Butterworth's Fortnightly Notes.

"He (Dicey) has drawn with unerring hand those features which distinguish our constitution from others, and has given us a picture, which can hardly fail to impress itself on the mind with a sense of reality. I have tried to map out a portion of its surface and to fill in the details. He has done the work of an artist. I have tried to do the work of a surveyor."

—Anson.

TUESDAY, SEPTEMBER 27, 1927.

BORER.

Should the damage done by borer be at the risk of the landlord or of the tenant is the pertinent question asked by the correspondent H.D. on page — of this issue. It can be safely said that the general impression is that borer is a landlord's risk, but such is not the case. It has already been decided (**Puhi Mahi v. McLeod,** (1920) N.Z.L.R. 372, per Edwards J.) that the tenant is liable under a covenant to keep in repair. In the case cited the house was built of white pine which is peculiarly susceptible to the borer pest. The verandah to the house was of the same timber and was in a bad state of repair when the lease was granted to the defendant. The covenant is to keep the premises in good and tenantable repair and it is clear law that under such a covenant the covenantor is bound to put the premises into repair when the covenant was entered into. This, it was held, extended to the verandah which had already been heavily affected by borer.

The question of degree of liability was ably discussed by Mr. C. Palmer Brown in his article on "Covenants to Repair" (3 B.F.N. 60) who concluded his article by intimating that the practical effect of the decisions for conveyancers is that it is safer to retain the common formula in covenants to repair, viz.: "and will replace all such parts thereof as shall become decayed and become unserviceable."

To regard damage by borer as a tenant's risk when the repair covenant is drawn as recommended by Mr. Palmer Brown, would be quite reasonable, the tenant having expressly covenanted to replace parts which had become unserviceable.

Nevertheless, it can be argued that the object of the covenant to repair is primarily intended to ensure that the premises shall not be permitted to deteriorate through the absence of replacements made necessary in **consequence of user.** If this view is taken the ravages of the borer pest cannot be regarded as coming within the category, for the damage to the premises is not as a rule caused by any act or negligence on the part of the tenant. It is a risk which the landlord intended to take when he elected to erect a dwelling of wood. It seems reasonable that the risk should remain with the landlord. Should such be the intention of the parties to the lease it would however be necessary to expressly provide for it. It is hoped, as suggested by our correspondent, that the practice of conveyancers in the various parts of the Dominion will be made known through the correspondence column of this Journal.

BANKRUPTCY AMENDMENT.

The several changes proposed by the Bankruptcy Bill merit more than passing consideration. Clause 2 substitutes the district "within which the petitioning creditor resides or carries on business" as the place where petitions may be filed instead of the place wherein the debtor has resided for three months. This is a convenience to creditors to which they are entitled. The assignee's powers of sale by private contract are to extend to all, or any part, of the property of bankrupt. This is to be subject to the authorisation of the supervisors (if any) or a resolution of the creditors. Further protection is to be afforded to creditors against fraudulent preference by adding "any surety or guarantee for the debt due to" the creditor preferred. Ordinary creditors also are to benefit by the limitation of a landlord's preferential claim for rent from six to three months (Clause 8) and also by Clause 12 whereby provision is to be given by the assignee or any lessee or under lessee the interests of whom are affected by the intended re-entry or forfeiture resulting from the bankruptcy or an act of bankruptcy on the part of the lessee to make application to the Court for relief against such re-entry or forfeiture. The latter provision might more appropriately be incorporated in the Property Law Amendment Bill.

The extension from three to twelve months of the period within which the Official Assignee may determine to disclaim onerous property (Clause 6) is an attempt to bring our provision into line with that of the English Act of 1914. While this period appears long it does not necessarily involve hardship upon parties interested because they have the right to call upon the Official Assignee to disclaim within one month.

The prohibition of the publication of the reports of examination of bankrupts, except with the special consent of the Court, is undesirable. The examination of the debtor before the Official Assignee could frequently be more desirably held in camera. A bankrupt who has become insolvent through misfortune is sufficiently sensitive of his position and usually assists his creditors after he has been adjudicated bankrupt. The absence of publicity under these circumstances would encourage the bankrupt to greater candour. The creditors could be left to decide as to whether publicity would be advantageous to the administration of the bankrupt's estate and to their individual interests. It would be more desirable if the creditors were empowered to decide by a majority of those present at the meeting whether or not a report of the examination of the bankrupt should be published.

The chief object of the public examination of a bankrupt before the Court is to obtain a fuller disclosure concerning the bankrupt's assets. Publicity under these circumstances is desirable, and there is no more reason for prohibiting the publication of reports of these proceedings than there is for prohibiting publication of reports of any legal proceeding. Should there be any good reason for reports not appearing in any particular case the matter should be left to the discretion of the Court on the application of one or other of the parties.

A novel feature to be added to the Bankruptcy Law is the power to assign future assets which are not in existence at the time the assignment is made. The Courts have adhered strictly to the logic that before an asset can be assigned it must be in existence and in the possession of the assignor. In the case of **O.A. of Bredow v. Newton King** (1925) N.Z.L.R. 200—the case

which occasioned the feature now under review—Ostler J. stated the principle of Law thus :—

" Where a person gives an order or an assignment of monies which become due to him at a future date under a contract the consideration for which, on his part, is executory, so that the monies will not become due unless and until he executes that consideration, then if that person is subsequently adjudicated a bankrupt and the bankruptcy relates back to an earlier date, the assignee under the order can only obtain a good title to so much of the monies, the consideration for which has been executed by the bankrupt up to the date to which his bankruptcy relates back ; in other words, the assignee under the order can only obtain a good title to so much of the monies as has become a debt."

It is proposed (Section 11) that this principle of law be abrogated in respect to what are generally known as factory cheques, i.e., the monthly payments made by the dairy factory to its suppliers in respect to milk or cream supplied during the month.

Sub-section 2 is as follows :—

" (2) A contract by a dairy farmer by the terms whereof a person who makes or has made advances to a dairy farmer becomes assignee of or is otherwise entitled to receive monies which are then, or thereafter become, payable to the dairy farmer by a purchaser, or any part of such monies, is valid in law."

It is further provided that notice in writing to the purchaser of the milk of such contract (of assignment of factory cheques) shall be effectual to charge not only the monies then due, but also " all other monies which may thereafter from time to time become payable by the purchaser in respect of milk purchased " from the dairy-farmer. The contract is not impeachable as a fraudulent preference except only to the extent of advances made to the dairy-farmer before the execution of the contract. Notice of an act of bankruptcy committed by the dairy-farmer is not to affect the validity of the contract nor of any advances made thereafter to the dairy-farmer.

AUTREFOIS ACQUIT.

It is not since 1914 that the special plea of *autrefois acquit* has been advanced in our Courts *vide* (**R. v. Holland** 33 N.Z.L.R. 931). It was then held that the plea could not be raised after a plea of not guilty. The defence was raised in Queensland in 1925, in the case of **Curran v. Wong Joe : Ex parte Wong Joe,** 20 Q.L.R. 112. The facts of the case were that the oriental gentleman named Wong Joe, had been charged that " he unlawfully had in his possession opium," and the complaint was dismissed upon the ground that the complaint revealed no offence and that the prosecution had not proved that the accused was in possession of opium, or not a medical practitioner, chemist, wholesale dealer in drugs or common carrier. A fresh complaint was subsequently laid against the accused, setting forth the offence and that the accused did not come within the exceptions mentioned by the section of the Act. Accused's solicitor admitted the evidence given upon the first complaint as evidence on the second complaint and further evidence was tendered. Thereupon accused's solicitor then pleaded *autrefois acquit*. Apparently the accused had first pleaded the general issue. In New Zealand the special plea would not then be entertained (**R. v. Holland** *supra*.) A certificate of dismissal had not been obtained by accused in respect to the first complaint, the special plea of *autrefois acquit* was therefore overruled, and a conviction was entered.

Upon appeal Douglas J., in a written judgment, which is difficult to follow because as published in the reports, of the frequent misuse of terms and the lack of lucid exposition, found it unnecessary to enquire as to whether the accused had been placed in jeopardy or not, concluded : " I am of opinion that as the appellant did not obtain a certificate of dismissal . . . . the magistrate was right in overruling the plea of *autrefois acquit*." He comes to the remarkable conclusion that because the statute provides a method of proving *autrefois acquit* namely by a certificate of dismissal, that the defence cannot be proved in any other way. The opposite view has been held since the days of Alfred the Great, of whom it is reported : " He hanged Therborne, because he judged Osgot for a fact whereof he was acquitted before, against the same plaintiff, which acquittance he tendered to own by oath, and because he would not own it by record, Therborne would not allow of the acquittal which he tendered him."

Doubtless Wong Joe, did he know, would sigh for the days of Alfred.

SUPREME COURT.

Stringer J. Aug. 31 ; Sept. 7, 1927. Auckland.

EASTMAN v. EAGLE STAR AND DOMINIONS INSURANCE CO. LTD. AND NEW ZEALAND INSURANCE CO., LTD.

Insurance—Accident—Proposal Describing Situation of Premises Where Insured's Trade or Business Carried On as " Auckland City and Suburbs "—Insured a Building and Sewerage Contractor—Whether Insurance Limited to Area Mentioned—Construction Contra Proferentem—Meaning of " Suburbs."

