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

"As to the uncertainity of the Law, this will never be entirely eliminated."

—Lord Justice Sankey.

Vol. IV. Tuesday, June 12, 1928. No. 8

Police Methods and Police Evidence.

It is the duty of the police to prosecute offenders and to obtain evidence from such persons as they believe are able to give evidence in support of the charges made, and it is likewise the duty of citizens to give that evidence willingly to the police, but no person can be forced, till brought before a judicial authority, to give evidence to the police or anyone else, nor can he be detained for the purpose of extracting such evidence from him. Detention, as distinct from arrest, is unknown to the English Law, and a man can be detained only on the reasonable suspicion that he is guilty of an offence. The police are, however, at perfect liberty to call on anyone at his home or elsewhere and ask him to supply them with information, but if they are met with a refusal, it is their duty to depart. If they adopt threats in such circumstances, the individual concerned can refuse to answer any question, and, if subsequently, the person so questioned is arrested by the police and charged, the police should be able to show, if they want to give in evidence his answers to their questions, that such answers were obtained from the accused before they suspected him of being the guilty person. Unless they can show that, the Judge or Magistrate is at liberty to reject such evidence. Immediately the police suspect the individual of the offence they are investigating, they should treat him, not as a witness from whom they are free to obtain information, but as an accused person to whom the necessary caution should be given that if he says anything, it is liable to be used in evidence against him.

It has been said that the effect of such a caution is to prevent evidence, useful to the cause of Justice, being given, and that, because of this effect, the police in certain cases refrain from giving the caution till the last moment. No doubt such a temptation may assail police officers intent on doing their duty, and the caution may, in some cases, be unduly delayed but, though it is said in England that there are indications that the process of interrogation is being abused, and some late cases in New Zealand suggest that the method of interrogation adopted has not always been free from criticism, there is, as far as we know, no reasonable ground to suppose that Third Degree methods are being adopted in New Zealand. If they are, there is no reason to doubt that they will, when disclosed, meet with the same reprobation here as they are meeting in England.

Although, however, we may congratulate ourselves on the absence of Third Degree methods in New Zealand, we cannot say with the same assurance that police evidence in New Zealand is not subject to the same criticism that is being directed against it elsewhere. The classes of case in which police evidence is being most frequently taken to task in Great Britain, are those of solicitation by women and indecent behaviour in public places, as illustrated by the Hyde Park cases. In such cases and also in the innumerable cases of offences against statutory regulations and by-laws in which private citizens now-a-days find themselves involved, it is clear that the evidence of the accused must be regarded with suspicion but it is not clear that the evidence of reputable citizens not involved, and in as good a position as the police to observe the facts relating to the offence, should not be regarded as of equal value with that of the police. It may be that there is no valid complaint on this score, but it is very generally recognised that police evidence does receive full value, and that despite the fact that it is in very many cases, open to criticism.

Before the Street Offences Committee, sitting in London, the value of police evidence was discussed. Mr. A. H. Lieck, Clerk of the Marlborough Street Police Court, giving evidence said :—

"One quality of a well-organised police force is a strong *esprit de corps*. As regards the police officer in the witness-box that *esprit de corps* was a drawback. It allowed undue support being given by one police officer to another. An officer with a tendency to untruthfulness would hardly get his propensity corrected if he could rely on his more truthful comrades to stretch a point rather than "let him down."

"There is a tendency for police officers to stereotype their testimony. There is a lurking danger that cases different in small but important details would be treated as members of a class of cases. The classification was an unconscious process in the officer's mind, but it might be vital to his truthfulness. "I have never come across," he said, "an instance of a police charge shown to have been made in bad faith. But police officers 'strengthen' their evidence against men whom they know to be guilty. They fail to grasp the propriety of letting off a guilty man against whom the evidence is weak. Human testimony in general has the defect of the substitution of inference for observation. Police corroboration was often of little value. Officers had plenty of opportunity to acquaint themselves with one another's evidence and undoubtedly did so. Apart from any willfulness the 'corroborator' had nearly always heard the 'charger' give his account to the Inspector in the charge room. Under the pressure of cross-examination officers invented details. They were foolishly reluctant to say 'I don't know.'"

Although Mr. Lieck was referring more especially to cases of solicitation, his remarks have a general application. Mr. Lieck further emphasised that upon the whole, the police were as truthful a race as other men. They were trained in observation, but not trained to express what they saw, and he therefore suggested that they be trained in the giving of evidence; but in answer to a suggestion that improved education would make them more likely to be impartial in giving evidence, he replied that, in his opinion, impartiality was a product of character rather than a product of education. Most people will agree with Mr. Lieck in this respect, and it is likely that lawyers with experience of police evidence will agree that his criticism of police evidence in general, deserves consideration by Inspectors of Police. It is generally admitted that the morale of the police in New Zealand is high, and that they are an honest, conscientious and capable class of men, but although there is no reasonable fear of Third Degree methods being adopted here, nor any reason to suppose that the more serious charges made against the police in England, would have any foundation of truth if made here. it may well be advisable for those in charge of police evidence to see that it is as far as possible free of defects of the nature pointed out by Mr. Lieck, which, even if they do not now appear in such evidence, may very easily creep in.

Supreme Court.

Skerrett, C.J. February 29; May 2, 1928.
Wellington.

IN RE ANTROBUS: HENDERSON v. SHAW.

Will—Construction—Vesting—Trust to Pay Legacy to Beneficiary at Such Times and in Such Manner as in the Discretion of the Trustees Shall Seem Best—Whether Legacy Vested Notwithstanding Discretion as to Payment—Rule in Lassence v. Tierney Applied—Trust "Subject as Hereinafter in This Paragraph Appearing" to Pay Legacy to Beneficiary with Discretion in Trustees as to Payment—Whether Gift Absolute—Trust for Maintenance of Children of Testator's Daughter Until Youngest Child Should Attain Twenty-five and Upon Such Youngest Child Attaining Twenty-five to Pay Capital and Income to Children Then Living.—Rule Against Perpetuities—Principle of Construction—Whether Trust for Maintenance Severable from Gift Over—Whether Void as Infringing Rule Against Perpetuities—Trust to Pay Legacy to Beneficiary After Beneficiary Shall Have Attained Twenty-one—Whether Legacy Contingent on Beneficiary's Attaining Twenty-one.

Originating Summons for interpretation of the will of Edwin Antrobus. The testator died on the 5th November, 1925, leaving a wife and seven children. Of these children five were of age, and two, namely, Alma May Antrobus and Dorothy Pearl Antrobus, were under age. Two stepchildren of the testator, Miriam Joan Antrobus and Arthur Herbert Antrobus were still minors.

The testator, after making certain provisions with reference to funeral benefits, insurance, and lodge moneys, and other provisions in favour of his wife, directed the remainder of his estate and effects to be converted and the funds held upon certain trusts. The trusts relevant to the questions arising for determination were the following:—

(a) Upon trust to pay to his wife during her life so long as she remained his widow an annuity of £104 per annum. (b) Upon trust out of the income to maintain, educate and advance in life his infant children and the illegitimate daughter of a named child of the testator's until they each should attain the age of twenty-one years. (c) Upon trust to pay to his daughter Elsie Grace Henderson the sum of £1,000 "at such times and in such manner as in the sole and uncontrollable discretion of my trustees shall seem best in the interests of the said Elsie Grace Henderson and of my estate." (d) Upon trust "subject as hereinafter in *this paragraph appearing*" to pay to his said named child the sum of £750 to be paid to her at such time or times and in such manner as in the sole discretion of his trustees they should think fit. And he directed that his trustees might if they in their sole discretion thought fit well and advisable instead of paying the same sum of £750 to his daughter to invest the same and pay the nett annual income unto his said named child during her life and from and after her death to devote the said income in and towards the maintenance education and advancement in life of the children or child of his said daughter until the youngest of such children or child should attain the age of twenty-five years, and upon such youngest child attaining the age of 25 years to pay the capital and income of the said sum of £750 unto and amongst her said children as should be then living in equal shares or if only one child should then be living to such one child absolutely. (e) Upon trust to pay to the illegitimate daughter of the said named child of the testator the sum of £250 if she should attain the age of 21 years, to be paid to her after she has attained the age of 21 years at such times and in such manner as should seem best in the interests of the said illegitimate daughter and of his estate and in case the said illegitimate daughter should not attain the age of 21 years upon trust to pay to the said named child of the testator the sum of £250 absolutely. (f) Upon trust to pay to his daughter Ina Emeline Antrobus the sum of £1,000 to be paid to her after she shall have attained the age of 21 years and *at such times thereafter* and in such manner as to his trustees in their sole and uncontrolled discretion should seem best and suitable in the interests of the said Ina Emeline Antrobus and of his estate.

Trusts in favour of Edith Myrtle Antrobus (£1,000), Fanny Louisa Antrobus (£1,000), Miriam Joan Antrobus (£200), and Arthur Herbert Antrobus (£200) were declared in terms identical with the terms of clause (f). By clause (k) the capital and income of the testator's residuary estate was to be paid to his daughters Alma May Antrobus and Dorothy Pearl Antrobus in equal shares upon their each attaining the age of 21 years as and when his trustees in their sole discretion should think fit, with gifts over in the event of either of them dying before attaining 21 leaving issue. Clause (l) provided that if both Alma May Antrobus and Dorothy Pearl Antrobus should die before attaining the age of 21 years without leaving issue the capital and income of the residuary estate should be paid to certain named beneficiaries in equal shares.

The principal question to be determined was whether all or any of the legacies given by the will had vested in the legatees? Other minor questions were raised, which are indicated in the report of the judgment.

L. A. Taylor for plaintiffs and certain others.
D. Hutchen for defendant trustees.
North for residuary legatees represented by guardian *ad litem*.

SKERRETT, C.J., said that so far as the vesting of the respective legacies depended on the discretion given by the testator to his trustees to pay the legacy to the legatee at such times and in such manner as they should think fit, the legacy of £1,000 to Mrs. Henderson, of £750 to the said named child of the testator, of £250 to the illegitimate daughter of that child, of £1,000 to Ina Emeline Antrobus, of £1,000 to Edith Myrtle Antrobus, of £1,000 to Fanny Louisa Antrobus, of £200 to Miriam Joan Antrobus and of £200 to Arthur Herbert Antrobus were all in the same position. It was clear that all those legacies were vested despite the discretion purported to be given to the trustees as to the time and manner in which each legacy was to be paid. The very point was decided by the Master of the Rolls in Ireland in **In re Miller deceased: Clancy v. O'Callahan** (1897), 1 I.R. 290. That case was decided by the Master of the Rolls on the authority of **Snowden v. Dales,** 6 Sim. 524, and **Mills v. Johnston** (1894), 3 Ch. 204, which His Honour referred to and discussed. Reference was made also to **In re Carter: Harding v. Carter,** 21 N.Z.L.R. 227. On principle and upon the authority of those decisions His Honour held that the legacies before referred to were vested in the legatees on the death of the testator free from the exercise of any discretion on the part of the trustees.

With reference to the legacy of £750 to the said named child of the testator, three questions required to be considered. The first was, was there in the first instance an absolute gift to the legatee upon which further trusts were afterwards engrafted or imposed. Secondly, did the trust or power engrafted or imposed upon that absolute interest fail, and if so, to what extent, as offending the rule against perpetuities. Thirdly, was any part of such trust or power severable from the rest and what effect or operation had the part so severed.

His Honour thought it clear that the will (paragraph 5 (d)) in the first instance bequeathed absolutely the legacy of £750 freed and discharged from the discretion of the trustees as to the time or times and the manner in which the sum was to be paid. The effect of such a discretion had already been considered in the case of the other legacies. It had been contended, however, that the legacy was not in the first instance absolute because of the words "Subject as hereinafter in this paragraph appearing."

