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"The tooth of Time will cut away an ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative."

—SIR JOHN SALMOND.

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THE DOCTRINE OF PROXIMITY IN TORT.

1.

THE question for decision in *Mc Alister (or Donoghue)* v. *Stevenson*, * [1932] A.C. 578, was (to use Lord Atkin's words) whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect and likely to cause injury to health.

The answer to this question by a majority of the House of Lords has created what may be termed the doctrine of proximity in tort, although shortly after the actual decision in *Donoghue's* case, the late Sir Frederick Pollock deprecated talk about "proximity" — which he termed "a kind of fictitous poor relation of privity." He said it was a notion which belonged to the law of contract and was wholly out of place in the law of tort. Nevertheless, the doctrine, since explained and applied by the Judicial Committee of His Majesty's Privy Council, and referred to in many judgments of lesser tribunals subsequently, has entrenched itself in the law of negligence.

The doctrine really dates from the statement of Lord Esher, M.R., in *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, when, referring to *Heaven* v. *Pender*, (1883) 11 Q.B.D. 503, he said that case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them:

> If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.

He is bound, as Bowen, L.J., said in the same case, to take care to protect those persons who will be brought into connection with him. And A. L. Smith, L.J., said:

> The decision in *Heaven* v. *Pender* was founded upon the principle, that a duty to take care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done to one or the other.

That statement, said Lord Atkin in *Donoghue's* case, sufficiently states the truth if proximity be confined not to mere physical proximity, but be used, as His Lordship thought it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. Lord Atkin went on to say that this was the sense in which nearness of "proximity" was intended by Lord Esher was obvious from his own illustration in *Heaven* v. *Pender* of the application of his doctrine to the sale of goods:

> This [the rule he had just formulated] includes the case of goods, &c., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought that the goods would in all probability be used at once by such persons, before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that the neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, or who was about to use it. It would exclude a case in which goods are supplied under circumstances in which it would be a chance by whom they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that the want of care or skill as to their condition or the manner of supplying them would not probably produce injury to that person or property.

In considering the duty owed by persons to others closely and directly affected by their acts, Lord Atkin,

* In legal documents and in proceedings, Scottish practice names a married woman by her maiden, as well as by her married, surname; but in citing the case only the married name should be used. Thus, the proper designation of this case, for citation purposes, is "*Donoghue* v. *Stevenson*."

at p. 582, drew particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be " used immediately " and " used at once before a reasonable opportunity of inspection." That, he added, was obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. Lord Atkin said that, with this necessary qualification of proximate relationship, as explained in *Le Lievre* v. *Gould* (*supra*), he thought the judgment of Lord Esher expressed the law of England.

In concluding his speech, Lord Atkin, at p. 599, stated the principle as follows :—

> By Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

Lord Thankerton stressed the fact that *Donoghue's* case was not one in which there was contractual relationship between the manufacturer and the consumer, and he said that unless the consumer can establish a special relationship with the manufacturer, the manufacturer had no duty towards the consumer to exercise diligence. That relationship of duty is established when the manufacturer has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to ensure that the article shall not be harmful to the consumer. Then the consumer, on showing that the article has reached him intact and that he has been injured by the harmful nature of the article, owing to the failure of the manufacturer to take reasonable care in its preparation prior to its enclosure in the sealed vessel, will be entitled to reparation from the manufacturer. The essential element in the case, in His Lordship's view, was the manufacturer's own action in bringing himself into direct relationship with the person injured.

Lord Macmillan said that it might be a good general rule to regard responsibility as ceasing when control ceases. Where the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer and the manufacturer takes steps to ensure this by sealing or otherwise closing the container, so that the contents cannot be tampered with, his control remains effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded. In other words, each of the speeches cited rests the liability upon there being no reasonable possibility of examination between the manufacturer and the consumer.

In concluding his speech, Lord Macmillan referred to the burden of proof in cases where the relationship of proximity is set up. He said that the burden of proof must always be on the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defendant a duty to take care not to injure the plaintiff. There is no presumption of negligence in such a case, nor is there any justification for applying the maxim, *res ipsa loquitur*. Negligence must be both pleaded and proved.

Stated simply, the doctrine was summarized by Scrutton, L.J., in *Farr* v. *Butters Bros. and Co.*, [1932] 2 K.B. 606, 615, when he said that the liability is rested on the fact that the manufacturer sends out the article in such a condition that it cannot be inspected until it is consumed, and the impossibility of intermediate examination makes the relation so proximate that there is liability : but this statement has been criticized.

In *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85, the Privy Council, in an opinion delivered by Lord Wright, further explained and applied the doctrine of proximity. Of their Lordships' Board, only Lord Macmillan was present in the House of Lords in *Donoghue's* case, and he was of the majority there.

The well-remembered facts of *Donoghue's* case may be summarized as follows: The defendants were manufacturers of ginger-beer, which they bottled. The plaintiff was given one of their bottles by a friend. It was opaque, and was sealed and stoppered so that it could not be tampered with until it was opened in order that its contents might be consumed. It was impossible without pouring out those contents to discover that they contained the decomposed remains of a snail.

In *Donoghue's* case the manufacturers were sued by the person who was given the bottle of ginger-beer by a friend who had purchased it from a retailer. In *Grant's* case both the manufacturer and the retailer were sued by the person who had purchased underwear from the retailer, and who had suffered injury through the wearing of the garments. The retailer was held liable in contract under the Sale of Goods Act, but this aspect of the case need not trouble us. What is of importance is the fact that the appellant had contracted dermatitis of an external origin as the result of wearing one of these woollen garments, which, when purchased from the retailer, was in a defective condition owing to the presence of excess sulphites, which, it was found, had been negligently left in it in the process of manufacture. The presence of the deleterious chemical was a hidden and latent defect, and could not be detected by any examination that could reasonably be made ; nothing happened to change its condition between its manufacture and its being worn ; and the garment was made by the manufacturers for the purpose of being worn exactly as it was in fact worn by the appellant. Applying the principal of *Donoghue's* case to these facts, it was held that they established a direct relationship as between he manufacturers and the appellant, imposing on the former a duty to take care ; and, for the breach of that duty, the manufacturers were liable in tort.

The doctrine of proximity of relationship naturally arose for consideration, and *Grant's* case, while applying the principle of *Donoghue's* case, limited it to a defect in manufacture which is hidden and unknown to the customer or consumer.

Their Lordships, in *Grant's* case, followed the decision in *Donoghue's* case, the principle of which they considered to have been summed up in the words of Lord Atkin in concluding his speech (*cit. supra*). They explained the decisions as having treated negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty, and still less as having any dependence on contract. In distinguishing the relationship in tort, as enunciated in *Donoghue's* case from contractual relationship, Lord Wright, who delivered the Board's opinion, considered that the use of the word " privity " in this connection as being apt to mislead, because of some suggestion of overt relationship like that in contract. He said that the word " proximity " is open to the same objection. He proceeded :

> If the term " proximity " is to be applied at all, it can only be used in the sense that the want of care and the injury are in essence directly and intimately connected ; though there may be intervening transactions of sale and purchase, and intervening handling between these two events, the events are themselves unaffected by what happened between them : " proximity " can only properly be used to exclude any element of remoteness, or of some interfering complication between the want of care and the injury, and like " privity " may mislead by introducing alien ideas. Equally also may the word " control " embarass, although it is conveniently used in the opinions in *Donoghue's* case to emphasize the essential factor that the consumer must use the article exactly as it left the maker, that is in all material features, and use it as it was intended to be used. In that sense the maker may be said to control the thing until it is used. But that again is an artificial use, because, in the natural sense of the word, the makers parted with all control when they sold the article and divested themselves of possession and property.

