Butterworth's Fortnightly Notes.

"The lawyer primarily wants to know what an institution is, and then, the circumstances of its growth."
—Anson.

TUESDAY, AUGUST 2, 1927.

COMMORIENTES.

Copied from Lord Birkenhead's Act (Section 184) clause 6 of the Property Law Amendment Bill proposes to alter the rule of law with respect to persons who may die in the same calamity. Prior to the commencement of the Property Law Act 1925 (Imperial) the rule in England was (as it still is in New Zealand) that where two persons perish by the same calamity, then, in the absence of evidence on the point, there is no presumption as to the order in which they died or that they died at the same time. In such a case the onus of proof lies on the party who asserts the survival, or concurrent decease or pre-decease as the case may be. In **Broughton v. Randall** (1596) Cro. Eliz. 502, of two men who were "hanged in the one cart," one was held to have survived the other, from movements of the limbs and etc. **In the Goods Selwyn** (162 E.R. 1331) it was laid down in 1831 that "the general presumption is that the husband is the stronger and therefore survived." Since lady swimmers have crossed the Channel where strong men have failed is this presumption now valid? In 1860 however, when husband, wife and two children perished at sea, being washed off the deck by one wave and all disappearing together, it was held that there was no presumption that the husband had survived the wife, or the wife the husband (**Wing v. Angrave**, 11 E.R. 397). On similar facts the same decision was arrived at in **Reid v. Reid,** 29 N.Z.L.R. 124.

The Queensland Titles to Land Act, Section 26, creates a presumption of survivorship in favour of the younger person, but it is restricted in its application to realty; the then English rule is followed in regard to personalty *vide* **Palmer v. Muir** (1890) 4 Q.L.R. 46. It will of course, be still open to anyone bringing forth proof to assert the survivorship (**Wing v. Angrave**) *supra*. The ground will however, be cleared by the reasonable presumption sought to be created by the Bill.

LIGHT AND AIR.

The advent of tall buildings has made necessary an alteration to the existing law in relation to grants of rights of access over land of light and air. Such grants cannot now effectively be made for a longer period than twenty-one years. The Property Law Amendment Bill now before the House has for its intendment the enabling of grants to be made for a longer period than at present.

MAGISTRATES COURT ACT CONSOLIDATION.

The Hon. the Minister of Justice has informed the New Zealand Law Society that it is proposed to consolidate the Magistrates Court Acts this year, and at the same time has intimated that he will be glad to consider suggestions from Law Societies.

The Council of the New Zealand Law Society will be glad to receive any suggestions from practitioners in the direction indicated.

JURIES AMENDMENT.

To whittle down the right of the individual to be tried before twelve good men and true, to ten, as is proposed in the Juries' Amendment Bill may appear desirable in this country at the present time, and it is quite possible that, the empowering of the Judiciary to, in their discretion, accept as a verdict a majority of five-sixths of a jury would save considerable time to the Courts and expense to the country. The proportion of disagreements is about one in ten and upon a second trial probably half result in a conviction. Assuming that the proposed change would result in three fourths of the convictions upon the second trial being effectuated upon the first trial, the saving in time and expense does not appear to be so great. It should be borne in mind that the safeguards placed between an individual and the deprivation of his liberty, while appearing to be unnecessary in normal times, are very desirable in times of stress. It is in the interests of individual liberty, and for the furtherance of the ends of justice, that those safeguards should remain unimpaired. Those who practice in the Criminal Courts are well aware that a jury verdict is usually a majority verdict, the minority acquiescing. This is the reason why Counsel mark the dominating personalities on the Jury and then endeavour to convince them trusting that they will carry the Jury with them on retirement. Were it possible for a juryman's decision not to affect the issue, juries might possibly not be unanimous with the same frequency as now prevails. Should the saving of expense in Criminal administration be pressing, attention could more desirably be turned to the use of Grand Juries than to any tampering with the trial Jury.

JUSTICES OF THE PEACE ACT.

The Justices of the Peace Bill introduced into the House by the Attorney-General is a Consolidation of the 1908 Act and its five subsequent amendments. The occasion has been availed of to correct clause 28 9of the 1908 Act which provided that any declaration made under that Act which was false or untrue in any material particular, the person wilfully making such false declaration was guilty of perjury. Perjury however, is defined in Section 130 of the Crimes Act 1908 as assertions made by a witness in a judicial proceeding as part of his evidence on oath or affirmation. A false declaration may therefore be lacking in some necessary particular: for instance, it may not be made in a judicial proceeding.

It was held in **Rex v. Wilson,** 31 N.Z.L.R. 850, that the prisoner should not have been indicted for perjury under Section 130 (*supra*) but for his actual offence of making a false declaration as defined by Section 133 (*ibid*). As the penalty for perjury is liability to seven year's imprisonment, and for making a false declaration the maximum is two years, the distinction carries a difference. In the Bill before the House the clause 302 is amended by omitting that the false declarant **is guilty of perjury** and substituting "is liable to two year's imprisonment with hard labour."

SUPREME COURT.

Ostler J. July 4, 23, 1927.
Wellington.

FARMERS' MILKING MACHINE CO. LTD. v. KNAPP (No. 2)

Arbitration—Reference to Arbitration under Section 15 of the Arbitration Act 1908—Powers of Supreme Court with regard to Report of Arbitrator—Arbitration Act 1908, Sections 11, 12, 14, 15, 17.

Two motions in an action for infringement of a patent, one on behalf of the defendant for the adoption of the award of an arbitrator, and the other on behalf of the plaintiff for the variation of that award and for judgment for the plaintiff upon the award so varied. On 9th July, 1926, an Order of Court was made by consent of the parties under Section 15 of the Arbitration Act 1908 that certain questions on issues of fact be tried before an arbitrator agreed upon by the parties. The report of the arbitrator was made on 5th August, 1926, filed in the Court on 16th September, 1926. On 16th November, 1926, the plaintiff filed a motion to set aside or remit the report to the arbitrator for reconsideration. MacGregor J. held that the motion was premature—see **3 B.F.N.** 106. On the defendant moving to adopt the report the plaintiff filed the present motion.

Sir John Findlay K.C., and Park for plaintiff.
Blair for defendant.

OSTLER J. said that counsel for the plaintiff had contended that the Court has jurisdiction to review the findings in the award upon the same principles as were applicable to an appeal from the Supreme Court to the Court of Appeal—that on the authority of **Wade v. Hardley,** 29 N.Z.L.R. 577, and Section 14 (2) of the Arbitration Act 1908. The reference in the present case, however, had not been made under Section 14 of the Act. It was not a reference to an official or special referee for enquiry and report. It was a reference to an arbitrator agreed on by the parties for the trial by him of the questions of fact agreed to be submitted and therefore Section 14 (2) had no application. The distinction between a reference under Section 14 and a reference under Section 15 was similar to the distinction which existed under Sections 56 and 57 of the English Judicature Act 1873—see **Baroness Wenlock v. River Dee Co.,** 19 Q.B.D. 155, 160. The powers of the Court were different in the two cases. With regard to a report under Section 14 the Court might adopt or partially adopt or reject the report of the referee as it thought fit; but a report made by an arbitrator on a reference under Section 15 had the effect of the verdict of a jury. In England an elaborate set of Rules had been promulgated under the Arbitration Act, but in New Zealand there were no such Rules, and the powers of the Court were to be looked for in the Act itself, and the inherent jurisdiction of the Court. Even had this report been on a reference under Section 14 His Honour thought that the Court would not have had power to vary the report—see **Dunkirk Colliery Co. v. Lever,** 9 Ch. D. 20. The Court had express power under Section 14 to partially adopt the report, which implied a power to partially reject it, and in this sense the report might be said to be varied, but His Honour thought that even under section 14 there was no power in the Court to vary the referee's report beyond the power of adopting part and rejecting part. But the reference in the present case being under Section 15, the findings were equivalent to the verdict of a jury, and the only powers of the Court with regard to the report were those given by the Act. Those powers were as follows:—

(1) To adopt the findings in toto and give judgment in the action for the defendant on those findings.

(2) To set aside all or any of those findings upon any ground alleged in the motion upon which the verdict of a jury can be set aside.

(3) To give judgment for the plaintiff if it could show that *non obstante veridicto* it was entitled in law to judgment.

His Honour thought there was no power either to partially adopt the report (except on the principle that any separate finding might be set aside) or to decide the case on the evidence taken before the arbitrator. The Court had, however, by virtue of Section 17, all the powers conferred by the Act on the Court in cases of reference by consent out of Court. Those powers were to be found in Sections 11 and 12, and one of them was the power from time to time to remit the matters referred, or any of them, to the arbitrator for reconsideration. Consequently in addition to the powers already stated there was power to remit the matters referred or any of them to the arbitrator for his reconsideration.

In **Wade v. Hardley,** 29 N.Z.L.R. 577, the reference had been under Section 15, but in that case there were special terms in the order of reference which were construed as evidencing an intention of the parties that the whole matter should be freely open to review by the Court. That case should therefore be treated as one depending on its special circumstances, and not as laying down the general principle that the Court could deal with the report of an arbitrator on a reference under Section 15 on the same principles as those on which the Court of Appeal deals with an appeal from the Supreme Court. That principle had now been established in England by virtue of the Rules made under the English Arbitration Act 1889—see **Clark v. Sonnenschein,** 25 Q.B.D. 464. But in the earlier case of **Miller v. Pilling,** 9 Q.B.D. 736, which was decided on a reference under Section 57 of the Judicature Act 1873, it was made clear by the Court of Appeal that a finding of fact by an arbitrator under that Section must be dealt with as the verdict of a jury.

