and January 31, 1937, did not entitle the applicant to the benefit of the Mortgagors and Lessees Rehabilitation Act, 1936.

In the course of its judgment, the Court said:—

"The mortgagees contend that the purpose of the Act in respect of all applicants is to retain them in the use and occupation of their properties and the implication of the use of the word 'retain' is that at the time of the passing of the Act the parties were entitled to the properties they sought to retain.

"We think this contention well founded and that the Act's intent is to apply to a class ascertained at the time of its passing. A farm lease is defined by the interpretation clause of the Act as 'a lease of any land that at the passing of the Act is used by or on account of the lessee,' &c. A farm mortgage is a mortgage 'granted over any land that at the passing of the Act is used by or on account of the mortgagor . . . '

"Similarly, home leases and home mortgages relate to premises that are leased or mortgaged at the passing of the Act. Subsection (2) of s. 4 relates to cases where land used for agricultural purposes or as a dwelling before the passing of the Act has been abandoned by a mortgagor or lessee. The Act, then, applies only to farmer applicants and home applicants who can show that they are subject to the Act at the time of its passing.

"There is no express definition of 'other applicants' pointing to the passing of the Act as being the time at which they must show use of the property, and for the mortgagor it is said the absence of such provision, in view of its inclusion in the definitions of farmer and home applicants, indicates a distinction in the mind of the Legislature that entitles such other applicants to apply even if they had not the owner-

* Continued from p. 342.

ship or use of the property at the time of the passing of the Act.

"In our opinion, this argument cannot prevail against the general intention of the Act to retain and keep people in possession of properties owned at the time of the passing of the Act, and, *per se*, is not of much effect as there was no need for particular definition except in the case of farmer applicants and home applicants. Where, as in those instances, expansion was needed the purpose was made clear and the assumption is, we think, that the purpose particularly set out in those instances are only in conformity with the general purpose which is unexpressed in the general definition of applicant.

"Incontestably the purpose of the Act is for the benefit of those owners who, at the passing of the Act, needed relief.

"Other general provisions of the Act are in conformity with the view that those purchasing land and mortgaging it, or buying land subject to mortgages, after the passing of the Act, do not come within the purview of the Act.

"October 1, 1936, to January 31, 1937, is set up by the Act as a stay period during which proceedings are stayed against those entitled at the passing of the Act to make application to retain their properties. A sale by a person before application made by him, but after the passing of the Act, does not entitle the purchaser to the benefit of the Act—that is to say, a person who is entitled to relief is not entitled to sell his right. The right to relief is not pertinent to the property. It is personal to the owner.

"All property other than farm property has to be valued as at October 1, 1936—s. 38 (2); and in such cases the ability of the owner to pay must relate to the same time. The Act should not be interpreted so as to create practical difficulties to its main purpose—that is to say, the adjustment of liabilities—if an interpretation amenable to the general purpose of the Act is available. An interpretation which would allow those who purchased at any time subsequent to the Act, but prior to the end of January, 1937, to apply for relief, would render notice necessary to those who would thus become guarantors and who would accordingly escape liability as principal debtors as the notice required by the Act could not be served upon them within the prescribed period. Consequently, the interpretation asked for by the applicant would render nugatory the general provisions relating to guarantors, and such a result is against such an interpretation unless the language is imperative. In our view it is not.

"For these reasons applicant in this case had no ground for application. The order of the Commission must be set aside and the application for relief dismissed."

CASE No. 122. Motion for an order extending the time within which an appeal against an order of the Adjustment Commission may be lodged. It had been agreed that, in the event of the Court granting such extension, the motion should be treated as the appeal itself.

The order of the Commission made on November 10, 1937, and sealed on December 4, 1937, purported to affect Mortgage No. 216796, held by appellant, Mrs. McD., over lands owned by F. J. H., the wife of the applicant; such mortgage having been given to the said Mrs. McD. by the said F. J. H.

While the order of the Commission cut down this mortgage from £750 to £170 and discharged the amount by which the principal sum was reduced, neither the mortgagor, F. J. H., nor the said Mrs. McD. were parties to the application being dealt with by the Commission which was one made by P. R. H., husband of the said F. J. H., for an adjustment of his liabilities.