Lord Wright pointed out that a definition of the precise relationship from which the duty to take care is to be deduced is essential as a step to establish the tort of actionable negligence. He proceeded :

> It is, however, essential in English law that the duty should be established : the mere fact that a man is injured by another's act gives in itself no cause of action : if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right : if the act involves lack of care, again no case of actionable negligence will arise unless the duty to be careful exists. In *Donoghue's* case the duty was deduced simply from the facts relied on—namely, that the injured party was one of a class for whose use, in the contemplation and intention of the makers, the article was issued to the world, and the article was used by that party in the state in which it was prepared and issued without it being changed in any way and without there being any warning of, or means of detecting, the hidden danger : there was, it is true, no personal intercourse between the maker and the user ; but though the duty is personal, because it is *inter partes*, it needs no interchange of words, spoken or written, or signs of offer or assent ; it is thus different in character from any contractual relationship.

Their Lordships disregarded the theoretical difficulty that when the act of negligence in defective manufacture occurs there is no specific person to whom the duty can be said to exist, or be other than potential or contingent, only becoming vested by the fact of actual use by a particular person. They pointed out, however, that the principle of *Donoghue's* case can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent : the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.

Again, no distinction can be logically drawn between a noxious thing to be consumed internally, as in *Donoghue's* case, and a noxious thing applied externally, as in *Grant's* case.

The essential point in regard to control (in the extended sense of that word as used in *Donoghue's* case), in their Lordships' view, was that the article should reach the consumer or user subject to the same defect as it had when it left the manufacturer : the decision in *Donoghue's* case did not depend on the bottle being stoppered and sealed ; so, too, in *Grant's* case, the defect in manufacture was present when the garment reached the user, although it was one of others merely put into paper packets which in the ordinary course would be taken down by the shopkeeper and opened, and the contents handed and disposed of separately, so that they would be exposed to the air. The argument thus answered missed the essential point in *Donoghue's* case, which rendered irrelevant the mere possibility of interference (without actual proof of any interference) by intermediate persons, once it is shown that the article, on a fair inference from the facts, left the manufacturer subject to a defect which was then latent, and remained so until it reached the consumer.

In concluding their Lordships' opinion, Lord Wright said that no doubt many difficult problems would arise before the precise limits of the principle of *Donoghue's* case were defined : many qualifying conditions and many complications of fact might come before the Courts for decision. That is already true ; but a consideration of the application of the principle to diverse sets of facts, and of its limitation by the Courts in other cases, must be left for another occasion. It will then be seen that the present tendency is to enlarge, and not restrict, the ambit of the legal conception of duty due to " proximity " of relationship.

Unheil Hitler !—Many of us have given our friends the Nazi salute in derision, but it is an indiscreet thing to do nowadays, especially in public. Even the raising of a clenched fist immediately afterwards is unlikely to allay suspicion, because Hitler and Stalin are now comrades, or shall we say, gangsters in uneasy alliance. Any way, the Nazi salute executed in public is here and now mere " insulting behaviour whereby a breach of the peace might be occasioned," a refreshingly frank description of a foolish gesture.

In a recent case where this view was taken, not only the saluter but the saluted got locked up, which one feels was hard measure. None of us is without a fool among his acquaintance and it is a little unfair if he can thus get us into trouble, especially when he has been remonstrated with and told he is doing a risky thing. One of those who has suffered set up in defence that when striking a golf ball he was wont to say, " I wish that were Hitler."

It is a cheerful thought : Hitler hit hard, driven to flight, and finally falling into a hole—or perhaps bunkered ! Unheil Hitler !

—APERYX.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1940.
September 27;
October 4.
Myers, C.J.
Blair, J.
Kennedy, J.
Northcroft, J.

PETONE BOROUGH
v.
WELLINGTON CITY CORPORATION.

Rating—Rateable Property and Exemptions—"Waterworks"—Whether s. 244 of the Municipal Corporations Act, 1933, to be invoked for interpretation of the Exemption Provision in the Rating Act, 1925—Rating Act, 1925, s. 2 (k)*—Municipal Corporations Act, 1933, s. 244.*

Paragraph (*k*) of s. 2 of the Rating Act, 1925, which excepts from the definition of "rateable property" "waterworks belonging to or under the control of any Borough Council" must be read together with and in the light of s. 244 of the Municipal Corporations Act, 1933, which defines "waterworks."

Timaru Harbour Board v. *Timaru Borough*, [1926] N.Z.L.R. 210, [1925] G.L.R. 217, followed.

Counsel: *Harding*, for the plaintiff; *O'Shea*, and *Marshall*, for the defendant.

Solicitors: *Meek, Kirk, Harding, and Phillips*, Wellington, for the plaintiff; *J. O'Shea*, City Solicitor, Wellington, for the defendant.

SUPREME COURT.
Auckland.
1940.
October 10.
Smith, J.

In re **ANTE MRAVICICH (DECEASED).**

Practice—Probate and Administration—Probate—Will in Foreign Language—Practice to be followed.

In an application for probate of a will in a foreign language, the original will must be sworn to, and there must also be lodged a translation of the will into English by a competent person, accompanied by an affidavit of the translator, verifying the translation and stating his qualification. The English translation alone is engrossed with the probate (which is of the original will), and registered and headed "translation from the ."

Counsel: *Smytheman*, in support.

Solicitors: *Brookfield, Prendergast, and Schnauer*, Auckland.

SUPREME COURT.
Wellington.
1940.
August 22, 23, 28;
September 30.
Smith, J.

SCOTT v. BANK OF NEW SOUTH WALES.

War Emergency Legislation—Finance Emergency Regulations—Whether coming into Force when made or Gazetted—Contract—Illegality—Effect of Legislation—Frustration—Acts Interpretation Act, 1924, ss. 4, 8, 23—Regulations Act, 1936, ss. 3 (1), 6—Emergency Regulations Act, 1939, ss. 3 (1), (4), (5), (6), (7), 4 (1) (b)*, 8—Finance Emergency Regulations, 1940 (Serial No. 1940/65), Regs. 3 (1)* (b), (c)*, 4 (1)* (b).

Publication of the nature prescribed by s. 6 of the Regulations Act, 1936, assumes that the regulations themselves already have the force of law unless express provision has been made to the contrary.

Section 8 of the Emergency Regulations Act, 1939, is not directed to the date at which the regulations acquire the force of law, but its purpose is to ensure that publication of the regulations in the manner specified shall constitute notice to all persons concerned, whether they have notice in fact or not, and so where knowledge is material, to affect the determination of liability in both civil and criminal proceedings. Regulations made under that statute, therefore, come into force on the day on which they are made (in the absence of any provision to the contrary), whether they are gazetted on that day or not.

S. arranged an exchange transaction between two companies at the rate of 141⅛ per cent. paid in New Zealand currency in New Zealand for £100 sterling paid in England. S. was to receive the 1⅛ per cent. (£325) as his remuneration for arranging the transaction. On April 10, 1940, the Finance Emergency Regulations, 1940 (Serial No. 1940/65) were made. They were gazetted on April 11. They made such a contract illegal, and brought to an end such contracts as had been made before they came into force—on April 11. Of the New Zealand money which passed through the Bank of New South Wales, 140 per cent. had been lodged with the N. Bank, and £325 retained by the Bank of New South Wales, both held in suspense pending the receipt by the Bank of New South Wales of cabled advice from London that the transaction in England had been completed. On April 11, the sum required in England was lodged with the N. Bank, and a cable to that effect sent to the Bank of New South Wales, which received it on April 12. On April 11, the New Zealand firm, which was to receive the money in England, repudiated the transaction. The Reserve Bank having declined to allow the transaction, the moneys paid by each company were refunded to them respectively, except that the £325 was paid into a suspense account at the N. Bank to meet S.'s claim to it as money received by the Bank of New South Wales. In an action by S. against the latter bank for its recovery,

E. K. Kirkcaldie, for the plaintiff; *Spratt*, for the defendant

Held, 1. That the Finance Emergency Regulations, 1940, came into force on April 10, and that there was no contract which the law could recognize under which S. could have acquired a right to the said sum of £325.