His Honour dealt at length with the report and the facts and remitted the report to the arbitrator for further consideration.

Solicitors for plaintiff: **Findlay, Hoggard, Cousins and Wright,** Wellington.

Solicitors for defendant: **Thompson and Turton,** Greytown.

Reed J. June 16, 27; July 11, 1927.
Auckland.

COLONIAL SUGAR REFINING CO., LTD.
v. VALUER-GENERAL.

Valuation of Land—"Unimproved Value"—Only Interests in Land Those of Lessor and Lessee—Lessee's Interest—Peculiar Value of Land to Lessee—Principles upon which Value of Lessee's Interest to be Assessed—Whether Appeal Lies from Assessment Court on Ground that Decision not Justified by the Evidence—Valuation of Land Act 1908, Sections 16, 17, 39.

Appeal, under Section 17 of the Valuation of Land Act 1908, from the decision of the Assessment Court given at Auckland, on 12th August, 1925, assessing the lessee's interest in the unimproved value of a mud flat at Chelsea, Auckland, such appeal being by leave of the President of the Court.

The property in question was approximately twenty-two and a-half acres in area and, excepting where reclaimed, was a mud flat covered by the sea at high water. It was leased from the Auckland Harbour Board by the appellant for a term of 50 years at an annual rental for the first twenty-one years of £10 0s. 0d. per annum, and for the remainder of the term £15 0s. 0d. per annum. Except on the seaward side the mud flat was surrounded by the freehold land of the appellant. The property was of considerable value to the appellant as a catchment area and for other purposes in connection with its works on the adjourning land; but its value to anybody but the appellant was not nearly so great.

The respondent assessed the capital value of the mud flat at £15,120 0s. 0d., valuing the improvements at £9,685 0s. 0d., the total unimproved value at £5,435 0s. 0d., and the lessee's interest in the unimproved value at £1,660 0s. 0d. At the date of the valuation complained of the lease had between seven and eight years to run. The appellant's estimate of the values were: Capital Value £2,502 0s. 0d., total unimproved value £732, value of improvements £1,770 0s. 0d. The Assessment Court sustained the respondent's valuation, the decision being in the following terms:—

> "We think that it is not possible to value Duck Creek "area apart from the surrounding area. On account of its "deep water frontage accessibility to Auckland and suita- "bility for a catchment area as well as for other purposes "the valuation should be sustained."

Richmond for appellant.
Paterson for respondent.

REED J. said that under the provisions of the Valuation of Land Act 1908 the onus of proof that a valuation was too high was upon the objector (Section 16) and the only appeal against the decision of the Assessment Court was upon points of law (Section 17) and only then by consent of the President of the Court (*ib*). Counsel for the appellant had contended that the points of law open to him were: (1) That there was no evidence to justify the finding; (2) that the Assessment Court applied

a wrong principle in arriving at its decision. His Honour did not think that in an appeal from an Assessment Court the first point was open. No provision was made for bringing the evidence before the Supreme Court (Section 17 (c)) and therefore the consideration of whether there was any evidence to support the finding would appear to be excluded. The second point was open, and as, in lieu of a formal decision setting out the principles upon which the Assessment Court acted in arriving at its decision, the evidence had, by consent, been made part of the case, His Honour was entitled to look at that evidence and from that and the decision deduce the principles that had been applied. Whether the correct principles had been applied or not was clearly a question of law upon which an appeal to the Supreme Court would lie..

His Honour reviewed the evidence at length and said that for the Assessment Court to have sustained the valuation of the respondent it must have based its judgment almost entirely upon what it considered was the value of the area to the Company. Mr. Paterson had contended that the Assessment Court was not bound to decide upon the evidence at all, that the members of that Court were in the position of experts, or skilled witnesses, and that the Court was analagous to a Nautical Court and the Assessors to Nautical Assessors, and he referred to **Australia v. Nautilus** (1926) L.J. (P.) 145. The difference was obvious—nautical assessors were appointed on account of their nautical knowledge to assist the Court; assessors on an Assessment Court required no qualification whatsoever—they might be absolutely ignorant of the principle of land valuation. The Assessment Court was in truth a judicial tribunal which must act on the evidence brought before it; it must act within the law, and by applying the correct legal principles to the evidence, ascertain and determine the proper valuation.

The question then was as to what were the correct principles to apply. Certain principles had been laid down in **Duthie v. Valuer-General** 20 N.Z.L.R. 585, where the Court applied the definition of "unimproved value" in the Government Valuation of Land Act 1900. That definition was substantially the same as that in the Valuation of Land Amendment Act 1912. **Duthie v. Valuer-General** was decided in November, 1901. In 1903 the Statute was amended; the amendment now appeared as Section 39 of the Valuation of Land Act 1908. Undoubtedly if that Section applied, the simple and common sense method of computing a lessee's interest in the unimproved value of an area of land, as laid down in **Duthie's** case, had been abrogated, and a much less fair and reasonable method substituted. The question was whether it applied in the circumstances of the present case. The Section only applied "where land is subject "to a lease and there are more interests therein and more "owners than one." Both conditions must exist. In the present case the land was subject to a lease, which implied two persons, the lessor and lessee, but there were no more interests therein, and, even conceding that the word "owner" included a lessee, the implication was that there must be an additional "owner" to the two necessary parties to the lease. The Section dealt *inter alia* with the interests of sub-lessees and it was probable that the draftsman had that in mind when drafting the Section. In **Thomas v. Valuer-General**, (1918) N.Z.L.R. 164, 176, Hosking J. left the question open.

His Honour thought that, upon the proper construction of the Section, it had no application where there were no interests outside that of the lessor and lessee. It was obvious that the Valuation Department had adopted the artificial method prescribed by that Section and had in no respect based its valuation on the real value in the market of the unexpired term of the lease. The Assessment Court had no doubt proceeded on the correct principle of attempting to really value the lessee's interest in the unimproved value, but it had gone wrong in considering it from the point of view of its value to the Company.

The correct method of ascertaining the lessee's interest in the unimproved value was that directed in **Duthie v. Valuer-General.** The Assessment Court was not debarred from considering the appellant Company as a possible purchaser, but it must be as an unfettered purchaser, that was to say, the Company's special requirements, owing to its established business in the vicinity, must not be allowed to be a factor in determining the value of this eight years' lease of an unimproved mud flat. The use to which the land was being put or the nature of the existing occupation was quite immaterial.

The Appeal would be allowed and the matter remitted to the Assessment Court with a direction to ascertain and determine the value of the appellant's interest in the unimproved value of the property in the manner above indicated.

Solicitors for appellant: **Buddle, Richmond and Buddle,** Auckland.

Solicitors for respondent: **Crown Solicitor,** Auckland.

Reed, J. June 24, 28, 1927.
Auckland.

ONE TREE HILL ROAD DISTRICT v. AUCKLAND PRESBYTERIAN COLLEGE FOR LADIES LTD.

Rating—Exemption—Land and Buildings Used for a School not carried on Exclusively for Gain or Profit.—Presbyterian School owned and carried on by Limited Liability Company——Dividends of Shareholders Limited—Whether School within Exemption—Rating Act 1925, Section 2 (g).

Case stated to determine the question whether a school carried on by the defendant company was entitled to exemption from the payment of rates under Section 2 (g) of the Rating Act 1925, as being a school "not carried on exclusively for gain or profit."

The defendant was a limited liability company registered under the Companies Act 1908. Its Memorandum of Association showed that the chief object of the company was the establishment of a Presbyterian school for girls. The school was carried on as a boarding and day school and at the beginning of 1926 there were attending it 314 day scholars and 116 boarders. This constituted a full roll for the school. The fees charged were of approximately the same amount as those usually charged in private schools. The only free scholars were four scholarship holders who, in terms of their scholarships, received their tuition free. By the Articles of Association shareholders were entitled to dividends out of the profits it being provided that "no dividend should be declared or paid which would yield "to the shareholders a greater rate of interest than six pounds "per centum per annum (cumulative)." Provision was also made, in case of the General Assembly of the Presbyterian Church determining to purchase the school, for its sale "at a "price which would return to the shareholders the actual capital "subscribed by such shareholders and would insure that such "shareholders after taking into account any dividends paid "to them would receive back the subscribed capital together "with interest thereon at a rate not exceeding six pounds per "centum per annum." All profits, in excess of the amount required for payment of the dividend, were required to be, and had been, spent in improvements to the school property; the directors received no remuneration; the teaching staff and employees were paid for their services. Up to 31st March, 1926, the maximum dividend of six per cent. had been regularly paid; for the year ending 31st March, 1927, the profits did not warrant the payment of a dividend.

Rogerson for plaintiff.
Stanton for defendant.

REED, J., said that the question as to whether a particular school came within the exception as "not carried on exclusively "for gain or profit" had been several times before the Courts. In every case where exemption had been granted it had been shown that no pecuniary gain or profit was being derived by any person from the carrying on of the school. On the other hand, where it had been doubtful what became of the profits, exemptions had not been granted—**Mayor of Christchurch v. Riddell,** 34 N.Z.L.R. 226; **Hawke's Bay County v. Welch** (1919), N.Z.L.R. 474. Those cases came under review in the Court of Appeal in **Christchurch City Corporation v. Christ's College** (1920), N.Z. L.R. 662, where the Court, without adopting every expression used in the course of the judgments in those cases, accepted them as in their results expressing the law so far as they went. But the importance of the Court of Appeal judgment was that it laid down as a fair test as to whether a school came within the exemption, the answer to the question: "into whose coffers "would the sum go which is saved by the non-payment of the "rates?" There could be but one answer to that question in the present case. Clearly it would go to the shareholders as any reduction in the expenses assisted to make the profit out of which their dividends were to be paid.