Held, extending the time for appealing, That, although there was no authority for describing the husband's application as in the matter of himself and his wife or for assuming that his application included his wife, with or without her consent, the wife was affected by the Commission's order and, under s. 27 of the Mortgagors and Lessees Rehabilitation Act, 1936, had the right of appeal.

The Court said, in the course of its judgment:—

"There is no question but that if the Court has power the appellant should be heard. Section 27 allows any person affected by an order to appeal, and there is no question here.

"It is true that the order of the Commission is intituled as in the matter of an application by P. R. H., farmer, of Turua, for an adjustment of the liabilities of himself and of F. J. H., his wife. But there is no authority for so describing the husband's application, or assuming that his application includes his wife, with or without her consent.

"The Commission probably had some reason, or perhaps founded their belief on some statement made in the course of argument, for coming to the conclusion that they were dealing with an application of Mrs. H. as well as the application of P. R. H. It is true that in his application for adjustment and the statement of his own liabilities the husband included the mortgage to Mrs. McD., but the husband was not the owner of any property under mortgage to her and she received no notice that any application was made for relief in respect of the mortgage given to her by Mrs. H.

"It is difficult to justify an order affecting a mortgage when there is no application by the mortgagor for relief and no notice has been given to the mortgagee that any relief is asked for in respect of her mortgage.

"The mere fact that the mortgage in question was incidentally dragged in by the husband in his enumeration of his own liabilities is not sufficient ground to enable the Commission to make an order in the absence of an application and in the absence of the parties concerned.

"For Mrs. H., who now seeks to retain the benefit of the Commission's order, it is said that early in 1938 her husband, whose application had been heard in October, 1937, met the husband of Mrs. McD. and his solicitor at Paeroa when they were attending a sitting of the Commission in connection with entirely different applications and informed them of the result of the order. No notice was taken of this information. It is unnecessary to examine the conflicting accounts of the circumstances under which this information was said to have been given.

"It is true that there have been cases in which the Court has treated informal and incomplete applications made by parties or by agents as sufficient applications and have given orders that they should be treated as such. We have, however, not gone the length of construing for a party, not himself an applicant, an application without having before us material in substance an application though not in form.

"It may be unfortunate for Mrs. H. that an application was not put in by her within the proper time. That, however, was her own fault and any hardship she may have suffered by not making an application must be borne by her.

"The Commission was not entitled without an application made by her to make an order affecting the mortgage given by her to Mrs. McD. without any notice being given to Mrs. McD. and without her having an opportunity of being heard.

"Under s. 27 any person affected by an order has the right to appeal. Mrs. McD. is a person affected by the order and has the right to appeal. This Court has the right to extend the time for making that appeal, and in this case should certainly do so as it was not until long after the order was made that Mrs. McD. had notice of the order.

"In these circumstances, therefore, the appeal is accepted and the order of the Court sealed on December 4, 1937, relating to the application of P. R. H., is amended so that all reference therein to Mortgage No. 216796 from Mrs. H. to Mrs. McD. is struck out."

A New Zealand Legal Centenary.—Last week, on November 27, a hundred years had passed since the admission of the Hon. Robert Hart, M.L.C., the founder of the present-day firm of Treadwells, Wellington. In the hall of the new premises of Messrs. Treadwells there is a photograph of Mr. Hart, and beneath it is the original certificate admitting him as a solicitor of the High Court of Chancery, England, on November 27, 1838. It is signed, "Langdale, M.R." Five years after admission, Mr. Hart came to New Zealand and began the practice which has since been continuously carried on.

Practice Precedents.

Companies: Restoration of Name of Company in Liquidation to the Register.

Where the Registrar of Companies has reasonable cause to believe that a company is not carrying on business or in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or in operation; and, if within one month he receives no answer or an answer that the company is not carrying on business or in operation, he may publish in the *New Zealand Gazette* and send to the company by post a notice that, at the expiration of three months from the date of that notice, the name of the company will be struck off the register and the company will be dissolved, unless cause is shown to the contrary: Companies Act, 1933, s. 282 (1), (2), (3). A company may be "in operation" though not "carrying on business": *Re Financial Corporation*, (1883) 27 Sol. Jo. 199 (voluntary winding-up); *Re Estates Investment Co., ibid.*, 585 (compulsory winding-up).