On 3rd September, 1925, the plaintiff on a form prepared by the defendants made a proposal for an insurance of indemnity against liabilities incurred by him in the course of his business as a building and sewerage contractor under the Workers Compensation Act or at Common Law. The proposal form contained the following printed words : " Situation of premises where trade " or business is carried on." The plaintiff wrote in the blank space provided for the purpose the words " Auckland City and " Suburbs." In answer to the further printed words : " Nature " of trade or business in respect of which indemnity is required " the plaintiff wrote the words : " Building and sewerage." The policy issued in pursuance of the proposal after reciting that : " Whereas Roy Ernest Eastman carrying on at Auckland City " and Suburbs in the Dominion of New Zealand the business " of building and sewerage (covering carpenters, bricklayers, " painters and drainage employees) and no others for the purpose " of risk under this policy, hath applied for an indemnity against " all such claims as hereinafter mentioned," and, after declaring that the proposal and declaration made by the plaintiff was to be the basis and form part of the contract, provided that : " the Company indemnifies the employer against his liability " under or by virtue of 'The Workers Compensation Act, 1922,' " 'The Deaths by Accident Compensation Act, 1908' 'The " Mining Act, 1908,' 'The Coal Mines Act, 1908' 'The Coal " Mines Amendment Act, 1914' or at Common Law in respect " of any personal injury, fatal or non-fatal, which at any time " during the continuance of this policy shall happen to any " worker or workman whilst in his employ in the above mentioned " business or in the employ of a Contractor or Sub-contractor " performing work for the employer and engaged in the above " mentioned business provided always that the wages of such " worker or workmen (whether such wages are paid by the " employer of any contractor or sub-contractor) are included " in accounts kept in accordance with the provisions of this " policy." Then followed a proviso limiting the Company's liability to £1,000 in respect of any claim other than one under the Workers Compensation Act. At the time of making the proposal the plaintiff was in fact, carrying on business in Auckland City and Mount Roskill in the sense that at such time his

office was in Auckland City and his actual operations were confined for the time being to Mount Roskill where he was engaged in erecting two buildings and in the construction of a drain. Subsequently and during the currency of the policy the plaintiff in the ordinary course of his business entered into a contract for the construction of certain drainage works at Hamilton, and on the 15th March, 1926, one of his employees was buried by the subsidence of the side of a drain and sustained serious injuries in respect of which he sued the plaintiff for damages at Common Law and recovered judgment for the sum of £1,267 18s. 0d., and costs. The plaintiff thereupon claimed to be indemnified to the extent of £1,000 in terms of the policy; the defendants repudiated liability and the present action was brought.

Finlay and King for plaintiff.
Northcroft for defendants.

STRINGER J., said that the facts of the case were not in dispute and the only question to be determined was as to the proper interpretation of the contract between the parties embodied in the proposal and policy. It had been contended on behalf of the plaintiff that in stating the situation of his premises as being "Auckland City and Suburbs," he merely was stating where his existing contracts were being performed without intending thereby to limit the insurance to the area mentioned; on the other hand it had been contended on behalf of the defendants that the words "Auckland City and Suburbs" were descriptive of the risk insured by them, and therefore that the plaintiff's contract at Hamilton was not covered by the Policy. It was to be remembered that the printed form was one which was used for insurance risks attendant upon the carrying on of all classes of trade and business and consequently might not be quite appropriate to some particular trade or business. Where the proposed insurance was in connection with factories or shops the question as to the situation of premises where the trade or business was carried on was quite appropriate and might be important in determining the nature of the risk, but the question appeared to be quire inappropriate where a proposal was made in connection with a building and sewerage contractor's business which, as the parties must have known, had no local habitation and from its very nature was always changing its scene of operation. Nor was the locality of such operations of any importance as to the nature of the risk for building and sewerage operations were for all practical purposes much the same from an insurance point of view wherever carried out; it was well known that the premiums for such insurance were uniform and did not vary with the locality except perhaps, as had been suggested, in such exceptional places as Rotorua or White Island, as to which however it would be easy for the company to exempt itself from liability in express terms or to charge a special rate of premium for any business risk. Construing the contract as it stood, without the aid of decided cases, or canons of construction, His Honour should have arrived at the conclusion that it was not in the contemplation of the parties that the protection to the plaintiff should be limited in the way contended for on behalf of the defendants which, in His Honour's opinion, would render the insurance largely illusory and would not give a reasonable business efficacy to the contract.

The principles upon which contracts of insurance should be interpreted were well settled. His Honour referred to **Pearson v. Commercial Union Assurance Co.,** 1 App. Cas. 498, 507, and **Yorkshire Insurance Co. v. Campbell** (1917), A.C. 218, 223. Applying those principles His Honour had no doubt that having regard to the nature of the business carried on by the plaintiff and the knowledge common to the defendants and other business men, that the locality of the operations of a building and sewerage contractor must necessarily change from time to time as opportunity offered, it was not intended or understood by either of the parties that the words "Auckland City and Suburbs" should operate as a limitation of the area wherein the policy should apply. If the defendants had any such intention it was their duty in order to make that intention effective to express it in clear and unambiguous terms. The observations of Farwell L.J., in **Re Bradley and Essex and Suffolk Accident Indemnity Society** (1912), 1 K.B. 415, 430 appeared to be directly applicable to the present case. The contract so far as the description of the risk was concerned, even according to the defendant's contention, was plainly ambiguous and indeed so ambiguous that His Honour saw the greatest difficulty in giving effect to it. "Auckland City and Suburbs." Auckland City one knew as it has defined boundaries; but who could say what was included in the term "Suburbs?" His Honour quoted the definition of "Suburb" contained in the Oxford Dictionary. Were the various Boroughs adjoining or adjacent to the City of Auckland suburbs of Auckland? If there were areas outside Auckland which could properly be termed suburbs how far did they extend? What area did they include? So far as His Honour could see it was impossible to frame a definition of "suburb" which would make it intelligible in the contract under consideration.

The recent case of **Roberts v. Anglo-Saxon Insurance Association,** 96 L.J. K.B. 590, was clearly distinguishable. In His Honour's opinion the true description of the risk covered by the present policy was to be found in the words "Nature of trade "or business in respect of which indemnity is required: build- "ing and sewerage," and the words "Auckland City and Sub- "urbs" did not form, nor had they been intended to form, any part of the description of the risk covered by the policy.

Judgment for plaintiff with costs.

Solicitor for plaintiff: **W. J. King,** Hamilton.
Solicitors for defendant: **Earl, Kent, Massey and Northcroft,** Auckland.

Skerrett C.J. Aug. 26; Sept. 5, 1927. Wellington.

PUBLIC TRUSTEE v. REGISTRAR-GENERAL OF LANDS.

Administration—Trust—Land Transfer Act 1915—Death of Administratrix After Having Paid the Debts and Collected the Assets but Before Distribution of Assets—Whether a Trustee for Next-of-Kin—Whether Executor of Administratrix Entitled to be Registered as Proprietor of Lands of Intestate—"Transmission"—"Acquirement of Title to an Estate or Interest by Operation of Law"—Trustee Act 1908, Section 80.

Application on the part of the Public Trustee to compel the Registrar-General of Lands to register the Public Trustee as proprietor of an estate in fee simple under the circumstances set out in the judgment.

Rose for Public Trustee.
Currie for Registrar-General of Lands.

SKERRETT C.J., said that one Jack having died intestate, Letters of Administration were granted to his widow Mary Ann Jack. The next-of-kin were the widow and one son. The intestate possessed both personal and real property. The real estate consisted of a piece of land in the township of St. Kilda, the title to which was under the Land Transfer Act. M. A. Jack died on the 12th August, 1926, leaving a will probate whereof was, on the 4th September, 1926, granted to the Public Trustee, as appointee of the executor named therein. Prior to her death, the administratrix had paid all the debts of the intestate and had collected all the assets. She also had caused herself to be registered by transmission as the owner of an estate in fee simple of and in the intestate's land. Paragraph (5) of the affidavit of the Public Trustee appeared to be really a statement of a contention of law. In that affidavit the Public Trustee said that, at the date of her death, M. A. Jack was trustee of the assets of the intestate, then vested in her, for the next-of-kin of the intestate. In effect that statement was a claim that the administratrix having paid all the debts of the intestate and collected all his assets, *ipso facto* became a trustee of the residue of the assets for the next of kin. No information had been vouchsafed as to any severance of or definition of the share of each of the next-of-kin in those surplus assets, nor of any assent by the next-of-kin, nor particularly of the assent of the administratrix that she would hold her son's defined share of the surplus assets as trustee for him. No facts were stated on which it could be held that with the son's consent the administratrix had constituted herself a trustee of the son's share of the surplus assets so that the transaction would in substance and effect be the equivalent of the payment of a defined share to the son. The real estate of the intestate still remained unsold.