His Honour thought that concluded the matter, but it was necessary to refer to a submission made by Mr. Stanton. He contended that, as the rate of interest was limited to a rate below the current rate of interest on mortgage, the subscriptions of the shareholders should be looked upon as loans to the school. He had submitted that, if instead of the money required for the school having been provided by shareholders in a company, the money had been advanced on debentures carrying six per centum per annum interest, the exemption would apply. His Honour was not prepared to concede that. It was highly probable that if such debenture holders were the managers of the school the Court would look behind the apparent transaction and treat the holders as being in truth the receivers of profits from the school; but it was not necessary to decide that point for that was not the position in the present case. The real transaction could in no respect be held to place the share-

holders in the position of debenture holders who had lent their money to the school. The scheme of finance was indistinguishable from that of any ordinary commercial concern with the one exception that the amount of interest was limited. The fact that the whole of the profits did not go to the founders and managers but were limited, did not affect the position. The spirit of the Act, as interpreted by the various cases, was that no school was entitled to exemption under the Section where any part of its profits went to private persons, particularly if those persons were the proprietors and governors of the school.

Solicitors for the plaintiffs: **Nicholson, Gribbin, Rogerson, and Nicholson,** Auckland.
Solicitors for the defendant: **Stanton, Johnstone, and Spence,** Auckland.

Alpers J. April 8, 13; July 7, 1927.
Christchurch.

KERR v. AVON DAIRY CO. LTD. (In LIQUIDATION).

Contract—Butter-fat Supplied to Non-Co-operative Dairy Company—Promises of "Bonus" to Suppliers—Whether a Contract—Whether Contract too indefinite.

Action to recover the sum of £95 6s. 10d. being balance of total purchase price due to the plaintiff on 1,158 lbs. of butter-fat sold by him to the defendant at 5d. per lb., or alternatively the balance of total purchase price due to the plaintiff on such butter-fat sold in London by the defendant as agent for the plaintiff, for which the defendant had failed to account to the plaintiff. The plaintiff was induced to supply butter-fat to the defendant by means of certain advertisements and statements made to the agents of the defendant. The following, Alpers J. held, was a fair sample of the advertising matter:

"AVON DAIRY CO. LTD.,
GIVES YOU
HIGHEST BONUS POSSIBLE
CONSISTENT WITH
HIGHEST MONTHLY RETURNS.

The defendant company, which was not a co-operative company, went into liquidation and decided not to pay out a bonus upon the butter-fat supplied during the season preceding the liquidation.

Wright and Brassington for the plaintiff.
Donnelly for defendant.

ALPERS J. said that counsel for the plaintiff had contended that he was entitled to a bonus equal to the best paid by any of the other companies operating in the district. This claim, counsel had admitted, must be founded on contract. Unless the Court could from the conduct of the parties and the course of business between them "spell out" contract, the claim admittedly failed. The defendant on the other hand had contended that the nebulous arrangement between the parties did not amount to contract, and if it did, that the contract was so vague and uncertain as to be unenforceable. The difficulty of drawing inferences as to the nature of such a contract was well illustrated by the division of opinion in the Court of Appeal in **Good v. Bruce** (1917), N.Z.L.R. 919; but in that case there was at least data from which it was possible to ascertain the amount of the bonus or final payment. That process was fully explained in **Lawrence v. Handley** (1920) N.Z. L.R. 169. But in the present case the position was much more difficult for the defendant company was not a co-operative company and there is no evidence to show that it had ever pretended to be one. It used the word "bonus" as a "bait" to attract business; but its meaning could not be identical with or even closely analagous to the final payment or so called "bonus" paid by co-operative societies.

His Honour read the above advertisement and said that 2d. per lb. was not the highest or even the second highest bonus paid in the district. Certain balance sheets had been put in and counsel had addressed written submissions thereon. The long delay in lodging these submissions must be held partly responsible for the delay in giving judgment. The balance-sheets and counsel's comments thereon did not help to elucidate the difficulty. The plaintiff had not proved his case and the motion of counsel for the defendant for a non-suit would be granted with costs.

Solicitors for plaintiff: **Duncan Cotterill and Co.,** Christchurch.
Solicitors for defendant: **Raymond, Stringer, Hamilton and Donnelly,** Christchurch.

Herdman J. June 27; July 11, 1927.
Hamilton.

BENTLEY v. O'BRIEN.

By-law—Vehicles Plying for Hire—License—Whether Vehicle Licensed for Heavy Traffic under Motor-lorry Regulations Required to be Licensed to Ply for Hire—Public Works Act 1908, Section 139 (2) (h)—Motor Vehicles Act 1924, Section 12 (4)—Counties Act 1920, Section 109.

Appeal from decision of R. M. Watson, Esq., S.M., convicting the appellant of driving a vehicle used for hire on 28th November, 1926, without such vehicle being duly licensed to ply for hire or to be used for hire under By law No. 48 of the Waitomo County which provided: "No person shall drive or act as the driver of "any vehicle while plying for hire, or that is in fact used for "hire in the County, unless such vehicle shall have been duly "licensed as required by this part of these By-laws." The fact of plying for hire was admitted by the appellant, but it was claimed that his vehicle, being a "motor-lorry" in respect of which a heavy traffic license fee under the Motor-lorry Regulations 1925, had been paid, was therefore exempt from the provisions of the By-law.

Vernon for appellant.
Mackersey for respondent.

HERDMAN J. said that the By-law was made under the authority of Section 109 of the Counties Act 1920. The contention of counsel for the appellant was based upon Section 139 (2) (h) of the Public Works Act 1908, which while enabling a local body to make a by-law providing for a yearly license fee on a vehicle engaged in heavy traffic, enacted: "Provided, in "the case of a by-law made by a local authority that no other "charge is levied thereon by the local authority." His Honour did not think that that sub-section had any bearing on the present case. The Motor-lorry Regulations were not by-laws made by any local authority. The form of heavy traffic license prescribed by those Regulations did not authorize the vehicle to ply for hire, nor was the driver authorized to ply for hire. Engaging in heavy traffic and plying for hire were two distinct things. This was recognized in Section 12 (4) of the Motor-vehicles Act 1924, which declared that nothing in that section should exempt persons from charges made under statutory authority in respect of heavy traffic or in respect of vehicles plying for hire. His Honour had been unable to discover any ground for deciding that the appellant's heavy traffic license absolved him from complying with the By-law. Appeal dismissed with costs.

Solicitors for appellant: **Hine and Vernon,** Te Kuiti.
Solicitors for respondent: **Broadfoot and Mackersey,** Te Kuiti.

Herdman J. June 28, 29; July 11, 1927.
Hamilton.

ELWELL v. ELWELL.

Divorce—Desertion—Domicil—Petitioner Domiciled in New Zealand at date of Commencement of the Proceedings—Suspicion that Domicile subsequently changed—Whether Decree should be Refused.

Petitioner for divorce on ground of desertion. At the time the petition was filed in December, 1925, the petitioner (the husband) was domiciled in New Zealand. The papers were duly served upon the respondent. When, by leave of the Court, the petitioner gave evidence in support of his petition, the parties were still domiciled in New Zealand. At the hearing of the petition counsel for the petitioner admitted that there was some ground for believing that the petitioner had since abandoned his New Zealand domicil.

Seymour for petitioner.

HERDMAN J. said that counsel could not speak with any certainty as to the change of domicil of the petitioner, and in the absence of definite proof of any such change, it ought to be assumed that the petitioner had retained his New Zealand domicil. Further, Section 21 of the Divorce and Matrimonial Causes Act 1908, enabled a person who, at the time of the institution of the proceedings "is domiciled in New Zealand for two years" to present a petition for dissolution. At the date when the petition was filed the Court in New Zealand was probably the only Court in the British Dominions possessing jurisdiction to hear and consider such a petition, and His Honour did not think that any suspicion about the petitioner's abandonment of his New Zealand domicil at the last moment should deter him from making a decree. There was, however, still wanting evidence which would corroborate the petitioner's statement as to his wife's desertion, so the petition would be adjourned until such evidence should be obtained.

Solicitors for petitioner: **Seymour and Harkness,** Hamilton.

THE LAW OF BANKRUPTCY IN NEW ZEALAND.

(By W. A. Beattie.)

An essay on the history of Bankruptcy, and on comparative jurisprudence.

Part I. The History of Bankruptcy in its Beginnings.

A "Black-letter" lawyer is one who rejoices in the study of the out-of-date and old, because its age appeals to him as a source of interest in itself. The smell of the old leather binding, and the musty pages which crackle as he turns them over, the old irregular and thick type draw him as irresistibly as a "lollie" shop draws the children who glue their noses to the window every afternoon on their way home from school. A learned lawyer is one who indeed studies these old books, but for the definite purpose of making himself acquainted with the history and the foundation of the law as it stands at present. Goethe, that man of great philosophic intellect, said that we should study the past because it is certain, and by knowing what is certain we shall be the better able to interpret the present, and to project the future, which is uncertain. In these articles, it is therefore hoped that a study of the history of bankruptcy law may not alone prove interesting because it is old, but because in disclosing the foundations of this intricate branch of the law, and the development of its design, the reasons for many of its present aspects may become the more clear and intelligible. Articles in a journal must necessarily be somewhat brief; Montaigne used to say that that was the reason that he gained so much more benefit from articles than from books, as he found sustained reading tiresome; but it is hoped that the references given will enable those who are sufficiently interested to learn more of this subject, to do so for themselves.

