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Incorporating "Butterworth's Fortnightly Notes."

"*There have been two occasions in English history when attempts were made to get rid of the lawyers. The first of these attempts was made by what was known as the 'Mad Parliament,' and it resulted immediately in civil war; and the second was made by the 'Unlearned Parliament,' which has been described in a well-known work as 'an assembly which soon grew irksome to itself and ridiculous to the world'.*"

—THE RT. HON. VISCOUNT HAILSHAM.

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The Work of the Law Revision Committee in 1938.

EVERY ONE in the profession is interested in the work of the New Zealand Law Revision Committee, which has now been in existence for the greater part of two years. The ending of the present legal year affords a convenient opportunity for recalling the nature and extent of the Committee's work during the last twelve months, during which four fully-attended meetings have been held and a large amount of useful work has been done.

The Committee has given a lot of attention to the institution of legal aid to poor persons in civil proceedings. A Sub-committee, consisting of Messrs. F. C. Spratt, W. P. Rollings, and the Secretary of the New Zealand Law Society, provided the Committee, at its request, with a very comprehensive report on the systems operating elsewhere, and recommended that the English system of voluntary aid be adopted here. The report was adopted, with the extension of the proposals to the inferior Courts, including Warden's Courts, and to non-indictable offences when an application for legal aid is made through a Magistrate or a Warden. Before the year ended, the Committee had approved a draft statute to empower the Governor-General in Council to make rules, and the detailed draft rules which the Sub-committee had prepared. These draft rules will be submitted to the New Zealand Law Society for consideration, and, on their adoption by that body, the new system will be put into operation.

In England, where the system proposed to be adopted here has been in operation since 1925, and, as amended, since 1928, the work of inquiring into and reporting on the cases of persons applying for legal aid has been undertaken by the Law Societies through which the system of poor person's legal aid is administered. In New Zealand, as is shown in the recent judgment of His Honour Mr. Justice Blair, *Carr v. Scott (No. 2)*, [1938] N.Z.L.R. 1058, the only statutory reference to poor persons in civil proceedings is the remission of Court fees (but not jury fees), and the admission of a poor person to appeal *in forma pauperis* in the Court of Appeal. While every one in the profession knows that no deserving poor person has ever had to go without legal assistance, it is advisable that the whole position should be put on a regular basis. In the past, the benevolent professional activities of practitioners, while extensive and praiseworthy, have not received the appreciation from the general public which they merited. By adopting a system which has proved of great advantage in England, the Law Revision Committee has had at heart the interests of all parties concerned. We trust that the system will be in full working order early in the New Year.

A very useful work was undertaken by the Committee in its obtaining a report on the Imperial statutes now in force in New Zealand. This was ably supplied by a member of the Committee, Mr. A. C. Stephens, and this JOURNAL was requested by the Committee to publish it for the assistance of practitioners generally. We had pleasure in doing this, *ante*, p. 205; and we heard many expressions of appreciation of the helpful and comprehensive work done by Mr. Stephens.

The drastic limitation put on claims for compensation by s. 45 of the Public Works Act, 1908, is familiar to all practitioners, and has been the subject of adverse judicial comment for many years—for example, by Mr. Justice Edwards in *Palmerston North Borough v. Fitt*, (1901) 20 N.Z.L.R. 396, 405; by Sir Robert Stout, C.J., in *Farrelly v. Pahiatua County Council*, (1901) 22 N.Z.L.R. 683, 684; and again by Mr. Justice Edwards in *Lyttle v. Hastings Borough*, [1917] N.Z.L.R. 910, 918. After considering reports on the subject, the Committee decided to ask the Law Draftsman to prepare a draft amendment of the section to give the Court power to extend the present period of limitation in proper cases. Section 84 of the same statute provides that, if the compensation awarded does not exceed one-half of the amount claimed, the claimant is disentitled to recover any costs. In the interests of justice to claimants, the Committee adopted the English rule, with the modification that, in the event of the claim being excessive having regard to the amount actually recovered, the Court may disallow the claimant all or any part of the costs.

In *Sutherland v. Towle*, [1937] G.L.R. 509, 511, His Honour Mr. Justice Ostler referred to the inequitable principle, that when work has been done on the understanding that it is to be remunerated by a legacy, a claim is not maintainable against the estate of the person for whom the services were rendered, if no testamentary provision were made in fulfilment of the contract or promise. After considering a valuable report by Mr. E. P. Hay, the Committee recommended a statutory provision to provide that a Judge may approve the payment out of the estate of a deceased person for services rendered upon an express or implied undertaking in a form not enforceable at law by reason of uncertainty or otherwise, such as a promise to recompense by a testamentary provision, thus meeting the objections to which His Honour had referred.

Amendments to the Destitute Persons Act, 1910, suggested by members of the profession were considered and adopted; while some other proposals for amendments were not recommended, after reports had been received and discussed.

The Committee devoted considerable attention to amendments in the law of property suggested by members of the profession. A step in the right direction was the appointment of a Sub-committee, consisting

of Messrs. K. M. Gresson and S. I. Goodall, to confer and report on the bringing of the Trustee Act into line with the present statute-law in Great Britain. Mr. Goodall and the Law Draftsman have in hand the preparation of a new Landlord and Tenant Bill, in which the scattered provisions of that branch of law will be collected, and, with the addition of useful provisions in the English statute, incorporated. A report is being prepared on the enactment of one Real Property statute, to include both the present Property Law Act and the Land Transfer Act, except where they overlap, and to add the amendments to those statutes recommended by the Committee.

Some useful amendments of the Magistrates' Courts Act, 1928, removing the necessity for the depositing of the amount of a judgment before an appeal could be commenced, were included in the Statutes Amendment Act, 1938, as recommended by the Committee. The revision of the Magistrates' Courts Act as a whole is now being made, with the general intention of providing a code of rules to cover all procedural matters, and of leaving such matters as personnel and jurisdiction to the statute itself.

The Arbitration Amendment Act, 1938, is the fruit of the Committee's recommendation, after considering a report by leading counsel; and the new statute brings the New Zealand law into line with the corresponding English legislation.

The varied nature of the Committee's work is shown by the fact that, in addition to the statutes already mentioned, consideration was given to proposed amendments to sections in the Shorthand Reporters Act, 1908, the Mining Act, 1926, the Local Elections and Polls Act, 1925, the Divorce and Matrimonial Causes Act, 1928, Legitimation Act, 1908, the Wages Protection and Contractors' Liens Act, 1908 (which is to be recast), the Justices of the Peace Act, 1908 (in course of revision generally), the Deaths by Accidents Compensation Act, 1908, the Administration Act, 1908, the Chattels Transfer Act, 1924, the Family Protection Act, 1908, the Land Act, 1924, the Mutual Fire Insurance Amendment Act, 1934, the Crown Suits Amendment Act, 1910, and the Impounding Act, 1908. To give further variety, it should be mentioned that, among other matters considered, were blood-tests in affiliation cases, the giving to notarial acts of British Consular Officers and New Zealand Government Trade Commissioners the same effect in Courts as is accorded to acts of a notary public, and a general consideration of the present law affecting juries.

It would be tedious, as it is unnecessary, to recapitulate here the many encomiums that have been showered on the work of the Law Revision Committee during the past year. Members of the profession in all its branches realize that it is a good thing, and that it has become a permanent institution in aiding the proper administration of justice in the Dominion. But there is another aspect of its activities which has not been overlooked, and which should not be overlooked in estimating the Committee's usefulness: that is the invaluable assistance given to it by the members of the profession who have been co-opted from time to time to give, out of the fund of their specialized knowledge of the subjects dealt with, reports on proposals made to the Committee. When the chairman of the Committee, the Hon. H. G. R. Mason, was speaking at the Bar Dinner at the Legal Conference at Christchurch last Easter, he said, in reply to congratulations given to himself on the institution of the Committee and on its work, that the speaker had failed to emphasize the point that the question of legal reform had been less a matter of his effort than it had been of the very willing and courteous co-operation of the profession. He added:

> "It has been a most striking thing to find the willingness with which men of the highest eminence, leading the busiest lives, have responded to every request to engage in laborious research for the Law Revision Committee, and my thanks, and the thanks of the Committee, and the thanks of all of us, are due to those members of the profession who have devoted themselves so willingly to that work."

