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"A man can never gallop over the fields of Law on Pegasus nor fly across them on the wings of oratory."
—Daniel Webster.

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Reports of Judicial Proceedings and Divorce (Consolidation) Bills.

Several Bills have come before Parliament this Session which are of general interest to the Profession. The Judicial Proceedings (Regulation of Reports) Bill was introduced by a private member, Mr. P. Fraser, and is on the lines of the English Bill which prohibits the publication of the details of divorce actions. Mr. Fraser's Bill in some respects appears to cover ground already covered by the Indecent Publications Act; but, insofar as it seeks to prevent the publication of the details of divorce suits, it directly raises the question as to whether it is in the public interest that the conduct of the parties to divorce suits should be published. The Attorney-General on the second reading of the Bill expressed the opinion that the fear of the publicity of divorce suits acted as a deterrent to misconduct in certain classes of cases. Although such an opinion may have been expressed by opponents of the English Bill when it came before the House of Commons, it is extremely doubtful whether any great body of the public believed that publicity acted as a deterrent to misconduct. On the other hand there is no question but that fear of publicity prevented the bringing of proceedings in a great number of cases where misconduct was alleged and admitted. Whatever effect, however, publication might have on the parties and their actions, no one is likely to assert that the publication of the details of such cases is otherwise than injurious to public morals. Opponents of the Bill have said that since it was passed in England the number of divorce suits has shown a great increase. Such increase, however, does not of necessity infer an increase in marital misconduct, although it does infer that more people are taking advantage of their right to sever marital relations, and the increased number of cases in which aggrieved parties take advantage of their rights may be due partly to the restricted publicity given. It should not, however, be forgotten that the additional grounds upon which divorce can be obtained are the principal cause of the increase in the number of petitions for divorce presented in late years.

It is the innocent party who as a general rule dreads publicity, not the guilty party. It can be said that this is unreasonable, but nevertheless it is so. If one could be satisfied that fear of publicity would prevent misconduct itself, the argument of the Attorney-General would be a very strong one; but, if the real effect is not to lessen misconduct, but only to deter people from exercising the rights such misconduct gives them, the argument has little if any weight. After all publicity is only one of the punishments for misdemeanour, whether domestic or public; if as a punishment it falls upon the innocent as well as the guilty it does not appeal as a model instrument of justice, and if it presses more heavily upon the innocent than the guilty it cannot be justified on any ground at all.

Allied in subject matter to Mr. Fraser's Bill is the Divorce and Matrimonial Causes Bill introduced by the Attorney-General. This is a Consolidation Bill, and its object is to remove some anomalies in the existing law as disclosed by reported cases and to place the existing Statute Law in a more convenient and, according to the Attorney-General, more modern form. The provision allowing a wife, who has been separated from her husband for the statutory period so that she can claim separation as a ground for divorce, to retain her domicil in the same way as she can when desertion is the ground of her suit is a convenient and wise provision. The provision, however, appears only to apply to those cases where the husband was originally domiciled in New Zealand, and the Leader of the Opposition suggested that it should be extended to meet the case where a husband who was domiciled elsewhere than in New Zealand at the time of his marriage to a New Zealand girl had subsequently left New Zealand. On the authorities Mr. Holland's contention that in such a case the only Court having jurisdiction, despite desertion, is a Court in the country of the husband's domicil at the time of marriage seems sound, and, we understand, was agreed to by the Attorney-General who promised that consideration should be given to the suggestion when the Bill was before the Statutes Revision Committee. When the Statutes Revision Committee deal with the matter they will find some difficulty in drafting a provision which, while bringing in the desired amendment, does not conflict with the principles of International Law. The question of domicil as the basis of jurisdiction is long established and that domicil is, till change of domicil, taken to be that of the husband at the time of marriage. The drafting of the amendment will need very careful consideration by the Crown Law Officers and it is quite possible that they will find themselves unable to make provision for the case in question, although careful consideration of the growth of the right of a deserted wife may lead to the conclusion that the Court can extend the principle and that legislation affecting it would not offend against the doctrines of International Law.

Suggestions for further improvement in the present provision of the Divorce Law were made by Mr. Wilford. One of these was to the effect that, where a wife presented a petition for dissolution on the ground of the adultery of her husband, the petitioner should make the person alleged to have committed adultery with the husband a respondent, unless on special grounds the Court ordered otherwise. The Attorney-General, however replied that, the Bill before Parliament being a Consolidation Bill, he thought it would be unwise to deal with this matter and the other suggestions of Mr. Wilford which added a further ground for divorce to those already existing in the present Bill; but that, in regard to a joinder of a woman co-respondent, he would consider whether it could be dealt with under the rules of procedure. No doubt the question will receive careful consideration; it is not, however, quite such a simple question as it seems, and is not unduly noncontentious. Considerations relevant to Mr. Fraser's Publicity Bill arise and have to be considered. In most cases of petitions by a wife on ground of adultery the woman concerned is unnamed.