If in any case where a company is being wound up the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up and the returns, required by ss. 232 and 241 of the Act to be made by the liquidator, have not been made for a period of six consecutive months, the Registrar may publish in the *Gazette* and send to the company or the liquidator, (if any) a like notice: *ibid.*, s. 282 (4). At the expiration of the time mentioned in the notice the Registrar may, unless cause to the contrary is previously shown, strike the name of the company off the register, and he must publish notice thereof in the *Gazette*, and on such publication the company is dissolved.

If a company or any member or creditor feels aggrieved by the company's having been struck off the register, the Supreme Court may order that the name of the company be restored to the register: *ibid.*, s. 282 (7).

Application for restoration to the register is by petition: *Supreme Court (Companies Rules)*, 1934, R. 7 (*g*).

The Court has jurisdiction to restore to the register a company which at the time of its striking-off was in voluntary liquidation, and carrying on business only for the purposes of the winding-up: *Re Outlay Assurance Society*, (1887) 34 Ch.D. 479.

The company should be joined as a co-petitioner when the petition is brought (*a*) by shareholders so that undertakings to make the required returns may be given—*In re Walter Wright, Ltd.*, (1923) 67 Sol. Jo. 577; and (*b*) by a liquidator, when the company is in liquidation, and he is a petitioner—*In re Johannesburg Mining and General Syndicate*, [1901] W.N. 46; though he may petition in the name of the company, *ibid.* Where the company itself applies, as it may do notwithstanding its dissolution by the notice of the Registrar of Companies (*In re Conrad Hall and Co., Ltd.*, [1916] W.N. 275), an officer of the company should be joined as a co-petitioner so that there shall be someone responsible for the Registrar's costs.

The Court should be informed by affidavit if any debts of the company or any calls by shareholders remain unpaid: *In re Carpenter's Patent Davit Boat Lowering and Detaching Gear Co.*, (1888) 1 Megone 26.

Notice of the petition should be served on the Registrar of Companies: *In re Great Southern Land Syndicate Co.*, [1910] V.L.R. 150; and, where there are undistributed assets, notice of the petition must also be given to the Crown—*i.e.*, by service on the Solicitor-General—since on the dissolution the undistributed assets pass to the Crown as *bona vacantia*: *In re Home and Colonial Insurance Co., Ltd.*, (1928) 44 T.L.R. 718; and as the making the order applied for is in effect divesting the Crown of those assets: *In re Conrad Hall and Co., Ltd.* (*supra*). An affidavit should be filed proving that such notice has been given and that no objection on behalf of the Crown was taken to the making of the order prayed for: *Practice Note*, [1931] W.N. 199. The order should contain a recital to this effect in the appropriate circumstances.

The Court has no power to mark its disapproval of the company's not having made its prescribed returns (which is the basis for its being struck off the register); but it may make its order of restoration on terms of the company's making its proper returns and paying the costs of the Registrar of Companies, though this practice is not followed when the company is in liquidation; and it may also relieve the company's officials of their personal liability for the engagements made by them as the company's agents: *In re Brown Bayley's Steel Works, Ltd.*, (1905) 21 T.L.R. 375, 376. The order may also order that a contributory petitioner should have his costs as between solicitor and client out of the company's assets: *Re Healey*, (1903) S.L.T. 679; *Re Charles Dale, Ltd.*, [1927] S.C. (Ct. Sess.) 130.

The order restoring the name of the company to the register should direct the Registrar of Companies to advertise it in his official name in the *Gazette*: *In re Johannesburg Mining and General Syndicate* (*supra*).

In an application under the corresponding section of the Companies (Consolidation) Act, 1908 (8 Edw. VII, c. 69), the Court adjourned the petitioning company to file such statutory returns as were required by the Registrar to bring the company's file up to date; and, on this being done, made an order restoring the name of the company to the register, and directed the Registrar to advertise in his official name in the *Gazette* this order, for the purpose of placing the petitioners as nearly as might be in the same position as if the name of the company had never been removed from the register: *In re Charles Dale, Ltd.* (*supra*).