With another year of the Committee's work completed, we feel sure that the learned Attorney-General has even more heartfelt reason to be grateful not only to the members of the Committee who are engaged in active practice, and whose attendance at meetings, at what must be great inconvenience to themselves, has never once failed, but also to all those practitioners who, during the year now closing, have so ably and so willingly co-operated in the Committee's work.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1938.
August 4, 5, 6, 7; September 12.
Myers, C.J.
Blair, J.
Fair, J.

In re **TAARE WAITARA (DECEASED), BEERE AND ANOTHER v. BATES AND OTHERS.**

Will—Construction—Natives and Native Land—Will in English Language—Testator an Illegitimate Half-caste Maori—"Next-of-kin"—Whether meaning "Successors according to Native custom"—Native Land Act, 1931, s. 174 (2).

Testator was an illegitimate half-caste Maori who knew of his illegitimacy, who had no issue living either at the time he made his will or at the time of his death. His union with the Maori woman with whom he had been living up to his death was merely a Maori customary marriage. His will was in the following terms:—

> "I Taare Waitara of Parihaka half-caste make this my last will.
>
> "I give all my property except my land at Picton to my trustees to hold in trust with power to invest moneys and lease lands but not to sell lands.
>
> "I direct my trustees to pay one-eighth (1/8) share of the yearly income of my estate to my half-brother Rawiri Matangi (Henry David Bates) Assistant Officer in Charge Telegraph Department Wanganui to use in his own absolute discretion I knowing that he will see to the care and maintenance of my dear wife and I direct my trustees to divide the rest of the yearly income of my estate equally between the said Henry David Bates and my half-brother Wiremu Matangi's children namely Rangi Kawinini Matangi, Tauaki Matangi, Tioro Matangi, Tahua Matangi, and Rangiwhetawheta Matangi and my half-brother's grandchild Teoti Te Koea or such of them as shall for the time being be living during their lives Provided always that if any of them die leaving issue such issue shall take (and if more than one in equal shares) the share of their parent in the income of my estate and after the death of my half-brother Henry David Bates and the children of my half-brother Wiremu Matangi I direct my trustees to hold my estate in trust for my next-of-kin absolutely.
>
> "I appoint Henry David Bates and Oswald Beere of Wellington executors and trustees of this my will."

In an action for interpretation of the will, removed into the Court of Appeal for hearing and determination,

Olphert, for the plaintiffs; **Barton,** and **C. N. Armstrong,** for the first and second defendants; **Spratt** and **Prichard,** for the third and fifth defendants; **Moss,** for the fourth defendant; **L. K. Wilson,** for the sixth defendant.

Held, That, in view of all the circumstances and of s. 174 (2) of the Native Land Act, 1931—which abrogated the decision in **Love v. Ihaka Te Rou,** (1890) 8 N.Z.L.R. 198—the term "next-of-kin" as used in the will should be construed as "successors according to Native custom."

Love v. Ihaka Te Rou, (1890) 8 N.Z.L.R. 198, distinguished.

Solicitors: O. and R. Beere and Co., Wellington, for the plaintiffs; **Armstrong, Barton, and Armstrong,** Wanganui, for the first and second defendants; **Ivor Prichard,** Waitara, for the third, fourth, fifth, and sixth defendants.

COURT OF APPEAL.
Wellington.
1938.
October 7, 22.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

In re **CLAY.**

Law Practitioners—Barrister—Admission—Applicant employed in a Department of State—"Legal work of such a character as in the opinion of the Court qualifies him to be admitted as a barrister"—Law Practitioners Act, 1931, s. 4 (2) (*e*)—Law Practitioners Amendment Act, 1935, s. 45.

It is impossible to lay down any rigid standard which an applicant must satisfy in order to be admitted as a barrister in pursuance of s. 45 of the Law Practitioners Act, 1931.

The Court, in each case, must consider the actual nature, extent, and quality of the work done by the applicant, and decide whether it is sufficient in its nature, importance, and extent, to qualify him for admission as a barrister.

So held by the Court of Appeal, dismissing an application for admission as a barrister by a solicitor who had been employed in a Department of State for at least five years continuously preceding the date of his application.

Council: Cunningham, for the appellant; **O'Leary,** K.C., and **Thompson,** for Hamilton District Law Society.

Solicitors: Gilchrist, Son, and Burns, Te Aroha, for the applicant.

SUPREME COURT.
New Plymouth.
1938.
August 16;
November 10.
Blair, J.

CARR v. SCOTT (No. 2).

Practice—Costs—Plaintiff's Successful Appeal *in forma pauperis* **—New Trial—Remission of Jury Fees—Plaintiff's Costs in Successful Re-trial—Juries Act, 1908, s. 159—Code of Civil Procedure, R. 582—Court of Appeal Rules, R. 43.**

There is a duty on Registrars to require payment of the appropriate jury fees, whether or not the plaintiff is a pauper or whether or not there has been a remission of Court fees under R. 582 of the Code of Civil Procedure.

Nothing in the Court of Appeal Rules prohibits solicitor or counsel charging a person for services rendered subsequent to the conclusion of the Court of Appeal proceedings to which such person was admitted to appeal *in forma pauperis.*

Costs may, therefore, be allowed the successful plaintiff in a new trial (ordered by the Court of Appeal as the result of an appeal *in forma pauperis*), but only as from the point of setting down for the rehearing, thus excluding any scale of costs of issue and service of the writ and statement of claim, and any right to costs of and incidental to the first trial and those phases of the case considered and dealt with by the Court of Appeal.

Carson v. Pickersgill and Sons, (1885) 14 Q.B.D. 859; **Johnson v. Lindsay and Co.,** [1892] A.C. 110; and **Boddie v. Armstrong and Springhall, Ltd. and Sievwright,** [1934] N.Z.L.R. 917, G.L.R. 721, referred to.

Brown v. Bailey, (1896) 15 N.Z.L.R. 39, distinguished.

Counsel: C. H. Croker, for the plaintiff; **Sheat,** for the defendant.

Solicitors: Croker and McCormick, New Plymouth, for the plaintiff; **Wilson and Sheat,** New Plymouth, for the defendant.

SUPREME COURT.
Auckland.
1938.
November 2.
Fair, J.

THE KING v. HONGE HAPE.

Criminal Law—Conversion—"In the ordinary course of business"—Grantor an Assisted Maori Farmer—Whether "Ordinary course of business" limited to the Special Class of Dairy-farming in which the Grantor engaged—Chattels Transfer Act, 1924, Fourth Schedule, cl. 9—Native Land Amendment Act, 1936, s. 48 (2).

Where a chattel security given by a Maori dairy-farmer who had obtained an advance under the Native Land Amendment Act, 1936, contained a provision that the grantor would not sell the stock subject thereto, the phrase "except in the ordinary course of business" in cl. 9 of the Fourth Schedule to the Chattels Transfer Act, 1924, which was incorporated in the said security, means "in the ordinary course of the business of a dairy-farmer," and cannot be construed as referring to the ordinary course of business of that special class of assisted Maori dairy-farmer in which the grantor was to be found.

Drew and Crewes Proprietary, Ltd. v. Bennett and Fisher, Ltd., [1923] S.A.S.R. 292, distinguished.

Counsel: V. R. Meredith, for the Crown; **Towle,** for the accused.

Solicitors: Crown Solicitor, Auckland, for the Crown; **Towle and Cooper,** Auckland, for the accused.

SUPREME COURT.
Auckland.
1938.
November 9, 17.
Callan, J.

PEARSE
v.
THAMES VALLEY ELECTRIC-POWER BOARD.

Industrial Conciliation and Arbitration—Award—Forty-hour Week—Award providing for Forty-six-hour Week—Ordinary Normal Working-week Forty-hours—General Order reducing Hours to Forty per Week—Worker's Hourly Wages not Reduced or Increased—Industrial Conciliation and Arbitration Amendment Act, 1936, s. 21 (3).

The purpose of s. 21 (3) of the Industrial Conciliation and Arbitration Amendment Act, 1936, is that workers who have enjoyed the actual benefits of an ordinary rate of weekly wages should not have their weekly wages reduced by reason of the forty-hour week.