The express point had been decided in Victoria in the case of **The Trustees Executors and Agency Co., Ltd. v. Jenner,** 22 V.L.R. 584. In that case a trust relating to the share of each daughter of the testator in his property was expressed to be subject to the declaration thereinafter contained. That declaration provided that the share of every daughter in the trust premises should be held by the trustees upon certain trusts which enured for the benefit of the daughter during her life and certain ultimate trusts after her death which were held too remote. It was contended that the rule, sometimes called the rule in **Lassence v. Tierney,** 1 Mac. & G. 551, did not apply. That rule was that where there was a gift absolute in the first instance and trusts were engrafted or imposed upon that absolute interest which failed either from lapse or from invalidity, or for any other reason, then the absolute gift took effect so far as the trusts failed, to the exclusion of the residuary legatee or next-of-kin as the case may be. It was said that the words above quoted prevented the application of the rule and prevented there being an absolute gift in the first instance. Mr. Justice A'Beckett held that the words referred to did not take the case out of the Rule.

His Honour quoted the words of Mr. Justice A'Beckett used at p. 591 in that case, and stated that the language was completely applicable to the words employed in the present will by the testator. It was clear that the construction of the Clause would be the same even if the words under discussion were not

contained in it. The object of the words was to show clearly that the absolute gift was intended by the testator to be cut down or qualified by the subsequent provision. That intention, however, was made quite clear by the clause quite apart from the introductory words. In no sense did such words prevent the first or original trust from being in the first instance an absolute trust—to be subsequently qualified by the other provisions of the will. His Honour followed the decision of the Victorian case as to the effect of the introductory words.

It was admitted before the Court that the ultimate gift over contained in the discretionary trust namely: "And upon such youngest child attaining the age of 25 years to pay the capital and income of the same unto and amongst her said children who shall be then living in equal shares or if only one such child should be then living to such child absolutely"—was void as infringing the rule against perpetuities. That admission was right. The gift over was to pay to and amongst the children of the said named child of the testator living upon her youngest child attaining the age of 25 years in equal shares, or if only one such child then to pay such sum to such one child absolutely. It was clear, therefore, that a child did not necessarily acquire a vested interest during a life or lives in being and twenty-one years afterwards. It was said, however, that the discretionary trust so far as it related to the maintenance, education and advancement in life of the children was separable from the ultimate gift over of the capital and did not offend against the rule relating to perpetuities. The cases relied on were: **Gooding v. Read,** 4 De G.M. & G. 509; **In re Watson** (1892), W. & N. 192; **In re Wise: Jackson v. Parrott** (1896), 1 Ch. 281: **In the Estate of Patrick O'Brien,** 24 V.L.R. 360. So far as those cases decided that a trust for maintenance might be severable from an ultimate gift over which was too remote they were no doubt valid authorities, but so far as they decided that a trust for maintenance in the form adopted in the present will, or in a similar form, did not offend the rule against perpetuities, His Honour did not think that they ought to be acted upon. In **Gooding v. Read** (*cit. sup.*) His Honour stated, the headnote was incorrect and wrongly set out the trust for maintenance. Under that trust each child on the death of its mother became entitled to an *aliquot part* of the income of the fund; and therefore to a vested interest in an *aliquot* share of the income arising within the time allowed by the rule though it might continue beyond the period allowed by the rule against perpetuities. Had the trust for maintenance been in the form stated in the headnote to the case it would have been held to infringe the rule against perpetuities. His Honour also referred to **In re Watson: Cox v. Watson** (1892), W. N. 192, which was regarded by Warrington, J., in **In re Blew** (1906), 1 Ch. 624, as unsatisfactorily reported, as a case which ought not to be acted upon, and stated that **In re Wise** (*cit. sup.*) was also an unsatisfactory decision. It was based upon the report of **Gooding v. Read** (*cit. sup.*) and the decision in **In re Watson** (*cit. sup.*) as was also **In re the Estate of Patrick O'Brien** (*cit. sup.*).

His Honour then proceeded to consider whether the trust for maintenance infringed the rule against perpetuities. It was common ground that the trust was separable from the ultimate gift over and its validity depended upon whether or not it offended the rule against perpetuities. In construing the trust His Honour adopted the principle laid down by Parker, J., in **In re Hume: Public Trustee v. Mabey** (1912), 1 Ch. 693, 698, that the proper course was first to construe the gift according to the ordinary canons of construction and then to consider whether any part of it as so construed offended against the perpetuity rule. It was not permissible to construe the gift otherwise than according to its natural meaning because if construed according to its natural meaning it would offend against the rule.

After remarking that there was no special exemption from the rule relating to perpetuities in favour of provisions for maintenance or education of children, His Honour proceeded to consider the actual clause relating to maintenance. That provision dealt with the income of a common fund and not with the income of a share or an *aliquot* part of a share given to an individual. The income was to be applied to the maintenance, education and advancement in life of all the children of the named child of the testator until her youngest child attained the age of 25 years. The income, therefore, was to be applied for the benefit of a class. The powers conferred by the trust upon the trustees continued in force and might be exercised at any time before the youngest child of the named child of the testator attained the age of 25 years. There were no words giving an *al quot* share or determinate part of the income to any individual child. The trust for maintenance was, in His Honour's opinion, a trust to apply the whole income for the maintenance and support of the children until the youngest child attained the age of 25 years. It would not be a breach of trust for the trustees to apply the whole income in unequal proportions for or towards the maintenance, education and advancement in life of the children. Upon that construction there was no trust of any *aliquot* or determinate part of the income for each of the children who would take as a member of the class. In order to prevent the clause from offending the rule against perpetuities it was necessary that under the trust a vested interest on the death of the life in being should be given to each child in some *aliquot* or determinate part of the income. Not only the person to take but the amount of his interest must be ascertained within the prescribed period—22 Halsbury 304; **In re Thompson: Thompson v. Thompson** (1906), 2 Ch. 199. His Honour referred at length to **In re Parker: Parker v. Parker,** 16 Ch. D. 44, and **In re Gosling: Gosling v. Elcott** (1902), 1 Ch. 945, (1903), 1 Ch. 448. The class of case which His Honour referred to were cases of gifts in terms contingent which had been held to be vested because of the gift of the intermediate income of the particular benefit. His Honour, nevertheless, thought that they were applicable because they determined the construction of maintenance clauses and enabled one to ascertain whether or not there was a vested gift of any share or part of the income on the death of the life in being. In order to constitute a vested gift the donee must be entitled either to the whole income of the fund, or to an *aliquot* or determinate share of that income. That right must not depend upon the exercise of a discretion by the trustees. If His Honour could have construed the maintenance clause as a gift to the persons comprising the class in equal shares, that, so far as the question of the interest was concerned, would have constituted a vested right in the children to an *aliquot* share in the income. His Honour was, however, unable to so construe the clause. If the trust was a trust to devote the whole income of the legacy among the members of the class so that it might be applied in unequal proportions for their maintenance, education and advancement in life that discretion might continue and might be exercised after the period fixed by the rule against perpetuities. It might be exercised at any time before the youngest child of the testator's named child attained the age of 25 years. That might be more than 21 years after the death of the daughter of the testator. It would thus infringe the rule against perpetuities. That view was in accordance with the decision of Warrington, J., in **In re Blew** (*cit. sup.*). In the present case the trust for payment of income after the death of the testator's named child until the youngest child attained the age of 25 years might continue and be exercised until the youngest child attained the age of 25 years and, therefore, might last more than 21 years after the death of the testator's named child. The exercise of the trust might result in the creation from time to time of new interests, some of which might come into existence after the perpetuity period had run out.

His Honour, therefore, concluded that the whole discretionary trust was void as being too remote. The effect of that conclusion was that the rule in **Lassence v. Tierney** (*cit. sup.*) and **Hancock v. Watson** (1902), A.C. 14, applied. That rule as stated in the headnote to the latter case was: "Where there is an absolute gift to a legatee in the first instance and trusts are engrafted or imposed on that absolute interest, which fail either from lapse or invalidity, or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin as the case may be." In **In re Harrison: Harrison v. Bush** (1918), 2 Ch. 59, the rule was held to apply equally to the case where the legacy was bequeathed to trustees in trust for the legatee as to the case where it was bequeathed directly to the legatee in the first instance. See also **Moryoseff v. Moryoseff** (1920), 2 Ch. 33; **In re Hamilton Gilmer, deceased** (1922), N.Z.L.R. 411. His Honour had already held that in the clause under consideration there was an absolute trust of the sum of £750 in favour of the testator's named child. Further trusts were engrafted or imposed on this absolute interest by the discretionary trusts, all of which failed for remoteness. The result, therefore, was that the absolute trust according to the rule took effect and the named child was absolutely entitled to the legacy of £750.

His Honour then proceeded to consider the other provisions of the will which might affect the vesting of the legacies given by the will. No further question arose as to the vesting of the legacy of £1,000 given in trust for Mrs. Henderson. It was plainly vested. The legacy given in trust for the testator's named child was also vested in her. No other question arose as to the legacies given in paragraph 5 (f) to Ina Emeline Antrobus, in paragraph 5 (g) to Edith Myrtle Antrobus, and in paragraph 5 (h) to Fanny Louisa Antrobus. Those legatees had all attained the age of 21 years, and the legacies were absolutely vested.

With regard to the legacy given by paragraph (e) in trust for the illegitimate daughter of the testator's named child, the

gift was plainly contingent on her attaining the age of 21 years, and there was a gift over in case she should not attain that age. Her legacy was therefore contingent.

With regard to the legacies of £200 given in trust for Miriam Joan Antrobus, the testator's stepdaughter, and to the testator's stepson, Arthur Herbert Antrobus, His Honour was of opinion that they were contingent on each legatee attaining the age of 21 years. That had been properly admitted. The event on which the legatee was to be paid was an event personal to the individual legatee. The gift in substance lay only in the direction to pay after the legatee should have attained the age of 21 years. The time for payment was postponed not on account of previous interests created in the fund, but on account of some qualification attached to the donees. See per Wood, V.C., in **In re Theed's Settlement,** 3 K. & J. 375. The legacy could not be paid to the legatees respectively until he or she attained the age of 21 years, and the direction to pay after that age would be meaningless unless it was intended to import some qualification in the legatee necessary to entitle such legatee to the legacy. Furthermore, the discretion reposed in the trustees as to the time and mode of payment after the legatee attained 21 years (although ineffectual to prevent or postpone vesting) might be used in construing the gift, and showed that the testator intended the gift to be contingent on the legatee attaining the age of 21 years. The legacies to Myrtle Joan Antrobus and Arthur Herbert Antrobus were, therefore, contingent on the legatees respectively attaining the age of 21 years.

With regard to the residuary trusts contained in paragraphs (k) and (l) of the will, no difficulty arose. The share of each of them, Alma May Antrobus and Dorothy Pearl Antrobus was in words contingent upon her attaining the age of 21 years. And in the event of either or both not attaining the age of 21 years there were gifts over to regulate the devolution of the shares.

The Originating Summons asked what was the duty or discretion of the trustees with regard to the maintenance of Myrtle Joan and Arthur Herbert Antrobus. His Honour merely stated that no provision was made in the will for their maintenance and education until they attained the age of 21 years. They did not come within the provisions of Clause 5 (b) of the will. It was no part of the duty of the Court to advise the trustees as to what powers it possessed in this respect either by statute or otherwise.

Solicitor for plaintiffs: **L. A. Taylor,** Hawera.

Solicitors for defendants: **Govett, Quilliam and Hutchen,** New Plymouth.

Skerrett, C.J. April 4: 27, 1928. Wellington.

IN RE DAVID A. HAMILTON AND CO., LTD. (IN VOLUNTARY LIQUIDATION).

Company—Voluntary Liquidation—Calls Made by Liquidator Without Proper Notice—Whether Interest Recoverable on Same—Whether such Calls were Debts Payable at a Certain Time by Virtue of a Written Instrument—Section 174 Companies Act 1908—Whether Voluntary Liquidator an Officer of Court—Indemnity Given by Shareholder to Liquidator Against Court and Legal Costs of an Appeal—Whether Contributories Entitled to Insist that such Indemnity be Enforced by Liquidator for Their Benefit—Claim for Interest on Amount Claimed as Damages for Breach of Contract—Whether Resolution of Certain Creditors to Pay Travelling Expenses Binding on Liquidator or Other Contributories.

This was a motion under Section 226 of the Companies Act 1908, for directions to be given to the liquidator of a company in voluntary liquidation.