Court of Appeal.

Reed, J.
Ostler, J.
Blair, J.
Smith, J.

July 4; 16, 1928.
Wellington.

WRIGHT v. MORGAN.

Trustee—Purchase by Trustee of Portion of Trust Estate—Purchase Judicially Set Aside—Liability of Trustee for Occupation Rent Basis on Which Such Occupation Rent to be Assessed.

Appeal from the decision of Adams, J., as to the basis upon which Douglas Wright should pay an occupation rent for the use of two estates Surrey Hills and Windermere (excluding Chapman's Block). The estates which formed part of a trust estate had been purchased by Wright, a trustee, but the purchase had been set aside by the Court: see (1926) A.C. 778; 2 B.F.N. 445. It was admitted by counsel for Wright that an occupation rent should be paid.

Sargent for appellant.
Donnelly for respondent.

SMITH, J., delivering the judgment of the Court, stated that it was contended for the appellant that what he should pay as an occupation rent was interest at agreed rates upon the capital value of the land in question at some period within seven years from the testator's death. That contention was founded firstly on the fact that the trustees of the will of E. C. Wright were not authorised to postpone conversion of the property beyond seven years from the testator's death, and secondly, on the fact that the life-tenants who would benefit by an occupation rent acquiesced in the sale of the lands to Douglas Wright and were aware of the position as explained by Stout, C.J., in his judgment in the Court of Appeal (1925) N.Z.L.R. 689, at pp. 710 to 720. Counsel contended that it was fair to adopt such a basis, notwithstanding the fact that the sale had been finally set aside by the Privy Council (1926) A.C. 788. While their Honours thought there was some force in that argument, their Honours were unable to accept it. An occupation rent was intended to represent the rent that would be fairly payable from year to year in respect of the occupation of the property. See the forms of order in Seton's Judgments and Orders (7th Edition) Volume 2, p. 1492. What the appellant proposed was that he pay merely interest on the capital value of the property at some date within seven years of the testator's death. In the opinion of their Honours that could not be fairly described as an occupation rent. The admission, therefore, that an occupation rent should be paid, defeated the appellant's argument.

Fraud was not alleged against Douglas Wright, and the basis upon which an occupation rent should be fixed depended upon the general principles of Equity relative to the restoration of the parties to their original position upon a rescission of contract. As was said by Sim, J., in **Fulton v. Reay** (1925) G.L.R. 538: "The object of the Court in exercising this jurisdiction is to do what is practically just, as Lord Blackburn said in **Erlanger v. New Sombrero Phosphate Co.**, (3 A.C., at page 1278)." In the present case, the Judge in the Court below had found that an occupation rent should be based on the Government Valuation of the land from time to time. In so doing, he had exercised his discretion as to what was practically just in the circumstances. Their Honours agreed with that decision, and the appeal must be dismissed.

Subsequence experience had, however, made it clear that for the year 1921 even Government Valuations were excessive, and Mr. Donnelly had offered to reduce the Government Valuation for that year by the sum of £18,500. The judgment of the Court below would be varied accordingly.

Appeal dismissed.

Solicitors for appellant: **Slater, Sargent, Dale and Connal,** Christchurch.

Solicitors for respondents Morgan and others: **Wilding and Acland,** Christchurch.

Solicitors for respondents trustees: **Joynt, Andrews and Cottrell,** Christchurch.

Supreme Court

Adams, J.

July 11; 26, 1928.
Christchurch.

BRENTNALL AND OTHERS v. HETRICK AND OTHERS.

Trade Union—Recovery of Funds from Branch Union—Parent Union Registered in England Having Three Branches in New Zealand—Branch Breaking Away and Registering as Independent Industrial Union and Refusing to Surrender Funds to Parent Union—Proposed Distribution of Branch Funds Among Members—Whether *ultra vires* of Parent Union to Form Branches in New Zealand—Whether Branches Part of One Trade Union—Power of Court to Make Order for Payment of Funds to Parent Union or Grant Injunction Restraining Distribution of Funds Among Members of Branch Union—Declaration that Proposed Distribution *ultra vires*—Trade Union Acts (Eng.) 1871, Section 4 (a) and (d), 1876 (Eng.) Section 6—Trade Union Act, 1908, Sections 2 and 5 (a) (c) and (d).