An award provided a forty-six-hour week, and a worker thereunder was entitled to an hourly rate of wages. For some years the duration of the ordinary normal week worked was forty hours, and the worker had been paid the hourly rate prescribed by the award. The General Order of the Court of Arbitration of September 7, 1936, which reduced to forty hours the working-week so prescribed, did not reduce the worker's normal weekly working-hours or his consequent normal weekly earnings.

Tuck, for the appellant; **Alderton,** for the respondent.

Held, That the worker was not entitled to have his ordinary rate of wages determined by a computation of forty-six times the hourly wage, as there had been no reduction in the number of his actual working-hours.

Solicitors: Tuck and Bond, Auckland, for the appellant **Lisle Alderton and Kingston,** Auckland, for the respondent.

Christmas Message from The Attorney-General.

THE JOURNAL is privileged to convey to practitioners the following message from the Attorney-General, Hon. H. G. R. Mason:—

The approach of the Christmas season brings to all lawyers thoughts of the completion of a year's strenuous work, of the effort required to complete it, and of the vacation which their labours will have earned. I wish to make reference not so much to the ordinary routine work of normal years, but to the special work which the profession has latterly been performing in the public interest.

First, in view of the completion of the work of the Commissions under the Mortgagors and Lessees Rehabilitation Act, I would tender my thanks to those members of the profession who have served in a judicial capacity upon the Commissions. To these, almost without exception, it has meant a considerable sacrifice to interrupt the work of their ordinary practice for the modest remuneration receivable as members of Commissions. This sacrifice, so readily made as a contribution to the general welfare, has been of major importance in enabling the country to bring to an end a most difficult aspect of the economic depression.

I would next refer to the further work the profession has been performing in the public interest in the field of law reform. This work has not been confined to those who are members of the special Committee set up, or even to those who have made available their specialized knowledge in writing reports on specific issues, but has been helped by large numbers of practitioners who have submitted suggestions.

The past year has been noteworthy in that it has seen the completion of the first—namely, Blenheim—of a series of Supreme Courts that it is hoped to reconstruct according to modern standards. It is hoped that as each year goes by another will be added to this list until none is left for which apology need be made. In journeying to different parts of the country on the occasion of the commencement or conclusion of these projects, Mrs. Mason and I have received much kindness and hospitality from practitioners, which we gratefully acknowledge.

Christmas is a season into the spirit of which lawyers enter with special enthusiasm. I know the spirit of goodwill which prevails in law offices at that time, largely founded, no doubt, upon a satisfaction at the thorough accomplishment of a year's work. It is a happy circumstance for me to be a member of that profession and to wish all my fellow-practitioners a merry Christmas and a happy and prosperous New Year.

H. G. R. Mason

Attorney-General.

Rights of Way.

A Consideration of Flavell v. Lange.

By E. C. ADAMS, LL.M.

(*Concluded from p. 350.*)

Alteration of and Subdivision of Severance of the Dominant Tenement.—As a general rule the burden on the servient tenement must not be unduly increased by the action of the owner of the dominant tenement. Now to the writer of this article the most important part of the judgment of Callan, J., in *Flavell v. Lange*, [1937] N.Z.L.R. 444, is the following passage, at p. 449:—

> "I have come to the conclusion that the plaintiff is entitled to a declaration of right in this form. The question for consideration was whether the words 'or other occupation' should be included. *Allan v. Gomme* ((1840) 11 Ad. & E. 759; 113 E.R. 602), which was decided in 1840, appears to have been sometimes understood as deciding that the right to use a way created by express grant is confined to the use of it to the dominant tenement *in the condition in which such tenement was at the date of the grant*. But it is now clear that this is not the law. The topic is discussed in *Gale on Easements*, 11th Ed. 343 *et seq.*, where cases later than *Allan v. Gomme* are mentioned. I refer in particular to *South Metropolitan Cemetery Co. v. Eden* ((1885) 16 C.B. 42, 57; 130 E.R. 670), and to the judgment of the Court of Appeal in *Newcomen v. Coulson* ((1877) 5 Ch.D. 133). These cases justify the conclusion that as the words of this grant made the way appurtenant to the *land* in the dominant tenements *and every part thereof*, the way may be used for the purposes for which such land is from time to time used, though such purposes may differ from the purposes for which the dominant tenements were used at the date of the grant. There will, therefore, be a declaration in the form asked for in the statement of claim."

Allan v. Gomme (*supra*) is a very awkward decision; it has frequently been criticized, distinguished, and the reasons therefor dissented from, but it has never been actually overruled. The owner of the dominant tenement had a right of way to his stable and loft and to a "space or opening under the said loft, and then used as a wood-house." It was held that the right of way was extinguished when the loft and space under it was converted into a cottage. It appears to be the better opinion that the decision in *Allan v. Gomme* (*supra*) can be justified by the special terms of the particular grant, but that it has no application to the construction of a grant in general terms, as, for example, the one in *Flavell v. Lange* (*supra*): see *Stroud's Law of Easements*, 172. (*Stroud's* is one of the latest English text-books on Easements, having been first published as late as 1934.) In *Allan v. Gomme* (*supra*) there were restrictive words in the grant itself. It was a decision on the construction of a particular deed: (*White v. Grand Hotel, Eastbourne Ltd.*, [1913] 1 Ch. 113, 117.) As Jarvis, C.J., said in *South Metropolitan Cemetery Co. v. Eden*, (1855) 16 C.B. 42, 57; 139 E.R. 670, 676:

> "If I grant a man a way to a cottage, which consists of one room, I know the extent of the liberty I grant; and my grant would not justify the grantee in claiming to use the way to gain access to a town he might build at the extremity of it."

In *South Metropolitan Cemetery Co. v. Eden* (*supra*) the right of way was made appurtenant to the dominant tenement and *every part thereof*, and therefore this old English authority was strictly relevant to

the construction of the grant in the very recent case of *Flavell v. Lange* (*supra*). It is not every grant of right of way that is expressly made appurtenant to every part of the dominant tenement. *Newcomen v. Coulson* (*supra*) was a right of way authorized by an Inclosure Act. It was in favour of the owner *and owners for the time being* of each dominant tenement. The area of the dominant tenement was 7 acres and 4 perches, and at the time of the grant it appears to have been used for agricultural purposes. The owner of the dominant tenement proposed to erect twenty-seven cottages thereon. It was held that the owner of each cottage would have the use of the right of way, the servient owner unsuccessfully submitting that the right of way was for agricultural purposes only. The employment of the plural, *owners for the time being*, made applicable, in the opinion of Sir George Jessel, the old case *Harris v. Drewe*, (1831) 2 B. & Ad. 164, 109 E.R. 1104, where it was held that the right to enjoy a pew appurtenant to the original messuage was not lost on subdivision, the owner of each subdivision having the right to share the pew with the owners of the other subdivisions. It is therefore submitted that the principle of *Newcomen v. Coulson* (*supra*) is not of universal application.

In a recent English case (*Hurt v. Bowmer*, (1937) 53 T.L.R. 325), the grant dated 1930 was as follows: "A right of way as at present *enjoyed* over adjoining property of the vendor as a means of access" to the field in question. At the date of the grant the field was used mainly for agricultural purposes, but certain recognized camping parties had used it for camping between the years 1921 and 1930. During the years 1934 and 1935 the owner of the dominant tenement had permitted a greatly increased number of campers to use it. The owner of the servient tenement unsuccessfully claimed that the right of way could not be used as a means of access to the field in question by campers. The Court held that the words "as at present enjoyed" did not refer to the purposes for which the right of way was used in 1930 nor to the *quantity* of the user, but to the *quality* of the user—that is to say, the way could be used for pedestrian, horse, and vehicular traffic. The Judge said: "But I think that if the intention of the grantor was to restrict and limit the defendant to a user for agricultural purposes he ought to have made that clear." But, if the words of the grant had been "as at present *used*," the decision might have gone the other way.

In *Stroud's Law of Easements*, at p. 172, the author sums up the position as to alteration of the dominant tenement as follows:

> "If any rule of general application can be deduced from the conflicting cases, it is that, under an express grant of a right of way for all purposes, or in general terms, no increased user of the right will usually be held excessive which is due to such alteration in or development of the dominant tenement as might reasonably have been within the contemplation or expectation of the parties at the time of the grant."