2. That, even if the Regulations did not come into force until April 11, when gazetted, the contracts for exchange were illegal when the advice was received from England that the transaction was complete. They became frustrated by reason of a supervening illegality, such frustration determining the contracts, from the date of frustration, and the plaintiff was not entitled to recover compensation for part performance.

Horlock v. *Beal*, [1916] A.C. 486; *Metropolitan Water Board* v. *Dick, Kerr, and Co.*, [1918] A.C. 119; *Appleby* v. *Myers*, (1867) L.R. 2 C.P. 651; and *The Madras*, [1898] P. 90, applied.

Solicitors: *Buddle, Anderson, Kirkcaldie, and Parry*, Wellington, for the plaintiff: *Morison, Spratt, Morison, and Taylor*, Wellington, for the defendant bank.

Case Annotation: Horlock v. *Beal*, E. and E. Digest, Vol. 12, p. 384, para. 3166; *Metropolitan Water Board* v. *Dick, Kerr, and Co.*, *ibid.*, p. 394, para. 3233; *Appleby* v. *Myers*, *ibid.*, p. 618, para. 5103; *The Madras*, *ibid.*, Vol. 41, p. 678, para. 5072.

COMPENSATION COURT.
Auckland.
1940.
September 30;
October 3.
O'Regan, J.

WALLACE
v.
PUKEMIRO COLLIERIES, LIMITED.

Workers' Compensation—Assessment—Worker suffering from Non-fatal Accident—Continued effect of Disease and Injury—Injury aggravated by Subarachnoid Aneurysm—Compensation allowed for shortened Period of Working Life—Workers' Compensation Act, 1922, s. 3.

In a non-fatal case where disablement is due to the combined effect of injury and disease, and the medical evidence is that, had there been no accident, the plaintiff would have been disabled by the disease before the expiration of the period of liability for accident, the measure of compensation is the period by which the injury has hastened the disablement, and in this respect there is no difference between heart disease, cerebral haemorrhage, subarachnoid aneurysm, or any other disease. Accordingly, in such a case, the Court, though it is largely a matter of conjecture, must estimate the period of disablement due to the injury alone.

Armstrong v. *New Zealand Shipping Co., Ltd.*, [1938] N.Z.L.R. 167, G L.R. 215, followed.

McHerron v. *Hansford and Mills Construction Co., Ltd.*, [1932] N.Z.L.R. 1222, G.L.R. 465, considered.

Counsel: *C. J. O'Regan*, for the plaintiff; *Hore*, for the defendant.

Solicitors: *C. J. O'Regan*, Wellington, for the plaintiff; *Buddle, Richmond and Buddle*, Auckland, for the defendant.

COMPENSATION COURT.
Auckland.
1940.
September 20, 24.
O'Regan, J.

DAVIS
v.
MacEWANS MACHINERY, LIMITED.

Workers' Compensation—Liability for Compensation—Skin Cancer caused by gradual process in Course of Employment—Whether "injury by accident" or disease—Workers' Compensation Act, 1922, s. 3 (1).

The workers' compensation legislation has been framed deliberately to provide compensation for two classes of injury, one due to accident and the other due to disease. The distinction between the two is that one occurs at a definite time and place, while the other is due to a gradual process. Notwithstanding the successive decisions by which the meaning of the word "accident" has been extended, the distinction still exists.

Consequently, where a worker in the course of his employment, by a gradual process, contracted epithelioma or skin cancer, which had not been proclaimed as an industrial disease under s. 10 (*b*) of the Workers' Compensation Act, 1922, the epithelioma was not injury by accident, and he was not entitled to compensation.

Fenton v. *Thorley and Co., Ltd.*, [1903] A.C. 443, 5 W.C.C. 1; *Brintons Ltd.* v. *Turvey*, [1905] A.C. 230, 7 W.C.C. 1; *Innes (or Grant)* v. *Kynoch*, [1919] A.C. 765, 12 B.W.C.C. 78; *Burrell and Sons, Ltd.* v. *Selvage*, (1921) 90 L.J.K.B. 1340; 14 B.W.C.C. 158; and *Fife Coal Co., Ltd.* v. *Young*, [1940] 2 All E.R. 85, 33 B.W.C.C. 108, distinguished.

Counsel: *J. F. W. Dickson*, for the plaintiff; *I. J. Goldstine*, for the defendant.

Solicitors: *Dickson and Norris*, Auckland, for the plaintiff; *Goldstine, O'Donnell, and Wilson*, Auckland, for the defendant.

Case Annotation: Fenton v. *Thorley and Co., Ltd.*, E. and E. Digest, Vol. 34, p. 266, para. 2264; *Brintons Ltd.* v. *Turvey*, *ibid.*, p. 464, para. 3799; *Innes (or Grant)* v. *Kynoch*, *ibid.*, p. 272, para. 2308; *Burrell and Sons, Ltd.* v. *Selvage*, *ibid.*, para. 2309.

COMPENSATION COURT.
Hamilton.
1940.
October 7, 10.
O'Regan, J.

HAMILTON
v.
TUCK BROS., LIMITED.

Workers' Compensation—Liability for Compensation—Maori Prejudice against Hospitals—Treatment delayed until too late to save injured Worker's Life—"Death . . . caused . . . by an unreasonable refusal to submit to medical treatment"—Workers' Compensation Act, 1922, s. 16.

The removal to hospital of a Maori worker who had suffered a fracture of each leg, was advised by a doctor, who had no doubt that, had he gone at once, after a course of treatment there, he would have been restored to full working capacity. Owing, however, to old Maori prejudice against hospitals, he refused to go until his condition was so desperate that he died under an amputation of one leg for gangrene.

R. B. G. Chadwick, for the plaintiff; *A. L. Tompkins*, for the defendant.

Held, That his conduct was unreasonable and in contravention of the provisions of s. 16 of the Workers' Compensation Act, 1922, which applied, and therefore that no compensation was payable in respect of his death.

Solicitors: *Hampson and Chadwick*, Rotorua, for the plaintiff; *Tompkins and Wake*, Hamilton, for the defendant.

TRANSFERS TO BENEFICIARIES UNDER A TRUST, WILL, OR SETTLEMENT.

Stamp Duty Payable.

By E. C. ADAMS, LL.M.

These notes on a somewhat difficult branch of stamp duty law have been prompted by a consideration of the recent judgment of Blair, J., in *Pattison* v. *Commissioner of Stamp Duties*, [1940] N.Z.L.R. 93.