The Registrar of Companies may consent to the granting of the prayer of the petition; and such consent, when obtained, should be filed as in the subjoined precedent. In any event, an office copy of the order must be delivered to the Registrar.

The following precedent does not contain an affidavit as to notice to the Crown and of no objection being made on behalf of the Crown; and this is consequently not recited, as it should be, in a proper case, in the order.

PETITION.

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

IN THE MATTER of the Companies Act 1933

AND

IN THE MATTER of the A. B. &c. Co. Ltd. (in liquidation).

To the Right Honourable Sir Chief Justice of New Zealand.

day the day of 19 .

THE HUMBLE PETITION OF C. D. of , company director showeth as follows:—

1. Your petitioner is a creditor of the above-named company which company was registered as a public company under

the Companies Act 1908 at on the day of 19 under the name of the A. B. Company Limited.

2. That the registered office of the company since its incorporation has been at number : Street in the City of .

3. The nominal capital of the said company is £ divided into shares of £ each all of which shares are fully paid up.

4. That on the day of 19 the said company passed a resolution that the company be wound up voluntarily which resolution was duly confirmed on the day of 19 .

5. That by the said resolution on the day of 19 G. H. of the City of accountant was appointed liquidator of the said company.

6. That on the day of 19 a notice was posted by the Registrar of Companies at to the said G. H. as liquidator of the said company calling upon the said G. H. to make returns to the said Registrar in accordance with the provisions of the Companies Act 1933.

7. That the said G. H. neglected to make such returns.

8. That on the day of 19 the Registrar of Companies forwarded to the said G. H. a notice notifying him that on the expiration of three months from the date of such notice the name of the said company would be struck off the Register of Companies unless cause were shown to the contrary.

9. That a copy of such notice was published in the *New Zealand Gazette* on the day of 19 .

10. That the said G. H. failed to take any action in respect of such notice and the said company was struck off the Register of Companies on the day of 19 , and due notice of such striking off was published in the *New Zealand Gazette* on the day of 19 .

11. That at the date the said company was struck off the register the liquidation of the company had been partly carried out but was not complete.

12. That the said company owns numerous assets which have not been realized or got in.

13. That the said G. H. died at on the day of 19 .

14. That unless the name of the said company is restored to the Register of Companies hardship will accrue to your petitioner and to the shareholders of the said company.

15. That your petitioner is able and willing forthwith to pay the annual license fees owing by the company and has already deposited the necessary moneys with his solicitors.

16. That I. J. of the City of public accountant is willing to act as liquidator of the company after having inspected and invested the books and accounts of the said company.

WHEREFORE YOUR PETITIONER HUMBLY PRAYS that this Honourable Court will order :—

1. That the name of the A. B. Company Limited be restored to the Register of Companies at .

2. That I. J. of the City of public accountant be appointed liquidator of the said company.

3. That the costs of and incidental to this application be paid out of the assets of the said company.

4. That your petitioner be granted such further or other relief as to this Honourable Court may seem just.

AND YOUR PETITIONER WILL EVER PRAY ETC.

Petitioner.

Witness :

VERIFYING AFFIDAVIT.

I C. D. of the City of company director the above-named petitioner make oath and say that so much of the foregoing petition as relates to my own acts and deeds is true and so much as relates to the acts and deeds of any other person I believe to be true.

Sworn &c.

AFFIDAVIT IN SUPPORT OF PETITION.

(*Same heading.*)

I I. J. of the City of public accountant make oath and say as follows :—

1. That I am a public accountant practising on my own account in the City of .

2. That on the day of 19 I inspected the books accounts and records of the A. B. Company Limited (in Liquidation) and of its liquidator G. H. late of the City of public accountant now deceased.

3. That as a result of such search I ascertained—

(*a*) That the said company was registered as a public company under the Companies Act 1933 at the City of on the day of 19 and that since the date of incorporation its registered office has been at number in the City of .

(*b*) That the nominal capital of the said company was divided into shares of £ each and that all the shares were issued and are fully paid.

(*c*) That C. D. of Wellington company director is a contributory of the said company.

(*d*) That on the day of 19 the said company passed a resolution that the company be wound up voluntarily and that on the day of 19 such resolution was duly confirmed and the said G. H. appointed sole liquidator of the said company.