The company was registered on the 23rd January, 1920. The total number of shares was ten thousand. The company went into voluntary liquidation on the 22nd December, 1920, and a liquidator, Mr. Hunt, was appointed on the 31st January, 1924. The liquidator made a call upon all contributing shares in the capital of the company of the balance unpaid on such shares. A Mr. Brown held 3,000 shares in the company, on which he had paid £500. A call of £2,500 was made upon his shares. The company's articles of association incorporated Table A, and articles 11 and 14 relating to calls were therefore included. The call was made under Section 199 (c) of the Companies Act. A proper notice of call specifying the time and place of payment and to whom the call should be paid was, it appeared, not given by the liquidator. Nevertheless, the liquidator in a statement to the solicitors for Brown made a demand for payment of the call and interest. The sum demanded was paid, but Brown subsequently claimed that as the interest had been paid by mistake it could be recovered.

It appeared that on the liquidation of the company, Overell Sampson Proprietary, Ltd., and Tennant, Sons and Co., Ltd., claimed damages for breaches of alleged contracts of sale in respect of 1,000 boxes of tin-plates, and in respect of 250 boxes of tin-plates. In an application to ascertain whether proof of these claims should be admitted, Chapman, J., held that both claims should be admitted. Brown was dissatisfied and urged the liquidator to appeal, which the liquidator consented to do upon Brown giving an undertaking to indemnify the liquidator against all Court and legal costs in taking the appeal. The liquidator proceeded with the appeal. The judgment of Chapman, J., was affirmed as to the 1,000 boxes of tin-plates and reversed as to the 250 boxes, and the costs of the appeal were not allowed to either party. The contributories desired the liquidator to enforce the indemnity so that the costs of the appeal would fall on Brown and not on other contributories.

A claim was also made that Overell Sampson Proprietary, Ltd., was entitled to rank for dividend in respect of interest on the amounts claimed from the company in liquidation for breach of contract. The travelling expenses of one Overell were also claimed from the liquidator.

Findlay, K.C., in support.

Kennedy for Overell Sampson Proprietary, Ltd.

Johnston for liquidator.

SKERRETT, C.J., stated that the questions to be determined were:—

(1) Whether Brown was entitled to a refund of the monies retained by the liquidator as interest on a call made by the liquidator upon the shares held by Brown.

(2) Whether the liquidator ought to be directed to enforce the contract of indemnity given by Brown.

(3) Whether Overell Sampson Proprietary, Ltd., was entitled to rank for dividend in respect of interest on its claim against the company in liquidation.

(4) Whether the liquidator ought to pay the travelling expenses of one Overell under the circumstances subsequently mentioned.

(1) With reference to the claim made by Brown to recover interest His Honour stated that Brown claimed that the interest on the call was not payable because notice was not given to him under Article 13 of Table "A," and that although the money was not recoverable at law, having been paid under a mistake of law, the Court would not permit that defence to be set up by the liquidator, he being an officer of the Court, on the ground that it was inequitable that the liquidator should retain the money.

Even though the interest had been paid by Brown under the belief that he was in fact liable to pay the same, His Honour was of opinion that the claim against the liquidator for the repayment of interest could not succeed for the following reasons:—

First, His Honour was of opinion that a voluntary liquidator under the provisions of the New Zealand Companies Act 1908, was not an officer of the Court within the line of cases which commenced with **Ex parte James** L.R. 9 Ch. 609—see **In re Hills Waterfall Estate and Gold Mining Co.** (1896) 1 Ch. 947. His Honour could not satisfy himself that anything contained in the New Zealand Companies Act 1908, or in the regulations made thereunder had the effect of creating a liquidator in a voluntary winding-up an officer of the Court in the same position as a trustee in bankruptcy.

Secondly, the case was not within the rule laid down in **Ex parte James** (*sup.*) or the long line of cases which had followed that decision. It was claimed that the provisions of Articles 11 to 14 of Table "A" did not apply to calls made by the liquidator but only to calls made by the directors during the life of the company. That appeared to be established by the case of **In re Welsh Flannel and Tweed Co.** L.R. 20 Eq. 360 at p. 367. What then was the effect of that conclusion? As Articles 11 to 14 did not apply to a call made by the liquidator, the effect of that call must, therefore, be ascertained from the statute itself. Section 199 (c) of the Companies Act authorised the liquidator to make calls on contributories, and Section 174 had an important effect. That section declared that the liability of any person to contribute to the assets of the com-

pany in the event of the same being wound-up should be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time, or respective times, when calls were made as thereinafter mentioned for enforcing such liability. The effect of a similar provision in the Imperial Act of 1862, which made the liability of the contributor a specialty debt, was considered by the Court of Appeal in **Overend Gurney and Co. ex parte Barrow** L.R. 3, Ch. 784, 38 L.J., Ch. 15. In that case it was held that the statutory provision made the call a debt payable at a certain time by virtue of a written instrument within the meaning of 3 and 4 Wm. IV c. 42. It was clear that the difference between our Act and the Imperial Act upon this point made no difference. The Statute of 3 and 4 Wm. IV c. 42, s. 28, made no difference between a specialty debt and a debt payable at a certain time by virtue of a written instrument. In His Honour's opinion, therefore, Mr. Brown was liable to pay interest at the rate at which he was charged—6 per cent., because of the fact that Section 174 of the Companies Act 1908 made the call a debt payable at a certain time by virtue of a written instrument.

In any event His Honour could see nothing inequitable or improper in the liquidator receiving and retaining the sum paid for interest. Presumably all the other contributors of the company either paid punctually or paid interest on the amount of their calls which they had failed to pay. It was at any rate open to Mr. Brown to waive the defect of not giving him notice of the call. It would be carrying that line of cases too far to make the order asked for by Mr. Brown.

(2) The second claim was made by Overell Sampson Proprietary, Ltd., and Tennent Sons and Co. Ltd., that the Court should direct that the liquidator should enforce the indemnity, given to him by Mr. Brown, against all Court and legal costs incurred in taking an appeal. The result of the appeal was that Overell Sampson Proprietary, Ltd., and Chas. Tennant Sons & Co., were eliminated as creditors for a substantial sum of money in respect of the contract relating to the 250 boxes of tin-plates. The appeal was therefore justified and the liquidator was undoubtedly entitled to payment of all costs incurred by him in connection with the appeal out of the funds of the liquidation. It was, however, contended that the liquidator should enforce the indemnity given by Mr. Brown to the liquidator. If that contention were to succeed the result would be that the contributories of the company would obtain the full benefit of the successful appeal and the whole costs of that appeal would be discharged by Mr. Brown, the one contributory. In His Honour's opinion that contention was not well founded. It was an elementary rule that a person who was not a party to a contract could not sue upon it. The contract in fact was entered into with Mr. Hunt personally, and was not entered into with him on behalf of the company, or for the benefit of the company. It was entered into for the personal indemnification of Mr. Hunt. That undertaking of Mr. Brown did not take away or affect the liquidator's right to pay the costs in taking the appeal out of the funds of the liquidation, if the appeal was a proper one. It was a contract between Brown and the liquidator personally and conferred no rights on the contributories of the company. The appeal was successful in a material part and saved the company from liability to admit a proof of debt for a substantial sum of money. It was clear, therefore, that the appeal was properly brought, and the liquidator was entitled to deduct the costs incurred by him out of the liquidation funds of the company. His Honour did not see what standing the contributories had to require Mr. Hunt to enforce the contract made with him personally and for his own personal benefit.

(3) With regard to the third claim, namely, whether Overell Sampson Proprietary, Ltd., were entitled to rank for dividend in respect of interest on their claim against the company in liquidation, His Honour was of opinion in the negative. The claim was for unliquidated damages. Those damages had never been ascertained or made liquidated. Neither Mr. Justice Chapman nor the Court of Appeal determined the quantum of damages. The claimants were not entitled to interest upon the amount of their proof for damages in connection with the contract relating to the 1,000 boxes of tin-plates.

(4) With regard to the fourth question relating to whether the liquidator should pay the travelling expenses of one Overell, the answer to that was also in the negative. The only justification for that claim was a resolution passed at a meeting of creditors held in the course of the voluntary liquidation that Overell Sampson Proprietary, Ltd.'s, expenses should be paid by the company and should be made preferential. Before that resolution was passed the amount of those expenses was calculated to be about £630. The creditors of the company had no right by any such resolution to bind the company. It was not binding on the other contributories or upon the liquidator.

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

Solicitors for Liquidator: **Johnston, Beere and Co.,** Wellington.

Solicitors for Overell, Sampson Proprietary Ltd.: **Luke and Kennedy,** Wellington.

Sim, J. April 24; 27, 1928.
Christchurch.

IN RE THE PAREORA RIVER BRIDGE EX PARTE THE LEVELS COUNTY COUNCIL.

Main Highways Amendment Act 1925, Section 7—County Council—Construction of Bridge—Apportionment of Cost—Powers of Main Highway Board Delegated to Council—Declaration by Minister of Public Works Pursuant to Section 7 that Section 119 Public Works Act 1908 as to Apportionment of Cost of Construction of Bridge Applied—Effect of Declaration—Whether Boroughs Could be Required to Contribute to Cost of Bridge.

Case stated under Section 10 of the Commissions of Inquiry Act 1908 to determine whether certain boroughs could be required to contribute towards the cost of the Pareora River Bridge. The Levels County Council desired to construct the bridge in question. The Main Highways Board had delegated to the Levels County Council the whole of the powers conferred upon the Board by Section 9 of the Main Highways Act 1922 in respect of the main highways in the Levels County. Under Section 7 of the Main Highways Amendment Act 1925 the Minister of Public Works, on the recommendation of the Board, had declared that the provisions of Section 119 of the Public Works Act 1908, in so far as they provided for the apportionment of the cost of construction, should apply with respect to the apportionment of the cost of construction of the Pareora River Bridge. The Levels County Council took the steps prescribed by Section 119 of the Public Works Act 1908. The estimated cost of the bridge was £15,000, of which £8,000 was to be provided for out of the Main Highways account. The Levels County Council proposed that the Timaru Borough Council should contribute the sum of £2,907 towards the cost of the bridge and the Waimate Borough Council the sum of £1,302. These two bodies objected to this proposal, and a Commissioner was appointed to go into the matter. The Commissioner stated the following question for the decision of the Court: Whether in the circumstances upon the true interpretation of the Public Works Act 1908 and the Main Highways Act 1922 and the Main Highways Amendment Act 1925, the Timaru Borough Council and the Waimate Borough Council could be called upon to contribute any amount towards the cost of the Pareora River Bridge?

Campbell for Levels County Council.
Stephens and Fitch for Waimate County Council.
Donnelly for Waimate Borough Council.
Sim for Timaru Borough Council.

SIM, J., stated that it was clear that, until the Main Highways Amendment Act 1925 was passed, Borough Councils were not liable to be called upon to contribute towards the cost of such a bridge, and the answer to the question submitted depended on the view taken as to the effect of Section 7 of the Act of 1925. It was contended on behalf of the Borough Councils that that section ought to be regarded merely as a machinery provision for the purpose of having the cost of such a work apportioned between the local authorities already liable under the Main Highways Act to contribute towards such cost. It was impossible, His Honour stated, to construe Section 7 in the way suggested, or to hold that it was not intended to create a liability on the part of Borough Councils in a case such as the present. Section 119 of the Public Works Act 1908 was considered by the Court of Appeal in the case of **Mayor of New Brighton v. Attorney-General** (1927) G.L.R. 416. It gave the Governor-General power to determine whether the proposed work should be constructed or not, but that power could not be conferred in connection with a work such as the bridge in question by a notice under Section 7 of the Act of 1925. It was for the Board to determine whether the proposed work should be constructed or not, and all that the Governor-General had power to determine was the apportionment of the cost of the work, if constructed. In dealing with the matter the Com-

missioner had to ascertain whether of not the two Boroughs in question were adjacent districts according to the principles laid down in the **Mayor of Lower Hutt v. Mayor of the City of Wellington,** 23 N.Z.L.R. 519, 6 G.L.R. 121; (1904) A.C. 773 and **In re the Jacobs River Estuary Bridge** (1927) G.L.R. 527. If they were found to be adjacent districts, then the Commissioner had to ascertain whether or not the proposed bridge would be of advantage to the whole or a considerable portion of the respective inhabitants of these districts. If the answer to both questions was in the affirmative, then the Commissioner would be entitled to recommend that the two Borough Councils should make respectively a specified contribution to the cost of the proposed bridge. The answer to the question submitted was, therefore, that, subject to the specified conditions, the two Borough Councils could be called upon to contribute towards the cost of the proposed bridge.