Although throughout this article what is dealt with is the duty on a *transfer* or conveyance, the reader must bear in mind that s. 88 (1) of the Stamp Duties Act, 1923, provides that every instrument of *agreement of sale* of property (other than shares) is liable to the same conveyance duty as an actual transfer or conveyance on sale. It is especially important to bear this in mind in dealing with instruments by way of family arrangement; the *ad valorem* conveyance duty, if any, is usually payable on such instruments and not on the subsequent transfer or conveyance in pursuance thereof. Thus, in *Commissioner of Stamp Duties* v. *Thompson*, [1926] N.Z.L.R. 872, the Court of Appeal held that it was the agreement between the two beneficiaries which was liable to *ad valorem* conveyance duty, and not the transfer of the land from the trustee to the purchaser beneficiary at the request of the vendor beneficiary. The Court did not state what duty the transfer in that case was liable to, but obviously it was chargeable with a duty of 15s., under s. 168, as a deed not otherwise chargeable, in respect of its operation as being in pursuance of the trust, *and* to a duty of 3s. under s. 91, as a conveyance in pursuance of a duly stamped agreement of sale. The principle of *Hulse* v. *Commissioner of Stamp Duties*, [1920] N.Z.L.R. 876, is also to be noted. There it was held that a recital in a transfer from A. to C. of an oral prior sale between A. and B., is to be stamped with *ad valorem* conveyance duty as an agreement of sale. Thus a recital in a deed of release between beneficiaries and trustees of an oral family arrangement will bring into operation s. 88 (*supra*). Indeed, Stout, C.J. (who gave a dissenting judgment in *Hulse's* case (*supra*) went so far as to say in the unreported case of *Chambers* v. *Minister of Stamp Duties*, 1920:

> Many English cases no doubt show that if an instrument is duly stamped for its leading object, such stamp covers everything accessory to that object, but in my opinion a different principle was laid down in *Hulse* v. *Commissioner of Stamps*.

The practical importance of the matter in this paragraph is that an instrument of agreement of sale (as defined in s. 88) is not always followed by an instrument of conveyance on sale (as defined in s. 77), and also, that sometimes when it is followed by a conveyance, the position of the estate as to debts and legacies owing by the executor may have changed in the meantime, as in *Thompson's* case (*supra*).

During the course of a long practice in assessing instruments to beneficiaries, the writer of this article has derived much assistance from two sources. *First*, from the careful and lucid arguments and illustrations addressed by the late Sir John Salmond to the Full Court, when appearing for the Crown in *Hammond* v. *Minister of Stamp Duties*, [1918] N.Z.L.R. 968; *secondly*, from certain passages in *Alpe's Stamp Duties*, 22nd ed. 133, 134:

> The persons who were executors and trustees of a will which contained a trust for sale could always, apart from any power of appropriation contained in the will, or given by Statute, appropriate any specific part of the residuary estate in or towards satisfaction of a pecuniary legacy upon the principle that under the trust for sale they had power to sell the particular asset to the legatee and to set off the purchase money against the legacy: *In re Beverley, Watson* v. *Watson*, [1901] 1 Ch. 681.

In such cases there is by law an intendment of sale, and *ad valorem* conveyance duty is payable accordingly. But an appropriation made by an executor under an express power in the will *not requiring the consent of the legatee* to the appropriation would stand on an entirely different footing, and would not be liable to conveyance duty.

Now, these cases dealing with the stamp duty payable on transfers to beneficiaries may be divided into two main classes—

A. When the transfer is strictly in pursuance of the will or settlement, there being done nothing *dehors* of the will or settlement.

B. When the trusts of the will, intestacy, or settlement are not allowed to take their full course, but something is done by agreement to intercept, modify, or vary the trusts.

Class A. may be further subdivided into two classes: (1) When the transferee has by the terms of the will or settlement to pay something or give something of value before he is entitled to the transfer of the specific property; and (2) when the transferee by the terms of the will or settlement has not to pay anything or give anything of value before he is entitled to the transfer of the property. It will be seen later that the assumption by the beneficiary of specific property *cum onere* does not *per se* render the transfer liable to conveyance duty.

Class B. may also be subdivided into two classes: (1) When the contract is between the trustee and the beneficiary, when usually *ad valorem* duty is payable on the full value of the property transferred or on the full amount of the consideration; and (2) when the contract is between the transferee beneficiary and another beneficiary, when usually *ad valorem* duty is payable, not on the full value of the property transferred, but only on the amount of the consideration passing from the transferee beneficiary to the vendor beneficiary, *or* on the value of the specific property *less* the value of the transferee's pre-existing beneficial interest therein.

Class A. (1).—*When the transfer is strictly in pursuance of the will or settlement, but the transferee has to give valuable consideration therefor.*

The specific exemption around which the arguments nowadays revolve is s. 81 (*d*), which reads thus:

> The following conveyances shall be exempt from conveyance duty:—
>
> (*d*) A conveyance by a trustee, executor, or administrator to a beneficiary, devisee, legatee, appointee under a power of appointment, or successor on an intestacy, of property to which such beneficiary, devisee, legatee, appointee, or successor is entitled under the trust, will, or intestacy, to the extent to which he is so entitled.

The words of the subsection which usually require interpretation by the Court are the last ones, "*to the extent to which he is so entitled.*" It may be mentioned in passing that this exemption is extended to an assignee of the beneficiary, and also to his legal personal representative: *Thompson's* case.

The phraseology of this exemption differs materially from the corresponding exemption in the previous Act, the Finance Act, 1915; but cases decided under the present Act show so far that there has been no material alteration in the law. The principles laid down in cognate cases under the earlier Acts appear to apply equally to the present Act. Thus, although unlike the previous Acts the present Act confers no *express* exemption from *ad valorem* duty of conveyances by way merely of confirmation of title, it is probable that such transfers are equally exempt under the 1923 Act; this result can be achieved by giving a wide meaning to the words "beneficiary" and "trust" in subsection 81 (*d*); this appears to follow from the reasoning of the Court of Appeal in *Thompson's* case.

The leading case under Class A. (1) is *Sutherland* v. *Minister of Stamp Duties*, [1921] N.Z.L.R. 154, where certain of the beneficiaries were entitled to a transfer of realty called "Craiglea" upon payment of a certain price, the price being their share in the residue *plus* the difference between the sum which their shares represented and the value of "Craiglea." It was held that conveyance duty was payable not on a sum equal to the value of "Craiglea," but only on the sum by which the value of "Craiglea" exceeded the value of the transferees' shares in the residue. *Commissioner of Stamp Duties* v. *Schultz*, [1934] N.Z.L.R. 652, is very much like *Sutherland's* case. A. devised mortgaged land to B., subject to B. giving his executors another mortgage for a sum to be ascertained. It was held by the Court of Appeal that *ad valorem* duty was payable on the amount of the mortgage which B. had to give to the executors. Ostler, J., in *Schultz's* case, at p. 661, sums up the law thus:

> In the judgment of the Court of Appeal in that case [*i.e.*, *Thompson's* case] *Sutherland's* case is carefully distinguished, the facts being referred to in such a way as to show that the Court of Appeal intended to throw no doubt on the proposition that if a farm is devised to a beneficiary subject to the condition that he is to pay part of its value, *to the extent he is required to pay*, he is a purchaser.

The judgment of Ostler, J., is also useful in its reference to *McIlraith's* case, which has served for thirty years or so as a good old stand-by for the tax-payer's counsel:

> Counsel for respondents also relies on *McIlraith* v. *Commissioner of Stamps*, (1906) 25 N.Z.L.R. 949. That case was quoted with approval by Skerrett, C.J., in his judgment in *Thompson* v. *Commissioner of Stamp Duties*, [1926] N.Z.L.R. 871, 876, only on another point. The case was not mentioned in the judgment of the Court of Appeal. In my opinion, in so far as it decides that a conveyance in pursuance of a devise subject to a condition that the devisee shall pay certain money is exempt from all stamp duty, the case is impliedly overruled by *Sutherland's* case.

But in *Sutherland's* and *Schultz's* cases the transferees were undoubtedly devisees of the land; yet questions sometimes occur in practice as to whether the principle of those cases should be extended to include not only a devise in the strict sense but a testamentary *benefit* attaching to land, such as an option to purchase land.

(To be continued).

NEW ZEALAND LAW SOCIETY.

Council Meeting.

(Concluded from p. 249).