(*e*) That there is no record of the said G. H. having reported to the contributories of the said company that the said company had been struck off the Register of Companies.

4. That the said G. H. died at on the day of 19 as appears to me from having searched probate granted on the day of 19 in the estate of the said G. H. in the Registry of the Supreme Court of New Zealand at .

5. That no liquidator of the said company has been appointed in place of the said G. H.

6. That the liquidation of the said company was partly carried out by the said G. H. but has not yet been completed.

7. That the company owns numerous assets which have not been realized or got in and consist of lands moneys and interest outstanding on mortgage cash in bank the total value of which assets is approximately £ .

8. That the debts of the said company amount to the sum of £ or thereabouts.

9. That numerous transfers of shares have taken place since the incorporation of the company but the share register of the company has not been kept up to date so that the particulars of the shares as entered in the register cannot be relied upon.

10. That I am willing to accept appointment as liquidator of the said company at a remuneration to be fixed by this Honourable Court.

Sworn &c.

MOTION IN SUPPORT OF PETITION TO RESTORE NAME OF COMPANY.

(*Same heading.*)

Mr. of Counsel for the petitioner C. D. of the City of company director TO MOVE in Chambers before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Court House at on day the day of 19 FOR AN ORDER in terms of the prayer of the petition filed herein.

1. That the name of the A. B. Company Limited be restored to the Register of Companies at .

2. That I. J. of the City of public accountant be appointed liquidator of the said company.

3. That the costs of and incidental to this application be paid out of the assets of the said company in .

AND FOR SUCH FURTHER ORDER as to this Honourable Court shall seem just UPON THE GROUNDS set forth in the said petition and in the affidavits of I. J. and K. L. filed herein.

Dated at this day of 19 .

Certified pursuant to the Rules of Court to be correct.

Counsel for petitioner.

MEMORANDUM FOR HIS HONOUR.—His Honour is respectfully referred to s. 282 of the Companies Act, 1933, and the Supreme Court (Companies) Rules, 1934, R. 7 (g); and, for the practice generally, to *In re Conrad Hall and Co., Ltd.*, [1916] W.N. 275; and *In re Johannesburg Mining and General Syndicate*, [1901] W.N. 46 [and *such other cases above mentioned as may be applicable to the special circumstances of the petition*].

AFFIDAVIT AS TO NOTICES AND SEARCH.

(*Same heading.*]

I K. L. of the City of solicitor make oath and say as follows:—

1. That I am a solicitor in the employ of Messrs. solicitors for the petitioner herein and as such have knowledge of the said petition and the matters relating thereto.

2. That on the day of 19 I made a search of the records relating to the above-named company (in liquidation) at the office of the Registrar of Companies at .

3. That I ascertained as a result of such search—

(*a*) That on the day of 19 a notice was posted by the Registrar of Companies addressed to G. H. of public accountant as liquidator of the said company requiring the said G. H. to make returns to the said Registrar in accordance with the Companies Act 1933.

(*b*) That the said G. H. failed to make such reports to the said Registrar.

(*c*) That on the day of 19 a notice was posted by the Registrar of Companies addressed to the said G. H. notifying him that on the expiration of three months from the date of such notice the name of the said company would be struck off the register of companies unless cause were shown to the contrary.

(*d*) That a copy of such notice was published in the *New Zealand Gazette* on the day of 19 .

(*e*) That no reply to such notice was made by the said G. H. to the Registrar of Companies and the name of the said company was struck off the Register of Companies on the day of 19 and notice of such striking off was published in the *New Zealand Gazette* on the day of 19 .

Sworn &c.

CONSENT OF REGISTRAR OF COMPANIES TO ORDER.

(*Same heading.*)

I HEREBY CONSENT to an order that the name of the above-named the A. B. Company Limited be restored to the Register of Companies in terms of the petition of C. D. filed herein.

Dated at this day of 19 .

Registrar of Companies.