Solicitors for Levels County Council: **Raymond, Raymond and Campbell,** Timaru.

Solicitors for Waimate County Council: **Hamilton and Fitch,** Waimate.

Solicitors for Waimate Borough Council: **Raymond, Stringer, Hamilton and Donnelly,** Christchurch.

Solicitors for Timaru Borough Council: **Perry, Finch and Hudson,** Timaru.

Adams, J. May 17; 21, 1928. Christchurch.

LAW v. HALSTEAD.

Contract—Sale of Milk Round—Breach of Contract by Purchaser—Clause in Contract of Sale Authorising Vendor Upon Breach to Annul Contract and Retain Property or Resell Same—Whether Vendor Upon Rescission Entitled to Canvass Former Customers of Milk Round.

This was an appeal from a judgment of nonsuit in the Magistrates' Court at Christchurch. By contract in writing, dated 3rd September, 1925, the respondent sold to the appellant his milk round and certain chattels used therewith for £390, of which £100 was paid in cash and the balance, with interest, by quarterly instalments. In consideration of this agreement the purchaser agreed to purchase from the vendor the first 40 gallons of milk required by the purchaser. Payment was to be made monthly. So long as the milk was retailed at 6d. a quart certain stipulated prices were to be paid, but if the retail price varied then the wholesale price to the purchaser was to be amended. Purchase money and interest was paid until September, 1927, when the appellant (the purchaser) informed the respondent (the vendor) that he could no longer take milk from him. Clause 6 of the agreement provided that if the purchaser should not pay his purchase money at the times specified and in all other respects perform the conditions in the agreement contained and on his part to be performed, the deposit money should be forfeited to the vendor, who should be at liberty to annul the contract and to retain the property comprised therein, including the Milk Round, or to re-sell the property, including the Milk Round, at such time and in such manner and subject to such conditions as he should think fit.

Upon the appellant's breach of contract the respondent commenced selling and delivering milk on the run which he had sold to the appellant, and canvassed his former patrons for their custom. By this means he induced a number to leave the appellant and come to himself. The appellant claimed £50 damages. The Magistrate took the view that under the contract the appellant had agreed to take the milk stipulated for in Clause 6 "so long as he remained a milk-seller and the respondent a milk wholesaler," that the appellant's refusal to continue taking milk was a repudiation of that agreement, and that the respondent thereupon became entitled under Clause 6 to rescind the whole contract, to forfeit the moneys paid thereunder, and to retake the milk run. He therefore nonsuited the appellant.

Upham for appellant.

Lascelles for respondent.

ADAMS, J., said that counsel for the appellant had relied upon a passage in Salmond and Winfield on Contracts, (1927), p. 286, which reads as follows: "In rescission for breach the contract remains operative as to the past, and therefore precludes any such claim for *restitutio* in respect of acts of performance prior to rescission. Money which has been paid or property which has been transferred by either party to the other must stay where it is and cannot be recovered. On the same principle every obligation which has accrued due between the parties before the rescission of the contract, and so creates a then existing cause of action, remains unaffected by the rescission and can still be enforced. It makes no difference in this respect whether such accrued obligation and existing cause of action is one in favour of the party rescinding the contract or is one in favour of the other party." His Honour said that was a clear and accurate statement of the law. It followed that the property in the milk run which passed from the respondent to the appellant, with all the rights necessary to its undisturbed enjoyment which the law conferred, remained vested in the appellant and might be enjoyed and enforced by him. There was no magic in the word "goodwill." The sale of a milk run, although that word was not used, was neither more nor less than a sale of the goodwill. The respondent's act in canvassing the old customers was a wrongful interference with the appellant's rights vested in him under the contract. The evidence and findings as to the appellant ceasing to take milk from the respondent were not relevant to the issues in the action, and the question of the construction of the appellant's agreement to take milk from the respondent did not arise.

Appeal allowed and judgment of nonsuit set aside. Judgment entered for appellant for £50 damages.

Solicitors for appellant: **Harper, Pascoe, Buchanan and Upham,** Christchurch.

Solicitors for respondent: **Weston, Ward and Lascelles,** Christchurch.

MacGregor, J. May 23, 1928. Auckland.

KEEP BROTHERS, LTD. v. BIRCH AND BRADSHAW, LTD.

Solicitor—Practice—Discovery—Letter Written by Plaintiff to His Solicitor Containing Instructions as to Preparation of Debenture to be Given by Defendant Company—Debenture Given—Subsequent Action on Debenture—Defence that Giving of Debenture Fraudulent Preference—Whether Letter Privileged—Whether Inspection of Diary of Plaintiff's Solicitor Obtainable.

Summons for inspection of documents. In 1925 the plaintiff being in doubt as to the financial position of the defendant company which was indebted to the plaintiff wrote to its solicitors with reference to the matter, and in pursuance of the advice received it was agreed that the defendant company should give a debenture to the plaintiff for the amount of its indebtedness. A few days after the execution of the debenture the defendant company went into voluntary liquidation. In a subsequent action by the plaintiff for the recovery of the moneys secured by the said debenture, the liquidator of the defendant company alleged (*inter alia*) that the debenture was void as a fraudulent preference in that it had been executed within three months prior to the winding-up of the defendant company. The defendant took out an order for discovery but the plaintiff refused to produce the letter above referred to upon the ground that it was a communication between itself and its legal advisers and therefore, privileged. The defendant also sought production of a diary kept by one of the solicitors for the plaintiff, which recorded an interview between such solicitor and a person other than the plaintiff in the action, at which interview the preparation of the debenture was discussed.

Mackay in support of summons.

McVeagh to show cause.

MACGREGOR, J., (orally) said that the documents involved in the application comprised four letters and a diary. As to three of those letters there was no dispute; it was admitted by Counsel for the plaintiff that no valid reason could be advanced for withholding the production and inspection desired. The fourth letter was written by the plaintiff to its legal advisers, and it was alleged by the defendant that it contained instructions by the plaintiff relating to the preparation of the debenture

which was sought to be set aside in the action before the Court. The diary in question was the diary of a member of the firm of solicitors who were acting for the plaintiff and it contained a record of an interview between a person named Minter and a member of such legal firm. It was strenuously contended that no order should be made with respect to the fourth letter and the above-mentioned diary. With regard to the diary, His Honour was satisfied that he had no power to make the order asked for. It was not the property of the plaintiff, nor had the plaintiff any control over it. It was the property of the solicitors who acted for the plaintiff. The solicitors were in no sense parties to the action.

Turning to the fourth letter, it was to be noted that it was a letter written by the plaintiff to its legal advisers. The present action had been brought to enforce certain rights claimed by the plaintiff arising under a debenture given by the defendant company, in June, 1925. The letter of which production was sought was written by the plaintiff before the debenture was prepared. It was very properly admitted by Counsel for plaintiff that the letter existed and that it contained instructions as to the future preparation and issue of the debenture. It was, however, claimed that the letter was privileged upon the ground that it was a communication passing between a client and his legal advisers, and on that ground its production was objected to. One of the defences raised in the action was that the giving of the debenture amounted to a fraudulent preference: in point of fact it was executed only a few days before the passing of the resolution for the voluntary winding-up of the debtor company. There was evidence upon which a Court could hold that a *prima facie* case of fraud was made out. That brought the matter within the principle laid down in **Williams v. Quebrada Railway Co.** (1895), 2 Ch. 751, and **R. v. Cox,** 14 Q.B.D. 153. On the authority of the cases cited* to him His Honour thought that the letter in question was not privileged and that it should be produced. The order would, therefore, be that the plaintiff produce the letters numbered 1 to 4 in the summons for production. No costs were asked for.

(*Counsel in support of summons cited in addition to the cases mentioned in the judgment, **In re Whitworth** (1919) 1 Ch. 320, 327; **O'Rourke v. Darbishire** (1920) A.C. 581, 622, 631: **R. v. Bullivant** (1900) 2 Q.B. 163, 167, 168.—Ed. N.Z.L.J.)

Solicitors for plaintiff: **Russell, McVeagh, Bagnall and Macky,** Auckland.

Solicitors for defendant: **Stanton, Johnstone and Spence,** Auckland.

Ostler, J. May 12, 1928.
Palmerston North.

BOLTON v. BOLTON.

Divorce—Custody of Children—Wife Guilty of Adultery—Whether Wife Entitled to Reasonable Access to Children.

This was a motion by the petitioner, the husband, who had obtained a *decree nisi* for dissolution of marriage on the ground of his wife's adultery, for a decree absolute and for custody of the children of the marriage. The jury, in finding the respondent guilty of adultery, had added a rider that this might have been contributed to by the carelessness and neglect of the petitioner. The respondent opposed the application and asked for the custody of the children, or in the alternative that she be given reasonable access to them. The children were two girls aged respectively seven and five years. The respondent moved also for permanent maintenance, but the case is not reported on this point.

Ongley for petitioner.
C. A. L. Treadwell for respondent.

OSTLER, J., said that *prima facie*, the petitioner had a right to the custody of the children. The welfare of the children was the paramount consideration. Since they were deserted by the respondent and left in the custody of the petitioner there was nothing to show that they had not been well cared for. Petitioner had ample means to provide for them, and female relatives who could take charge of them. They were at a Girls' Collegiate School at Masterton, and were being properly cared for and educated there. There was nothing in the affidavits to shew that they could be better cared for if the custody were given to the respondent. His Honour held that the petitioner was entitled to a decree absolute, and made an order giving him permanent custody of the children.

With regard to access it seemed that the law on the point of access to her children by a wife guilty of adultery had altered in recent years. The first rule laid down by the Divorce Courts was that a wife found guilty of adultery forfeited all right to access to her children, and unless the husband consented access was refused: see **Seddon v. Seddon and Doyle,** 2 Sw. & Tr. 640. That rule was applied rigidly until 1891, when the Court of Appeal first departed from it in **Handley v. Handley** (1891) P. 124. His Honour referred also to a statement of the law appearing in **Stark v. Stark and Hitchins** (1910) P. 190, and confirmed in **B. v. B.** (1924), P. 176. The true rule of law on the question seemed to be that adultery by the wife ought not to be regarded for all time, and under all circumstances, as sufficient to disentitle her to access to, or even to the custody of the children. The Court had regard to the particular circumstances of each case, always bearing in mind that the benefit and the interest of the infant was the paramount consideration. In the circumstances of the case, His Honour thought that it would be in the best interests of the children that their mother should be granted a limited access to them. Although she was found guilty of adultery on her own admission, there was no evidence that she was living a loose life. The children were both young girls, and their mother bore towards them a mother's love. She was living a reputable life and His Honour considered it would be depriving the children of a priceless influence in their lives to cut them off from any intercourse with their mother. His Honour accordingly made an order that the respondent should be entitled, on condition that she rigidly abstained from using any endeavour to influence the minds of the children against the petitioner or against any of his relations, to have access to the children for two hours on every Saturday afternoon during their school terms, and that she be entitled, on the same condition, to take them out and have them in her sole charge during such periods of access. The order would be until the further order of the Court. It would depend upon the circumstances whether the order would be varied so as to give more or less liberal access to the respondent. Liberty to both parties to apply to vary or rescind the order was given.

Solicitors for petitioner: **Gifford, Moore, Ongley and Tremaine,** Palmerston North.
Solicitors for respondent: **Treadwell and Sons, Wellington.**

Peculiarities of the Judicial Committee.

There are two peculiarities about the Judicial Committee of the Privy Council. In the first place, its decisions are not binding upon other Courts; secondly, a dissenting judgment is an impossibility. In the House of Lords expressed differences of opinion are not uncommon, but in the Privy Council a member of the "Board" who does not agree with the majority must forever hold his peace. It never delivers a judgment. The so-called judgment is no more than a statement of the reasons by which the Committee will be governed in tendering advice to His Majesty.