Leases: Extension of Endorsement: Deeds.—In reply to the communication from the New Zealand Law Society, the Secretary of the Law Revision Committee wrote as follows:—

> I have your letter of July 3, with reference to the extension of leases by endorsement under the deeds system.
>
> I am directed by the Chairman to reply that a Sub-committee of the Law Revision Committee is at present examining and reporting upon draft Land Transfer and Property Law Bills prepared by Mr. S. I. Goodall, and that the Minister is of opinion that the best course is to forward a copy of your communication to this Sub-committee for its consideration.

Mr. Goodall's attention was also drawn by the Society to the matter, and he had replied as follows:—

> Your letter herein of 17th instant is at hand with its enclosure.
>
> Some time since I prepared draft copies of Land Transfer and Property Law Bills, making provision in both systems for extension of leases by endorsement, with incidental provisions. At the present moment these bills are being dealt with by a Sub-committee of the New Zealand Law Revision Committee.
>
> It would appear that the matter is already well brought before that committee, but if you particularly so desire I will again draw their attention to the matter, stating that it has the approbation of your Society.

It was resolved that the letters be received.

Hire Purchase Agreement Act, 1939.—The point raised in this matter at the last meeting of the Council had been referred to the Attorney-General who had included a provision in the Statutes Amendment Act, 1940.

Removal of Judgments and Orders from Supreme Court to Magistrates' Court.—The following letter was received from the Wanganui Society:—

> I enclose herewith copy of letter dealing with the above subject from Mr. . I am instructed to forward the letter to you with a request that its contents be conveyed to the proper quarter.

Enclosure—

> I should like, through your Society, to draw the attention of the Rules Revision Committee to anomalies in the procedure for the removal of judgments or orders from the Supreme Court into the Magistrates' Court.
>
> The provisions for such removals are contained in:
>
> 1. The Magistrates' Court Act, 1928, s. 36.
> 2. The Rules for Magistrates' Courts under the Imprisonment for Debt Limitation Act, Rule 4.
> 3. The Destitute Persons Amendment Act, 1926, s. 8.
>
> If it is desired to issue execution on a judgment or order of the Supreme Court in the Magistrates' Court it is necessary to obtain and file, under the provisions of s. 36 of the Magistrates' Court Act, 1928, a Certificate of Judgment. If on the other hand it is desired to issue a judgment summons on such a judgment it is necessary, under Rule 4 of the Rules under the Imprisonment for Debt Limitation Act, to file a certified copy of the judgment or order to be enforced. It will be seen, therefore, that a party wishing to enforce a judgment or order of the Supreme Court in the Magistrates' Court and desiring to resort to execution first, and on failure of this, to judgment summons proceedings, would be put to the unnecessary expense of obtaining and filing first a Certificate of Judgment and then a copy of the judgment.
>
> Section 8 of the Destitute Persons Amendment Act provides that where the Supreme Court in divorce proceedings has made an order for payment of any weekly or monthly sum, a copy of such order under seal of the Court may be registered in the Magistrates' Court and thereupon enforced as though it were an order of a Magistrate made under the Destitute Persons Act.
>
> It recently came to my notice that where a Decree Absolute in divorce contained also an order for payment of a weekly sum for maintenance and also an order for payment by the respondent of the petitioner's costs, and it was desired to remove both orders into the Magistrates' Court for enforcement, the petitioner was required to obtain and file a sealed copy of the Order as a basis of proceedings to enforce payment of maintenance and another sealed copy as a basis for judgment summons proceedings and by analogy had it been desired to issue execution for the costs a certificate of judgment would first of all have been necessary.
>
> From the above I deduce this contention that the above provisions should be revised to provide for the filing of one copy of any judgment or order of the Supreme Court in the Magistrates' Court in order to found any proceedings for subsequent enforcement.

On the motion of the Chairman, the matter was referred to the Under-Secretary of Justice with a suggestion that amendments be made to do away with the existing anomalies.

Salaries Increase; Order of Court of Arbitration.—The Southland and Canterbury Societies enquired as to whether the five per cent. increase in salaries recently granted by the Arbitration Court applied to the Law Clerks' Union.

It was pointed out that at the present, this increase applied only to Industrial Awards and that it was a matter which should be left for each Society to act as it thought best.

Law of Property Act, 1925 (Eng.), s. 82: Proposal to Adopt.—It was decided to refer the following letter received from the Wanganui Society to the Law Revision Committee:—

> My Council instructs me to forward to you for consideration of the Statutes Revision Committee a suggestion that s. 82 of the Law of Property Act, 1925 (English) should be incorporated in an amendment to our Property Law Act.
>
> This s. 82 abrogates the rule in *Ellis* v. *Kerr*, [1910] 1 Ch. 529, and provides that where a person enters into an agreement with himself and another, or others, the agreement is construed as if it had been made with the other or others alone.

Pass Books: Cheques Entered by Numbers.—The following letter was received from the Hamilton Society:—

> My Council have asked me to have the following resolution placed on the order paper for the next meeting of the New Zealand Law Society:

That practitioners should not make any agreement with their banks whereby Trust Account cheques are entered in pass books or bank ledgers by number only.

The undesirability of this practice was evident in a recent case, where the practitioner left the country leaving no books or records of any kind behind. He had uplifted his Trust Account cheques from the bank and instead of the payees' names being entered in the Bank's books there were only numbers against the amounts of the cheques. The result was to make the investigation of his affairs extremely difficult and much more difficult than it would have been had the payees' names been entered.

Mr. McMullin stated that the position was that the banks had asked a number of practitioners whether they would allow numbers to be inserted instead of names.

It was decided that the matter should be left to the Wellington members to obtain further information for the next meeting.

"Law Journal" Golf Cup.—With the consent of Messrs. Butterworth and Co. (Aus.), Ltd., the Council was asked for permission to compete for the "Law Journal" Cup at the "Devil's Own" legal golf tournament being held at Palmerston North that week-end. Permission was given accordingly.

Jurisdiction of Supreme Court and Court of Appeal in Claims for Wages.—Mr. Watson drew attention to articles which had appeared in two weekly newspapers indicating that apparently an effort was being made, following the decision of the Full Court in *Wilson* v. *Dalgety and Co.*, to have legislation passed removing claims for wages and other claims arising from contracts of service from the jurisdiction of the Supreme Court and Court of Appeal and vesting exclusive jurisdiction in such cases in the Arbitration Court. He considered the matter a very serious inroad on the right of the subject to have free access to the ordinary civil Courts of the Dominion, and he accordingly moved as follows:—

The Council of the New Zealand Law Society views with grave apprehension any suggestion that the jurisdiction of the Supreme Court and Court of Appeal should be in any way limited or restricted in connection with claims for wages or other claims arising out of contracts of employment. The Council is of opinion that it is essential in the public interest that all citizens should have unrestricted access to the ordinary civil Courts of the Dominion for the purpose of litigating all classes of civil claims.

It was resolved that a copy of the foregoing resolution be forewarded to the Attorney-General.

Secretary; Leave of Absence.—A letter was received from the Secretary notifying his enlistment in H.M. Forces and requesting leave of absence during his period of war service.

The President reported that Mr. Watson and he had attended the meeting of the Council of the Wellington District Law Society when this matter had been discussed. The Wellington Society had decided to approve of a grant of a subsidy on the Secretary's military pay and also of a special bonus of £105, the Wellington Society's proportion to be decided when the matter received consideration by the New Zealand Law Society.

It was resolved that the Secretary be given leave of absence for the period of his War service.

Acting Secretary.—It was decided that Mrs. D. I. Gledhill be appointed Acting Secretary and that it be left to the Standing Committee to arrange for any extra assistance that may be required during the next three months.

DOCTORATE OF LAWS.

Conferred on Mr. O. C. Mazengarb.