In *Callard v. Beeney*, [1930] 1 K.B. 353, 355–56, Talbot, J., said:

> "There is no doubt that a grant of land together with a right of way over the grantor's land *simpliciter* grants the right to use the way for all purposes connected with the land granted *or any part of it*, subject to any question, which does not arise here, of the effect of a change in the character or mode of occupation of the dominant land."

Again, in *Stroud's Law of Easements*, at p. 173, the author sums up as follows:

> "On a severance of the dominant tenement, a right of way will attach to the severed portions (*Codling v. Johnson*, (1829) 9 B. & C. 933) in accordance with the rule as to easements in general, but subject to the condition that the occupants of the severed portions can bring themselves within the terms of the grant (if any) and the limits of the right as previously existing."

It would appear, therefore, that under English law in exceptional cases a right of way will be destroyed on a change in purpose of the dominant tenement, and will not accrue to each severed portion on a severance of the dominant tenement. It is on these exceptional cases which the effect of registration under the Land Transfer Act remains to be considered. If the District Land Registrar notes the right of way against the certificate for the servient tenement, and brings it down on the certificate or certificates for the dominant tenement or tenements, and there are dealings registered against the particular dominant tenement, it appears to the writer that the effect of the State-guarantee must be to preserve the right of way and make it appurtenant to the particular dominant tenement, unless there are restrictive words in the grant itself (which constructively forms portion of the Register-book) and which in itself shows that the right cannot exist, having regard to the present condition or purposes of the particular dominant tenement. If the grant is in general terms, then the extent of permitted user will have to be ascertained in the usual manner, but in the absence of restrictive words the *existence* of the right could not very well be denied; it is not reasonable to suppose that the Courts would impute to the Legislature the intention of the State guaranteeing a mere naked right. An easement is just as much State-guaranteed as any other interest registered under the Land Transfer Act, and is therefore indefeasible: *Bevan v. Tatum* (*supra*). If, on the other hand, there were restrictive words in the grant itself, different considerations would apply; a person proposing to deal with the dominant tenement should examine the registered grant. For example, a grant in the form of *Allan v. Gomme* (*supra*) would have its own inherent weakness exposed to public search; if the loft and space under it was converted into a cottage, the State-guarantee of the right would not prevent its practical disappearance. To cite also an example from *11 Halsbury's Laws of England*, 2nd Ed. para. 577:

> "Thus, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard, the right of way ceases."

If such a specific purpose were stated in a Land Transfer grant, then it is submitted the right would cease on conversion of the cottage into a tanyard; but if the specific purpose were not stated in the Land Transfer grant, then it is considered that the State-guarantee would preserve the right, no matter what were the intentions of the original parties to the grant. If a Land Transfer grant of way is expressed to be solely for the purpose of taking goods to and from the warehouse of the dominant owner and situate on part of the dominant tenement, and there is a warehouse on the dominant tenement at the time of the grant, and the warehouse is afterwards pulled down, the right of way is then destroyed: *Patterson and Barr, Ltd. v. University of Otago*, [1925] N.Z.L.R. 192, unless possibly the warehouse is pulled down merely for the purpose of repair and is accompanied by an intention, acted upon within a reasonable time, of rebuilding it: *Lutterel's Case*, (1601) 4 Co. Rep. 84b, 76 E.R. 1063; *Moore v. Rawson*, (1824) 3 B. & C. 332, 338, 107 E.R. 756, 759.

On the subdivision of the dominant tenement to which a right of way is appurtenant, some of the subdivided lots may not remain in physical contiguity with the land over which the right of way exists; but that in itself would not prevent the right of way from remaining appurtenant to each severed portion, although it would cease to be of any practical use to a severed portion not contiguous, until another right of way was created over the intervening land: *Todrick v. Western National Omnibus Co., Ltd.*, [1934] Ch. 561; *Midland Railway Co. v. Gribble*, [1895] 2 Ch. 827, 833. Since the coming into operation of the Property Law Amendment Act, 1905, a legal easement in gross may be created in New Zealand (and easements in gross are registrable under the Land Transfer Act notwithstanding an opinion to the contrary in Kerr's *The Australian Lands Titles (Torrens) System*, at p. 297), but it is obvious that an easement intended by the parties to the grant to be appurtenant to a parcel of land could not at the will of the dominant owner be changed into an easement in gross: see *11 Halsbury's Laws of England*, 2nd Ed., para. 675. The requisite of an appurtenant right of way is that it must be possible for it to be of use to the dominant tenement. To take an extreme case, a right of way over land situate in the City of Wellington could not be created appurtenant to land situate in Palmerston North. Or to take an example from the English cases, there cannot be a right of way over land in Kent appurtenant to an estate in Northumberland.

Lord Halsbury at Golf.

Involved Legal Issues.

In his recently-published reminiscences, *Time Gathered*, Mr. W. B. Maxwell recalls a meeting with the Earl of Halsbury at Hornburg. After references to Lord-Justice Henn-Collins, Sir Ellis Hume-Williams, Sir Chartres Biron, Lord Reading, and Lord Carson, he says:

"There was a miniature golf course in the little park, for which the only weapons needed were a mashie and a putter. Though so small, it was very good fun. I used to play on most mornings with still another lawyer, old Lord Halsbury, the Lord Chancellor. Lord Halsbury vied with me in badness, but two agreeable young women used to carry us round in a foursome, and sometimes one side won and sometimes the other. There was much excitement when it came to a close finish, and Lord Halsbury expressed exuberant delight if he and his lady won. It was amusing also to hear him soliloquising if his caddie, aged ten, had forced him to count a second stroke after his ball had been pulled out from under the low-lying branches of a laurel bush. 'A harsh decision on the part of the caddie,' he would say. 'And I cannot but urge strongly that if the ball was playable in law it was not playable in fact. Then how can one equitably be penalized, as if committing a misdemeanour, when only doing that which is unavoidable and inevitable. I would submit that if golf be really a game of skill, and not merely a game of chance. . . . ' And he went on talking to himself until we reached the green."

Mr. Phineas Levi.

Birthday Presentation.

The President of the Wellington District Law Society, Mr. P. B. Cooke, K.C., presided at a large gathering of legal practitioners at the Supreme Court Library on December 6, to mark the occasion of Mr. P. Levi's eightieth birthday. Mr. Cooke apologised for the absence of many of the profession who had been unable to attend and especially for Mr. C. H. Weston, K.C., and Mr. A. K. S. Mackenzie, who were out of town.

Mr. Cooke said that the Wellington practitioners felt that they could not let the occasion of Mr. Levi's eightieth birthday pass without meeting to wish him many happy returns of that day.

"You, Sir, occupy a position among us, which I think is unique and you have had a great influence on the lives of many of us," the President continued, addressing the guest of honour. "You have given us sympathy and help when we were students; in your office as Chairman of the Council of Victoria University College you have ever been jealous of our interests; as an examiner in law appointed by the University of New Zealand you have set the fairest papers I have ever seen, and marked them more leniently than any one I have ever known; and, later on, when the time came for us to take our knocks in the hurly-burly of professional life, you showed us by your example how a lawyer should demean himself in practice. I am not going to say much as I am going to ask my friend Mr. Humphrey O'Leary to speak. He is one who had the great privilege of being in your office, and who therefore knows as much about you as any of us. But I do want to say this, that by your unrivalled knowledge of the law and by your scrupulous regard for the rules of fair play you have won the respect and the admiration of us all: and, in addition to that, on the occasion of your eightieth birthday, we want you to know that we do not forget the kindness you have always showed us and the help you have always given us, and as a trifling indication of our affection for you we ask you to accept this small birthday present. On behalf of the profession in Wellington I wish you Sir, very many more happy birthdays, and always good luck" (*applause*).

The President then handed Mr. Levi a cheque from the practitioners in Wellington.

Mr. H. F. O'Leary, K.C., President of the New Zealand Law Society, said he was very pleased to have the opportunity of supporting Mr. Cooke in making this presentation "to our dear old friend, Mr. Levi." "It is true that I was once in his employ," the speaker proceeded. "To give the exact history: it was away back in 1903 that I succeeded my friend Frank Kelly, who is now in practice in Hastings, in the highly important, though not very lucrative, post as office boy to Mr. Levi. In the following year he was joined in partnership with Mr. Thomas Wilford, now Sir Thomas, who is, happily, with us to-day. I continued with the firm until 1910, when I went into practice on my own account. Since then I have been in closest touch with Mr. Levi as a brother practitioner, and as a friend; and I would like to add a tribute to the very excellent qualities that we all know Mr. Levi possesses.