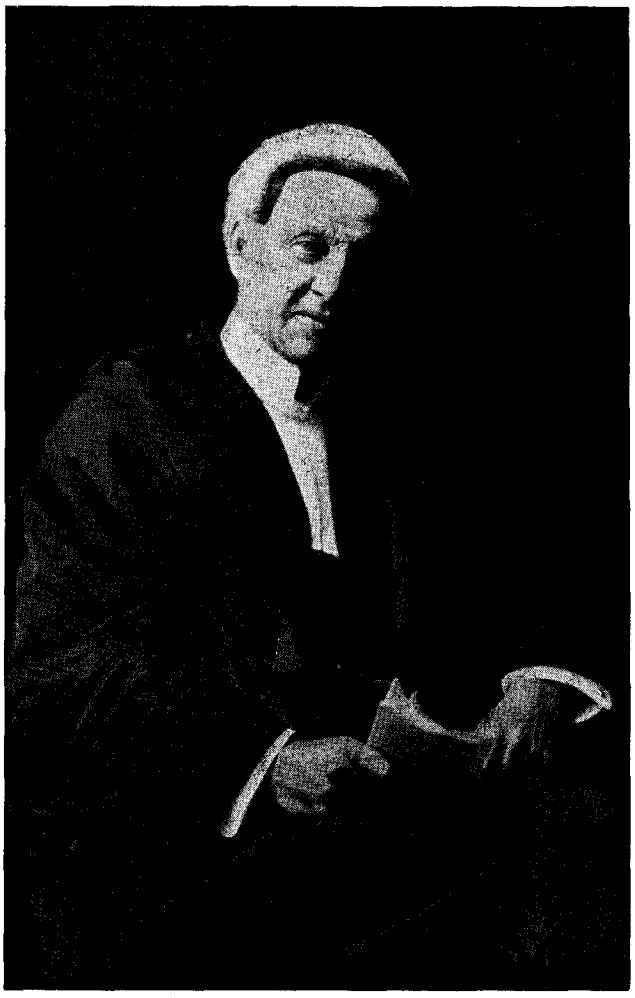
The rule that a joint opinion shall be given without disclosing "how the voices and opinions went" is now 301 years old. It is contained in Article 4 of an Order in Council made on February 20, 1627. But it has been broken on occasion. In a reported case, Dr. Lushington intimated that a particular judgment was not unanimous, and after the decision in **Ridsdale v. Clifton,** where an appeal by a clergyman who had offended in matters of ritual was dismissed, Sir Fitzroy Kelly, C.B., allowed it to be known that he was not of the same mind as his colleagues.—"Law Journal."

Obituary

Sir John Hosking

Late Judge of the Supreme Court of New Zealand.

The late Sir John Hosking was born at Penzance, in Cornwall, in 1854. He came to New Zealand when a child and was educated at Auckland. At the age of sixteen he was articled to the late Mr. Samuel Jackson, of Jackson & Russell, of Auckland, and, in 1875, was admitted to the Bar by His Honour Mr. Justice Gillies. Soon afterwards he went to Dunedin, where, in 1877, he became a member of the firm of Kenyon and Hosking, a partnership which continued until 1898. For the next ten years he practised alone, and, at the end of that period, he and Mr. John Cook, of Dunedin, amalgamated.



At the Bar Mr. Hosking enjoyed a very extensive practice, and in 1907 he was appointed King's Counsel. In 1914, after a most distinguished forensic career, he was elevated to the Supreme Court Bench, a position which he occupied with conspicuous distinction until his retirement in 1925. In the latter year he was made a Knight Bachelor. Shortly after his retirement Sir John Hosking was appointed a temporary Judge to dispose of the mass of applications filed under the Mortgages Final Extension Act of 1924.

Of the late Sir John Hosking's judicial career one cannot do better than quote the words of the present Chief Justice, then Mr. C. P. Skerrett, K.C., speaking on behalf of the New Zealand Bar on the occasion of Sir John's retirement: "High as has been the standard of the Judicial Bench your Honour need not fear to be measured by that standard. We shall always remember that you brought to the Judicial Bench a deep and compendious knowledge of law, and a wide experience of practice and of human nature—so necessary to a successful Judge. You will leave behind you valuable expositions of the law contained in our Law Reports which will keep your memory green amongst us. By the public—and by us also—you will be remembered as a man of highest integrity, of great industry, of an almost meticulous conscientiousness and a burning desire to be just."

An Appreciation.

By The Right Honourable Sir Robert Stout, P.C., K.C.M.G. (late Chief Justice of New Zealand).

May I be allowed to make reference to the departure hence of one of my former colleagues on the Supreme Court Bench.

I first became acquainted with Sir John Hosking in the year 1877, on his arrival at Dunedin from Auckland. He joined the office of Kenyon & Maddock.

The late Sir James Prendergast had been the leading member of the firm before his appointment to the office of Attorney-General. Hosking brought a letter of introduction to me from an old friend, Mr. William Swanson, then a member of the House of Representatives. I remember yet, part of the letter: "Hosking is a good chap and he always attended to my business when I visited the Auckland office." Since then he was my friend. We met as fellow lawyers and we never ceased to be friends. His death came as a great shock to me. In the latter part of January and all of February, March and April, I was absent from Wellington, and when I came back early in May, hearing, though not from himself or his family, that he was as usual, I had no idea that so near to him was the Call to go hence. I did not, therefore, call on him as I would have done. My deepest sympathy goes out to those he has left behind; may they be comforted by the knowledge that all his numerous friends are with them in their sorrow.

New Zealand has had many Supreme Court Judges. More than twenty of those who have sat on the Bench have passed away. And regarding all of them we may say that they had different characteristics. Some were noted for their ability as trial Judges, especially in criminal cases. Some revelled in discussing equitable pleas. One or more seemed to know our Statute Law by heart. Sir John Hosking had more than one char-

acteristic. First he followed the advice of a famous lawyer, President of the United States of America—Abraham Lincoln—who said: "The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for to-morrow which can be done to-day." Hosking never put off his work. Another characteristic was his painstaking—nay, even meticulous—examination of the facts and of the law of every case that came before him. Nothing was slurred over. Time was of little moment to him. He had a great knowledge of Real Property Law and Conveyancing, and his general knowledge fitted him for his great task as a Judge. Gifted with an equable temper and kindly feeling for all, he became revered by those practising before him—all loved him. Outside of his profession he was a popular citizen. He recognised that the better part of one's life consists of one's friendships: he kept his friends. Is not then his life a lesson to us all? To the young lawyers he has set an example that they will do well to follow. Does it not say: "Do your work as well as you can and be kind. Be patient, be busy, stand well with anyone that stands right, so long as he is right. Ever remember that success in life depends on character, on work, and on ability, and the rewards of life are for service."

Tributes of Dunedin Bar.

Reference was made to the late Sir John Hosking at a large and representative gathering of the Bar at the Supreme Court, Dunedin, on Friday, June 1st, His Honour, Mr. Justice Sim, presiding.

Mr. W. R. Brugh, President of the Otago District Law Society, said that it was entirely fitting that they, as members of the Otago Law Society, should meet to do honour to the memory of one who had taken such an interest in the affairs of the Society both as President and as a member, and one who had for so long practised his profession in their midst. Sir John Hosking was a man of outstanding ability and of the highest ideals. He ever placed the practice of his profession upon a lofty and honourable pedestal, and in all his dealings, both with clients and with his brother practitioners, he ever endeavoured to live up to that high standard. It seems but yesterday that they, then the younger members of his profession, regarded him and Sir William Sim, as the respected leaders of the Bar in the district. Sir John Hosking was ever ready to assist younger men in overcoming the difficulties which continually beset one who endeavoured to tread the tortuous journey through law. As a citizen he gave of his best, and gave ungrudgingly in his time to help the common weal. They rejoiced with him when, in the course of time, he was elevated to the Bench. If the speaker's memory served him right Sir John was appointed a judge about the same time as that grand old man of the legal world—he referred to the late Sir Joshua Williams—received his appointment in England. It might truly be said that Sir Joshua's Court was a veritable judge's nursery. It was only to be expected that Sir John would live up to the high ideals which were synonymous with British justice. In his eminence as a counsel he yielded only to his eminence as a judge. He further had that attribute of mercy which seasoned justice. Therefore on his retirement from the Bench, when His Majesty the King bestowed upon him the dignity of knighthood, they all felt that it was a proper tribute and a fitting reward. Even in his years of retirement Sir John's undimmed faculties were used for the furtherance of works of considerable benefit to the State. "Let us therefore," continued Mr. Brugh, "meet to pay our halting tribute to the respect of his memory. Let us honour him as he was—a knightly judge and a knightly gentleman."

Mr. S. Solomon, K.C., said: "I have to thank the President of the Law Society for asking me to say a few words in memory of our lost friend and colleague. I feel that I will be forgiven for saying that it is fitting that I should be so honoured, for, as he graciously acknowledged when we met him upon his appointment, in the days of long ago I urged him strongly to relinquish conveyancing work and devote himself to practising at the Bar. I well remember the day, forty years ago, when he told me that he had decided to accept my advice. I believe that you, sir, and you gentlemen also will agree that when he came to that conclusion he did signal service to the Bar, the Bench, and the people of New Zealand. Since then I have known him as leader, fighting side by side with me; I have known him, too, as an opponent, and best of all as a dear friend. I have known no man more kindly, none more honourable, none more unselfish, and none who made so many friends and lost so few."

"It is fitting that the members of the profession should express in this way their sorrow for the death of Sir John Hosking," said His Honour, Sir William Sim. "He had a distinguished career both as a lawyer and as a judge, and held a high place in the esteem and affection of all. He was a citizen of Dunedin for thirty-nine years, and the profession owed a lot to him for the way in which he sought to maintain a high standard of professional honour, and for the example he set by his zeal for thorough and efficient work. Whatever his hand found to do that he did with all his might. It has been said that when a learned man dies his learning dies with him. That is certainly true of Sir John Hosking. He was one of the most learned lawyers we have had on the Bench, and was master of a store of legal lore not possessed by his contemporaries, and not likely to be possessed by any of his successors. For the last two years of his life he was a confirmed invalid, and he must have been inclined at times to echo Lord Bacon's words: 'Above all believe it the sweetest canticle is Nunc Dimittis when a man hath attained worthy ends and expectations.' Sir John certainly attained these, and all we can do now is to express our sympathy with Lady Hosking and her family in the loss they have suffered."

Lords of Appeal are Younger.

Now that Lord Atkinson has gone from the ranks of the Lords of Appeal in Ordinary, and his place is filled by another eminent Irishman, Lord Atkin, it is necessary to revise the estimate of the average age of a Law Lord as previously recorded in these notes. The substitution of Lord Atkin, aged 59, for Lord Atkinson, aged 83, does make a difference. The ages are now as follows: Dunedin, 78; Shaw, 77; Sumner, 68; Carson, 73; Blanesburgh, 66; Atkin, 59; average age of Lords of Appeal in Ordinary, from whose judgments there is no appeal, 70; and exceptionally young, owing to the cause aforesaid, for a Lord of Appeal in Ordinary.

There is only one genuine Englishman amongst them. Dunedin, Shaw and Blanesburgh are of Scottish extraction; Carson and Atkin are Irish. Sumner remains England's sole and sufficient stay and representative.

—"Law Journal."

Insurance Law.

The Principles of Insurance Law. Part IV.

(By H. F. Von Haast).

Indemnity and Subrogation.

(Continued).