Assuming that the administratrix had been constituted a trustee of the share of her son under the intestacy, and that the Public Trustee had taken the necessary steps to appoint himself a new trustee of such share, the question was whether he was entitled to require the Registrar-General to enter him on the Land Transfer Register as the proprietor of the real estate for an estate in fee simple. The leading and the essential feature of the Land Transfer system was that title was given by registration. It had been aptly and properly said that an estate conferred by registration under the Torrens System was neither the common law legal estate or seisin nor the statutory seisin of the Statute of Uses, but a new statutory estate—a registered estate. See **Hogg's Australian Torrens System,** 766. It however was quite certain that all derivative estates and interests must under the system be derived from a registered proprietor. The registered proprietor in the present

case was the administratrix, M. A. Jack, under Letters of Administration of the estate of her husband granted by the Supreme Court. It was clear that the executor of her will was not entitled to represent the administratrix or the original intestate. A grant *de bonis non* or a grant under Section 37 of the Administration Act 1908, was necessary to enable a person to represent the estate and interest of the original intestate. The position of an executor claiming under a registered proprietor's will was quite different. Dr. Kerr in his recent work on **The Australian Land Titles (Torrens) System,** at p. 451, quite accurately pointed out the position of an executor as distinguished from the position of an administrator acting under Letters of Administration. The view there stated was the view taken by the Full Court of Victoria in the case of **In re O'Connor,** 24 V.L.R. 896, although unfortunately no reasons were given. There could be no doubt that where there was an unbroken chain of representation the ultimate executor became entitled to be registered by transmission of land belonging to the estate of the original testator. He derived his title from an actually registered proprietor and represented in point of fact the actually registered proprietor. That accorded with the view taken by Cussen J. in **The King v. Registrar of Titles ex parte Miller and Maddock** (1914), V.L.R. 387, 391, whose judgment was affirmed by the High Court of Australia in **Maddock v. Registrar of Titles,** 19 C.L.R. 681. The definition of a "Transmission" contained in the Land Transfer Act was altered in 1925 to read: "'Trans-"'mission' means the acquirement of title to an estate or interest "by operation of law." In His Honour's opinion that definition must be read as meaning the acquirement of title to an estate or interest of the last person whose name was entered in the ordinary way as the proprietor of the interest in his own right. That was the view taken by Cussen J. in the case referred to at p. 391. The Public Trustee was not the representative of the intestate nor of the last proprietor of the land named in the title. By reason of the grant of probate of the will of the administratrix the Public Trustee did not succeed by operation of law or otherwise to the estate of the original intestate or to the estate right or interest of the widow as administratrix appointed under the order of the Court. The Public Trustee in no way represented the original owner of the land. There was therefore no power or jurisdiction which would justify the Registrar-General of Lands in entering the name of the Public Trustee on the Certificate of Title as the registered proprietor of the land by transmission.

There was however a second branch of the argument. It was said that the administration under the Letters of Administration was at an end before the death of the administratrix, and that at her death the administratrix held the residue of the intestate's estate after payment of debts and expenses in trust for the two next of kin. It was strongly urged that once an administratrix had paid the debts she automatically became a trustee of the residue of the intestate's assets for the next-of-kin, and that she had no duty as administratrix to convert the surplus into money and divide the same amongst the next of kin. **In re Ponder: Ponder v. Ponder** (1921) 2 Ch. 59 was certainly no authority for that position. His Honour's view was not really different from the view taken by Hosking J., in **In re Clover** (1919) N.Z.L.R. 103, 104. That learned Judge was dealing with cases like **Cooper v. Cooper,** L.R. 7 H.L. 53; **Blake v. Bayne** (1908) A.C. 371; **Attenborough v. Solomon** (1913) A.C. 76. His Honour quoted from the judgment of Lord Cairns in **Cooper v. Cooper** (*cit. sup.*) at p. 64, and said that His Lordship was not dealing there with the duties of an administrator or with his duty, if required by the next-of-kin, to convert and divide the surplus assets. All that His Lorsdhip held was that the next-of-kin had proprietary rights in the surplus assets, and, if they chose, all being *sui juris*, to waive the conversion of the assets they were at liberty to do so, and take them in specie. Such a waiver however would probably require to be with the consent of all the persons entitled as next-of-kin. On the other hand there could be no question that an administrator might at the instance of or with the consent of the next-of-kin, constitute himself a trustee of the testator's assets provided he had paid all the debts and liabilities of the intestate. But there must be evidence as there was in **In re Ponder** (*cit. sup.*) that the administrator had in effect held himself out as holding the defined shares fo the next-of-kin as trustee for them. Even assuming there was a declared trust of the surplus assets of the intestate in favour of the next-of-kin how was the Public Trustee to procure himself to be registered as proprietor? His Honour pointed out that he did not succeed to the intestate's property as representing in any way the intestate. He did not succeed at any rate by operation of law. Section 80 of the Trustee Act 1908 did not apply to land under the Land Transfer Act. Even under the original definition of "Transmission" the Public Trustee could not have procured the registration of his title. He did not acquire any estate consequent upon the death of the intestate, or as his executor, or as his administrator, or as a trustee under a will or settlement, or by virtue of appointment or succession to any office. The suggested trust was not evidenced by any document. Under the old statutory rules regulating transmissions registration of an interest under an unregistered settlement, if it could be done at all, was a clear departure in a special case from the cardinal principle of the Act. But there must have been a settlement, and under that deed or writing the Land Registrar must have been satisfied that the applicant was entitled to succeed to the estate or interest of the registered proprietor. Here it was sought to register a transmission under a verbal and undefined trust. His Honour thought that the Registrar-General was justified in his refusal to register, and was entitled to costs.

Solicitor for plaintiff: **Solicitor, Public Trust Office,** Wellington

Solicitor for defendant: **Crown Law Office,** Wellington.

Skerrett, C.J. Aug. 25; Sept. 5, 1927. Wellington.

HOLMES v. COMMISSIONER OF STAMPS.

Revenue—Death Duties—Estate Duty—Sum Payable under Marriage Settlement on Death of Deceased—Whether Deductible in Computing Final Balance of Estate—Whether a Debt Incurred "for Full Consideration in Money or Money's Worth"—Death Duties Act 1921, Sections 9 (2) (a), 42.

Appeal from assessment of death duty made by Commissioner. The deceased, on 12th September, 1873, in anticipation of his marriage entered into a marriage contract. By that contract he covenanted to pay to certain named trustees, on his decease, the sum of £10,000 to be held by such trustees in trust for the purposes therein specified. The interest of the fund was to be paid to the widow during her lifetime, and after her death the trustees were to hold the capital moneys in trust for payment to the children of the marriage, as the testator might appoint, and failing such appointment then upon trust to distribute the fund equally among the children. Certain moneys were under the provisions of the contract to be brought into settlement by the wife. She disponed and assigned to the trustees of the marriage settlement: (a) all and sundry the property then belonging to her; (b) property which she might succeed to or acquire by or through the decease of her brother or sister before the shares of their deceased father's estate became vested in them; (c) property which she might succeed to in any other way during the subsistence of the intended marriage and (d) a sum of £3,000, being the wife's share in the residue of her deceased father's trust estate. The question to be determined on the appeal was whether the sum of £10,000 could be deducted from the final balance of the deceased's estate—see Section 9 (2) (a) of the Death Duties Act 1921.

Young for appellant.

The Solicitor-General (Fair, K.C.) for respondent.

SKERRETT C.J., said that it was unnecessary to specify in detail the value of the moneys and properties brought by the deceased's widow into the settlement. It was sufficient to say that the value of such moneys and properties at the date of the marriage settlement might be regarded as substantial, though they did not amount to the sum of £10,000 which the deceased had covenanted to bring into settlement. It was clear that in an ordinary sense the obligation on the part of the deceased to pay £10,000 to the trustees of the settlement was a debt, and apart from some exceptional statutory provision would ordinarily be deductible as a debt owing by the testator at his death. But sub-section 2 (a) of section 9 of the Death Duties Act 1921 expressly declared that no allowance should be made for debts incurred by the deceased otherwise than for full consideration in money or money's worth wholly for his own use and benefit. The covenant to pay the debt was in consideration of marriage and of certain moneys and property brought into, or to be brought into, the settlement by the wife. Was the consideration of marriage then a consideration in money or money's worth? That question seemed to have been settled both in the Scotch and English Courts adversely to the appellants. His Honour referred to **Lord Advocate v. Alexander's Trustees,** 7 S.C. (5th Ser.), 367; **Lord Advocate v. Warrender's Trustees,** 8 S.C. (5th Ser.), 371; **Floyer v. Bankes,** 9 Jur. N.S.

1255; 3 De G. J. & S. 306; **In re Bateman,** 95 L.J.K.B. 199, per Rowlatt, J., at p. 201; and **Lord Advocate v. Sidgwick,** 4 S.C. (4th Ser.), 815, and said that the view which appeared to be taken by English and Scotch Judges was that the true consideration of a marriage contract or settlement was not the mutual obligations undertaken by the parties but the marriage. However this might be, it appeared to be conclusively determined that marriage was not a consideration in money's worth.

It accordingly followed that the acceptance by the wife of the benefits in her favour in full satisfaction of all terce of lands and every other claim whatever which she could ask or demand through the decease of her husband in case she should survive him and in full of all that her representatives and next of kin could claim by or through the decease of their father could not in the circumstances assist the appellants to claim the deduction of the debt.

For those reasons His Honour thought that the appeal should be dismissed and His Honour declared that the sum of £10,000 covenanted to be paid by the testator under the marriage contract could not be allowed or deducted under Section 9 of the Death Duties Act 1921. There was no necessity to deal with the arguments of the Solicitor-General based on Section 42 of the Act.

Solicitors for appellants: **Young, White & Courtney,** Wellington.