"Mr. Levi has never had an enemy. His standard in the practice of his profession was so high and his relations with his brother practitioners was always so amicable and happy that they could not but be on the most friendly footing with him. As a Society we are indeed under a debt of gratitude to have had him not only in the Wellington District Law Society, but also in the New Zealand Law Society, for which he has done a great amount of work; and it is only those in closest touch with these bodies who know of that gratuitous work given by Mr. Levi over a period of forty years."

Mr. O'Leary said he did not suggest that Mr. Levi had been perfect in all things. Perhaps the most extraordinary trait in him and in one of his race was that he had had no regard for the material things of the world: he was incapable of accumulating this world's goods. In addition, he was lacking a little in force and aggressiveness. If he had added these to his profound knowledge of the law, it would have made him one of the most formidable members of the profession. To illustrate from a recent happening, what he meant, Mr. Levi was never capable of throwing a tomato at a Judge (*laughter*).

In conclusion, Mr. O'Leary said: "Mr. Levi, this gathering will show you the affection in which you are held by all. I would like to say that when practitioners were approached regarding this little function and a testimonial to you, they not merely acquiesced, but showed an evident delight at the suggestion and their desire to partake in it. I congratulate you on attaining your eightieth birthday. May you still have many years of pleasure before you, and, however long you live, you can be assured that our affection for you will never wane" (*applause*).

Sir Thomas Wilford, K.C., said that he did not think it was necessary for him to add much to what had been said. Mr. Levi and he were in partnership for twenty-five years. "We never had a deed of partnership when we started, and when we separated we walked away just as we had joined one another," he added. "During the whole time that I was in partnership, I never quarrelled with Mr. Levi; because if we had I should have known the fault had been mine. I am very sorry that, when visiting Geneva, I did not bring back for Mr. Levi some of Voronoff's gland so that he could have lived for ever. So far as Mr. Levi is concerned, I have the greatest admiration for him; and if I talked for twenty years I could not say any more" (*applause*).

Mr. Levi, who received an ovation on rising to reply, remarked that he did not really know what to say, excepting that he was very grateful to them all. After referring to the fact that, during the past few weeks, he had been the recipient of all sorts of congratulations from every one, he said he felt overwhelmed, because he did not know what he had done to deserve it all.

"I feel very fit for an old one," Mr. Levi continued. "I am quite conscious of age incapacities and various defects which are bound to come with age; but still I am going on, and I am still determined to go on as long as people want me and have any use for me. The advice I give to every one is: 'Keep up your interests in your professional calling, or keep up your interests in something. Don't bother thinking about yourself!'

"I would like to say a word to Mr. Cooke with reference to his remarks regarding examinations. I would like to say that his papers were the most remarkable papers I have ever read. I gave him 90% for them; and the strange thing was that I found all the other examiners thought the same thing and also gave him 90%. They were the most remarkable papers I ever marked.

"I would like to say to Mr. O'Leary that he was a very good office boy, and a very good clerk. I can remember when he came to me first—he wore short knickerbockers." (Mr. O'Leary: "You must remember that I was managing clerk as well as office boy.") "I was in a small way then, and Mr. Wilford sought me out, and we only parted as he was leaving the country. We had no quarrel whatever and we always got on well together. I have never had anything in the nature of a quarrel with any of the profession.

"There have been some members of the profession older than myself with whom I have been associated, among them Sir Francis Bell, who I consider was the ablest member of the Bar and of the public that we have ever had in New Zealand. And when I think of members like these, I wonder that you go to all this trouble for me. But I appreciate from the bottom of my heart your coming here to-day, and thank you most sincerely for your present, which I accept with the greatest pleasure and thanks" (*applause*).

Penal Reform.—The Criminal Justice Bill has been introduced in the House of Commons. It embodies the Home Secretary's scheme of penal reform. There has been in the last 100 years very extensive reform in the methods of dealing with crime. At first the efforts of Sir Samuel Romilly and other reformers were devoted to lessening the severity of punishments—in particular to confining the death penalty to murder, and even for that, if the recent resolution of the House of Commons is acted on, it will be abolished for an experimental period. The reform of prisons and the treatment of prisoners which followed, mainly under the influence of John Howard, and his work, *The State of the Prisons*, has of recent years been carried farther by the Prison Commissioners, whose Report for last year has just been issued. The present Bill continues and quickens this work, in particular by amending and consolidating the law relating to the probation system, and by altering the law as regards young persons. Imprisonment will be abolished for persons appearing to the Court to be under sixteen, and will be inflicted from seventeen to twenty-one only when information has been obtained of circumstances showing that no other method is appropriate; and remand centres are to be provided for persons between fourteen and twenty-three. There are also other important proposals. Corporal punishment (save for serious assaults on warders)—this is in accordance with the recent Report on the subject—penal servitude, and hard labour are to be abolished, and a system of sentences for corrective training and preventive detention is to be introduced. All this is more than reform; it is a revolution in the treatment of crime. Sir Arthur Greer, whose letter to the *Times* (Nov. 22) has been read with interest, suggests that the path of crime is being made too rosy, and he writes "as a Judge who, while performing his duties at criminal trials, earned the reputation of an exceptionally lenient Judge," a record which no doubt will be indorsed by lawyers who practised before him. That is another aspect of the case which Parliament is not likely to forget.—APTERYX.

"The Stormy Petrel."

Who became first Governor-General of Ireland.

The resurrection by Mr. O'Leary at the Conference dinner at Christchurch last Easter-time of one of the many witty and happy retorts of Mr. T. M. Healy, one which was made to the rather testy, but great Judge, Sir Andrew Marshall Porter, M.R., and the appearance of a little book by the late Mr. Justice Barton (so he was to the end affectionately remembered)* recalls a wealth of memories of "Tim," as he was always known and wished to be known, to his friends but "Tiger" Tim to his opponents.

Sir Plunket Dunbar Barton's book is entitled *Timothy Healy: Memories and Anecdotes*, and well repays perusal. Every page bears the imprint of its having been written as a tribute of love from friend to another, who together in London hungered for the old asscoiations of the Library of the Four Courts, described, after the House of Commons, as the next best Club in Europe.

Originally intending to write a brief review of Sir Plunket Barton's book, the reviewer considers the interest aroused by Mr. O'Leary's quotation in the main excuses him if he digress a little from his original intention, for Mr. Healy's was an amazing career and must be of absorbing and human interest to every lawyer; whether he wears ermine or hopes to, or thinks he deserves it. This classification probably includes every practising member in the conjoint professions.

Mr. Healy was not born with any silver spoon apparent. He came, however, from a well-known Southern Irish family whose progenitors lost their family possessions in the Elizabethan and Cromwellian confiscations. His mother's people were equally of the ancient but dispossessed Irish aristocracy. Mr. Healy's father was the Clerk of the Bantry Poor Law Union, in which town Tim was born. Tim received the ordinary education of the Irish boy at the Christian Brothers' Schools, but his education was mainly acquired by his own private efforts. Very early he mastered the art of shorthand, and the story goes that his early love-letters were written in that unromantic medium and so replied to. He had soon to go to work, as the family means necessitated it; and, at thirteen, the future Governor-General was working in the office of a merchant in Dublin. From Dublin he drifted as a railway clerk to Newcastle-on-Tyne, and it was a visit to that centre (which then was, and now is, a very considerable Irish settlement) by the then Home Rule Leader, Isaac Butt, K.C., that first placed Mr. Healy in the local limelight. Like Healy, Mr. Butt was a lawyer of great distinction, and at the time unequalled as a "jury man." Sir Plunket Barton states that Mr. Healy positively modelled his style on him, in his polished and respectful independence towards the Judicial Bench. Butt it was who once defended a client against whom a Court, with indeed some just provocation, but without adequate consideration, had proceeded for contempt. The mistake was made in initiating the proceedings on the motion of the Court itself, without complaint from the Law Officers and merely on the evidence of a newspaper report. In the course of his argument Mr. Butt said in immortal words:

> "You are grounding here a process to destroy a man on a statement behind his back. It violates every principle of British Law. Any judgment founded on that evidence will go forth without authority and will return without respect. It will be said of it that it was an indictment without an accuser, a sentence without a trial and a conviction without evidence. I hope I have not gone beyond my duty in my submission to the Court. I know the surest reference for authority is often manifested by boldly remonstrating when it is going wrong. If I have been lacking in courtly manners, my defence is 'Be Kent unmannerly when Lear's mad'."