ORDER RESTORING NAME.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the Petition of C. D. filed herein and the affidavit of I. J. and K. L. filed in support thereof and UPON READING the consent of the Registrar of Companies filed herein AND UPON THE APPLICATION of Mr. of Counsel for the said C. D. IT IS ORDERED that the name of the A. B. Company Limited be restored to the Register of Companies at by the Registrar of Companies AND IT IS ORDERED that I. J. of the City of public accountant be and he is hereby appointed liquidator of the said company and that the question of remuneration to the said I. J. be reserved AND IT IS FURTHER ORDERED that the costs of and incidental to this petition be taxed by the Registrar of this Court as between solicitor and client and paid out of the assets of the said company AND IT IS ALSO ORDERED that the Registrar of Companies do and he is hereby directed to advertise in his official name in the *New Zealand Gazette* this order for the purpose of placing the said company in the same position as nearly as may be as if the name of the said company had never been struck off the register.

By the Court.

Registrar.

Recent English Cases

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

BANKRUPTCY.

Petition—Service—Service Out of the Jurisdiction—Necessity that Nature of Document Served be Brought to Notice of Debtor—Bankruptcy Act, 1914 (c. 59), s. 5 (1)—Bankruptcy Rules, 1915, rr. 155, 156, 158.

In the service of a bankruptcy petition the nature of the documents served must be expressly brought to the notice of the person served.

Re A DEBTOR, *Ex parte* THE PETITIONING CREDITOR *v.* THE DEBTOR, **[1938] 4 All E.R. 92. C.A.**

As to service of bankruptcy petition: see HALSBURY, Hailsham edn., vol. 2, pp. 72, 73, par. 87; and for cases: see DIGEST, vol. 4, pp. 136–138, Nos. 1259–1275.

HIGHWAYS.

Fences and Boundaries—Presumption of Dedication—Rebuttable—Public User.

The presumption that fences are to be taken as having been originally put up for the purpose of separating land dedicated to the public as highway from land not so dedicated cannot be raised unless the circumstances make it reasonable to do so.

HINDS AND DIPLOCK *v.* BRECONSHIRE COUNTY COUNCIL, **[1938] 4 All E.R. 24. K.B.D.**

As to width of highway: see HALSBURY, Hailsham edn., vol. 16, pp. 258–262, pars. 313–319; and for cases: see DIGEST, vol. 26, pp. 312–316, Nos. 442–480.

NEGLIGENCE.

Action for Damages for Personal Injuries—Motor Cyclists—Agreement by Leading One to Act as Pilot to Second Motor Cyclist Carrying Pillion-Rider—Accident Due to Pilot Accidentally Leaving Road—Whether Injured Pillion-Rider can Recover.

If a motor cyclist offers to lead the way for another motor cyclist, and injury results through his negligence in so doing to a pillion-rider of the second motor cyclist, the pillion-rider can recover damages from the first.

SHARP *v.* AVERY AND KERWOOD, **[1938] 4 All E.R. 85. C.A.**

As to the application of the principles in *Donoghue v. Stevenson*: see HALSBURY, Hailsham edn., vol. 23, pp. 632–634, par. 887; and for cases: see DIGEST, Supp., Negligence, Nos. 364*a*–364*f*.

Rules and Regulations.

Education Act, 1914. Teachers' Leave of Absence Regulations, 1924, Amendment No. 6. November 30, 1938. No. 1938/151.

Education Act, 1914. Primary Teachers' Grading Regulations, 1926, Amendment No. 3. November 30, 1938. No. 1938/152.

Education Act, 1914. Examination and Classification of Teachers' Regulations, 1931, Amendment No. 3. November 30, 1938. No. 1938/153.

Education Act, 1914. Training College Regulations, 1926, Amendment No. 19. November 30, 1938. No. 1938/154.

Education Act, 1914. Education Boards' Grants Regulations, 1938. November 30, 1938. No. 1938/155.

Land Act, 1924. Taupo Landing Reserve Regulations, 1938. November 30, 1938. No. 1938/156.

Industrial Efficiency Act, 1936. Industry Licensing (Storage-battery Manufacture) Amendment Notice, 1938. November 22, 1938. No. 1938/157.

Rabbit Nuisance Act, 1928. Rabbit Destruction (Tuhikaramea Rabbit District) Regulations, 1938. November 30, 1938. No. 1938/158.

Primary Products Marketing Act, 1936. Butter Internal Prices Revocation Order, 1938. November 30, 1938. No. 1938/159.