Solicitors for respondent: **Crown Law Office,** Wellington.

Skerrett C.J. Sept. 6, 8, 1927. Wellington.

FINCH v. COMMISSIONER OF STAMP DUTIES.

Revenue—Death Duties—Estate Duty—Gift Made by Deceased Within Three Years Before his Death—Expenditure of Money on Alteration and Improvement of Family Home the Property of Deceased's Wife—Whether a Gift—Death Duties Act 1921, Sections 38, 39.

Appeal under Section 62 of the Death Duties Act 1921 from an assessment of the Commissioner. The question to be determined was whether certain expenditures made by C. E. Finch deceased, in the alteration and improvement of the family home occupied by the deceased and his wife constituted gifts liable to taxation under Section 38 and 39 of the Act, and therefore part of the dutiable estate of the deceased by virtue of Section 5 (1) (b) of the Act.

During the year 1925 the deceased so expended £1,350, and in 1926 the further sum of £632. The deceased and his wife had been married some years and at the date of his death two children of the marriage (two boys aged about 18 and 11 years respectively) were left surviving him. The deceased and his wife with their family had lived in the residence, which was apparently in the name of the wife, for some fifteen years. The facts in connection with the expenditures were stated in the Special Case, as follows: "For some time prior to the carrying out of the alterations and repairs to the house, both decesaed and appellant had been saving money with this object in mind and appellant had been receiving only fifteen pounds a month from deceased for housekeeping purposes in order that deceased's money might accumulate. Deceased never suggested to the appellant that in paying for the said alteration and repairs he was making a gift. The object in appellant's mind and as far as she knew the object in his was simply the improvement of the family home in accordance with their means and station in life."

Parry for appellant.

The Solicitor-General (Fair K.C.) for respondent.

SKERRETT C.J. said that it was not unimportant to observe that it appeared inferentially from the statements of the Special Case that the Commissioner's assessment had been made under Sub-section (f) of Section 39 and not under Sub-section (a) of the same section. It was further to be observed that no statement was contained in the Special Case that the purpose of any part of the expenditure was to benefit the wife or to make a gift to the wife otherwise than for the convenience and benefit of the husband. Were then those expenditures gifts within Section 38? There was neither a presumption of law nor of fact that if a man at his own cost erected buildings on the lands of another he thereby made a gift of the money so expended to the owner of the land. The question whether the expenditure was of that character was one of pure fact—arising out of the circumstances attending each transaction. What was the purpose and object of the expenditure could only be determined from the actual facts surrounding it. The husband might well have expected to get his money's worth in his lifetime by the use of the alterations and improvements made by his expenditure. In the present case the deceased, a vigorous man in early middle age—some 53 years of age—had died suddenly. His death was quite unexpected and ordinarily he might have expected to live for many years. His Honour thought that the deceased and persons in a similar position to him must be regarded as being in the position of tenants occupying the property upon which improvements were made. *Prima facie* the improvements made by them would be regarded as made for their own purposes unless they were of so extravagant a character as to indicate plainly that their main purpose must have been to improve the value of the wife's property. It must always be remembered that moneys expended in improving the buildings and accommodation of a family dwellinghouse were seldom fully reflected in the sale value of the property and sometimes were most inadequately so reflected. The object of those improvements in very many cases was not to improve the saleable value of the property, but to increase its comfort for occupation by the husband and his family. It was noticeable that although the Special Case was full of statements of intention it contained no finding of fact that the intention of the deceased in making the expenditure was to increase the value of the wife's property or to make a gift to the wife. The wife, so far as appeared from the Special Case, had no voice in the nature and character of the improvements nor was she concerned in any way with them. It was true that in order to constitute a taxable gift it was not essential that the donor should have intended to make a gift if in fact he had made a gift. But where the question as to whether there was a gift depended upon mere inference of fact, the fact that neither party regarded the transaction as a gift must be of importance in drawing the correct inference. It would be noticed that if the Commissioner's decision was right the administrator of the estate would be charged duty on a sum far in excess of the value of the benefits accruing from the expenditure.

Under all those circumstances His Honour thought that the onus rested upon the Crown to satisfy the Court that although those sums were not paid to Mrs. Finch, they were in point of fact expended for the main and substantial purpose of improving her property. In His Honour's opinion the Crown had not discharged that onus. It appeared that the proper conclusion to be drawn from the findings of fact of the Commissioner was that there was no evidence whatever that the expenditure was made for the purpose of benefiting Mrs. Finch, or that the expenditure was other than a reasonable and normal expenditure by the husband for his own benefit including the benefit of his family. He had, if not a legal, at least a social obligation towards his family, and one could well understand how closely the interests of a father were bound up with the upbringing and welfare of his children. It had been urged that the transaction amounted to a conveyance or transfer under Subsection (a) of Section 39. His Honour did not think that that contention was at all tenable.

The final question to be determined arose under sub-paragraph (f) of Section 39, which provided that the term "disposition of property" meant any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own estate and to increase the value of the estate of any other person. The answer to that was that it was nowhere found in the Special Case that the expenditure by the deceased was made with intent to diminish his estate and to increase the value of his wife's estate. All that could be said by Mr. Solicitor was that every gift involved a reduction of the value of the donor's estate and an increase of the value of the donee's estate. His Honour could not think that that somewhat metaphysical argument was of any assistance in the construction of the sub-section. What was meant by the sub-section was some transaction involving the transfer of a part of the donor's estate to another with the intent, i.e., for the very purpose, of increasing the value of that other's estate.

Appeal allowed with costs.

Solicitors for appellant: **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.

Solicitors for respondent: **Crown Law Office,** Wellington.

MacGregor J (In Chambers) — Aug. 26; Sept. 1, 1927. Wellington.

PUBLIC TRUSTEE AND OTHERS v. BENJAMIN.

Practice—Costs—Party and Party—Whether Fee for Notes of Evidence and Agency Charges Allowable as Disbursements. —"Agency Charges if Specially Allowed"—"Other Necessary Payments"—Code of Civil Procedure, Table C., Paragraphs 11 and 35.

Motion under Rule 574 to refer the taxation of the defendant's costs in the above action back to the Registrar with directions to review his report and to make certain alterations therein. By the Notice of Motion and Affidavit in support thereof it was claimed that the Registrar had decided erroneously in respect of two items claimed as disbursements in the Bill of Costs. The first appeared as "Fee on Notes of Evidence £2 12s. 6d." and the second as "Payment of Mr. Jones' Agency costs £26 19s. 6d." No special direction as to disbursement was given in the judgment itself, which allowed to the defendant costs according to scale in the usual way with disbursements and witnesses' expenses to be fixed by the Registrar.

Christie in support of motion.
Cousins to oppose.

MACGREGOR J. said that the matter appeared to be regulated by Table C of the Third Schedule to the Code of Civil Procedure, entitled "Scale of Costs." The first 35 rules of Table C set out seriatim the various items of costs chargeable as between party and party in the Supreme Court. Then followed Rule 36 which was as follows: "In addition to the above, all disbursements for fees of Court, fees of officers, witnesses' expenses actually paid according to the allowance fixed by Table E, agency charges if specially allowed, and other necessary payments."

The first branch of the question raised by the motion related to a small sum paid by the defendant for a copy of the judge's notes taken at the trial which was allowed by the Registrar at the taxation, as coming within the expression "other necessary payments." His Honour thought that the Registrar was right in his decision on that point. The payment was "necessary," in the sense of being reasonably required for the proper conduct of the defendant's case. If such a disbursement was not included amongst "fees of officers," it was comprised within the "other necessary payments" referred to in the rule, and should be allowed accordingly on taxation.

The second point depended on different considerations and demanded separate treatment. The sum of £26 19s. 6d. had been allowed as a "disbursement." The Bill of Costs in support of that item disclosed that the agency work actually done was in the main attendances by a Wellington solicitor on various witnesses in Wellington regarding their evidence, and sundry letters reporting the result to defendant's Christchurch solicitors. In other words, the agency work charged for was in law and in fact "preparing for trial" on the part of the defendant. For that very preparation for trial a special fee of £12 12s. 0d. was provided by Table C, and had been allowed to the defendant by the Registrar in the present case. No special order or allowance in respect of agency charges was made by the Judge at the trial or in his written judgment. The words of the rule were: "agency charges if specially allowed." In His Honour's opinion those words meant "if specially allowed by the Court." It was only in exceptional cases that the question arose in practice, and counsel should be careful to see that any point of the kind was brought to the notice of the Judge at the latest before judgment was finally entered. The taxation would be referred back to the Registrar with a direction to review his report by disallowing the sum of £26 19s. 6d. allowed for agency charges.

Solicitors for plaintiffs: **Chapman, Tripp, Blair, Cooke, and Watson,** Wellington.
Solicitor for defendant: **E. A. R. Jones,** Wellington, agent for **Duncan Cotterill and Co.,** Christchurch.

MacGregor J. — Aug. 24, 27, 1927. Wellington.

IN RE HYLTON, AN INFANT.

Infant—Custody—Habeas Corpus—Welfare of Infant—First and Paramount Consideration—Future as well as Present Welfare to be considered—Order Defining Rights of Parties.—Guardianship of Infants Act, 1926, S.2.

Application for writ of *habeas corpus*; the facts appear sufficiently in the report of the judgment.