Professor Maitland said of legal history that "Such is the unity of all history that anyone who endeavours to tell a piece of it must feel that his first sentence tears a seamless web." Such is the case when we state that the first bankruptcy Statute in England was 34, 35 Henry 8 c. 4 (1542), and that the history of the law of bankruptcy commences in England then. Before this date and indeed after insolvency was looked upon as a crime, and the terror of insolvents was the debtors' prison. In continental countries bankruptcy law showed considerable development before this date, although it was confined to traders, as indeed it was in England until 1861. The word in Spanish for culpable or fraudulent insolvency was "Bancarota," while that for failure occasioned by misfortune was "Quiebra." (See Bewes, Romance of the Law Merchant, 61, 62, and authorities there cited). It is therefore probable that very different sets of rules were applied in the different classes of case. The meaning of the word "bankrupt" is "broken bench." (See Oxford Concise Dictionary, sub. verb. Bankrupt). It originated from the custom in the great fairs of Europe, of publicly breaking the bench of any money changer who was found unable to meet his obligations during the course of a fair. This proceeding, done before the concourse of merchants present, who, it should be remembered travelled from fair to fair, not transacting business in one place only as is generally the case nowadays, served as a public proclamation that the money changer was thenceforth an outcast from business. The assets were taken and distributed forthwith amongst the creditors. It is difficult to ascertain what the proceedings were in the case of a "quiebra," but one might judge that the debtor was brought before the local magistrates, and that as a general rule it was a matter of honour amongst the merchants to give him respite for a reasonable time to allow him to get on his feet again. (See "The Merchant of Venice," Sc. 1 of Act 4, where Shakespeare uses the word bankrupt, and probably shows with quite considerable accuracy in the words of the Duke, the attitude that was taken towards a merchant in misfortune. Shakespeare died 1616). Research amongst the books in the British Museum might throw considerable light on the distinction between the two classes of insolvency, and it is not unimportant, as there can be no doubt whatever that as contact with the continent increased, so would continental notions, compatible with English conceptions of right, influence the development of this branch of the law. The adoption of the word bankrupt, and the fact that it was confined to traders shows in itself that continental influence was at work. In England insolvency was looked upon as a crime, and this idea was replaced by more just and reasonable rules extremely slowly. The law of obligations was most strict and unyielding. The law of procedure tempered it long before it was tempered by the substantive law. It is almost humiliating to have to think that this idea being so ingrained in English Law, it was the custom up till 1861 to consign to the Marshalsea, the debtors' prison, non-trading insolvents, nor were they given any chance of paying their debts. (The lawyer who has not yet done so should read "Little Dorrit" on this). Chapters might be written on the matters, referred to in a somewhat general way, in this paragraph, but we follow Montaigne's advice, or take his hint, and after giving this small glimpse of a broad and fascinating vista of the past, move on with our readers to delve into the yellow crackling folios whereon is impressed the thick black uneven type of the printers to King Henry the Eighth.

At the outset of this article, it should be borne in mind that the state of England commercially was at the very least becoming sound. It might assist the reader to look briefly at some industrial history of England to verify this. It is important, as the impress of the condition of a country is seen clearly on its legislation and its development. This Act of the reign of Henry is aimed at the equitable distribution of estates, and beyond that, has little affinity with the bankruptcy law as we know it. Coke 4th inst. 277, refers to it as aimed at the "crime" of bankruptcy. It is very interesting to read Coke on this matter. He states that merchants were given to three kinds of "costlinesses," namely that of building, that of living, and that of apparel. Coke states that the derivation of the word "bankrupt" may be from the French "banc" meaning bench as we have stated, and route, that is, cart rut, that is, a removing of the bench away, so that the creditors cannot find it. Bench would of course be then figurative. The legislators appear to have adopted this meaning at first, and the other meaning in subsequent Statutes. They speak in this Statute of the Act as "An act against such persons as do make bankrupts." The Act then recites: "Where divers and sundry persons craftily obtaining into their hands great substance of other men's goods, do suddenly flee into parts unknown or keep their houses not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason equity and good conscience." Then follow six sections. The first empowers the Lord Chancellor, Keeper of the Great Seal, Lord Treasurer, Lord President, Lord Privy

Seal, or other of the King's Privy Councillors the Chief Justices of either bench, or three of them at least of whom one of the first five must be one, on complaint in writing to seize the person and property of the debtor and to distribute it rateably amongst the creditors. The section authorises the disposition accordingly. It should be noted that the matter takes place on complaint in writing. The unfortunate debtor has no standing to appear and oppose the matter. He is not summoned. The matter is ex parte, and therefore liable to create great injustice. The next section gives power to examine sub-debtors, and if they do not make full disclosure, they forfeit twice the amount they owe, and it is distributed accordingly. The third section prescribes a double forfeiture for fraudulent claims against the estate. The fourth section prescribes that persons *bona fide* recovering against the estate, but having been induced to believe in their *bona fides* by the fraud of the offender, shall pay over the amount so erroneously recovered, and it shall be distributed. Section five provides that if the debtor goes to a foreign country, and does not return within three months of the date of a proclamation, he is to lose the protection of the King. A penalty is given against those who assist the bankrupt to escape. The last section provides that after payment of the dividend in the estate, the creditors may execute for the residue of their debts. The more one studies this Act, the more harsh it appears. The person who " makes bankrupts," to use the words of the Act, is purely and simply a criminal. A person might wake up one morning to find the bailiffs in his house seizing his goods, and he might find himself later imprisoned, because a malicious person to whom he owes a small sum of money has made a complaint in writing to the Lord Chancellor.

Twenty-eight years after this appears the next Act. It is an Act of 1570-71, 13 Eliz. c 7. It is entitled: " An Act touching orders for bankrupts." The preamble states, *inter alia*, what one would have anticipated from the wording of the former Act, namely, that all kinds of persons were being made bankrupt. " Forasmuch as notwithstanding the Statute made against Bankrupts in the 34th year of the reign of our late Sovereign Lord King Henry the Eighth, those kind of persons have and do still increase into great and excessive numbers, and are like more to do, if some better provision be not made for the repression of them, and for a plain declaration to be made and set forth, who is, and ought to be taken and deemed for a bankrupt." Section one defines the persons who may be bankrupts. They are wholesale and retail merchants, and persons engaged in buying and selling. In either case they must be British subjects or denizens. Acts of bankruptcy are then defined. They are departing the realm, keeping house, taking sanctuary, submitting to voluntary arrest, suffering outlawry, imprisonment or leaving their dwellings, with intent to defraud or hinder creditors. Such persons shall be reputed deemed and taken for bankrupt. It is interesting to note to what lengths people would apparently go to avoid payment of their debts. By this section the rules had at least become definite, and indiscriminate seizure of person and property was in a manner checked. However, section two retains the old procedure of complaint in writing to the Lord Chancellor or Lord Keeper of the Great Seal (omitting the others). Instead of dealing with the matter however, they are to appoint commissioners who take the person and property of the debtor. Power is given to take property, including that which is the subject of a secret use, and any property which the debtor may lawfully remove. The property is as before to be rateably distributed. There is no power over the commissioners once appointed. Coke (ref. sup.) states that they were to be men of repute and honesty and wisdom. Section 3 deals with their power over copyholds. Section 4 is a distinct advance, and makes the commissioners account to the bankrupt on request, and to pay over to him the surplus if any. Sections 5, 6, 7 relate to examination of sub-debtors, penalties against those who refuse to make disclosure, and remedy in case of fraudulent withholding of property by the bankrupt. Section 8 states that if, after the bankrupt's debts have been paid, any forfeitures remain, half goes to the Queen, and half to the poor within hospitals in every city, town or county where the bankrupt may be. Section 8 is a ray of warm light in a statute of cold darkness. Section 9 provides that where a bankrupt withdraws from his dwellinghouse there shall be five proclamations made on five successive market days commanding him to return. If he does not obey, he is taken out of the protection of the Queen. Risky indeed, but so was the submitting to the jurisdiction. Persons assisting were liable to fine or imprisonment. Section 10 provides that creditors were to keep their remedy for any balance of their debts not paid on the distribution of assets. No time is prescribed within which the commissioners must distribute assets. No limit is placed on the costs which they were to charge. In fact, they had a freer hand than any officers should have, and we shall see subsequently that they in many cases abused this. Section 11 provides for power to take and distribute subsequently acquired property, and section 12 very prudently protects *bona fide* transfers of property made by the bankrupt before the bankruptcy.