This remarkable statement of Butt's Mr. Healy was never wearied of quoting, especially to those of us beginning to find tottering feet in the arena; and it rings as true to-day as when it was first enunciated and earned its immortality.

In those busy surroundings of the railway, Mr. Healy found time to acquire by his own efforts a profound knowledge of French and German and, I think, a working acquaintance with Spanish. Ten years after his meeting Mr. Butt, Mr. Healy was called to the Irish Bar. In the interval he had been prominent in Irish politics, then an extra stormy period; and, as he himself writes in a letter to his father, there was considerable apprehension lest the Benchers, who then were to a man of the Conservative and ruling class, would veto his admission. Fortunately, saner counsel prevailed.

I am, of course, writing of Mr. Healy as a barrister, and any digression into the story of his parliamentary life in a journal devoted to law would not be permissible. One remark, however, may be made, and that because it may help to dispel a reproach sometimes levelled at Mr. Healy's sense of fair play, so indispensable in the successful lawyer. He is blamed for the intensity of the apparent animosity he showed towards Mr. Parnell and Mrs. O'Shea during the Parnell crisis. Sir Plunket Barton deals with this in his book; but another, and, I think, the real explanation of anything Mr. Healy either said or did during that unfortunate period is this: His whole life was lived for Ireland and he loved her with a passionate detachment greater than that of any patriot Time has ever produced. In Mr. Parnell and in any other Irish leader he saw only a man affianced to Ireland and the righting of her wrongs and woes, and in his indictments of Mrs. O'Shea he regarded her as a co-respondent. After all, she too, had "burned the topless towers of Ilium." Healy hated to think or speak of the incidents of that internicine warfare which perhaps two more generations may forget.

Twice Mr. Healy stood in the Dock. On the first occasion he had been aroused to a state of great indignation by the suffering and death of an evicted tenant. This man, after his home was levelled to the ground, had no shelter for himself or his family save what was given by an upturned boat on the sea-shore. The unfortunate man died from exposure. Healy, incensed by all he saw, made a very violent speech in Bantry. He was arrested and returned for trial. The result was quite at variance from what the prosecutors expected, because, labelled with the hall-mark of respectability and tried patriotism, he was sent unopposed to the Imperial Parliament as Member for Wexford, Mr. John Redmond, who had the

* *Timothy Healy: Memories and Anecdotes*, by Sir Dunbar Plunket Barton, Bart., K.C., M.A. (Oxon), Hon. D. Litt. (N.U.I.), Pp. 128. London: Faber & Faber, Ltd.; Dublin: Talbot Press, Ltd.

reversion of the seat, giving way to the new martyr. As Sir Plunket Barton gleefully puts it,

> "the martyrdom had a happy termination for he soon emerged successfully from his trial at the Cork assizes. He was defended by no less a person than Sir Peter O'Brien, afterwards Attorney-General, and Lord Chief Justice of Ireland (under the title of Lord O'Brien of Kilfinora) with the help of whose advocacy he was triumphantly acquitted."

It should not be forgotten that Mr. O'Brien was the leader of the extreme Conservative element of the Irish Bar, who from his methods to extract verdicts from unwilling juries in political cases was better known as "Peter the Packer"; and it speaks in clarion tones for the integrity of the Irish Bar not only that he was offered, but that he accepted, the brief for the defence of the young Irish firebrand.

Next time Tim was not so lucky. He would make violent speeches, and on this occasion he was ordered by a "Removable Magistrate" to give securities that he would endure a period of silence or serve six months. The silence was more than Tim could contemplate, and to prison he went.

Double-haloed this time, Tim when he emerged wearied to death, as he said, of "having nothing to do except to read the newspapers" was adopted as Parliamentary candidate for the County Monaghan, then considered a secure Tory stronghold. Although he had a perfectly safe seat already, he resigned and dissipated the energy stored up during his incarceration in the contest. The double halo won, and Tim was returned. I often wonder if any one could at the time have projected his mind down the corridors of time and seen the convict his Sovereign's Regent in the Vice-Regal Lodge, what his reactions would have been; or if he had known that Healy was in the same fullness of time to be offered by his Sovereign any step he would select in His Peerage. Mr. Healy respectfully asked King George permission to refuse, as his sole ambition was to die as he was known amongst his countrymen "Plain Tim Healy," and His Majesty with kingly courtesy assented.

Time moved on, and the ex-convict was called to the Inner Bar in Ireland. It is noteworthy his "silk" was offered to him, without any request by him directly or indirectly, by the Conservative Lord Chancellor, Lord Ashbourne, after he had only been fifteen years a Junior Counsel. In the meantime he had been called to the English Bar, and after eleven years he was made a King's Counsel in England. This time the offer came from the Liberal "Bobby" Reid, titularly Lord Loreburn. The whole description of the scene is given by Sir Plunket Barton and is so delicious as to bear repetition :—

> "Eleven years afterwards he met the Lord Chancellor of Great Britain, Lord Loreburn, in the corridors of the House of Commons. 'Can I do anything for you, Healy,' said the Lord Chancellor, who as Sir Robert Reid had known him well in Parliament. 'Well,' said Healy with a twinkle in his eye, 'are there any Bishoprics vacant?' 'No,' said the Lord Chancellor laughingly. 'Then,' said Healy, 'since you cannot give me "lawn" you might give me "silk".' The Lord Chancellor smiled a willing assent, and Healy thus became a King's Counsel in England as well as in Ireland."

The ecclesiastical tinge in this story reminds me that Shane Leslie, whose people Tim had beaten in the Monaghan election, once described him as "an Imp who had fallen into the Baptismal Font." Years later, Leslie was destined to be defeated in his own contest, Derry City, as a Nationalist, on the same day Tim and the writer were defeated by undiscerning constituencies in the second parliamentary election held in the same year.

But I must move on. As a lawyer, Healy was regarded as a perfectly safe man for a jury case. His greatest friend would not call him a profound lawyer amongst a Bar containing giants like Donaldson and Cuming, but in one peculiar branch of law he specialized: he had an uncanny knowledge of International Law, and his opinion on this obstuse and changing branch of our law was avidly sought in both countries.

He was a man of great human emotion, and the pathos with which he fought his jury cases was heartfelt, not staged. This pathos coloured his life very markedly. He was engaged in the Recorder's Court in Dublin when the sad news came through of the death of Fitzgibbon, L.J., second only to Palles, C.B., and not very far behind him, and the idol of every practising lawyer, be he barrister or solicitor. The business of the Court was interrupted to allow sorrowful tribute to be paid and an adjournment made. No one who was present in Court can ever forget Healy's address. He spoke of the great churchman who had stabilized the finances of his Church and saved destruction after Gladstone had disendowed it, and the kindly Mason who spent most of his leisure time solving newspaper competitions that he might augment in this way the funds of his order's orphanages; and he concluded, in a Court stilled to almost breathless silence with the words of the Requiem Mass he knew so well—"*Requiem aeternam dona ei, Domine*; *et lux perpetua luceat ei*"—his lustrous brown eyes dimmed with unforbidden tears as he spoke.