It follows from an application of the principle of subrogation that if the assured renounces any rights against a third party to which, but for such renunciation, the insurer would have a right to be subrogated, the assured must account for the value of those rights to the insurer. Mr. Isaacs learned that to his cost in **West of England Fire Insurance Co. v. Isaacs** (1897) 1 Q.B. 226. Owing to leases and subleases and deaths the facts in that case were complicated. For the sake of brevity the case is here treated as if there had been only one lease and no one had died. For our purposes then, let us say that Jones had leased a warehouse to Isaacs by a lease under which the lessee was to repair, but the lessor was to insure against fire and spend the moneys received in reinstatement, the lessee making good any deficiency. Jones insured with the Royal Exchange Assurance Corporation. A fire did £100 worth of damage. Notice of repair with a schedule of dilapidations was given by Jones to Isaacs. Jones demanded payment of £100 from the Royal Exchange. Isaacs sued the West of England Company with whom he had effected in his own name an insurance against fire, and recovered £100. Then the lease expired. Jones then sued Isaacs for breach of covenant to repair. Isaacs settled the action by paying £140 to Jones who gave him a receipt for all claims under the schedule of dilapidations, which included damage by fire, and Isaacs undertook not to bring any action against Jones for breaches of covenant. Then Jones pressed his claim against the Royal Exchange and was paid £100. The position then was that the loss had been paid twice over, a situation that had undoubtedly to be remedied. Accordingly the West of England Company sued Isaacs and recovered the £100. The line of reasoning which was approved by the Court of Appeal was this: Isaacs had a right to make Jones spend the £100 that he recovered from the Royal Exchange, in reinstating the premises. He did not do so, but, in his settlement with Jones, either paid £100 less than he would have done but for the lessor's liability to reinstate, or he deliberately renounced the right to have had the money expended in reinstatement, a right which he should have preserved in virtue of the West of England Company's right to be subrogated to him against his lessor, and therefore he had to repay to the West of England Company the £100.

Another attempt to beat the insurance company was revealed in **Phoenix Assurance Co. v. Spooner** (1905) 2 K.B. 753, but failed also. Mrs. Spooner owned a house and two shops in Plymouth, insured in the Phoenix. The Plymouth Corporation, desiring to acquire the property, gave notice to her which apparently is equivalent to an agreement to purchase the property. The premises were burnt and the Phoenix Company paid Mrs. Spooner £925. When she came to settle with the Corporation, the latter paid her the value of the premises less £925 received from the Phoenix Company, and agreed to indemnify her against any claim that that company might make against her. The Phoenix Company promptly sued. Counsel for the Corporation made a bold attempt to reverse the position by arguing that, on the notice to treat being given, the Corporation was subrogated to all the rights in respect of existing contracts of the person to whom it was given including the benefit of the policy, so that Mrs. Spooner, on receiving the agreed amount of the loss, became a trustee for the Corporation of the amount. But Bigham, J., did not see the position in that light and put it thus: "The plaintiff's contract was a personal contract with the defendant; it never passed either by assignment or operation of law to the Corporation and it amounted to nothing more than a promise to pay Mrs. Spooner a sufficient sum to indemnify her against any loss she might sustain by reason of her property being damaged by fire. The contract being one of mere indemnity, the assurers, upon payment of the loss, became entitled to all the rights then vested in Mrs. Spooner in respect of the destroyed property. Those rights included a right to be paid by the Corporation the value of the property as at the notice to treat, that is to say, the value, before the fire; and it was not legally possible for her to deprive the plaintiffs of the benefit of this right by any agreement with the Corporation."

But, as the contract of the insurance company is one of indemnity, the assured must be completely indemnified before the insurance company is entitled to take over any claim that he has against a third person and to sue in his name. No man is to be paid twice over in compensation for the same loss. But nothing should prevent the assured from being paid once in full the loss he has sustained. So, when the assured is underinsured at the time of his loss, and the amount of the loss sustained exceeds the amount recovered from the insurer, if the latter wishes to take over the claim of the assured against a third party and to sue in his name, he must pay the assured not only the amount insured but the full amount of his loss. If the insurer does not do that, the assured still remains free to go on with his claim and to control any action that he may bring. He remains as it is called *dominus litis*, lord of the suit. Of course he must not abandon rights so as to prejudice the position of the insurance company, and, if he recovers more than the total amount of his loss, he must account for the balance to the company. The case of **Commercial Union Assurance Co. v. Lister,** L.R. 9 Ch. App. 483, makes this plain. Mr. Lister, silk spinner at Halifax, had a large mill, insured in eleven fire insurance offices, for a total of £33,000. His mill was destroyed by an explosion of gas said to have been occasioned by the negligence of the servants of the Corporation of Halifax. Lister estimated his damage at £50,000 (apart from loss of profits £6,000, which would not be covered by the insurance) and sued the Corporation for £56,000. Then the Commercial Union and the ten other offices wanted to interfere, and brought an action praying that they were entitled to the benefit of Lister's right of action against the Corporation and that he might be restrained from prosecuting his action otherwise than for the whole amount of damage and for refusing to allow the insurance companies to use his name for the purpose of proceedings against the Corporation. The Court, however, held that Lister could conduct the action without interference by the insurers, but that he would be liable for anything done by him in violation of any equitable duty towards the insurers. So in bankruptcy, where a landlord, whose tenant who had covenanted to reinstate became bankrupt, recovered £273 from the

insurers in respect of a loss of £400 by fire, he was entitled to prove in the tenant's bankruptcy for £400, the full amount of his loss. When he had recovered £127 in dividends, making, with the £273, £400, he would be bound to account for the balance to the insurance company. **Re Blackbourne, ex parte Strouts,** 9 Mor. 249.

Technical Defences.

It must not be forgotten that it seldom pays an insurance company to rely on a purely technical legal defence, unless it is fairly plain to the public that the company has a strong suspicion either that the assured was not *bona fide* in his representations or that it has reason to suspect arson or some fraudulent practice, which the evidence available may not be quite strong enough to prove. For instance, the refusal to pay for the destruction by fire of the motor lorry recorded in **Dawson's Limited v. Bonnin** (1922) A.C. 413, was probably the worst advertisement that the Company ever had. Take the unenviable fate of the defendant in another case, where Viscount Dunedin said of the company that was resisting on technical grounds the claim of a "wretched little Jewish ladies' tailor": "I am left with this impression that those—shall I call them attractive—qualities which we are prone to ascribe to the Hebrews, among whom Shylock has always been the prototype have been quite as satisfactorily developed on the part of this insurance company as ever they were by the little Polish Jew," or of that of the defendant in a case which came before the High Court of Australia, where the trial judge expressed his "surprise that in the circumstances of the case a self-respecting institution should have thought it fit to contest its liability."

The Right of Interested Parties to Reinstatement.

It is now desirable to consider a statute that may seriously affect the right of subrogation in the case of the sale and purchase of a house, that is The Fires Prevention (Metropolis) Act 1774 (14 Geo. III, c. 78) Section 83, which authorises fire insurance offices, and requires them upon the request of any persons interested in the buildings insured, to spend the insurance moneys in reinstating the buildings, unless: (a) the party claiming such insurance money shall within 60 days next after the adjustment of the claim give a sufficient security that the insurance money shall be expended as aforesaid; or (b) that within that time the insurance money is settled or disposed of among the contending parties to the satisfaction and approbation of the insurers. This statute, which applies to New Zealand, has been held to be of general as opposed to local application. The following interpretations have been given to it. It enables a mortgagee whose mortgagor has insured, to insist on the insurer reinstating the premises—**Sinnott v. Bowden** (1912) 2 Ch. 414. It enables a lessor to insist on the insurance company reinstating when premises are insured in the joint names of the lessor and the lessee—**Sun Insurance Office v. Galinsky** (1914) 2 K.B. 545. When a lessee, who had covenanted with the lessor to insure in their joint names to three-fourths of the value of the premises and to apply the insurance money in reinstatement, improved the premises and affected a further insurance in his own name, the statute enabled the lessor to insist on the insurance company laying out in reinstatement the moneys received in receipt of the further insurance as well as of the original insurance—**Ex parte Gorely,** 10 Jur. N.S. 1085. It enabled a purchaser of an equity of redemption thrice removed from the original mortgagor to insist on an insurance company, in which the mortgaged buildings were insured in the names of the mortgagee and mortgagor, reinstating, although the policy provided that if the interest in the property insured should pass from the insured, otherwise than by will or operation of law, the insurance should cease to attach, unless the insurer should obtain the company's sanction, which had not been given.—**Mylius v. Royal Insurance Co., Ltd.** (1926) V.L.R. 252. In New Zealand, in **Cleland v. The South British Insurance Co.,** 9 N.Z.L.R. 177, the mortgagees obtained from the Supreme Court a declaration that they were entitled to require the company to expend in reinstatement the moneys payable under a policy taken out in the company by the mortgagor in her own name.

It must now be taken as good law that the right to require reinstatement is given to the various parties interested in the building, although they may not be interested in the policy moneys. The same rule will apply in the case of a house insured by the vendor, which a purchaser has agreed to buy and which is destroyed by fire before the completion of the contract. The purchaser can require the insurance company to expend the insurance moneys in rebuilding. It is suggested in **Williams on Vendor and Purchaser,** 3rd Edn., 487 (n) that in this case: "There is a statutory modification of the contract of insurance to the prejudice of the insurers. They are under a statutory duty to lay out the money in rebuilding which discharges them from the obligation of paying the vendor. But, as the vendor, having previously parted with his beneficial interest in the property insured, would derive no benefit from the reinstatement, it is submitted that the principle of subrogation would not apply, and the vendor could not be called upon to refund on completion, a sum of money which was neither paid to him nor laid out on his property."

In the Victorian case of **Mylius v. Royal Insurance Co.** *cit. sup.* Macfarlan, J., in delivering the judgment of the Court, said that this Statute must have the effect of taking away the option of the company to pay or rebuild, and whatever benefits would have resulted to the company from the exercise by it of its option in the manner excluded by the section. If the right of subrogation was one of such benefits, its incidental loss would afford no ground for declining to give effect to the plain words of the section. That case went to the High Court of Australia—**Royal Insurance Co., Ltd. v. Mylius** (1927) V.L.R. 1, when the decision of the Full Court of Victoria was upheld. The High Court considering Section 49 of the Victorian statute, the Imperial Acts Application Act 1922, substantially identical with Section 83 of 14 Geo. III, c. 78, decided that the obligation of the insurance company was absolute to comply with the request and was enforceable if necessary, by mandatory order, and that accordingly the sum insured must be laid out in reinstatement. "The statutory duty," said the majority of the Judges of the High Court, "is not only explicit but it is in law exigent, unless one or other of the two specifically named exculpating events comes into existence."

This decision seems in direct conflict with an earlier decision of Sim, J., in New Zealand, in **Searl v. South British Insurance Co., Ltd.** (1916) N.Z.L.R. 137. The authorities previously referred to seem to consider that the person interested in the building has the right to require reinstatement, irrespective of the fact that this reinstatement may relieve him of his liability or

take away some right to which the insurance company would but for the statute be entitled to. But Sim, J., looked at the statute from quite a different angle. The facts were that Searl was the tenant of buildings belonging to the Dunedin City Corporation under an agreement to keep in repair, which bound him to rebuild them at his own cost. One of the buildings which had been insured by the South British under a policy issued to the Corporation, was burnt down. Searl notified the South British that he required the insurance moneys applied in reinstatement. The Corporation notified Searl that it required him to remedy the breach of his covenant and to reinstate the building. He preserved a masterly inactivity, and the South British declined to reinstate, so he applied to the Supreme Court for a mandamus. Sim, J., said that the prerogative writ of mandamus which was the only one that applied in the circumstances, was in the discretion of the Court. He held that the Court should refuse to assist Searl in his attempt to escape from the obligations of his contract with the Corporation for these reasons. The South British, on payment of the loss of the Corporation, was subrogated to the Corporation's rights against Searl and became entitled to use the Corporation's name and sue Searl for damages for his breach of covenant. The declared object of the Statute was " the discouragement of fraud and arson," and it ought not to be construed as altering contractual rights and obligations further than was caused necessary by the operation of its express provisions. The express provisions did not involve necessarily any alteration in the rights and obligations *inter se* of landlords and tenants with regard to repair. A tenant who had covenanted to repair, might be able by virtue of the Statute, to get insurance moneys payable to his landlord expended in rebuilding, but that would not relieve him from his liability to pay damages for the breach of his covenant. Sim, J., thought, therefore, that the plaintiff, although he had the right given him by the Statute, still remained liable on his covenant to repair, and that, if he succeeded in getting the insurance moneys expended in reinstating the building, he would still remain liable to an action for damages for breach of his covenant; the learned Judge, therefore, refused a mandamus.

Whether our Court of Appeal or the Privy Council will look at the problem from the same angle and restrict the application of the Statute, or will say that the Court must give the person interested his statutory right to reinstatement irrespective of what the effect on the rights of the various parties may be, remains to be seen.

(*Finis.*)

Rules and Regulations.