Blair for applicant.

Parry for respondent.

MACGREGOR J., said that the applicant for the Writ was the father of a boy between six and seven years of age, who claimed that the mother unlawfully retained the custody of the child from him. The parents of the infant had been living apart for several years owing to unhappy differences between them. The mother resided in Wellington along with the other children of the marriage, two daughters aged 20 and 16 respectively. The father of all three children lived in Wellington with his own father and mother, who appeared to be in comfortable circumstances. His Honour had had a private talk with the little boy, who appeared to be a healthy and intelligent child of normal disposition. Each of the parents was naturally anxious to have his custody, and both of them were equally desirous of doing their best for his education and upbringing. There was fortunately no dispute as to religious belief and no allegation of moral impropriety on the part of either parent unfitting him or her from training a young boy in the way he should go. The law on the subject was free from doubt. His Honour read Section 2 of the Guardianship of Infants Act 1926, and said that it in effect merely repeated the broad rule which had formerly been acted upon by the Courts both in England and in New Zealand. See **In re Thomson,** 30 N.Z.L.R. 168; and **In re Thain** (1926), 1 Ch. 676, 689. Having regard to all the relevant facts and circumstances of the case, His Honour had come to the conclusion that it would be for the welfare of the infant to give his custody to his father. The boy himself was nearly seven years old, and was just approaching the time of life when a father's care and guidance would be all-important. His father was admittedly much interested in education, and after all had the power of the family purse. If the only matter for consideration were the present happiness of the child, His Honour would perhaps have hesitated before removing him from the custody of his mother. But, in the case of a young child, as had been said by Eve J. in **In re Thain** (*cit. sup.*) at 684, one knew from experience how mercifully transient were the effects of partings and other sorrows. Regarding the future as well as the present welfare of the boy as the first and paramount consideration, His Honour would order the delivery of the child to his father. The mother would of course have all reasonable access to the boy. If the parties could not agree as to the precise extent and terms of that access, His Honour would hear argument on the subject.

The rule for *habeas corpus* would accordingly be made absolute, but, in the circumstances, without costs. His Honour proposed to make an order further defining the rights of the parties under The Infants Act 1908, as was done **In re Thomson** (*cit. sup.*). That order would be that the infant would remain under the care of his father until the further order of the Court. The mother to have access to him, as might be determined by consent or otherwise. Either party to have liberty to apply at any time in Court or at Chambers for further directions as to the custody and education of the infant.

Solicitors for appellant: **Chapman, Tripp, Blair, Cooke and Watson,** Wellington.

Solicitors for respondent: **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.

SUPREME COURT RULING.

Crawford v. Ryland (No. 2) 18 N.Z.L.R. 714, directed that where the costs of an interlocutory proceeding are reserved, application must be made by the Party who afterwards claims such costs at or before the time when final judgment in the action is pronounced.

The Judges of the Court of Appeal, with a view to the adoption of a universal practice, have determined that such reserved costs may be applied for and allowed before the final judgment in the action has been sealed.

THE N.Z. CONVEYANCER.

(Conducted by C. PALMER BROWN).

DEED OF SETTLEMENT OF FUND FOR COLLEGE MEDAL.

THIS DEED made this day of BETWEEN A.B. of the first part and the Public Trustee incorporated under the provisions of The Public Trust Office Act 1908 of the second part and X.Y. College of the third part WHEREAS the said A.B. being desirous of perpetuating the memory of C.B. son of the said A.B. and now deceased determined with the approbation of the said X.Y. to institute an annual medal to be called to be given to students attending the College and awarded under the regulations hereinafter set forth AND WHEREAS for effectuating such desire and determination the said A.B. proposes to give and appropriate the sum of £ sterling to be applied in such a manner as should be deemed most conducive to the purposes aforesaid AND WHEREAS it has been agreed that the said sum of £ should be placed in the hands of the Public Trustee for investment and that he should stand possessed thereof and the income thereof upon the trusts and with and subject to the powers provisoes agreements and declarations hereinafter declared and contained concerning the same respectively AND WHEREAS in pursuance of the said agreement the said A.B. has with the approbation of the said X.Y. paid to the Public Trustee the sum of £ for investment by him in such manner from time to time as he is or shall be by law authorised to do AND WHEREAS other moneys may be from time to time added to the said sum of £ to be held on the same trusts as are hereby declared concerning the said sum of £ NOW THIS DEED WITNESSETH that in further pursuance of the said agreement and for effectuating the said desire and determination of the said A.B. and in consideration of the premises it is hereby agreed and declared that the Public Trustee shall from time to time collect and receive the income of the said fund of £ and all additions thereto (hereinafter referred to as "the said trust fund") and by and out of the same pay and discharge or reimburse himself all expenses incurred in or about the receiving or obtaining of the said income or otherwise in or about the execution of the trusts of these presents or by reason thereof or incidental thereto and also pay and discharge all such other expenses (if any) as the Public Trustee and the said X.Y. shall approve and deem conducive to the purposes hereinafter expressed AND SHALL from time to time pay and apply the residue of the said income in the manner hereinafter provided for the purchase of a medal to be called to be given to a student attending the College and awarded under the regulations hereinafter set forth AND THIS DEED WITNESSETH that for further effectuating the said desire of the said party hereto of the first part and in consideration of the premises it is hereby agreed and declared as follows: that is to say:

1. The medal shall be awarded annually to that boy at the College who (insert special provisions as to qualifications of holder, appointment of judges, method of judging, etc.).

2. The said clear residue of the income of the said trust fund shall be paid into the hands of the Headmaster or Acting-Headmaster for the time being of the said College (whose receipt therefor shall be a sufficient discharge to the Public Trustee) not later than the day of in each year and shall be held by him until the award of the said judges shall be made when he shall apply the same to the purchase of a gold medal for the student entitled thereto.

3. The judges hereinbefore referred to shall consist of the Headmaster, the Housemasters, and one Prefect from each house ineligible to be a recipient of the medal.

4. In case in any year there shall not be a student attending the said College who in the opinion of the said judges shall merit the said medal then the income of the said trust fund shall be repaid to the Public Trustee and shall be added to the capital of the said trust fund.

5. In case any of the said judges or any of them shall refuse or neglect or be unable or unwilling to act as judges or if there shall be no persons filling these offices aforesaid or any of them then and in every such case the chairman for the time being of the said X.Y. or such persons as he shall in writing under his hand appoint shall fill the vacancy or vacancies for the time being by nominating one or more persons as the case may be to supply the said vacancy or vacancies and the person or persons so nominated shall if willing to act have all the same powers and authorities as the judge or judges hereby appointed whose place or places such person or persons shall be so nominated to fill would have had under these presents if willing or able to act.

6. The said medal shall be presented at the usual annual prize-giving day at the said College or at such other time as the Headmaster shall appoint.

PROVIDED ALWAYS and it is hereby agreed and declared that it shall be lawful for the said A.B. with the approval of the said X.Y. and the Public Trustees and after his decease for the said X.Y. with the approval of the Public Trustee from time to time to make new regulations with respect to the said medal either instead of the regulations herein contained or in addition thereto and such regulations reduced to writing and signed and executed by the persons or bodies corporate for the time being entitled to make the same shall be of the same force and effect as if they had been inserted in these presents and the regulations herein contained (if any) instead of which they shall be made had been omitted from these presents Provided always that such alterations shall be in accord with the spirit of this gift.

IN WITNESS, etc.

CORRESPONDENCE.

To the Editor.

Sir,

I was recently acting for a lessee of a shop and premises. The lease contained the usual clauses. The lessee was not to be responsible for damage from fair wear and tear, fire, earthquake, etc. On enquiry I found there was borer in one of the rooms and I therefore wished damage from borer to be at lessor's risk. At first the lessor's Solicitor was inclined to think that damage from borer came under fair wear and tear—borer being almost universal in New Zealand. We finally added borer as the lessor's risk, but I should be glad to know what is the practice in other places.

To me it seems equitable that in offices, at any rate, borer should be at the Landlord's risk. As a matter of fact, I don't suppose an agent would ever let a house if the lessee understood he was responsible for borer.

Yours, etc.,

H. D.

THE STATUS OF ALIENS NATURALISED IN NEW ZEALAND.

(By IMPERIALIST).

Part II of the British Nationality and Status of Aliens Act 1914 (Imperial) deals with the naturalisation of Aliens. It empowers the Secretary of State to grant a certificate of naturalisation to an alien who satisfies the Secretary of State, *inter alia*, that he has resided in the United Kingdom for not less than one year immediately preceding the application, and has previously resided either in the United Kingdom or in some other part of His Majesty's dominions, for a period of four years within the last eight years before the application. Such residence is a condition precedent to the grant of a naturalisation certificate Section 2.

The effect of such a certificate is set out in Section 3 of the Act which provides :—

> " A person to whom a certificate of naturalisation " is granted by a Secretary of State shall, subject to " the provisions of this Act, be entitled to all political " and other rights powers and privileges, and be sub- " ject to all duties and liabilities, to which a natural- " born British subject is entitled or subject and, " as from the date of his naturalisation, have to " all intents and purposes the status of a natural- " born British subject."