Another instance illustrates his deep-rooted humanity and his fearless devotion to what was to him Revealed Truth. He was engaged in a case in which the accident resulted in the death of a man. Opposing counsel produced to the jury portion of the deceased's anatomy to illustrate the injuries he had sustained. Healy was cyclonic in his protest that the actual remnants of mortality should have been thus made an exhibit, when, in even those days of mechanical progress, a facsimile model in either wood or plasticine could have been produced. He refused to handle the relics, and reminded the Court that it was stated on Biblical authority "Their bodies are the temples of the Holy Ghost and will rise glorious and immortal on the Last Day." This protest had its effect, and ever after in similar cases the authorities produced verified reproductions in criminal cases, instead of the ghastly actualtities. One may venture to think that the interests of justice were better served by this course. The practice is barbaric and revolting, and if Mr. Healy's suggestion were generally adopted much revulsion of feeling would be saved to the tribunal trying a case and much distress spared to surviving relatives:

Sir Plunket Barton deals with another shining facet of Mr. Healy's intellectuality—his sparkling if, at times, fantastic, wit, remarkable as all true wit is, for its conciseness. A few random stories that I recall, and not related by him, confirm all Sir Plunket writes. If any reader of these notes be curious enough or sufficiently interested to look up *O'Malley and Hardcastle's Reports* (about 1910 or 1912) in the Law Library, he will find where Tim had an election petition against his successful opponent in his last

North Louth parliamentary election. This was an epic contest and even the dry-as-dust report is full of incident. Tim won the petition with very substantial costs against Mr. Hazleton, who would not pay them or allow his Party to pay. Ineligible to sit for Louth, Mr. Hazleton was elected for another constituency and was therefore in receipt of a parliamentary salary of £400 a year. There being no other means of having his costs paid, Tim made Mr. Hazleton a bankrupt and proceeded before Boyd, J., to attach Mr. Hazleton's salary. Boyd, J., ever fearless, attached £200 a year, and Mr. Hazleton promptly appealed. The Court of Appeal reversed Boyd, J., with ignominy. Nothing worried, Mr. Healy moved on to the House of Lords and conducted what was in effect his own case. It was soon quite apparent that, were it not for the fact that the stupendous Chief Baron Palles was a member of the Court, Mr. Hazleton's case would have survived but a brief period. Quite plainly astonished at the judgment, Lord Dunedin felt constrained to ask Mr. Healy what were the arguments presented in the Court of Appeal by the respondent, and Healy's reply was terse and devastating: "A new version of *Alice in Wonderland*, My Lord." It was speedily an instance of "*Tabulae solvuntur risu.*" This case is also reported, *sub. nom. Hollingsworth* (*the O.A*) *v. Hazleton* about 1912.

Another time, Tim was arguing a case in the Court of Appeal arising from a church-building contract. He had enunciated some statement of law which, he had decided to his own satisfaction, concluded the matter. Fitzgibbon, L.J., looked up, and in a surprised tone asked him if he had any authority for the submission. "Authorities," replied Tim in a grieved voice, "why, I am buttressed up and gargoylled with them." Quick as a flash came Fitzgibbon's retort: "Flying buttresses, I presume, Mr. Healy."

The injuries sustained by the collier *Bonawe*, alleged to have occurred in Dundalk Harbour, produced many amusing interludes. It was an Admiralty matter, and the writer instructed Tim for the Harbour Board. The plaintiffs had spent much money in producing a beautiful model of the dock with its floor plentifully studded with vicious-looking miniature boulders which were alleged to have caused the damage. This case was also heard before Boyd, J., himself the holder of a master's certificate. A chance entry found in the *Bonawe's* log exonerated Dundalk as the scene of the accident, but Tim, taking no risks, concluded a very passionate address by inviting the Judge "To dismiss them with their pox-marked toy," which the Judge promptly did with substantial costs.

It must not be imagined from all this that Tim was ever casual with the members of the Court. Deep and almost reverential respect was the keynote of his attitude to them, not always perhaps to some of them personally, but always to what they represented. In his second last parliamentary contest in Louth he practically fought with his back to the wall against all the forces of Redmond and Devlin and the serried ranks of the mob. Great anxiety was felt in the Four Courts lest he should go under. The Court was sitting when the crier entered with a telegram for Palles, C.B., which he opened and handed to his colleagues on the Bench. Mr. Healy had survived by a majority of ninety-nine, and the smile of the Chief Baron was one of intense satisfaction. It was a delightful involuntary tribute to the man from the great Judge, and a new application of the maxim, *Inter arma silent leges.*

In addition to everything else, Mr. Healy was a great orator; and Mr. Arthur J. Balfour (afterward Lord Balfour), who should know, once described him as the last and greatest of the parliamentary orators. Redmond too was great, but he was ponderous compared to Healy.

In private life he was fascinating almost beyond believing. His hospitality knew no limit, and the only passport he demanded was the capability to interest. One member of the New Zealand Bar, at least, was his guest at the Vice-Regal Lodge at Dublin—Mr. A. R. Meek, of Wellington. Unfortunately at the time Mr. Healy's official duties had called him away, but in his stead was "the eldest daughter," as Sir Plunket Barton puts it, "his loving companion, who consoled and comforted him after the death of his wife and helped him in the social side of his life as Governor-General."

Mr. Healy's knowledge had a most extraordinary range, and it always reminded me of a well-worked beehive stored with cells of golden thought. Once in a moment of inspiration I asked him what was the finest epitaph he knew ever written on a lawyer, and without an instant's pause he quoted the delightful lines penned by Queen Alexandra and affixed by her to the wreath she sent to Russell of Killowen, L.C.J., also formerly parliamentary representative of Mr. Healy's Dundalk.

> "*And in his Heart sat Justice unafraid*
> *Shone on his Lips and sparkled in his Eyes.*
> *He goeth now the just man perfect made*
> *To meet his Master at the last Assize.*"

And with this tribute equally applicable to the Anglo-Norman scion of hundreds of years of chivalry who wrote this book about his friend, and to his friend the first of his native race to represent His Sovereign in the capital of his native land, I leave them with golden recollections of a time when to the writer all the world was young.

—S. H. M.

Answers to Correspondents.

Case.—If A. B. is swallowed by the Great Sea Serpent, would A. B. become a tenant in tail after the possibility of issue extinct? Alternatively, has he a common law remedy?

Opinion.—The question submitted in the above case is rather nice, though the position of A. B. is rather otherwise. Much depends upon the fact whether A. B. is regularly in, or is merely in de son tort, or whether he has suffered an entry in the usual manner. It is true that if he is a tenant in tail and the tail remains by way of jointure, there will be so far a joint tenancy. As however, my opinion is required on the entire case, I feel disposed to say conditionally, "No" if the premises hold, but if otherwise, positively "YES." In the absence of the necessary facts, I prefer to express no opinion on the alternative question of whether there was a stoppage *in transitu.*

The Laws of England.

(All-sham Edition.*)

ACTION.

Definitions.—In the wider sense "Actions" fall into three classes, namely:

(1) Good (See *Charities, Family Arrangements*);
(2) Bad (See *Criminal Law, Fraud*);
(3) Bloody (See *Executions*).

Although actions are still loosely referred to by one, and sometimes a combination of two, of the above terms even by the best of lawyers, and may be by Judges, in the strict legal sense an "action" is "the mode of pursuing a right to judgment." In the application of this definition, however, the following rules must be strictly complied with:

(*a*) The "mode" must be the right sort of mode;
(*b*) The "judgment" must be the right sort of judgment; and
(*c*) The "right" must be the right sort of right:

and, if any one of these three canons goes off, the action may be blown out or up or anything.

The less learned are at times confused as to the distinctions between "actions," "suits," "causes," and "matters," but, so clear have statutory definitions rendered these terms, that their meanings and relationship may be codified simply as follows:—

"'Action,' 'suit,' 'cause,' and 'matter' are respectively any action, suit, cause, or matter, which is not any other thereof, unless included in, or including, such other."

Cause of Action.—In the "popular" sense, "cause of action" has an awfully wide meaning, and may be anything from tying a donkey's legs together on a highway to failing to deliver rice on a boat, or wheat on a named day; and includes falling through a grandstand with a ticket, eating stones in buns, and dying on a voyage from Jamaica to Liverpool.

In the legal sense, however, "cause" (in the expression "cause of action") is an abbreviatior of the word "causeway," being anything which is to be traversed.

Actions which Lie.—Lying actions never lie. But all actions which are not lying do not lie, for certain maxims must be observed. The principal maxims applicable in deciding whether an action "lies" are "*Damnum sine injuria*" and "*Injuria sine damno*," which look very alike but are really quite different. In this work it is proposed to pass over these two maxims without further comment as a silent protest against this diabolical attempt to confuse the student of our laws. More readily understood (and hence more suitable for treatment in this work) is the maxim "*Volenti non fit injuria*," meaning "Still willing, but not fit for further injury." This maxim applies in such cases as claims arising from injury suffered in prize-fighting, and results in a technical knock-out both in the ring and in Court and the plaintiff may consider himself very fortunate not to have lost through the maxim "*Actio personalis moritur cum persona*" applying.