At a special meeting of the Senate of the University of New Zealand, held on October 22, the degree of Doctor of Laws was conferred on Mr. Oswald Chettle Mazengarb, Wellington, for a highly-praised thesis on the law of negligence and contributory negligence.

A work of such distinction brought credit both to Mr. Mazengarb and to the University, said the Chancellor, the Hon. Dr. J. A. Hanan, M.L.C. The thesis had been submitted to the senior professor of law at Cambridge University, who had described it as "a valuable contribution to learning," and had strongly recommended the granting of the distinction. Such a laudatory report, said the Chancellor, had caused him to obtain a copy of the thesis.

"The subject is a very difficult one, and the undertaking of such a bold venture necessitates very wide reading, powers of observation, and profound study," the Chancellor proceeded. "The thesis is a work of exceptional merit on a highly complex aspect of modern litigation. For many years efforts have been made by Courts of Appeal, the Privy Council, and the House of Lords to express the law of negligence in a form which would avoid anomalies and injustice. Mr. Mazengarb has traced the history of the law on the subject, and has discussed the differences of judicial opinion which now exist regarding it; and then he has explained the doctrine of contributory negligence in a manner that showed his expert knowledge of the law and of the problems which arise in practice."

In conclusion, the Chancellor said that laymen, as well as lawyers, would be interested in Mr. Mazengarb's conclusion that the doctrine of contributory negligence, when properly understood and applied, was a sound and useful doctrine, and in the proposals he had made for a reform of the law by legislation.

It is understood that the examiner, Dr. Haseltine, commended the thesis for its historical, theoretical, and critical treatment which illumined the whole subject of contributory negligence. Dr. Mazengarb's practical and constructive consideration of the modern problems to which the doctrine gives rise, came in for special praise.

LEGAL LITERATURE.

The Law of Death and Gift Duties in New Zealand. By E. C. ADAMS, LL.M. Pp. xx+292. With *Supplement No. 1, 1940.* Butterworth and Co. (Aus.), Ltd.

Death duties, so economists tell us, are a source of revenue to which legislators readily turn as being the least likely of all forms of taxation to produce resentment among constituents. This, we think, is true, though it is interesting to read in the preface to *Hanson's Death Duties* this vigorous denouncement:

> They absorb capital and are spent as income . . . their social effects have been devastating . . . that a sequence of two or three deaths with moderate intervals is sufficient to involve the shutting up or sale of a country place, the emasculation of a business or the flight of artistic treasure to America.

The outbreak of war has been accompanied by an inevitable increase in all forms of direct taxation and recent increases in death duties have been unusually severe.

Take as a typical illustration the *estate duty* payable in respect of an estate *exceeding* £5,000 but *not exceeding* £6,000. Under the Death Duties Act, 1921, the rate was 4 per cent.; by the Finance Act, 1939, where death occurs after August 1, 1939, the rate was increased to $5^1/_5$ per cent.; within a few weeks, by the War Expenses Act, 1939, where death occurs after September 26, 1939, the rate increased to $5^1/_5$ per cent. plus one-third thereof; and now by the Finance Act, 1940, where death occurs after June 30, 1940, the rate is 11 per cent. In other words, the estate duty has almost trebled and there has been in addition, a proportionate increase in *succession duty.*

Quite apart from war conditions, nets spread by the death duties statutes, both in England and in New Zealand, have been perhaps the most finely-spun of all the taxation nets. Estate duty, which in England as in New Zealand is a tax falling upon all the property passing on death without regard to the persons who take, was first imposed in its present form in 1894. The English predecessor of our succession duty—*viz.*, legacy duty—a tax upon personal property passing under a will or upon an intestacy, was first imposed in 1780. Since these early times the ingenuity of the lawyer in devising legitimate methods of evading the duty, has resulted in more thorough-going and formidable legislation.

It is therefore encumbent upon the family solicitor, and indeed upon every solicitor, to be as familiar as is possible with the provisions of the Act both for the purpose of advising his client during his lifetime and his executors after his death.

So it is opportune that Mr. Adams has seen fit to produce his work at this time. It will be indispensable to every solicitor, and a boon to all whose professional or business paths cross this field of taxation.

Mr. Adams possesses ideal qualifications for his task, and this is evident in every page. To attempt an analysis would be purposeless. All that a reviewer can profitably do is to draw attention to those sections in the Act which reveal any weakness in argument or exposition and to sound danger signals, if need be.

By all tests the present book passes handsomely. To s. 5 are devoted some forty pages of closely printed and carefully worded and pertinent comment with well-selected examples. It was, however, the treatment of s. 31 (incidence of death duties) and, particularly of subs. 2, which immediately attracted our attention and almost of itself convinced us that to the preparation of this book exceptional care and knowledge were devoted.

Apart from its excellence in subject-matter, the book commends itself in other ways. There is an exhaustive table of just under 600 cases; an Index which we have tested in numerous ways for omissions, but find excellent and adequate; the type is clear and readable with very careful use of small type and italics; and lastly the format possesses the desirable characteristics of utility and attractiveness in appearance.

It is unfortunate that the passing of the Finance Act, 1940, immediately after the book had gone to print, has necessitated the issue of a Supplement. What we have said however with regard to the excellence of the main work, applies with equal force to the Supplement.

This work is a first class contribution to practical legal literature.

—E. C. CHAMPION.

Control of Aliens in the British Commonwealth of Nations. By C. F. FRASER, sometime Fellow in Law, Harvard University, Assistant Professor of Law, Northeastern University. Pp. 304. London: The Hogarth Press.

In 1937 one of the reports in the International Series of the Institute of Pacific Relations, the *Legal Status of Aliens in Pacific Countries: An International Survey of Law and Practice concerning Immigrants, Nationalization, and Deportation of Aliens, and their Legal Rights and Disabilities,* edited by Norman MacKenzie, of Toronto, was published by the Oxford University Press.

Much water has flowed under London Bridge since then, when Fifth Column activities were not realized, and Professor Fraser's *Control of Aliens in the British Commonwealth of Nations,* with an additional chapter reviewing the changes that have taken place since the outbreak of war, comes at an opportune time, enabling Commonwealth legislators to compare the systems in vogue in the component units and to discover the underlying principles and standards (if any) upon which the administration of the law is based.

The author points out that while Canada, South Africa, and Eire have created a separate citizenship status apart from the common British nationality, Australia and New Zealand have so far not adopted "the novel doctrine that there is an Australian (or New Zealand) nationality as distinguished from a British nationality." He regrets that Eire has endeavoured to establish the proposition that the effect of a separate citizenship should extend beyond the sphere of Empire relationships into the international sphere, and considers that a uniformity of citizenship policy giving a distinct status to persons devised *solely for intra-Commonwealth purposes,* is highly desirable and indeed

almost essential. "It would seem unfortunate if the development of such Dominion citizenship should be deemed inconsistent with the continued existence of a common British nationality for international purposes."

The greatest danger in the Commonwealth in connection with our dealings with aliens is "the degree of unchecked executive control" left to the Administrators or boards in a domain "in which," according to Professor Laski, "no recognized principles seem to apply and in which an air of secrecy seems to cloak all the proceedings." Under the present system the Home Secretary could, in Great Britain, without giving reasons or public indication of his intention, effect the exclusion of any and every class of alien. In Australia, the dictation test can be abused in its application, and a writer in the *Round Table* commenting on its abuse in the Kisch case said that "many people had had the uneasy feeling as they look around the world and see what is happening elsewhere, that the very existence of such wide discretion as this consorts better with dictatorship than with a democratic parliamentary order."