Section 8 provides that the Government of any British Possession shall have the same power to grant a certificate of naturalisation as the Secretary of State has under the Act, and that the provisions of the Act as to such grant shall apply accordingly. Subsection (2) provides :

> " Any certificate of naturalisation granted under " this section shall have the same effect as a certifi- " cate of naturalisation granted by the Secretary of " State under this Act."

Section 9 (1) provides :

> " This Part (i.e., Part II) of this Act shall not, " nor shall any certificate of naturalisation granted " thereunder, have effect within any of the Dominions " specified in the First Schedule to this Act (in which " New Zealand is included) unless the legislature " of that Dominion adopts this part of this Act."

Part 3 Section 27 (1) contains the following definitions :

> " The expression ' British Subject ' means a person " who is a natural born British Subject or a person " to whom a Certificate of Naturalisation has been " granted. The expression ' Alien ' means a person " who is not a British Subject.
>
> " The expression ' Certificate of Naturalisation ' " means a Certificate of Naturalisation granted under " this Act or under any Act repealed by this or any " other Act."

By the British Nationality and Status of Aliens (in New Zealand) Act 1923 Parts I and III of the Imperial Acts are adopted, but not Part II. Section 9 (1) of the Imperial Act therefore applies.

The New Zealand Act contains the following definitions :

> " ' British Subject ' means a person who is a natural " born British Subject, or a person to whom a Certifi- " cate of Naturalisation has been granted **in New** " **Zealand.**
>
> " ' Alien ' means a person who is not a British " Subject as defined by this section, and includes a " person who has acquired by naturalisation the status " of a British Subject elsewhere than in New Zealand.
>
> " ' Certificate of Naturalisation ' means a Certificate " of Naturalisation granted under this Act."

Notwithstanding these definitions Section 2 (2) provides :

> " This section has no application in the interpreta- " tion of the sections set forth in the First Schedule " to this Act."

The First Schedule contains, *inter alia*, the definitions of the Imperial Act as above-quoted. The New Zealand Act also provides Section 3 (3) :

> " Acquisition by any person of the status of a British " Subject by naturalisation granted in the United " Kingdom or in any of the dominions, colonies, " possessions or territories of His Majesty other than " New Zealand shall not be deemed to have conferred, " and shall not confer upon such person, the status " of a British Subject in New Zealand."

The Act then provides for the conditions of naturalisation in New Zealand and the qualifying residence provided for was fixed at three years in New Zealand by Order in Council gazetted in 1924.

Section 6 provides :

> " A person to whom a Certificate of Naturalisation " is granted under this Act shall, subject to the " provisions of this Act, be entitled in New Zealand " to all political and other rights, powers, and priv- " ileges, and be subject to all obligations, duties and " liabilities, to which a natural-born British Subject " is entitled or subjected and shall have **in New** " **Zealand** to all intents and purposes the status of " a natural-born British Subject."

It is evident that part of the definitions in the New Zealand Act is inconsistent with those of the Imperial Act. The definition in the New Zealand Act of " British Subject " is far narrower than the definition in the Imperial Act. Nevertheless by Section 2 (2) of the New Zealand Act and Section 3 (1) of the Imperial definitions are expressly adopted. The New Zealand definition clearly declares a person naturalised under the Imperial Act an Alien within its territory. Notwithstanding this the Imperial definition is adopted. It is difficult to explain this inconsistency. Section 6 of the New Zealand Act defines the status within New Zealand of an Alien naturalised here. The question now to be considered is what his status is outside New Zealand. The point is not without authority.

It will be seen from the definitions contained in Part III Section 27 (1) of the Imperial Act above-quoted that inasmuch as New Zealand has not adopted Part II of the Imperial Act a Certificate of Naturalisation granted in New Zealand is not granted under the Imperial Act and therefore does not confer British nationality within the meaning of that Act. The result is that a person naturalised in New Zealand will be an alien in England.

The case of **Markwald v. Attorney-General** (1920) 1 Ch. 348 C.A. is precisely in point. In that case a natural born German left Germany for Australia where in 1908 a certificate of naturalisation under the Naturalisation Act then in force was granted to him. This conferred on him within Australia similar rights to those conferred by the New Zealand Act within New Zealand. He subsequently resided in London and was

convicted for failing to register under the Aliens Restriction Order 1916. Markwald later brought an action against the Attorney-General for a declaration "that he is no alien in England but a liege subject of His Majesty the King, and entitled to the protection of His Majesty the King in all parts of His Majesty's Kingdom and Dominions."

Astbury J. held that neither the taking of the oath of allegiance nor the taking of the oath coupled with the grant of the certificate in Australia made the plaintiff a British Subject in the United Kingdom and that he was therefore an alien in the United Kingdom. His decision was affirmed on appeal by Lords Sterndale, Warrington and Younger. Younger L.J. stating: "The appellant is at least to this extent to be regarded as an alien, that he is so described in that Act and for the purposes of that Act," i.e., the British Nationality and Status of Aliens Act 1914. He goes on to say: "But the question remains whether in the United Kingdom his status can, speaking generally, be properly described otherwise than as that of an alien, and I think it cannot," and this notwithstanding the fact that the learned Judge accepted the evidence "that the appellant had definitely and permanently lost his original Prussian nationality long before the outbreak of the late war," and that he had become an Australian subject of the King.

Since this decision Australia has adopted the "British Nationality and Status of Aliens Act 1914" in toto.

The result therefore is that in the present state of the law in New Zealand naturalised aliens will be regarded as aliens in the United Kingdom and being there so regarded it can hardly be expected that they will be treated as British Subjects in foreign countries.

The status of aliens naturalised in New Zealand when in any country but New Zealand may well be a very ambiguous one, inasmuch as by the laws of most countries the fact of naturalisation divests them of their original nationality of birth. Having lost the nationality of birth by naturalising in New Zealand but nevertheless not being British subjects outside New Zealand such persons are not only without a country but also without nationality when out of New Zealand.

Dicey's observations on the Imperial Act and the position of New Zealand in his Conflict of Laws, 4th Edn. (1927) at page 184 are incisive. He comes to the conclusion that part of the New Zealand legislation is void for repugnancy:—

"The aim of this legislation was the attainment "of two different ends. The one was to create "what is now called Imperial Naturalisation, i.e., "to confer upon a naturalised person naturalisation "which should be recognised throughout the whole "of the British Dominions, and, as far as British "power could effect the result throughout the world. "The second object was to prevent any interference "with the rights hitherto exercised by the Govern- "ment of British possessions in general and especially "of each of the five self-governing Dominions of "granting naturalisation valid within their territorial "limits only.

"Up to 1926 Canada, Australia, the Union of "South Africa and New Foundland of the self- "governing Dominions had adopted Part II of the "Act of 1924. New Zealand instead by Act No. 46 "of 1923 declined to accept Imperial Naturalisation "and to recognise that the Imperial Acts of 1914 "to 1922 are, save as regards naturalisation, operative "as such in New Zealand, part of whose legislation "is thus void for repugnancy."

CORRESPONDENCE.

To the Editor.

Sir,

COMMORIENTES.

In looking through the Property Law Amendment Bill now before Parliament, we find that Section 6 applies to commorientes. The effect of the Bill, following the English precedent, is that in a double calamity the younger is presumed to have survived. This tends to make will-drawing more interesting than ever as it is possible that by this Bill an estate may be called upon to pay double death duties.

To illustrate my point: A and B husband and wife, may have made cross wills to each other, and in the event of death, everything to go to the children. Should the wife be younger, the husband's property would go first to her Estate and then to the children.

How many sets of death duties would have to be paid?

I may say I have been dodging the point in some cross wills, by making a provision that should the one die within seven days of the other, then the whole of the property goes to the children or, as the case may be. The point is of interest in these days of sudden death which can quite easily wipe out husband and wife or father and son at a blow.

Living in the country one is not able to compare notes as freely as one would like.

Your Journal therefore, does us good service.

Yours etc.,

"COUNTRY SOLICITOR."

To the Editor.

Attorney-General's Office,
Wellington,
20th September, 1927.

Dear Sir,

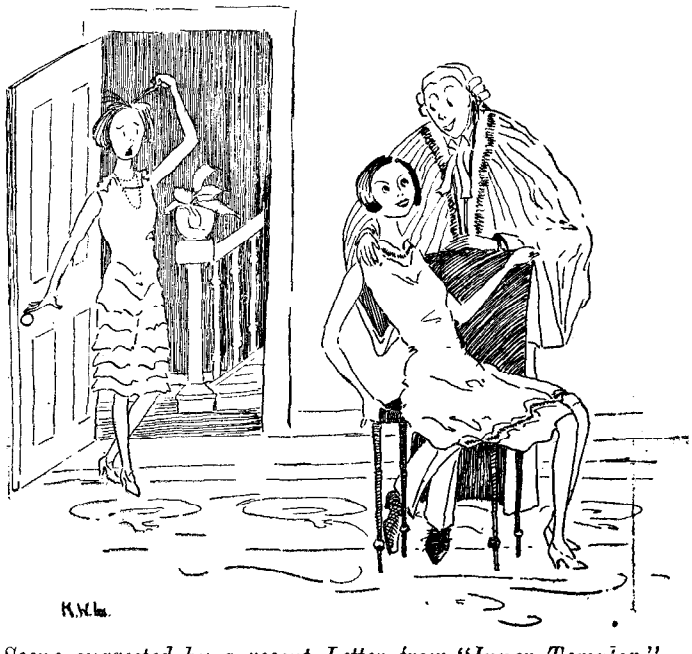
I have to thank you for your letter of the 13th September, and for your courtesy in bringing under my notice the letter from "Country Solicitor."