The law stood in this state from 1571 to 1705, a period of some 134 years. It is strange that no legislative enactment was passed during this period, as in other branches of the law, it was a period of activity, and it was the 18th Century which has been looked upon as a period of stagnation in legislative reform. See Jenks, Short History of English Law, 210-11. The cases expounding the Statute of Elizabeth, are the following: " The case of bankrupts " also called Cullamor's case, or Smith v. Mills, 1 Rep 481 (lib. 2 fol. 25, 26). It was held by Wray, C.J. and a Full Court that (a) A bankrupt cannot dispose of estate after a commission is awarded; (b) If a creditor refuse or neglect to come in under the commission, the assignment by the commissioners to the other creditors is effective as against his claim; (c) A bankrupt cannot give one creditor preference over others; (d) A commission of bankruptcy is a matter of record, of which everyone must take notice; (e) An assignment or sale by commissioners of personal property is good though not enrolled, and it is good though they have not seen the property (that is, though there is not actual delivery). It is interesting to note that these decisions are by Courts of Common Law, so that in its beginnings, bankruptcy law was developed by Common Law rules, and not by Equitable rules. This changed afterwards however. The next case is a dictum in Baspole's case, 4 Rep. 336, at 339. It is mentioned that there should be equal distribution " of a bankrupt's goods between all the creditors, but that is, to be intended of those who will come in and signify their debts." The next reference is in Dr. Bonham's case, where it is stated (4 Rep. 367, at 382), citing an unreported case of Cutts v. Delabarre, " Because there is no other remedy, if the commissioners do not pursue the Act and their commission, he shall traverse that he was not a bankrupt, although the commissioners affirm

(*Continued on page 145*)

THE PUBLIC TRUST OFFICE

(By F. D. O'Halloran).

The questions of Government control and Government competition in private enterprise are at present commanding wide-spread public attention, and the moment appears opportune for an impartial investigation into the activities of perhaps the most aggressive, from the view-point of private business, of all the Government departments—the Public Trust Office.

It is proposed to make this review wholly impersonal; to support every contentious statement with relevant authority taken from Public Trust Office official pamphlets, advertisements and reports, and particularly from the Public Trust Office Act 1908, with its many and far-reaching amendments, and the regulations made thereunder; and to draw inferences only in so far as they appear to be fully justified by the facts and the authority adduced.

In an inquiry of this sort, in which many diverse aspects of the central idea require to be considered in turn, it is always advisable to give at the outset a clear definition of the writer's main purpose. In this instance that purpose is to show that, from several important points of view, including that of public policy, the much-vaunted cheapness of Public Trust Office administration is largely fictitious and, regarded from the aspect of political economy, based on a fallacious principle.

It is safe to say that the spheres of private business in which the activities of this department are most formidable are those of law and of banking. Put briefly, the whole point which it is intended to demonstrate in this article is this: the private practitioners in these two professions derive their full working expenses and profits directly from those members of the public who receive the benefit of their services, and, in addition, they pay their full share of all forms of taxation; while the Public Trustee, by virtue of his many exemptions and privileges—the most noteworthy of which will be touched on later—is really asking the general taxpayer to bear a not inconsiderable proportion of what should be his full working expenses, while conferring the whole benefit of his services on the individual beneficiaries in the particular estates which he from time to time administers. Even those beneficiaries in the course of time suffer a diminution, in the form of increased general taxation, of the benefits which they have received, while the ordinary man in the street, whose life's orbit never impinges on the Public Trustee's sphere, is merely a silent, though probably mercifully unconscious, sufferer all the time.

The Common Fund.

It would appear that the Public Trustee's power to cut fees and rates of commission to a point designed to be impossible of imitation by his competitors in the sphere of law is based primarily on his legal right to receive the balance of interest from the investment of trust moneys in the Common Fund (*vide* Sec. 32, Public Trust Office Act, 1908). The ordinary legal rule binding a private trustee is, of course, that he is not permitted to derive any benefit from his position (*vide* **Keech v. Sandford,** 1726 Sel Cases Ch. 61).

From the summary of the Public Trustee's last annual report published in the issue of "The Evening Post" for Friday, 13th May, 1927, it will be seen that the total value of the estates under administration for the year ended 31st March, 1927, was £41,043,523. The proportion of cash invested, or available for investment, on mortgage and other security from this large amount is shown as £25,495,626. For convenience, let us take this sum in round figures as £25,000,000. The rates charged on advances over a number of years have been $5\frac{1}{2}\%$, $5\frac{3}{4}\%$, 6% and $6\frac{1}{2}\%$—*vide* various regulations issued under the principal Act—the average rate thus being $5^{15}/_{16}\%$, or roughly 6%. The rates—as only comparatively recently increased—allowed on trust moneys held are 3%, $4\frac{3}{4}\%$ and $5\frac{1}{4}\%$—an average rate of $4\frac{1}{3}\%$. The amount available annually for the Public Trustee from the difference of $1\frac{2}{3}\%$ on the foregoing hypothetical sum would be roughly £416,666. Even if the average credit rate of interest be raised to 5%, and the margin of profit corresponding reduced to 1%, the net annual profit would be £250,000. As commission only is deducted from the interest on special investments before the income thereon is paid to clients—*vide* page 15 of the booklet entitled "The Public Trustee Explains"—this sum might be further reduced to, say, £150,000. The foregoing example is given merely in illustration of the general principle involved, and makes no pretensions to being exact as to amount.

This "fighting fund" (whatever its exact amount)—if it may be so called from the view-point of the average lawyer—is available for the purpose of cutting fees and rates of commission, and it comes from a source which is closed to the private practitioner by law, although invidious comparisons may be made against him by virtue of its existence. The question here is not the existing position between the Public Trustee and his own clients, but rather the inequitable bases on which two organisations carrying out similar functions are required to work, the officials of the favoured body being in addition enabled to extol the quality of their own services both by advertisement and otherwise, while the private practitioner is conveniently bound down to Christian silence by his code of professional etiquette.

In this connection a further point may be noted with advantage. Perhaps for fear that at any time the process of rate-cutting may be overdone, the Public Trustee is empowered to call on the Consolidated Fund for unauthorised expenditure up to £50,000 in any one financial year (*vide* Public Trust Office Amendment Act, 1921, Sec. 31(2)). The exact purport of this provision is far from clear. It is obviously a powerful addition to the financial advantage derived from the use of the margin obtained from interest on investments in the Common Fund.

For the purposes of this article it is unnecessary to enlarge here on the general effect on the money-market of the attractive terms offered by the Public Trustee for investments on long-term deposit. The more important matter of the loss of public revenue on these large **sectional** funds in virtue of the reduction in rates of commission will be fully examined hereafter. It must always be borne in mind that the quality of the Public Trustee's action in a given direction may be open to criticism on the ground that he is a public official, not a private individual, and therefore more strongly called upon than an ordinary practitioner to act for the good of the community **as a whole.**

(To be continued)

CROSS-EXAMINATION: A Gossip with Students

(By B. J. DOLAN)

(Continued from page 132.)

General Notes.

It would be impertinent to suggest any improvements on the rules embodied in the text-books already referred to. I have not, as I write from a hospital cot, the opportunity of referring to any of the authors in question, but I have noted that eminent cross-examiners both at home and abroad appear to observe certain practical rules in cross-examination, a few of which may be enunciated as follows :—

(1.) Begin with sufficient gravity and earnestness to convince the witness that you are doing your best to establish the truth and with his assistance.

(2.) Get on good terms with him and always control your temper.

(3.) Under no circumstances, therefore, examine crossly or with any bully-ragging suggestion. The Old Bailey style has been quite "called in," but be emphatically persistent if occasion arises.

(4.) Don't shake your fist at him. Some of the best men cross-examine with hands folded behind their backs, and I have seen a witness by returning the minatory gesture crumple up a timid counsel.

(5.) Don't tire the jury ; keep them interested. But, primarily, don't tire the Judge or you will become the point of interest. You will never have the impertinence to inform the Court when rebuked for wasting its time to retort as Mr. Purvis, the bellicose Victorian K.C. did, "Well, the Court is jolly well paid for its time." (His Honour scored afterwards, however, when Mr. Purvis complained that a witness had just insulted him by mumbling something about his being a blackguardly solicitor from Melbourne. The Court benignly turned to the witness and advised him, "Don't mumble.")

DON'T TIRE THE JUDGE.

Indignant Counsel (Who has been wasting the time of the Court) complaining to the Bench : "Witness has just mumbled something about me being a blackguardly solicitor."

Court (benignly to Witness) : "Don't Mumble."

(6.) If a witness, particularly of bucolic type, scores on you, laugh at yourself louder than anyone in Court.

(7.) Let your questions be concise, though a well-framed lengthy "tangler," syntactically constructed and which the associate will no doubt bless you for having to repeat three times to the witness, will often outflank a garrulous expert and give you a breather. As to conciseness, a final yarn :—

A Borough by-law of N———, many years ago contained early-Victorian provisions about bathing on the beach *sans* togs after 5 o'clock a.m., or some such unearthly hour and for some reason an unnaturally Puritanical fellow-countryman of mine, the new local police inspector, decided on enforcing it. Six bright youths of from 22 to 27, law, stock-and-station, and bank clerks, walked down from their boardinghouse soon after six one morning and disported as was their wont in the *tout ensemble*. A stationed constable watched the fearful spectacle and forthwith two informations were laid against each bold swimmer, one for breach of the by-law and the other, above all things, for exposure ! Best girls, sisters, and maters wept and dads were distracted, and on the due date the six alleged villains duly appeared before a very wise S.M., an ex-colonel. An able barrister who then fought for the defence (and afterwards on many occasions overthrew me to my sorrow when he acted for the Crown) held the fort for the gallant half-dozen. He knocked out the by-law "in one hit." On the main charge he cross-examined the constable who also came from the Old Green Isle :—

COUNSEL : You were 80 yards from the bathers when you made your observations ?