Child Welfare Act, 1927: Form of application for registration of any premises as a Children's Home.—Gazette, No. 44, 24th May, 1928.

Local Legislation Act, 1927: Regulations re election of members to the New Plymouth High School Board.—Gazette No. 44, 24th May, 1928.

Animals Protection and Game Act, 1921-22: Notification re destruction of deer by specially authorised persons.—Gazette No. 44, 24th May, 1928.

London Letter.

Temple, London,
11th April, 1928.

My dear N.Z.,—

I hope you will forgive me for being brief on this occasion, seeing that (at my end of the post at any rate) it falls well within the Easter recess and, indeed, only just a day outside the Easter public holidays. You no doubt share, and approve of, our policy of gradual accretion so far as concerns bank-holidays: bit by bit, we extend the scope of these—just as one good turn deserves another, so one bank-holiday leads to another. . . . To be frank, we are all in the country at the moment, and you only catch us in chambers with difficulty, and confine us there by force. The Temple has, as I write, its perfectly quiet and perfectly good atmosphere: the scoundrels are away, and only the chaste and plodding pupils frequent the deserted lawns and courts: I feel out of my element in the latter category, and would be away like my fellow rogues. Let us be quick with it, then, so that I may catch my earlier train to Suffolk. . . .

There is only one matter of last term to harp upon, of course, and that is the upheavals in high places of the law, consequent upon the death of Viscount Cave (or Earl, as he became within but a few hours of his death) and the promotions thereby necessitated. First, as to the late Lord Chancellor: may I refer you, with all submission and with the moderation which is appropriate to the sad occasion, to what I wrote of him many months, even some years, ago in this paper? I have seen no adequate tribute to his memory in any obituary column: no judge of him seems to have caught, or been able to convey, the beautiful simplicity and truth which were manifestly and emphatically the great characteristics of this great Chancellor. Because he had not a turbulent temper, a volcanic mind or an assertive exuberance, the majority seem to have written him off as a nice man, indeed, but nothing particular of a personality or a Chancellor. Of this, however, I am sure: he is the greatest Chancellor of my day, unless the modern paramount qualification must be window-dressing. I say this, knowing nothing whatever of him, personally, and having no greater acquaintance than was to be had by anyone with a normal practice at the Bar, and with such average contacts with our professional and political institutions as must have been the lot of many a hundred Liberal-Unionist practitioner of my age.

The new Lord Chancellor is a man of very different calibre, strength personified and force in full evidence. " Sweet reasonableness " was, I think, the brilliant characteristic which I ventured to attribute to the late Lord Chancellor and is, I think, the very last characteristic to be attributed to the new Lord Chancellor, a man who makes up his mind and will have nothing to the contrary. He is said to be the greatest advocate of our day, but with that judgment I venture to disagree because it does not do him justice: if I may say so, he is too damned honest to be top of the top flight of advocacy: there is no deception, and very little capacity for melodrama, in him. You may judge him for yourselves from this, that his was the voice which convinced the last of us of the doubtful nature of the New Prayer Book expedient, and he was the

man we conservative Churchmen would have chosen above all others to advise us as to what attitude we should adopt and to see to it that our views should be made to maintain. A fine personality, square as his predecessor was gentle, but having the same great intellect as his predecessor behind an altogether different facade. . . .

And lastly, as to the new Solicitor-General, my excellent friend Merriman. Well, he is such a friend and I have spoken of him to you so fully already (I believe I was months, if not years, ahead of anyone else in foreseeing and forecasting this promotion for him) that I will now say no more than that we all wish him Godspeed! For is he not an ex-Service man, and is he not one of ourselves, accustomed till very recently to eat his lunch with us at our table, in the Temple hall, and be told his weaknesses and his faults from day to day by the least of us! Let me say this, however, we his backers, may have been taken by surprise by the rapidity of the fulfilling of our prophecies, but we have not the least doubt that, little though he be known to the outside world, he will abundantly justify our betting and the higher authority's selection. A very modest, a very courteous, and a very attractive man, he is a little late, in one's acquaintance with him, in disclosing the very remarkable lucidity and ability of his mind, the by no means negligible, indeed rather formidable strength of his cross-examination and his more than average capacity to digest and marshall the most complicated facts and re-present them in an order not only intelligible but positively fascinating.

If there are any notable cases left over from last term, I will refer to them in my next. To tell you the dismal truth, none of my young men are to be seen among the chaste and plodding above-mentioneds on the lawn.

Yours ever,
INNER TEMPLAR.

The N.Z. Conveyancer.

Conducted by C. PALMER BROWN.

Agreement for Acquisition of Shares in Building Society by Company about to be Formed.

AN AGREEMENT made this day of One thousand nine hundred and
BETWEEN the several persons mentioned and described in the Third Column of the Schedule hereto and who are hereinafter collectively referred to as "the vendors" of the one part and
for and on behalf of the Company hereinafter mentioned (which Company is hereinafter referred to as "the Company") of the other part WHEREAS the vendors are members of the Building Society a Society duly registered under the Building Societies Act 1908 and hereinafter referred to as "the Society" and are severally registered in the books of the Society as the owners of shares to the number set opposite their respective names in the first column of the said Schedule and which are numbered in the books of the Society as set forth in the second column of the said Schedule AND WHEREAS at the desire and request of the vendors the Company to be called
is about to be formed under the Companies Act 1908 having for its objects among other things, the acquisition of shares in the Society AND WHEREAS the Memorandum and Articles of Association of the Company have with the privity of the vendors been already prepared and have for the purposes of identification been subscribed with the signature of the solicitor of the Society AND WHEREAS the nominal capital of the Company is to be divided into shares of each AND WHEREAS by the said Articles of Association it is provided that the Company shall immediately after the incorporation thereof adopt the agreement therein referred to being these presents NOW THIS AGREEMENT WITNESSETH that in pursuance of the premises and for the consideration herein appearing :—

1. The Vendors jointly and severally agree in the event of the dissolution of the Society to sell and the Company when incorporated agrees to purchase from each and every of the vendors in the event of such dissolution his or her share or shares as the case may be in the Society and all his or her interest in the Society of whatsoever nature or kind.

2. As to those of the vendors who are holders of shares in the Society upon which at the dissolution of the Society there shall be no moneys owing in respect of any appropriation under Section — of the rules of the Society the consideration for the sale by them to the Company shall be the several sums of money set opposite their names respectively in the fourth column of the said Schedule hereto for each and every share held by them in the Society and the purchase money of each such share shall be satisfied by the allotment to them respectively of an ordinary share in the capital of the Company of twenty-five pounds (£25) paid up to the amount set opposite the respective names of the said vendors in the said fourth column of the said Schedule hereto.

3. As to those of the vendors who are holders of shares in the Society upon which there shall at the dissolution of the Society be any moneys owing in respect of any appropriation under Section — of the rules of the Society the consideration for the sale by them to the Company shall be the several sums of money set opposite their names respectively in the said fourth column of the said Schedule hereto for each and every share held by them in the Society and the purchase money of each such share shall be satisfied by the allotment to them respectively of "B" shares in the capital of the Company of Twenty-five pounds (£25) paid up to the amounts set opposite their respective names in the said fourth column of the said Schedule hereto.

4. The vendors jointly and severally agree that pending the dissolution of the Society they will at all times exercise their rights and privileges as members of the Society in such manner as the Chairman of Directors for the time being of the Society shall direct.

5. The vendors jointly and severally agree with the Company that upon the dissolution of the Society they will hold their shares in the Society in trust for the Company and will deal with them as the Company shall direct.

6. Upon the adoption of this agreement by the Company in such manner as to render the same binding on the Company the said shall be discharged from all liability in respect thereof.

IN WITNESS whereof the vendors have signed their names in the fifth column of the said Schedule hereto and the said has signed his name at the foot hereof.

Witness to the signature of :

Rules—Appeals to Privy Council.

(*Continued from page 100*)

Amount of taxed costs to be inserted in His Majesty's Order in Council.

80. The amount allowed by the Taxing Officer on the taxation shall, subject to any appeal from his taxation to the Judicial Committee, and subject to any direction from the Committee to the contrary, be inserted in His Majesty's Order in Council determining the Appeal or Petition.

Taxation on the pauper scale.

81. Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of Counsel, and shall only award to the Agents out-of-pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-eights of the usual professional charges in ordinary Appeals. Such pauper scale shall apply to and include the application upon which leave to appeal *in forma pauperis* was granted.

Security to be dealt with as His Majesty's Order in Council determining Appeal directs.

82. Where the Appellant has lodged security for the Respondent's costs of an Appeal in the Registry of the Privy Council, the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's Order in Council determining the Appeal.

Miscellaneous.

Power of Judicial Committee to excuse from compliance with Rules.

83. The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Applications to be excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council, who shall take the instructions of the Committee thereon and communicate the same to the parties. If in the opinion of the said Registrar it is desirable that the application should be dealt with by the Committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a Notice of Motion returnable before the Committee.

Amendment of documents.

84. Any document lodged in connection with an Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be amended by leave of the Registrar of the Privy Council; but if the said Registrar is of opinion that an application for leave to amend should be dealt with by the Committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a Notice of Motion returnable before the Committee.

Affidavits may be sworn before the Registrar of the Privy Council.

85. Affidavits relating to any Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the Registrar of the Privy Council.

Change of Agent.

86. Where a party to an Appeal, Petition, or other matter pending before His Majesty in Council changes his Agent, such party, or the new Agent, shall forthwith give the Registrar of the Privy Council and the outgoing Agent notice in writing of the change, and shall amend the Appearance accordingly. Until such notices are given the former Agent shall be considered the Agent of the party until the final conclusion of the Appeal, Petition, or other matter.

Scope of application of Rules.

87. Subject to the provisions of any Statute or of any Statutory Rule or Order to the contrary, these Rules shall apply to all matters falling within the Appellate Jurisdiction of His Majesty in Council.

Mode of citation and date of operation.

88. These Rules may be cited as the Judicial Committee Rules, 1925, and they shall come into operation on the 1st day of January, 1926.

SCHEDULE A.

RULES AS TO PRINTING.

1. All Records and other proceedings in Appeals or other matters pending before His Majesty in Council or the Judicial Committee which are required by the above Rules to be printed shall be printed in the form known as Demy Quarto.

II. The size of the paper used shall be such that the sheet when folded and trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes. The number of lines in each page of Pica type shall be forty-seven or thereabouts, and every tenth line shall be numbered in the margin.

IV. Records shall be arranged in two parts in the same volume, where practicable, viz.:—

Part I, the pleadings and proceedings, the transcript of the evidence of the witnesses, the Judgments, Decrees, &c., of the Courts below, down to the Order admitting the Appeal.

Part II, the exhibits and documents.

V. The Index to Part I shall be in chronological order, and shall be placed at the beginning of the volume.

The Index to Part II shall follow the order of the exhibit mark, and shall be placed immediately after the Index to Part I.

VI. Part I shall be arranged strictly in chronological order —*i.e.*, in the same order as the index.

Part II shall be arranged in the most convenient way for the use of the Judicial Committee, as the circumstances of the case require. The documents shall be printed as far as suitable in chronological order, mixing Plaintiff's and Defendant's documents together when necessary. Each document shall show its exhibit mark, and whether it is a Plaintiff's or Defendant's document (unless this is clear from the exhibit mark); and in all cases documents relating to the same matter, such as—

(*a*) A series of correspondence, or

(*b*) Proceedings in a suit other than the one under appeal, shall be kept together. The order in the Record of the documents in Part II will probably be different from the order of the Index, and the proper page number of each document shall be inserted in the printed Index.

The parties will be responsible for arranging the Record in proper order for the Judicial Committee, and in difficult cases Counsel may be asked to settle it.

VII. The documents in Part I shall be numbered consecutively.

The documents in Part II shall not be numbered, apart from the exhibit mark.

VIII. Each document shall have a heading which shall consist of the number or exhibit mark and the description of the document in the Index, without the date.

IX. Each document shall have a marginal note, which shall be repeated on each page over which the document extends, viz.:—

Part I:—

(*a*) Where the case has been before more than one Court the short name of the Court shall first appear. Where the case has been before only one Court the name of the Court need not appear.