The author contrasts the procedure in the United States, where naturalization is a judicial process, with some assistance given by the executive in the matter of investigating applications with that in the United Kingdom where "expulsion, exclusion, and naturalization are almost wholly an executive process, with no publicity either as to investigation or decision." He advocates machinery providing a maximum of protection for the country and a minimum of hardship and mental anguish for the alien. This involves a greater measure of publicity, and some definite standard or standards known to the public, reasons being assigned for any decision not in conformity with such standards, the establishment of a series of reports accessible to the public.

Great care must be exercised to-day to see that no unnecessary hardship is caused to political refugees from Europe by reason of the military decision of some officer whose actions are not open to question: "The legislative machinery of the British Commonwealth, in so far as it applies to the alien in his public aspect must be reviewed in the light of current problems and revised as reason and commonsense demand."

In the author's search for standards or principles of policy, that guided the Home Office in England in its exclusion or expulsion from Great Britain, some amusing revelations were made. To protect British musicians from a terrific influx of American jazz orchestras, every one carrying a saxophone without any other excuse for entering the country was to be refused permission to land. Many radio listeners would consider this a very sensible standard; but the saxophonist shipped his instrument by cargo boat. To protect the English waiters and cooks against foreign aliens entering as tourists, those landing with alarm clocks and carving sets were to be treated as suspects, for waiters scarcely ever travelled without alarm clocks or cooks without carvers.

This is a useful book for the lawyer and the legislator.

—H. F. VON HAAST.

HALF A CENTURY AT THE BAR.

Mr. J. L. McG. Watson, Invercargill.

Mr. J. L. McG. Watson, who has spent fifty-two years at the Bar in Invercargill, was the guest of honour of the Southland District Law Society at a luncheon on October 21. Speakers referred to the high esteem in which Mr. Watson is held by members of the profession and by the community as a whole. His associations with men prominent in the profession in Southland in the early days were recalled. One of the visitors present was Mr. R. C. Abernethy, S.M. The chairman was the president of the society, Mr. Gordon J. Reed.

The society felt that it could not let the opportunity of honouring Mr. Watson for his long service at the Bar in Invercargill pass without paying him homage, said Mr. Reed. Mr. Watson had been fifty-two years at the Bar in the city, and he was seventy-six years old. He was held in the highest regard by the Bar, the Bench and the general community. He hoped, said Mr. Reed, that Mr. Watson would be spared for many years yet.

Mr. Watson had started his law career articled to the firm of Macdonald and Russell, said Mr. Eustace Russell, and he was associated there with several men prominent in the legal community of Southland, among whom were the late Mr. Thomas Royds, who was known as the ablest conveyancer in Southland, and the late Mr. John Corbett. At that time there were only five Judges in New Zealand—Chief Justice Sir J. Prendergast, Mr. Justice Richmond, Sir Joshua Strange Williams, Mr. Justice Johnston and Mr. Justice Gillies.

In 1889 the partnership of Macdonald and Russell was dissolved. Mr. Watson practised on his own for a time, and then joined the late Hon. Robert McNab in practice. Later, Mr. Watson went into practice on his own account again, and then joined the late Mr. Brian Haggitt. After Mr. Haggitt's death he was joined by his son, Mr. Neil L. Watson, and the firm was now practising as Watson and Watson.

Mr. Watson had been prominently connected with the Caledonian Society as a young man and was also a foundation member of the St. Andrew's Scottish Society, of which he had been chief for the past twenty-five years. He had many outside interests and had always taken a keen interest in active sports. He had a special hobby—that of collecting walking sticks—and his collection was an outstanding one.

Mr. Russell said he hoped Mr. Watson would have many years of good health ahead of him, and he felt sure that when he retired there would be written across his brief the words "well and truly done."

He had first met Mr. Watson forty-four years ago, when Mr. Watson was on his honeymoon, said Mr. M. H. Mitchel. He recalled the vivid impression he had made on his mind. Mr. Mitchel said he had started his legal career in Mr. Watson's office and had learned then the wide extent of his popularity. The practice had grown rapidly because Mr. Watson, with his great popularity and capacity, attracted business.

Mr. H. J. Macalister said he felt that it was a historic occasion for the profession to be honouring one who had spent over half a century in practice in Invercargill,

and as far as he understood, it was an occasion which had not been paralleled in Southland. He had first come into contact with Mr. Watson at the First Church Sunday School at which Mr. Watson was superintendent. He hoped that in eight years' time the society would be able to celebrate his sixty years in the profession.

Mr. C. E. Davey (Wyndham) and Mr. R. T. Meredith also spoke, Mr. Meredith referring to Mr. Watson's active participation in sport in his younger days. Both wished him continued health for many years to come.

In reply Mr. Watson expressed cordial thanks for the welcome the society had extended to him, and for the honour the members had paid him. He had enjoyed his work in the profession and felt it an honour that he had been born in and had practised in Invercargill. The city was growing, and he considered that Sir George Grey's prediction that Auckland and Invercargill would become the two chief cities of the Dominion would be fulfilled eventually.

RECIPROCAL ENFORCEMENT OF JUDGMENTS.

Currency Conversion, and Other Points of Practice.

It may be useful, by way of supplement to the article on the Reciprocal Enforcement of Judgments Act, 1934, *ante*, p. 190, to refer to the chief practical question that arises in connection with registration of foreign judgments in New Zealand, that of conversion from foreign currency into New Zealand money. This relates not only to the original judgment debt; but also to any interest which may have accrued thereon prior to the time of registration in New Zealand and which may be entitled to the benefit of registration.

The following are the enactments now in force:—

1. The Reciprocal Enforcement of Judgments Act, 1934.

2. The Reciprocal Enforcement of Judgments Rules, 1935 (*1935 New Zealand Gazette*, p. 3600).

These are the general rules, but are (R. 3) to be read subject to Orders in Council under s. 3 of the Act giving effect to any agreement with another country. Rule 26 in particular provides that questions relating to judgments of a particular country and interest thereon shall be determined by any provisions in the special Order in Council. These rules follow substantially with slight simplification of arrangement, the English Rules comprised in Order XLI B, made in 1933 (*1940 Annual Practice*, p. 743; *1940 Yearly Practice*, p.734), to the notes furnished to which in the practice books reference can conveniently be made.

3. The Reciprocal Enforcement of Judgments (France) Rules, 1938 (Statutory Regulations, Serial No. 1938/176).

These are particular rules relating to France. The Convention scheduled to the Rules applies primarily only to "the metropolitan territory of France," and it does not appear that the power to extend it to territories outside Europe has been exercised. Under the present international position the Rules are therefore in practice a dead letter.

4. The Reciprocal Enforcement of Judgments (Belgium) Rules 1938 (Statutory Regulations, Serial No. 1938/177).

These rules are at the present time in the same position as those relating to France.

5. The Reciprocal Enforcement of Judgments Order, 1940 (Statutory Regulations, Serial No. 1940/88), summarized in the *New Zealand Law Journal* on June 4, last, p. 136, *ante*.

Under s. 3 of the Act, Part I thereof extends to the United Kingdom by direct authority of Parliament without the need of any further action. When the Act is applied to any other country, it is necessary in the Order in Council which applies it to specify what Courts of that country are to be deemed "superior Courts" for the purposes of the Act. There is, however, no statutory indication of what is to be recognized as a "superior Court" in any of the jurisdictions comprising the United Kingdom; nevertheless by s. 3 (3) the only judgments to which Part I of the Act applies, whether given in the United Kingdom or anywhere else, must be judgments of a superior Court of a country to which Part I extends. It is a nice point of speculation how far the Supreme Court, in applying the terms of a New Zealand statute to a foreign legal system, can assume judicial knowledge of the hierarchy of the foreign Courts, or should require expert evidence by a qualified lawyer of England, Scotland, or Northern Ireland, as the case requires.