CONSTABLE : I was, sir.

COUNSEL : On your solemn oath, at that distance, could you distinguish the sex of the bathers ?

CONSTABLE : I beg your pardon. (Question repeated fortissimo).

CONSTABLE : I could not on me oath, sir.

S.M. : Case dismissed. I regret very much not being able to award costs against the police, particularly on the main charge.

The sequel happened outside, when Kerry inspector met Kerry constable :—

INSPECTOR : Of all the fools in the Force, you are the biggest.

CONSTABLE : How is that, sir ?

INSPECTOR : You told Mr. C. (meaning Counsel) that at 80 yards you could not swear to the exposure.

CONSTABLE : I didn't.

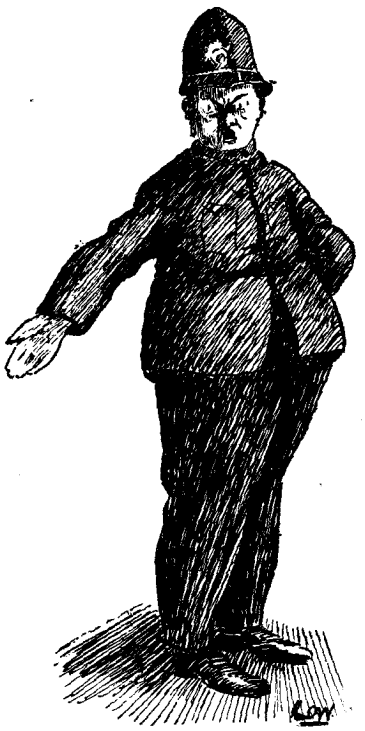
INSPECTOR : You did, and in your report you told me you could absolutely.

CONSTABLE : But that is not what he axed me, sir.

INSPECTOR : What did you think he axed you ?

CONSTABLE : He axed me if I could distinguish the sects of the bathers, and how the 'ell could I tell whether they was Catholics or Prodistans ?

(8.) In all things stand absolutely loyal to your client ; stick manfully to your guns when you honestly believe your point is right. Respect your opponent and honour the King's Judge.



"He axed me if I could distinguish the 'sects' of the bathers, and how the 'ell could I tell whether they were Catholics or Prodistans?"

L'Envoi.

(1.) It was never a sportsmanlike barrister that said, "Oh, that mine enemy would write a book—or a paper for B.F.N." so be merciful.

(2.) Remember that A. B. Walkley and his school of fellow-critics could pull Irving to pieces and demonstrate how all Shakespeare's characters should be played, but none of them could act Hamlet without the risk of being a target for cabbage. So do not expect too much in practice from authors of books or papers.

(3.) Some day a practical examiner in evidence will ask you to give notes for cross-examination of a land agent in an allegedly fraudulent exchange deal.

(4.) Only the absolutely perfect can consistently and thoroughly practise the ideals of cross-examination they preach.

(*Continued from page 142*)

him to be one." The protection of a bankrupt wrongly reputed such, is therefore an action of trespass against the person, against the commissioners, in the form of false imprisonment. This is an interesting point. It can be well seen from these decisions; that a certain number of general doctrines of bankruptcy as we know them are being evolved, but in the main, we can only say that it is in an extremely experimental stage. To give these old legislators and common law judges their due however, it is only right to say that not only did public opinion still regard insolvency as a crime to be suppressed at the expense of cases of undoubted hardship, but the law of bankruptcy is not yet out of the experimental stage. It is proposed in the next article to deal with the second period of bankruptcy law, that is, the period of the introduction of the certificate of discharge and the development of the law by the Chancellors, up to the reforms of the 19th century.

To be continued.)

CORRESPONDENCE.

"THE YOUNGER MEMBERS."

To the Editor.

Sir,—

Since reading the article by "Rusticus" headed: "The Status of Solicitors" (B.F.N., 24/5/27) I expected your columns to be deluged with letters from other solicitors endorsing the remarks of "Rusticus" and enlarging upon the views expressed by him. That his article provoked only one letter, and that one from the Public Trustee, is another illustration of the apathy and the indifference with which the profession generally looks on while one after another of its rights and its privileges is encroached upon or whittled away.

Practitioners should not quarrel with the Public Trustee if he conducts his business with zeal and with efficiency. The question for us is—"what steps are we taking to combat the inroads upon our clientele that the Public Trustee and other Trustee Corporations are making?" And the answer is—"None!"

The younger members of the profession are the ones most seriously affected by the competition of Trust Corporations, of Land Brokers, and of various Commercial Agencies or Creditors' Associations. It is safe to assume that the majority of the practitioners in the Dominion come within the category of "younger members," and they therefore have the voting power to remedy the existing state of affairs. They have the voting power to elect "younger members" to the Council of each District Law Society, and the power also to elect "younger members" to the Council of the New Zealand Law Society. If they were to do this, the competition that so vitally affects young solicitors would become the burning question at all meetings of the New Zealand Law Society and of the various District Societies. Then some effective means of combating that competition might be found.

Yours, etc.,
"SOUTH ISLAND."

DAMAGES FOR DEATH AT COMMON LAW.

To the Editor.

Sir,—

The letter of "Liber" at page 121 of your last issue provokes the comment that such vigorous criticism as his must justify itself by being sound.

The learned judge who decided **Public Trustee v. Higgins** (3 B.F.N. 90) directed his attention in the first place to the question of defendant's liability for breach of the statutory duty under Section 4 of "**The Inspection of Machinery Amendment Act, 1914.**" According to your condensed report he concluded that "the claim so far as it was based on **the statute or the contract of employment** could not be allowed"; and then proceeded to deal with the question of liability "for breach of the duty which was the basis of the ordinary action of tort at common law." In other words, having disposed of the statutory and the alleged contractual duty, he went on to consider whether defendant might not be liable in tort for negligence.

Now the "statute" referred to in the above quotation is clearly the "**Inspection of Machinery Act, 1914.**" No other statute is mentioned in the judgment, nor can one see any reason why "**The Deaths by Accident Act, 1908**" should be brought under discussion at that stage of the matter. "Liber," however, hastily assumes that the reference is to this latter statute, although his assumption would make the judgment contravene elementary rules. Anyone who cares to glance at the report will see that he has erred, and that the judgment contains no suggestion of liability in cases of death apart from "**The Deaths by Accident Act, 1908.**" Even had the wrong Statute been mentioned by mistake, there would have been nothing more than a verbal blunder obvious at a glance.

May I suggest that "Liber" retire from what he calls "the Common Law sector," and leave the Judge in possession of the field?

As Latin is the mode, I sign myself:

Yours, etc., "VINDEX."

LONDON LETTER.

Temple, London. 9th June, 1927.

My Dear N.Z.,—

On Thursday Parliament adjourned for Whitsuntide, in the very midst of its labours as to the Trades Unions Bill, the Moneylenders Bill, the Landlord and Tenant Bill and the Finance Bill, to name the most important. All are of considerable interest to lawyers; the point of the first is perhaps academical, the second concerns a subject which is for ever recurring in the King's Bench Division, the third attempts a notable innovation in its measures to secure for a tenant of business premises the benefit of the additional value which his good work has put upon them, and the fourth has the double importance of counteraction of the many ingenious devices to avoid super-tax, by company-promoting or share-dealing, and of initiation of the simplification of income tax law, which is intended to be achieved within the next five years or so. There is also, of course, on the stocks and at present in the handling of the Lords the New Companies Bill, a measure which is full of important detail and which, when brought into operation with the consolidating measure, also intended, will very considerably develop the company position.

At the same time, their Lordships of the High Courts dispersed for the Whitsuntide rest, but not before coming to a number of interesting conclusions.

The House of Lords, since I wrote, has delivered judgment in **Seymour v. Reed** the revenue case touching the taxability of a professional cricketer's benefit. (Cricket is a current subject very much in common between us, is it not?) Observing that the remuneration, by way of personal gift, was less an encouragement to future endeavour than a meed of thanks for past services, my Lords held (supporting Rowlatt J. and overriding the dissenting Lord Atkinson) that the benefit was not taxable income. But within a few days of this pronouncement, Rowlatt J. had occasion to delimit the application of the ruling and, in **Davis v. Harrison** in the current Revenue Paper, to show that not every remuneration which is labelled "Benefit" is, in the hands of the professional recipient, beyond the scope of income tax.

With regard to the subject of moneylenders, mentioned above, there were two of these actions in our period, of which one only calls for notice: **Crossingham v. Park.** The point at issue is one which may not concern you directly, the jurisdiction of the County Courts in such matters. But the Divisional Court had, in pronouncing upon it, to analyse the moneylending transaction as understood in law and to divide it into its two component parts. The point appears in the cited case, **Lazarus v. Smith** (1908) 2 K.B. 266. Moneylenders' actions in general remind me of interlocutory process and of our Masters who deal with them; I may mention the appearance, among the birthday honours, of Master Bonner, the doyen of the business, a rough man and a hard nut but a very good fellow, by popular consensus, and one who, with his strong sense of justice and expedition, has done a very great deal to eliminate from the path of the justifiable litigant the fearful obstacles of delay which are the disgrace of our present system.