When it is very clear that an action "lies," it is sometimes termed a "sitter" and can be won standing. But, though it lie and be a "sitter," it is never said to "lay," however much cackling there may be by parties or counsel either before or after the hearing. And crowing does not itself result in a "sitter," however portentous.

AGENCY.

Agents distinguisded.—Agents are distinguished persons of some authority. They are distinguished from mere servants or contractors (however independent either of these may be). And although an agent's relations (in law) may be peculiar, they cannot be denied once they have been allowed to become ostensible.

(*Here the Fragment ends.*)

* This fragment of a manuscript was recently discovered blushing in a dark corner. It is apparently the commencement of a work of some magnitude.

Practice Precedents.

Companies: Motion to Extend Time for Registration of Mortgage.

Section 89 of the Companies Act, 1933, provides for registration of certain charges with the Registrar of Companies. Subsection 3 provides that instruments required to be registered in accordance with the provisions of this section must, in the case of instruments executed in New Zealand, be registered within twenty-one days after the date of the execution thereof, and in the case of instruments executed outside New Zealand within three months after the date of execution. The company has a duty to register, but, pursuant to subs. 9, any person interested may do so and is entitled to receive from the company fees paid for registration: See also subs. 10 as to liability of company if default be made in certain instances.

Section 95 provides that the Court may, on the application of the company or any person interested, and on such terms and conditions as seem to the Court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or misstatement shall be rectified, on being satisfied that the omission to register a charge within the prescribed time, or that the omission or misstatement of any particulars from or in any document registered under Part IV of the Act, or from or in any memorandum of satisfaction, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief.

The foregoing provisions of the Companies Act, 1933, apply with respect to charges created before April 1, 1934, and registrable under s. 130 of the Companies Act, 1908, in the same manner in all respects as they apply to charges created after that date.

In *In re Jackson and Co., Ltd.*, [1899] 1 Ch. 348, where an omission to register a contract with the Registrar of Companies was due to the ignorance of the parties as to the provisions of the Act, it was held that the omission to file the contract was due to "inadvertence" within the meaning of the Act.

The question of creditors' rights may arise on an application for an order extending the time for registration of a company mortgage. In New Zealand, prior to 1928, the form of order used was based on that

made in *In re J. and J. Byers*, (1905) 24 N.Z.L.R. 903; but, while that form of order is applicable to the registration of instruments under the Chattels Transfer Act, 1924, it may be inapplicable under the Companies Act, 1933. Since the decision of Mr. Justice Reed in *In re Dalgety and Co., Ltd.*, [1928] N.Z.L.R. 701, where the English authorities were reviewed, the correct form of order is that set out by His Honour (*ibid*, 736); and it is set out hereunder. In the course of his judgment, the learned Judge, at p. 736, said:

"In order to enable the Court to decide whether an opportunity should be given to ordinary creditors to be heard it is essential that a company applying for an extension should, in the supporting affidavit, in addition to giving full particulars relating to the grounds upon which the application is made, give a very full and complete statement of the financial position of the company, with information (i) as to the amount owing to unsecured creditors and the nature of the accounts—*i.e.*, whether ordinary monthly accounts or of long standing; (ii) as to whether there are any judgments outstanding against the company; (iii) as to whether any proceedings are pending for winding-up the company; and generally such full and complete information as may be necessary to enable the Court to be fully seized of the position."

MOTION.

IN THE SUPREME COURT OF NEW ZEALAND.

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

IN THE MATTER of the Companies Act 1933

AND

IN THE MATTER of a mortgage of uncalled capital given by A. B. and Company Limited to C. D. &c. and dated the day of 19 .

Mr. of Counsel for A. B. and Company Limited to move in Chambers before the Right Honourable Sir Chief Justice of at the Supreme Court House on day the day of 19 at the hour of or so soon thereafter as Counsel can be heard FOR AN ORDER that the time for registration pursuant to the Companies Act 1933 of a mortgage of uncalled capital dated the day of 19 given by the said A. B. and Company Limited to C. D. &c. be extended ON THE GROUNDS that the omission to register the said mortgage within the prescribed time was inadvertent AND UPON THE FURTHER GROUNDS APPEARING in the affidavit of E. F. filed herein.

Dated at this day of 19 .

Certified pursuant to the rules of Court to be correct.

Counsel moving.

MEMORANDUM.—His Honour is respectfully referred to ss. 89 and 95 of the Companies Act, 1933; and to *In re Dalgety and Co., Ltd.*, [1928] N.Z.L.R. 731, as failure to register the mortgage within the prescribed time was due to inadvertence.

The affidavit of filed herein shows that there are no debts other than monthly current accounts amounting to approximately £ .

It is respectfully suggested that seven days be fixed as the time within which registration is to be effected.

Counsel moving.

To the Registrar.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I E. F. of the City of company secretary make oath and say as follows:—

1. That I am the secretary of A. B. and Company Limited a company duly incorporated under the Companies Act 1933 and having its registered office at in the City of .

2. That on the day of 19 the said company executed under its common seal a mortgage of uncalled capital to C. D. &c.

3. That the said mortgage was prepared by the said company's solicitors Messrs. and forwarded to me on the day of 19 for execution.

4. That the said mortgage was duly executed on the day of 19 .

5. That Messrs. the solicitors to the company instructed me that immediately the said mortgage was executed that I should return same to them for registration.

6. That owing to a bereavement in my family I left on the night of the day of 19 for Australia and did not return to New Zealand until the day of 19 .

7. That on my return on the day of I came across the said executed mortgage when I immediately communicated with the said solicitors and only then learned that the said mortgage was required to be registered within a period of twenty-one days from the date of execution pursuant to the Companies Act 1933.

8. That the omission to register the said mortgage was due to my ignorance and was due to inadvertence.

9. That I am informed and verily believe that it is impossible to now register the said mortgage without the leave of the Court.

10. That there are no debts or moneys due to unsecured creditors other than the usual monthly accounts which amount to approximately £ and which will be paid on the twentieth of the month.

11. That the financial position of the said company is sound.

12. That there are no judgments of any Court outstanding against the company.

13. That there are no winding-up proceedings pending or contemplated.

Sworn &c.

ORDER EXTENDING TIME.

(*Same heading.*)

Before the Honourable Mr. Justice
day the day of 19 .

UPON READING THE MOTION filed herein for an order extending the time for registering a mortgage of &c. and the affidavit of filed in support thereof AND UPON HEARING Mr. of Counsel for A. B. and Company Limited THIS COURT BEING SATISFIED that the omission to register the said mortgage within the time required by the Companies Act 1933 was due to inadvertence DOTH pursuant to s. 95 (1) of the said Act ORDER that the time for the registration of the said mortgage be extended until the day of 19 but that this order be without prejudice to the rights of parties acquired prior to the time when such mortgage of uncalled capital shall be registered.

By the Court.

Registrar.

Rules and Regulations.

Customs Act, 1913, and the **Reserve Bank of New Zealand Amendment Act, 1936.** Export Licenses Regulations, 1938. December 5, 1938. No. 1938/160.

Customs Act, 1913, and the **Reserve Bank of New Zealand Amendment Act, 1936.** Import Control Regulations, 1938. December 5, 1938. No. 1938/161.

Shipping and Seamen Act, 1908. Masters and Mates Examination Rules, 1930. Amendment No. 9. November 29, 1938. No. 1938/162.

Census and Statistics Act, 1926. Census and Statistics (Cinematograph Theatre) Regulations, 1938. November 30, 1938. No. 1938/163.

Finance Act, 1938. Public Service Remuneration Order, 1938. November 30, 1938. No. 1938/164.

Second-hand Dealers Act, 1908. Second-hand Dealers Exemption Order, 1938. November 30, 1938. No. 1938/165.

Reserve Bank of New Zealand Amendment Act, 1936. Sterling Exchange Suspension Notice, 1938. December 6, 1938. No. 1938/166.

Industrial Efficiency Act, 1936. Industry Licensing (Oyster-dredging) Amendment Notice, 1938. December 7, 1938. No. 1938/167.