As regards any part of His Majesty's Dominions outside the United Kingdom, and as regards foreign countries, the Act can be made to apply by Order in Council if the Governor-General is satisfied that substantial reciprocity of treatment will be assured. The Order of 1940 (consolidating proclamations made under the Administration of Justice Act, 1922, and continued in force by s. 12 of the Act of 1934) provides for reciprocity as regards various British territories. As regards foreign countries, the only ones with which reciprocity has so far been negotiated are France and Belgium, referred to above. The practice has apparently been to rely on the good offices of the Government of Great Britain to negotiate conventions the terms of which afford opportunity for accession by other British countries; and then for His Majesty to exercise in right of New Zealand the opportunity for accession which the original Convention affords.

Under the Administration of Justice Act, 1922, the question of interest in a foreign judgment was one of considerable complexity—*cf.*, notes to Order XLI A in the English practice-books. The position has to a great extent—but not entirely—been simplified by s. 4 (3) of the Act of 1934, which directs conversion at the rate of exchange prevailing at the date of the original judgment. Interest (if the original judgment carried interest) may, by s. 4 (6), be capitalized and included in the judgment debt upon registration of the judgment in New Zealand, but here there is no direction as to the rate of exchange to be selected. The point may be one of interpretation, or one of substantive common law. It does not appear that it has so far been the subject of legal decision either in New Zealand or Great Britain. Possibly s. 4 (3) applies, as s. 4 (6) speaks of the judgment as

" including " the interest. On the other hand, it would perhaps be fairer to select, as regards interest, the date of registration; at any rate the New Zealand rules (R. 12), require the supporting affidavit to state the ruling rate of exchange not only at the date of the original judgment (para. (*a*) of the rule), but also at the date of filing the documents (para. (*e*) of the rule)—which is as near to the date of registration as the case permits. It may be noted that the English rule (O. XLI B, r. 2 (2)) requires only a statement of the amount " payable under the judgment " represented in United Kingdom currency calculated at the rate of exchange at the date of the judgment. This suggests an assumption on the part of the English rule-making authority that interest is to be converted not at any rate ruling during the period when it accrued, but at the rate ruling when it began to accrue. This course, however convenient, is probably not in accord with sound commercial practice, under which capital sums are converted at a fixed rate, but revenue items at a current or average rate—*cf. Dicksee, Advanced Accounting*, p. 31. Payments accruing periodically are converted at the rates ruling on the date of payment: *Kornatzki* v. *Oppenheimer*, [1937] 4 All E.R. 133. On an action for account, however, even though payments should have been made periodically, the date to be selected is that when the balance is found on the account: *Manners* v. *Pearson*, [1898] 1 Ch. 581. Interest accruing from day to day should perhaps, on the analogy of one or the other of these cases, be converted either at an average rate or at the rate ruling when, on registration of the judgment, the interest is capitalized.

Reciprocity with United Kingdom.

As is mentioned above, the benefit of our Act has been granted to judgments of the superior Courts of the United Kingdom without any stipulation for reciprocity such as is required in the case of other countries. It may be of interest to note how New Zealand judgments actually fare in the United Kingdom. The Acts there in force are the Administration of Justice Act, 1920, and the Foreign Judgments (Reciprocal Enforcement) Act, 1933, upon which were modelled respectively our Acts of 1922 and 1934. The method of the Act of 1933 is to deal primarily with foreign countries and judgments of their Courts: s. 1. British countries are dealt with in a secondary fashion; s. 7 authorizes an Order in Council *applying* Part I of the Act to Dominions and judgments obtained in their Courts as it *applies* to foreign countries and judgments obtained in Courts of foreign countries. Such an Order in Council has been issued, the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933 (*1933 Statutory Rules and Orders*, p. 953). The result of this Order in Council—so it was held in *Yukon Consolidated Gold Corporation* v. *Clark*, [1938] 2 K.B. 241—is that Dominions in general are in the same position as foreign countries in general with respect to the application of the Act, and that the Act may be extended to a specific Dominion by a further Order in Council under s. 1 if reciprocity is assured. Two steps are necessary: (1) application to Dominions, &c., (2) extension to a specific Dominion, &c. The first step was taken in 1933, by the Order in Council already referred to; the second does not appear ever to have been taken.

Pursuant to s. 7 of the Act of 1933, when the Order in Council of 1933 was made, Part III of the Administration of Justice Act, 1920, ceased to have effect except in relation to those parts of His Majesty's Dominions to which it extended at the date of the Order in Council. Part II of the Act of 1920 had been applied to New Zealand by Order in Council of May 4, 1923; *1923 Statutory Rules and Orders*, p. 416; *1924 New Zealand Gazette*, p. 1294. Apparently, therefore, a New Zealand judgment is to be proceeded with in Great Britain under the Act of 1920, not under that of 1933, which corresponds to the New Zealand Act now in force. Which of the two is the more beneficial from the point of view of the New Zealand judgment creditor is not easy to say; the matter of interest, referred to above, is more uncertain under the earlier Act; on the other hand, the amply machinery by which registration of a judgment under the later Act can be set aside to the creditor's disadvantage is absent from the earlier Act.

According to the *Yukon* case, in the present semi-adopted state of the British Act, a Dominion judgment may, as at common law, be made the subject of an action in a British Court. In cases to which the new Acts apply this course is not merely superseded but expressly forbidden: see s. 8 of the Reciprocal Enforcement of Judgments Act, 1934, following s. 6 of the British Act of 1933.

RULES AND REGULATIONS.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (Bay of Plenty) Regulations, 1940. October 17, 1940. No. 1940/261.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (King-country) Regulations, 1940. October 17, 1940. No. 1940/262.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices General Regulations, 1940. October 17, 1940. No. 1940/263.

Customs Amendment Act, 1921. Customs Tariff Amendment Order, 1940. October 17, 1940. No. 1940/264.

Emergency Regulations Act, 1939. Protected Places Emergency Regulations, 1940. October 17, 1940. No. 1940/265.

Education Act, 1914. Educational Bursaries Regulations, 1940. October 17, 1940. No. 1940/266.

Fisheries Act, 1908. Sea-fisheries Regulations, 1939. Amendment No. 7. October 17, 1940. No. 1940/267.

Control of Prices Emergency Regulations, 1939. Price Order No. 14. October 17, 1940. No. 1940/268.

Control of Prices Emergency Regulations, 1939. Price Order No. 15. October 17, 1940. No. 1940/269.

Infants Act, 1908. October 24, 1940. No. 1940/270.

Industrial Conciliation and Arbitration Act, 1925. Industrial Conciliation and Arbitration Amendment Regulations, 1940, No. 2. October 24, 1940. No. 1940/271.

Transport Legislation Emergency Regulations, 1940. Transport Legislation Suspension Order, 1940. October 24, 1940. No. 1940/272.

Emergency Regulations Act, 1939. Aliens Emergency Regulations, 1940. October 24, 1940. No. 1940/273.

Air Navigation Act, 1931. Air Navigation Regulations, 1933. Amendment No. 9. October 24, 1940. No. 1940/274.

Education Act, and the Emergency Regulations Act, 1940. Education Amending Regulations, 1940. October 24, 1940. No. 1940/275.

Control of Prices Emergency Regulations, 1940. Price Order No. 16. October 24, 1940. No. 1940/276.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (Hawke's Bay–Wairarapa) Regulations, 1937. Amendment No. 3. October 24, 1940. No. 1940/277.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (North Taranaki) Regulations, 1940. October 24, 1940. No. 1940/278.

Industrial Efficiency Act, 1936. Licensed Industries General Regulations, 1940. October 25, 1940. No. 1940/279.