To revert to decisions: The House of Lords has dismissed the appeal from Court of Appeal's judgment in **Harnett v. Fisher** but not without a striking testimonial to the moderation and good sense with which the Appellant, in person, conducted his appeal. The Court of Appeal (M.R.; Scrutton and Lawrence and Sargant JJ.) has dealt with two matters of interest, among others of less note, **re Musgrove deceased, Davis v. Mayhew and Gilbert v. Gilbert.** In the first (M.R.; Scrutton and Lawrence LJJ.) arises the question, speaking technically, of "suspicion" as to a propounded will. The will, subject matter of the enquiry, had not been propounded till some twenty years after the testator's death, at least an odd circumstance when there is considered the beneficiary's great interest in the effect of it. In an interesting judgment, there is first laid the general maxim that the presumption to be gone upon, in the extraneous circumstances here existing, is that of *omnia rite esse acta*. This is a principle admittedly susceptible to the shaking, even shattering effect of "suspicion"; the point of the judgment is that the "suspicion," referred to, must be suspicion attending the document propounded and not "suspicion" attending the conduct of the person propounding it.

Gilbert v. Gilbert (M.R.; Scrutton and Sargant LJJ.) I have already mentioned to you, at an earlier stage. Dealing with the effect of our Supreme Court of Judicature (Consolidation) Act, 1925, upon our Matrimonial Causes Act, 1859, and arising upon the suggestion that the omission of the word "final" in the former Act enables a Court to vary settlements before **decree absolute** as it might not have done under the latter Act, the judgment lays down in precise terms the canon of construction that a consolidating measure does not alter the law which it tabulates: **Mitchell v. Simpson,** 25 Q.B.D. 183.

We may pass most readily to the decision of Hill J., in a cognate matter: **Bednall v. Bednall.** The Court was invited, and was unwilling, to make a declaration of legitimacy under our Legitimacy Declaration Acts, 1858–1926, in respect of a child born before the marriage. Here again was considered the effect of the above-mentioned Act upon the Legitimacy Declaration Act of 1858. In **Salvesen v. Administrators of Austrian Property,** also (I am informed by my note-taker) to be remarked, it was held that a decree of a German Court, declaring a marriage to be void under French law, was binding upon a Scottish Court. My note-taker omits to mention the nationality of the Court which so held; we will be thoroughly cosmopolitan and presume it was English!

I have only to add a reference to the judgment of Tomlin J. in **Graigola Merthyr Co. Ltd. v. Swansea Corporation.** Although the contention herein turns not a little upon an Act of our insular own, the Waterworks Clauses Act, 1847, sections 9 and 27, the contention itself is of the type which no doubt occupies your attention from time to time. The prayer was for an injunction as to the defendants' storage reservoir sitting upon the top of the plaintiff's colliery undertaking. The judgment shews what manner of evidence is required, at any rate in such circumstances as surrounded this particular case, to justify such a prayer and how it may fall short.

In conclusion, I am urgently reminded by the note of a learned junior very much more learned than myself at this juncture (a not infrequent attribute in juniors?) that the House of Lords, in dismissing an appeal in **Board of Trade v. Cayzer, Irvine & Co. Ltd.** has put the hall-mark of reliability upon (1927) 1 K.B. 269. I recognise the name, but I am blest if I recall the affair? It had something to do with a requisitioned ship. You will know what: or if you do not, you will (if the samples of your Bar I have seen are fair samples) be old enough hands to conceal your ignorance for the moment and to seize an early, if surreptitious, opportunity of discounting it for the future.

Yours ever, INNER TEMPLAR.

THE LIMITS OF THE JURISDICTION OF THE COURT OF ARBITRATION.

(References by Roman numerals appearing in this report are to Volumes of the Book of Awards).

On Wednesday the 6th July, Professor B. E. Murphy, M.A., LL.B., B.Com., Professor of Economics at Victoria University College, delivered before the Wellington Law Students' Society, a lecture on "The Limits of the Jurisdiction of the Court of Arbitration."

Professor Murphy has made a specialised study of industrial law, has practised as a barrister and solicitor, and as a lecturer has few, if any, equals in New Zealand. The Society accordingly enjoyed a lecture as valuable in point of matter as it was delightful in manner of presentation and, not least of its virtues, fully armed with authorities to support all the lecturer's statements.

The Bar, said Professor Murphy, was apt to consider the Court of Arbitration as something outside its sphere, but though the profession might not in industrial disputes appear before the Court without consent of all parties, this was not so in proceedings for the imposition of a penalty, and when a point of law required decision the Court usually secured the assistance, by argument, of Counsel.

The Professor then proceeded to his main theme, the extent of, and the limitations upon, the Court's jurisdiction. Section 75 of "The Industrial Conciliation and Arbitration Act 1925" was the Section defining the jurisdiction, and read as follows:— "The Court shall have jurisdiction for the settlement and determination of any industrial dispute referred to it under "the provisions of this Act." In this connection had to be considered also Section 61, reading as follows:—"There shall "be one Court of Arbitration for the whole of New Zealand "for the settlement of industrial disputes pursuant to this Act."

For nearly thirty years it remained undecided, though there were numerous dicta directed to the point, whether there was any limit to the powers of the Court. This doubt arose from the existence of the immunity from appeal and *certiorari* given by Section 97, which provides that: ". . . no award . . . or proceeding shall be challenged, appealed against, reviewed quashed "or called in question by any Court of judicature on any "account whatsoever."

In **Taylor and Oakley v. Edwards,** 18 N.Z.L.R. 876 however, prohibition was sought in regard of an award granting "preference to unionists," on the ground that the Court had exceeded its jurisdiction in providing for preference. The Court of Appeal held that the jurisdiction had not been exceeded, so that the existence of a right to prohibition in cases of excess of jurisdiction was not determined. Stout C.J. nevertheless said (at p. 886): "This Court (the Court of Appeal) has no "control over the Court of Arbitration in matters within its "jurisdiction.' and "No Court can control it once it is shown "to have dealt with an 'industrial dispute' as defined by the "Statute."

Similar views to that implied in the qualifications to the expressions of Sir Robert Stout quoted were indicated by Cooper J., Chapman J. and Sim J. while Judges of the Court of Arbitration. In **In re Auckland Tailoresses,** III, 109, **re Auckland Bakers,** VI, 107, and **In re Canterbury A. and P. Labourers,** VIII, 609 respectively, when they invited dissatisfied parties to carry alleged excesses of jurisdiction to other Courts. In the famous **Blackball Case,** 27 N.Z.L.R. 905, the question might have been settled had not the Court of Appeal again decided that there had been no excess of jurisdiction. But Edwards J. dissenting, held that the jurisdiction had been exceeded and that the Court of Arbitration could be restrained.

Finality was reached in **N.Z. Watersiders v. Frazer,** 1924, N.Z.L.R. 689, in which it was laid down that *certiorari* might be granted. This decision was approved in **Holloway v. Court of Arbitration,** 1925, N.Z.L.R. 551. There being power to restrain the Court from acting in excess of its jurisdiction, it was necessary, said Professor Murphy, to ascertain the boundaries of the jurisdiction.

First the Court could take cognisance only of "industrial "disputes" (Section 25). "Dispute" was given its primary meaning, a difference of opinion, a thinking apart (Lat. dis-apart putare-to think) and did not include only such differences as might cause immediate danger of industrial strife in the form of strikes or lockouts: **re Cromwell Co.,** 8 G.L.R. 834.

A dispute might arise tacitly from the conduct of the parties. Thus: failure to answer a letter making a demand was held to create a dispute in **In re Canterbury A. and P. Labourers,** 14 G.L.R. 342.

A dispute is an industrial dispute only if it arises in an industry as defined by Section 2 (1).

The dispute must relate to an "industrial matter" as defined by the same section. The list of matters which are industrial matters is, like the list of negotiable instruments, still open; but some restrictive propositions have been laid down by both the Arbitration and Appeal Courts. These however, were mostly *obiter dicta*, and there were inconsistencies in them. The question was extensively discussed in **Magner v. Gohns,** 1916, N.Z.L.R. 529, the headnote of which was read by the lecturer.

It now seemed clear that the Court of Appeal would hold that the term industrial matter included only matters within the master and servant relationship as at present understood. (Dicta of Stout C.J. and Sim J. in **Magner v. Gohns** and of Salmond J. in **N.Z. Watersiders v. Frazer** (*supra*) at p. 711). Such a rule was necessary, the lecturer stated, to prevent the Court from making radical economic changes.

The next essential was that the dispute should be between employers and unions of workers, as both are defined by Section 2 (1) and that the dispute should be "referred to it (the "Court) under the provisions of this Act" (Section 75). If, therefore, the Court proceeds in a matter which has not been properly referred in accordance with the provisions of the Act, it acts without jurisdiction.

The following matters are essential to a proper reference:

(a) There must be a dispute in existence when proceedings are commenced. **In re Canterbury Shearers,** 13 G.L.R. 293.

(b) The dispute must be between the parties applying, and the parties cited. **In re Canterbury Shearers** (*supra*).

The dispute must have been dealt with by the Conciliation Council except in the special cases contemplated by Section 90. Section 39 (1) **In re Canterbury Maltsters,** 14 G.L.R. 565.

(c) A ballot must have been taken under Section 108.

(d) There must be no subsisting award or industrial agreement in the industry in the district.

Compliance with the first three of these conditions could not, as would subsequently be pointed out, be waived, the Court having only jurisdiction given by the Statute. From the fact of the jurisdiction being statutory were derived the following rules:—

(a) There could be no waiver of irregularities of defects going to the jurisdiction.