I would point out that Clause 6 of the Property Law Amendment Bill does not in any way affect the law in regard to death duties, because the case quoted by your correspondent might have arisen quite independently of this enactment. All that Clause 6 does is to create a presumption in regard to survivorship where people perish in a common disaster.

I welcome any discussion by the legal profession on the point raised by your correspondent, because the same will be helpful to the Government in considering the incidence of death duties and the operation of the Death Duties Act.

Yours faithfully,

F. J. ROLLESTON,
Attorney-General.



Scene suggested by a recent Letter from "Inner Templar."

THE LAW OF BANKRUPTCY IN NEW ZEALAND.

(Continued.)

(By W. A. Beattie)

Part III. Case Law of the part hitherto traversed.

The decisions relating to the Law of Bankruptcy in the parts just traversed, relate mainly to the interpretation of the statutes. They were not by any means unimportant, but beyond the special cases which will be mentioned in this article, they are not of a great and lasting value. It is quite possible, of course, that one would find a useful instance of interpretation amongst them which might assist counsel in a present-day argument, but they are hardly relevant to this discussion, and therefore the greater part of them will not even be touched upon. They are admirably digested in Comyns Digest, and in Bacon's Abridgment. They are to be found ,in both cases, under the title "Bankrupt," and some additional notes in Comyns Digest under the title "Chancery, 2L, i and ii." One cannot fail to be impressed, in reading these two works, by the clear manner in which the doctrines and their application are expressed. The writers did not lack means of expression, and the amount of learning which is contained in one concise clear sentence or paragraph is quite astonishing. One ventures to suggest that it was a close study of the classics, and especially of Roman Law, that gave this result. Mr. Justice Greer, now Sir Arthur Greer, made the statement at Cambridge a short time ago, that a student of law should pay most assiduous attention to the study of Roman Law. There is no doubt, more particularly when it is read in the original, that it produces a facility in expression and classification of ideas which is of very great value; a value which becomes the greater as the student realises that it was once a living system, and has formed the basis of many existing systems, but the less however, as he considers it merely as a mental gymnastic, or book knowledge to be acquired as such. To revert however to our subject, the purport of some of the decisions may be given.

The question of who could be made bankrupt gave rise to interesting cases. Thus it was decided that a married woman could not be made bankrupt, nor could an infant. (1 Atk. 146 and 1 Ld. Ray. 443 respectively). If, however, a married woman was living apart from her husband under a deed of separation, she could in certain circumstances be made a bankrupt, when to all intents and purposes she was a *feme sole* (ex p. Preston, Green 8.) A married woman (or *feme couvert*) could be made bankrupt if she were trading in London and if she were a sole trader there according to custom (1 Atk. 206). If the Commissioners refused to consider a person bankrupt, a petition lay to the Chancellor. This was the procedure. Decisions in Chancery under this procedure gave rise to rules, and decisions in the Courts of Common Law, when the bankrupt proceeded against commissioners for *trover*, *habeas corpus*, or false imprisonment, also gave rise to rules. Numerous cases were decided as to the comprehensiveness of the word trader. Innkeepers were held to be traders if they supplied persons other than guests with liquor or victuals, but if not, their chief duty being in providing for their guests, they were thus not traders. A person who bought only, or sold only, was not a trader. A farmer was not, in normal circumstances liable to be made a bankrupt, for, whereas he obtained produce from his labour, and the buying of cattle and so on, and his selling of crops or stock was incidental to that, he was not considered a trader. The question was the intent, rather than the extent. Extent might be evidence of intent, but not more than evidence. "In all such cases it is a question for the jury whether there is evidence of an intention to deal generally" (3 Stark 56). The matter arose in such a variety of cases as one would scarcely anticipate. Thus coal-mine owners, alum pit owners, brick makers, chalk pit owners, pawnbrokers, insurance brokers, and many others applied to the Court for determination of the question as it affected them. A rather novel case (**Ex p. Meymot,** 1 Atk. 196) was that of a gentleman whose somewhat adventurous and engrossing occupation was that of a runner and smuggler of goods. He was held to be a trader. Undoubtedly he was, but we know not whether in the result his body was taken in execution by the State or the creditors. If a trader gave up business for a time, and then resumed, he could not be bankrupt in respect of intermediate debts, as the creditors "did not trust him upon the credit of his trade" (Vent. 5).

Decisions relating to acts of bankruptcy are numerous. A man who murdered his wife fled from the realm, and in the result delayed his creditors, and it was held that he could be made a bankrupt. This case was doubted afterwards, but was explained by the ingenious judge as a case where the evidence was sufficiently strong to enable the Court to infer that he departed to delay his creditors, he in fact having delayed them. What delay he caused them is difficult to comprehend, as, had he not departed the realm, and that right suddenly, it might have been a literal case of a man saying that he would see his creditors in———; but let us pass on. (See Bull. N.P.39). It was for a jury to determine the object of the moving. (8 Taunt. 671). The sensitive trader who leaves his house, where a meeting of creditors is about to be held, in order to "avoid irritation and harsh language" is apparently quite justified in so doing, notwithstanding that the language might be much harsher for his departure (4 Taunt. 603). One creditor called at the house of a debtor, and the debtor said that he was going out for a minute to get the money. He went to the tavern and on to the billiard saloon. Moreover, custom was proved by other creditors, and in the result, we have a case appropriately called **Bigg v. Spooner,** 2 Esp. 651, wherein the debtor was adjudicated bankrupt. A proprietor of a theatre used to retire behind the scenes when the sheriff's officer approached, and he met with the same fate. On the other hand, we have the religious debtor who said: "No! It is Sunday" and he was held to have rightly refused to see the creditor, who, we have no doubt, was probably only seeking a church collection. The epicurean debtor also, who bade the creditor wait till after dinner, was, whatever else, no bankrupt.

Amongst decisions of importance we should mention the following. The rule that in the case of bankruptcy of a partnership, the joint property was primarily liable to payment of joint debts and separate property to separate debts, 2 Vern. 293, 706 (*vide* also Bacon Abr.) evolved, and was elaborated. The rule as to stoppage in transitu was definitely formulated in the case of **Wiseman v. Vandeputt,** 2 Vern. 203 (1690), and the rule of the vendors lien where the purchase money is unpaid was decided in 1684 in the case of **Chapman v. Turner,** 1 Vern. 267, 268. The question of preferential payment was considered in **Worsley v. De Mattos,** when it was

decided that a trader may prefer creditors or give them security before bankruptcy, but if he conveys so much of his property that he is disabled from trading, this is a fraudulent preference, and is an act of bankruptcy. The question of degree is one to be decided in individual cases with that rule as the basis. There are a number of cases affecting the "order and disposition" sections of the Acts, mutual set-off, and so on. It is not thought that any of them are sufficiently interesting to find a place in this article, which must of necessity be brief, but a perusal of the cases, which are digested in Bacon's Abridgment repays one amply for the leisure moments which one might devote thereto. Another interesting class of case is that dealing with the property which may be taken by the assignees, such for example, as the right to publish a newspaper, the right to exercise a power of appointment, and so on. Holdsworth (Vol. 8) "Hist. of Eng. Law," under the title "Bankruptcy," deals briefly with these and other cases, but as stated already, the best way to find them is to read the Abridgment under the appropriate heading. When the writer took the volume of the Abridgment from its place in the library, a spider, which had evidently died from starvation, fell from the dusty cobwebs which covered the volume. A certain Scottish hero might have considered this ominous, but the writer can assure the reader of this article that he would be more likely to starve on his breakfast bacon than on this most appetising and satisfying work.

LEGAL LITERATURE.

"LICENSING LAWS OF NEW ZEALAND."

Mr. T. E. Maunsell, the Stipendiary Magistrate at Nelson, has completed a text-book entitled: "The Licensing Laws of New Zealand." It deals thoroughly with the law, which is set out in paragraph form. The work is now in the hands of the printer, and arrangements have been completed for its publication by Butterworth & Co., Wellington.

BILLS BEFORE PARLIAMENT.

Peel Forest Amendment. To extend to other local authorities in the neighbourhood same powers and privileges as are enjoyed by the local authorities now represented on the Board.

RULES AND REGULATIONS.

Regulations as hereinafter mentioned appeared in Gazette No. 64, issued on 15th September, 1927:—

Amended Rules of Court under the Native Land Act 1909.

Amended regulations for Trout-fishing in the Auckland Acclimatization District, as to use of baits—Fisheries Act 1908.

Charges for Radio Money-order Telegrams and Radio Savings-bank Telegrams payable in or issued in Chatham Islands—Post and Telegraph Act 1908.

Samoa Commissions of Inquiry Order 1927—Samoa Act 1921.

Extradition Treaty with Albania—Extradition Acts 1870-1906 (Imp.).

LONDON LETTER.

Temple, London,
My Dear N.Z.,— 3rd August, 1927.