(*b*) The marginal note of the document shall then appear, consisting of the number and the description of the document in the Index, with the date, except in the case of oral evidence.

(*c*) In the case of oral evidence, "Plaintiff's evidence" or "Defendant's evidence" shall appear beneath the name of the Court, and then the marginal note consisting of the number in the Index and the witness's name, with "examination," "cross-examination," or "re-examination," as the case may be.

Part II:—

The word "Exhibits" shall first appear.

The marginal note of the exhibit shall then appear, consisting of the exhibit mark and the description of the document in the Index, with the date.

X. The parties shall agree to the omission of formal and irrelevant documents, but the description of the document may appear (both in the Index and in the Record), if desired, with the words "not printed" against it.

A long series of documents, such as accounts, rent-rolls, inventories, &c., shall not be printed in full, unless Counsel so advise, but the parties shall agree to short extracts being printed as specimens.

XI. In cases where maps sent from abroad are of an inconvenient size or unsuitable in character, the Appellant shall, in agreement with the Respondent, prepare in England, from the materials sent from abroad, maps drawn properly to scale and of reasonable size, showing, as far as possible, the claims of the respective parties, in different colours.

SCHEDULE B.

COUNTRIES AND PLACES REFERRED TO IN RULES 22, 29, AND 34.

Australia	Fiji
British Honduras	Hong Kong
British North Borneo	India
Brunei	Mauritius
Ceylon	New Zealand
China	Persia
Eastern African Dependencies	Seychelles
Falkland Islands	Somaliland Protectorate
Federated Malay States	Straits Settlements.

SCHEDULE C.

I. FEES ALLOWED TO AGENTS CONDUCTING APPEALS OR OTHER MATTERS BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(*33⅓ per cent. is added to these fees*).

	£	s.	d.
Retainer Fee	0	13	4
Drawing Appearance or Caveat	0	5	0
Perusing printed Record (for every printed sheet of 8 pages)	1	1	0
Perusing written Record (for every 25 folios)	0	6	8
Drawing Index (per folio)	0	2	0
Drawing Marginal Notes and Headings (per folio)	0	0	6
Attending at the Registry to examine proof print of Record with the certified Record—			
Per day	3	3	0
Per half-day	1	11	6
Correcting revised print of Record (per sheet of 8 pages)—			
Foreign or Indian cases	1	1	0
Other Cases	0	10	6
Instruction for Petition or Motion, or to Oppose	0	10	0
Instructions for Petition of Appeal	0	10	0
Instructions for Case	1	0	0
Drawing Petition, Motion, Case, or Affidavit (per folio)	0	2	0
Copying Petition, Motion, Case, or Affidavit (per folio)	0	0	6
Correcting proof of Case (per sheet of 8 pages)—			
Foreign or Indian cases	1	1	0
Other cases	0	10	6
Drawing and fair copy Case Notice	0	10	0
Perusing Petition, Motion, or Affidavit (per folio)	0	2	0
Perusing Petition of Appeal	1	1	0
Perusing Case (per printed sheet of 8 pages)	1	1	0
Instructions for and preparing Retainer to Counsel	0	10	0
Instructions to Counsel to argue an Appeal	1	0	0
Instructions to Counsel to argue a Petition or Motion	0	10	0
Instructions to printer	0	10	0
Attending Consultation	1	0	0
Attending at the Council Chamber for the hearing of a Petition or Motion	1	6	8
Attending at the Council Chamber all day on an Appeal not called on	2	6	8
Attending the hearing of an Appeal (per day)	3	6	8
Attending a Judgment	1	6	8
Approving draft Order	0	10	0
Attendances generally	0	10	0
Attendances on Counsel where fee is 30 guineas or over	1	0	0
Drawing Bill of Costs (per folio)	0	1	0
Copying Bill of Costs (per folio)	0	0	6
Attending Taxation of Costs of an Appeal	2	2	0
Attending Taxation of Costs of a Petition or Motion	1	1	0
Sessions Fee for each year or part of a year from the date of Appearance (in Appeals only)	3	3	0
Letters, &c. (in Petitions)	1	1	0
Letters, &c. (in Appeals)—			
For First year	2	2	0
For each following year	1	1	0

II. COUNCIL OFFICE FEES.

Entering Appearance	1	0	0
Amending Appearance	0	10	0
Examining proof print of Record with the certified record at the Registry (chargeable to Appellant only)—			
Per day	2	0	0
Per half-day	1	0	0
Lodging Petition of Appeal	3	0	0
Lodging Petition for special leave to appeal	2	0	0
Lodging any other Petition or Motion	1	0	0
Lodging Case or Notice under Rule 60	2	0	0
Setting down Appeal (chargeable to Petition only)	5	0	0
Setting down Petition for special leave to appeal (chargeable to Petitioner only)	2	0	0

(*Continued at foot of next column.*)

Correspondence.

The Editor,
"N.Z. Law Journal."
Sir,

Service of Magistrate's Court Summonses by Post.

I have read with considerable interest the correspondence in your columns on this subject and may I be permitted to add just a few words.

It seems to me that The Honourable the Minister of Justice is as to the principle of service by post correct, and is to be congratulated for having introduced the reform which should save considerable expense in cases where the defendant resides at a distance. There can be no doubt that the large fees for mileage incurred in such cases are often a cause of considerable hardship. Defendants must surely sooner or later realise that to refuse to accept summonses served by registered post can be of no advantage to them and will mean simply that heavy fees will be incurred for mileage when personal service comes soon afterwards to be effected.

But your correspondent, Mr. L. A. Taylor, of Hawera, is also correct. As he points out, the cumulative effect of Section 75 of the Magistrate's Courts Act 1908, and of Section 4 of the Amending Act of last year is to constitute a number of permitted modes of service. It may be a disputable point as to whether the choice of a particular mode of service in each particular case is, on the proper interpretation of the statutory provisions, which do not appear to be expressed in particularly lucid language, given to the plaintiff, or whether the mode of service is to be directed by the Court. If a plaintiff has the right to select any one of the enumerated modes of service then one may well ask what justification there is for attempting to deprive him of this right without statutory authority. If, on the other hand, the proper view is that the manner of service is in each case to be directed by the Court then it is rather strange to find this apparently unconstitutional attempt to indicate the principles upon which the discretion is to be exercised.

Doubtless there have been found practical difficulties in bringing into effective operation the provisions of the Act of 1927, and the Departmental Circular in question may be perhaps explainable on that ground. If this is the case, then why not as early in the coming Session as possible amend Section 4 of the 1927 Act, by adding words having the effect of the circular. To such a course there could be in any event no constitutional objection.

CONSTITUTIONAL.

(*Continued from preceding column*)

Setting down any other Petition (chargeable to Petitioner only)	1	0	0
Summons	1	0	0
Committee Report on Petition	2	0	0
Committee Report on Appeal	3	0	0
Original Order of His Majesty in Council determining an Appeal	5	0	0
Any other original Order of His Majesty in Council	3	0	0
Plain copy of an Order of His Majesty in Council	0	5	0
Original Order of the Judicial Committee	2	0	0
Plain copy of Committee Order	0	5	0
Lodging Affidavit	0	10	0
Certificate delivered to parties	0	10	0
Lodging Caveat	1	0	0
Subpoena to witnesses	0	10	0

Taxing Fee, 6d. for each £1 allowed, or fraction thereof, up to £300, and 1 per cent. beyond that sum, calculated at the rate of 5s, for each £25 or a portion thereof.

Bench and Bar.

Mr. E. Page, S.M., has been appointed Chairman of the Otaki Licensing Committee, in succession to Mr. J. H. Salmon, S.M.

It is understood that His Honour Sir William Sim and Mr. J. C. Stephens, of Dunedin, are together preparing a volume of Supreme Court Forms for publication.

Mr. L. H. Herd, of Tripe, Herd and Herd, Wellington, has been admitted as a Barrister by His Honour Mr. Justice Ostler.

Mr. F. W. Aickin, of Wellington, has been admitted as a Solicitor by His Honour Mr. Justice Ostler, on the motion of Mr. C. A. L. Treadwell.

Mr. C. Freyberg, District Public Trustee at Hawera, and Mr. E. L. Mulcock, of the staff of Messrs. Welsh, McCarthy, Beechey and Houston, Hawera, have been admitted as Solicitors by His Honour Mr. Justice Reed, on the motion of Mr. J. Houston.

Legal Literature.

Moore's Practical Agreements.

Eighth Edition, by F. W. Pearson, M.A., LL.B., B.C.L. (pp. 478 : Butterworth & Co. (Publishers) Ltd.)

Moore's Practical Agreements is one of those works which have come to be regarded as leaving little, if any, room for improvement. But new statutes and judicial decisions, both numerous and important, since the last edition was published seventeen years ago, have necessitated considerable alterations in the matter of the volume. Many obsolete forms have been discarded and new ones take the place of the old. The essential characteristic of the book—the practical nature of the forms—remains. Many of these precedents can be used in New Zealand without the slightest modification; very many others require only some trivial alteration; those which cannot properly be adopted in this country are few and far between. All of the English precedent books suffer from the point of view of the New Zealand practitioner, from this disadvantage, but it can be truly said that the objection applies with the least force to *Moore*. Take, for instance, the forms collected under the titles Advertisements, Affiliation, Arbitration, Building, Business, Commission, Compromises, Easements, Exchange, Guarantees, Inventions, Landlord and Tenant, Mortgages, Partnership, Sale of Land, Separation, Service and Solicitors—and these are but a few of the titles that catch the eye while one turns over the pages—there are relatively few of these forms which cannot be adapted to our law.

In this edition the notes are both more numerous and more comprehensive than in its predecessors. The conciseness of the precedents is a feature which will commend itself to many and one in keeping with the scope of the work. Without doubt *Moore* is a book which ought to find a place in the library of every Solicitor.

Lewin's Practical Treatise on The Law of Trusts.

(Thirteenth Edition). By Walter Banks. (pp. 1339 : Sweet & Maxwell, Ltd.).

During the period of sixteen years which has elapsed since the publication of the last edition of *Lewin*, the mass of legislation embodied in the English Property Acts of 1925, and other statutory enactments, has been so extensive and so far-reaching in character that a complete remodelling of this standard work on Trusts has been found necessary.

The editor has omitted several hundred pages of matter rendered out of date, but the new matter inserted more than counterbalances the obsolete. In previous editions the work of the editors has been distinguished from that of the author himself by being inserted in square brackets, but this distinction, which now characterises several of our leading legal treatises, has in this edition, one observes with some regret, been dropped, though one can well believe that the wholesale remodelling necessitated by the new legislation rendered the retention of this feature impracticable. The revolutionary changes—some of them weird—effected by Birkenhead's Acts have, of course, little or no interest to the New Zealand practitioner but, nevertheless, the greater part of the English law of trusts still remains applicable in this country and there can be no doubt that one finds in this work, which has for so long held a leading place, an authorative and lucid exposition of that law. Reference will be found to all the cases reported up to July, 1927, and the decisions reported while the work was in the press are contained in an addendum. Mr. Walter Banks has indisputably done his work well.

Sic Transit Gloria.

The making of a judge of the High Court is in our own day a matter of moment; say what you will, a judge is a person high and lifted up; respected, admired, and even envied by the vast majority of legal practitioners. But it is a fact of infinite sadness for those who are prone to grieve over such matters, that in fifty years or so the names of most of our respected judges will be remembered no more, save when, in moments of stress, industry or necessity, their reported and un-reversed judgments are cited in support of a dubious case.

Collins, M.R., in 1906, in **Rex v. Melladew** (1907) 1 K.B. at p. 201, quoted a dictum of "that eminent judge, the late Christian, J." How many know that there was a judge of that name at all, still less that he was eminent? However, Christian, J., is rather a hard one, as the unfortunate judge was Irish. But who was Sir Gillery Pigott? Sir Henry Singer Keating? Sir William Robert Grove? Sir John Quain? Sir George Honyman? Even Sir William Bovill? Or Sir Charles Hall? All these lived and reigned half-a-century ago or little more; and one of them a Chief Justice. Some curious lawyers will, of course, recognise them for what they were; but not all of them are household words even in the best informed legal families. Verily, the glory of a judge, it quickly passeth away.

—"Law Journal."