(b) There could be no estoppel as regards matters going to the jurisdiction.

(c) Jurisdiction could not be conferred by consent of the parties: **re Wellington Hairdressers,** 1917, G.L.R. 645. The following matters were outside the jurisdiction:—

(a) Employments not for the pecuniary gain of the employer (e.g., Case of domestic servants). Section 154.

(b) Employments on Relief Works. Section 155.

(c) Employments by the Crown, except of:

(i) Railway servants. Section 142.

(ii) Coal miners. The State Coal Mines Act.

(d) Relationships resembling but not actually employment, viz.:—

(i) Partners. **In re Westland Tailors.** XII 64.

(ii) Independent Contractors. **Inspector of Awards v. McIntosh.** V 263.

(iii) Lessee of chair in barber's saloon. **In re Wellington Hairdressers,** 1917, G.L.R. 645.

(iv) Male Apprentices. **Apprentices Act 1923.** Section 17.

(v) Salaried staff of local authorities appointed pursuant to statutory powers. **In re I.C. and A. Act,** 28 N.Z.L.R. 933.

(vi) Gratuitous service.

The basis of awards was territorial. Section 89 (1c.), and the jurisdiction also was territorial. **In re Wellington Cooks** 26 N.Z.L.R. 394.

Finally, the only jurisdiction was to make awards, though the Court had assumed a very necessary jurisdiction to interpret awards. It could not, however, enforce rights created by awards, such as claims for wages. (**Baillie v. Reese,** 8 G.L.R. 795) or for damages for wrongful dismissal. (**Auckland Typos v. Cleave,** 2 G.L.R. 277).

The matter, said Professor Murphy, was one of great interest. The jurisdiction was of a novel character, partly judicial but chiefly legislative. Being the creature of statute it had been subject to the power of the Superior Courts to allow to the statute only such effect as they decided its wording gave it. Though considerations of time precluded him from dealing with many minor points arising, he had dealt with the main features of, and the broad outlines of the result of, the process of such delimitation of the jurisdiction. Apart from the legal aspect the line of evolution of thought is important as indicating the power which the Superior Courts, even when they have no right to declare legislation to be unconstitutional, can nullify or mould legislation by the process of interpretation. This affords some check on radical legislative innovation in an ultra democratic State.

WELLINGTON LAW STUDENTS' SOCIETY

ANNUAL REPORT.

1. The Committee has pleasure in presenting to you the Second Annual Report and Balance-sheet of the Society.

2. The Annual Meeting of the Society was held last year at Victoria University College, before a fair attendance of members. Particulars are given in the Minutes being confirmed at this meeting.

The officers for the past year, and the Syllabus, are contained in the Society's Handbook, 1927: copy annexed.

3. The membership for 1927 is 45 members, most of whom are financial.

The support received by the Executive from the Wellington members of the Bench and the Bar has been very gratifying, but, unfortunately, the same cannot be said of the members themselves. With few exceptions, the members have taken little or no interest in the various meetings of the Society.

It is to be noted by Practitioners generally, that the Rules of the Society have now been amended, with a view to widening the persons eligible for membership, and, accordingly, Barristers and Solicitors practising on their own accounts, or in partnership, are now eligible for membership.

4. Negotiations for the Annual Debate with the Accountants' Students are now in progress, but owing to congested Syllabi, it is feared that the fixtures will have to lapse for this year.

5. **Lectures.** The first lecture was given by His Honour Mr. Justice Alpers, on the 10th day of February, when His Honour stressed the necessity for a student to have a full knowledge of the English language and literature, in order to be a complete success as a Barrister, or as a General Practitioner. He illustrated his points with apt references to cases and incidents with which he came into contact during his practice at the Bar. The Society is indebted to His Honour for his exceedingly interesting and instructive address.

Professor B. E. Murphy addressed members on the 6th day of July, on the Limitations of the Jurisdiction of the Court of Arbitration, when members present were given an exceedingly enlightening talk on the alleged shortcomings of the Arbitration Court's Jurisdiction.

6. During the year ten Mock Trials were held: two being unavoidably postponed. We hope to arrange fixtures for these latter cases towards the end of the present year.

The reference in last year's Report to the poor attendances, etc., bear repetition in this Report, but we propose to leave these remarks to the Chairman.

The outstanding trial of the year was held on the 17th day of June, under the distinguished presidency of The Honourable Sir Charles Perrin Skerrett, Patron of the Society. This Trial will prove to be a milestone in the history of the Society, as it was the first occasion on which a member of the Judiciary has adjudicated in a Mock Trial. At the conclusion of Counsel's addresses His Honour summarised the principles of Law applicable to the case under discussion, and referred to the benefits to be gained from membership in a Society such as ours.

The Society wishes to place on record its appreciation of His Honour's kindness in acting as Judge on this occasion, and trusts that the example of Sir Charles Skerrett will be followed on future occasions by other members of the Bench, as their presence adds the necessary dignity and gravity to the proceedings, whereby the young advocates appearing can conquer their initial nervousness on their first appearances in Court.

7. We have also to draw your attention to the fact that full reports of all trials are being kindly inserted by the Proprietors of "Butterworth's Fortnightly Notes" in their publication. We take this opportunity of expressing our thanks to the generous manner in which our requests have been dealt with from time to time.

8. Next year we hope to have a "Fixture" night (immediately after the Syllabus has been published), when Counsel for all trials will be allotted.

A further innovation of the Syllabus has also received the attention of the Committee, and it will be handed to the incoming Committee to act upon, if they think it desirable.

9. The Balance-sheet shows that the finances of the Society are in a good position.

Our thanks are due to the Honorary Auditor, Mr. L. R. Atkinson, for his auditing of the Society's books.

For the Committee,
D. W. VIRTUE,
Honorary Secretary.

Dated this 22nd day of July, 1927.

BILLS BEFORE PARLIAMENT.

Property Law Amendment. Conditions precedent to lawful grant of rights of access of light or air covenants. Presumption of survivor of the younger when two people perish by the same calamity.

War Disabilities Removal. Repealing alien Enemy Teachers Act 1915; Part 1 War Legislation; War Legislation State Law Amendment Act 1918, Sections 2 to 12. Undesirable Immigrants Exclusion Act 1919; parts of Section 4 and 6; Divorce and Matrimonial Causes Amendment Act 1919, Sections 2–8 and 11.

Marriage Amendment. Provision for appointment of laymen to conduct marriage ceremonies on behalf of certain religious bodies.

War Fund Amendment.

Public Service Superannuation. Consolidation.

Justices of the Peace. Consolidation. Transmitted to Legislative Council July 15th.

Egmont National Park Amendment.

Crimes Amendment. Repealing Sub-sections (9) and (10) of Section 421 of principal Act.

Workers Compensation Amendment. Amending Sections 4, 5, 13, 67 and Second Schedule of principal Act.

Savings Bank Amendment.

Motor Omnibus Traffic Amendment.

Rent Restriction Continuance. To extend to 1st August, 1928, the existing Law as to the restriction of rent.

Legislature Amendment. Establishment of a permanent Representation Commission, Postal Voting; and miscellaneous.

Religious Exercises in Schools. Rejected by House of Representatives.

Noxious Weeds Amendment. Borough Councils and Town Boards may appoint Inspectors; definition of "clear" and "occupier"; Penalty for continual default.

Lands for Settlement Amendment. Appointment of Land Purchaser Inspector; altering constitution of Dominion Land Purchase Board; remission of rent; Relief of purchasers.

Shops and Offices Amendment. Amending the principal Act of 1921–22.

Samoa Amendment. Empowering Administrator to order persons to leave Samoa, if Administrator satisfied person concerned preventing or hindering the administration of the Territory.

Child Welfare Amendment. Part 1 relates to Orphanages not run by the State. Part 2 Children's Courts. Part 3 miscellaneous amendment of principal Act.

Inspection of Machinery Amendment.

Bankruptcy Amendment. Section 37 principal Act amended so that petition may be filed within district which the petitioning creditor resides, instead of debtor. Extending Assignees' powers of private sale: Section 79 principal Act (as to fraudulent preference) to extent to surety or guarantor for the debt due to that creditor: Extension of Assignees' right to disclaim onerous property: Prohibition publication of report of examination of bankrupt; Limiting Landlord's preferential claim for rent: Varying order of priority between rent and wages: Bankrupt may select furniture £50 value: Protection of persons accepting assignment of monies payable to dairy farmers in respect of sales of milk: Provisional protection of leases against forfeiture on tenant committing act of bankruptcy: List of undischarged bankrupts to be gazetted annually.

Compulsory Military Service Repeal: Militia abolished; universal training cancelled.

Local Elections and Polls Amendment. Repeal of Section 13 of Act 1926.

Building Trades Employees Tools of Trade Insurance. Employers to insure workers' tools of trade against loss by fire; Employer to have insurable interest; Employer to pay insurance monies to worker; Employer failing to insure liable for loss; Employer to produce policies of insurance.

Preferential Voting.

Canterbury College. Canterbury Agricultural College Amendment.

Massey Agricultural College.

Samoa Amendment. To the Legislative Council 26th July, 1927.

Imprest Supply No. 2.

Agricultural Bank.

Juries Amendment No. 2. Amending Section 35 principal Act: Claims under £500 to be before Jury of four if either party applies: Claims above £500 before jury of twelve unless both parties consent in writing to trial by jury of four or without a jury. Provisions for other actions; also special jury. Effect of Judicature Act 1908.