The term, and with it the legal year, 1926-1927, ended last week and we are now all dispersed on our Long Vacation. I will not plague you with any discourse upon it, being aware of this much, at least, of your own arrangements: that when this letter reaches you and, for your sins (which must be many and great) you have to read it, you will not be long-vacating yourselves. My plan is, to inform you in some little detail of three concluding incidents, in the Courts, of the term, since somewhat unusual interest perhaps attaches to them: and to keep for the later letters, to be written in the Long Vacation, the notes of other cases which I consider may interest you. Before doing so, it may be apt to catalogue the more recent of the cases, which, upon review of the term's operations, I shall discuss: **Looker v. Law Union, etc. Insurance Co.** (June 29), **In re Caie** (July 4), **Jones v. South-West Lancashire Coal Owners' Association Ltd.** (July 12), **In re Britannic Assurance Co. Ltd.** (July 13), **In re Cassel, In re White, In re Adair** (all of July 14), **Welsh Navigation Steam Coal Ltd. v. Evans** (July 15, I think; but as I cannot read my own writing and am, at the moment, away from authorities other than those to be found in so much of the daily newspaper as one's picnic lunch has been wrapped up in, I will not pledge myself to this), **W. H. Milsted & Co. Ltd. v. Hamp and Another** (July 19) and **In re Smith, Franklin v. Smith** (July 22). There is also a reserved judgment of Sankey J., which I intend to note in so lucid a form that you may readily appreciate it. On my tablets it stands so noted at present that I cannot get as far as to discover either the date or the name of it. I must have been very rushed at the end of the term, judging by these tablets. This may account for my present, sunny feeling that, here and from now on, "I am going to do nothing for ever and ever." However, I promised not to irritate you with that aspect of matters: let me deal at once with the final cases, three in number, of the term's activities.

Let us take the most important, if the least entertaining, first. The legal year ended, with an appropriate bang in **Donald Campbell & Co. Ltd. v. Pollak.** If you do not already know the fundamental issues in that litigation, it can only be that you do not want to; indeed, you must have gone to some pains, in reading our journals, to avoid them! For my part, so familiar is the title that the quarrel between the ex-director and the company seems to be an integral part of my legal life, and, though I have had nothing whatever to do with the case except to meet it in the press, Donald Campbell and Mr. Pollak seem to be old friends whom I should delight to see reconciled. Be that as it may, the House of Lords' decision which we have now to consider turns upon the costs: the costs, that is, of the umpty-umpth proceeding in the matter. Branson J., in trying a second action between the parties, gave judgment for the Respondent, in this appeal, but in so doing deprived him of his costs for the reason that, in a first action, he had been guilty of such (technical) "misconduct" as, in the learned Judge's view, to warrant that exercise of discretion. The Court of Appeal reversed that part of the order of Branson J. which dealt with costs, for the reasons that (a) conduct in a former action was not relevant, and (b) there was, in the Court of Appeal's view, no ground upon which to exercise the discretion to which the trial Judge had referred. The House of Lords allowed an appeal from

the Court of Appeal, and restored the order of Branson J., and I have decided that the matter is one which may be worth your while to investigate a little further. The Lord Chancellor spoke with obvious emphasis upon the mischief of the tendency to break down a statutory rule by the process of gradual attrition of encroaching decisions. There was a point made as to the power of the House of Lords to discuss at all a subject not raised by admissions below or pleadings; but the Lord Chancellor observed that questions of jurisdiction fell to be decided whenever they arose and were not excluded by the fact that they had been earlier passed over. He then reviewed the position as to the powers of a Judge at first instance to deprive the successful party of his costs, whether in cases tried with or in cases tried without a jury, and the powers of a Court of Appeal to overrule him. He referred specifically to the following of our legislation: Section 49 of the Judicature Act, 1873, Section 5 of the Judicature Act, 1890, and Section 31 (1) (h) of the Judicature Act, 1925; and to Order 65, Rule 1 of the Rules of the Supreme Court, from all of which he deduced the statutory intent that the trial Judge's exercise of discretion in the matter must be final. The Lord Chancellor then disclosed the gradual process of encroachment, resulting from recent decisions, i.e., from **Civil Service Co-Operative Society v. General Steam Navigation Co.** (1903), 2 K.B. 756 to **Ritter v. Godfrey** (1920), 2 K.B. 47; the decision is sure to be fully reported, and I think you must be interested in this remarkable illustration of the mischief to which the Chancellor refers and its fatal irresistibility. In the particular matter, it has only to be further noted in this reference that the Lord Chancellor's view, from which none of their Lordships (Lords Dunedin, Atkinson, Carson, Phillimore) dissented, was a preference for the reasons of Lord Sterndale in **Ritter v. Godfrey,** and he was further of opinion that even if the views of the majority in that appeal had to prevail, the order of Branson J. would still have been within the rule, which those views express, and fit to be restored upon its own merits.

I have earlier commented upon the odd fact that the new form of public communication, by wireless telephony, has caused so little discussion in the Courts; there was a libel action, involving such "publication," you will remember, but the decision was not very momentous. In **Messager v. The B.B.C. Ltd.** we find the modern phenomenon duly dealt with, and in the manner we should have expected and to the end already achieved in the Courts of the U.S.A.

In re John Stephens & Sons, Ltd. though less the ruling than the *obiter dicta* of Eve J. therein, will afford you the same thrill as it afforded us, though perhaps for other reasons. The issue turned upon an application of section 9 of our Companies (Consolidation) Act, 1908; the observations, of very recent date, turned upon the general undesirability of large amalgamations, leading to trusts. Shades of **Crown Milling** flitter across the page? Well, Eve J. said very much what we argued in the Privy Council; the "Times," as *vox populi* presumably, said much what Myers K.C. argued, in retort and what I believe represents the majority view with you; and the Court of Appeal (The Master of the Rolls, Sargant and Lawrence L.JJ.), though proceeding very cautiously in pronouncing upon the appeal which, being expedited, came before them with miraculous rapidity, went a little further than did the Judicial Committee upon the vexed question of big concerns and the alleged danger of big prices necessarily resulting. Yours ever, INNER TEMPLAR.

BENCH AND BAR.

Mr. Clifford F. Jones, formerly of the staff of Raymond Raymond and Campbell, Timaru; also Mr. E. A. Lee, formerly Justice Department, have entered into partnership and commenced practice at "Gravenor Buildings," corner Manchester and Hereford Streets, Christchurch.

Mr. A. Morris Dunkley, Solicitor, of Wellington, was admitted on September 2nd as a Barrister, before the Hon. W. C. MacGregor, on the motion of Mr. G. P. Hay.

The consequential vacancy caused in the firm by the death of the late Mr. Kirk, his partner, Mr. R. E. Harding, has been joined by Mr. G. C. Phillips, who has been carrying on the practice of his late father (Mr. Coleman Phillips) at Carterton. The new firm will be known as Kirk, Harding and Phillips.

Mr. E. F. Clayton-Greene, who has just commenced the practice of his profession at Hamilton, commenced his career as a Clerk in the Bank of New Zealand, in 1915. Upon reaching military age he joined up and served under Mr. E. H. Northcroft. During the period of demobilization Mr. Clayton-Greene matriculated in England. On returning to New Zealand he was taken into Mr. Northcroft's office in Hamilton, and remained in the employ of that practice until in January, 1925. He became Managing Clerk to Messrs. McDiamid, Mears and Gray, where he remained until he essayed to venture upon his own account.

CANTERBURY COLLEGE LAW SOCIETY.

"Foundations of Success" was the subject of an address by Mr. W. M. Hamilton, president of the Canterbury Law Society, to the College Law Society on Saturday night. Mr. W. B. T. Leete presided over a good attendance of members.

The first foundation of success, said the lecturer, was to take an interest in one's work. To take a pleasure in one's work it was necessary to discover towards which branch one had most inclination. A law student should not only study, but should also read about law, and for this Charles Dickens was the best author. Without a thorough understanding of the principles of law, a practical application of it could not be made. A student must specialise in that branch of law which appealed to him most, and which offered him most scope for his capabilities.

It was most important, added Mr. Hamilton, that a student should acquire clearness of expression. It was useless for a criminal lawyer to possess a thorough knowledge of his subject unless he was able to express himself in definite and concrete terms. Personality, honesty, and inflexible determination were essential.

W. J. HUNTER CUP.

The annual golf match for the W. J. Hunter Cup, a handsome trophy presented by Mr. Hunter for competition amongst members of the Law Society, was played at the Shirley links recently, and was won by D. E. Wanklyn. Much interest was taken in the match, for which there were a large number of entrants, the first pair driving from the No. 1 tee shortly after 9 a.m.

The following were the best cards handed in:—

	Gross	Hdp.	Net.
D. E. Wanklyn	90	22	68
H. O. D. Meares	89	15	74
C. W. Webber	82	8	74
V. W. Russell	87	12	75
M. J. Gresson	97	20	77
F. W. Johnston	101	22	79
C. A. Stringer	91	12	79
J. D. Hutchison	93	13	80
A. T. Donnelly	95	15	80
E. J. Ross	94	14	80
T. A. Wilson	98	18	80
E. J. Corcoran	89	8	81
J. Dolph	86	5	81
R. L. Ronaldson	89	8	81
A. B. Hobbs	96	15	81
M. H. Godby	85	3	82
R. Abernethy	93	11	82
L. A. Dougall	86	4	82
P. D. Hall	97	15	82
W. J. Sim	99	14	85
G. T. Weston	94	9	85
W. R. Lascelles	98	12	86