An action by trustees of the Amalgamated Engineering Union to recover from the trustees of a branch certain funds which the latter trustees had retained. The Amalgamated Engineering Union (referred to as the parent union) was a trade union registered in England under the Trade Union Acts, and the defendants were the trustees of New Zealand Branch No. 3 of that union. There was originally only one New Zealand branch, established some time prior to the year 1908. It had never been registered as a trade union in New Zealand, but obtained registration as an Industrial Association of Workers, in 1908. In 1921 the New Zealand branch was divided into three branches distinguished as Nos. 1, 2 and 3, each branch having separate officers and trustees. In March, 1923, the three branches decided to continue as an Industrial Association only. The trustees of branches Nos. 1 and 2 remitted the funds in their hands to the trustees of the parent union in accordance with the rules of the society, but the trustees of branch No. 3 retained the funds in their hands and applied them to the use of the Industrial Association. It was admitted that, subject to payment of certain expenses, those funds were held by the defendants in trust for the plaintiffs as trustees for the parent union. It was also common ground that the union was an unlawful society at common law, some of its objects being in restraint of trade. The plaintiffs asked for judgment for the amount of the funds, and in the alternative an injunction restraining the defendants from distributing the funds of No. 3 branch amongst the members of the branch, and from dealing with the said funds otherwise than in accordance with the rules of the union, and for an order for payment and other relief.

Acland and Wilding for plaintiffs.
O'Regan for defendants.

ADAMS, J., said that counsel for the defendants contended, first, that the establishment by the parent union of branches beyond the seas was *ultra vires* under the Trade Union Acts, 1871, and 1876, (Eng.); secondly, that on the facts the branches in New Zealand were trade unions separate from and independent of the parent union, and therefore that the jurisdiction of the Court was ousted by Section 4 (a) and 4 (d) of the Trade Unions Act, 1871 (Eng.) or by Sections 5 (a) and 5 (d) of the Trade Union Act, 1908 (New Zealand). In support of his first contention Mr. O'Regan had relied upon Section 6 of the Trade Union Act, 1876, (Eng.) which had not been enacted in New Zealand. That section required a trade union carrying on or intending to carry on business in more than one "country" to have a registered office (which His Honour thought implied registration) and to send copies of its rules to the Registrar of each of the other countries to be recorded by him, and provided that until such rules were so recorded the union should not be entitled to any of the privileges of the Trade Union Acts in that country. In that section, however, "country" was to be read as meaning England, Scotland, or Ireland. But that only meant that where the words "country" or "countries" occurred in the section the words "England, Scotland, or Ireland" were to be substituted. The section had reference only to unions carrying on or intending to carry on business

in two or more of the three countries named. But a trade union was not the creation of Statute—**Osborne v. Amalgamated Society of Railway Servants,** (1909) 1 Ch. 163, 174, per Cozens-Hardy, M.R. As stated in 27 Halsbury's Laws of England, 600, they had existed and still existed at common law, and at common law might be either lawful or unlawful according as their objects and rules did or did not violate the general principles of restraint of trade. At common law there was no territorial limit to their membership or lawful operations. Nor did His Honour see any valid objection to such a society having branches anywhere or imposing fit rules for their government. Such branches would, no doubt, be governed by the law of the country in which they carried on their business and would also enjoy the privileges and advantages given by that law. His Honour thought, therefore, that the provisions of Sections 2 to 7 of the Trade Union Act, 1926 (N.Z.) applied to the branches of the parent union in New Zealand. If His Honour was right, the parent union and its branches together constituted one trade union. The funds held by the defendants were not the funds of the branch as distinguished from the union, but funds of the branch as a constituent part of the union: **Cope v. Crossingham,** (1909) 2 Ch. 148, 163, per Buckley, L. J. and payable to the union under the social contract.

His Honour thought, however, that so far as the claim to a judgment for money was concerned, the plaintiffs were caught by Subsection (c) (i) of Section 5. Read with the introductory part it ran thus: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing any agreement for the application of the funds of a trade union to provide benefits to members." The construction of that section was considered by Mr. Justice Fry, in **Wolfe v. Matthews,** 21 Ch. D. 194. The plaintiffs in that case, who were members of a trade union, sought an injunction to restrain other members from misapplying the funds contrary to agreement. In the course of his judgment Fry, J., said: "An order that the defendants should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the money to somebody else. Either that is no enforcement at all or it is an indirect enforcement. To take a simple case, if there is a contract by A to pay £100 to B, that contract is enforced by a judgment of the Court directing A to pay B. And the contract is only indirectly enforced or not at all by a judgment restraining A from paying the money to someone else." That construction of the statute was adopted by the Court of Appeal, and in the House of Lords, by Lord Halsbury and Lord Lindley, in **Yorkshire Miners' Association v. Howden,** (1903), 1 K.B. 308; (1905) A.C. 256. It was again discussed in **Amalgamated Society of Carpenters, Etc., v. Braithwaite and Others** (1922) 2 A.C. 440, where Lord Atkinson (at p. 461) challenged the criticism of Mr. Justice Fry's statement by Lord Davey in **Howden's case** (*cit. sup.*) at pp. 272, 274, saying: "I think **Wolfe v. Matthews** will survive Lord Davey's criticism and is entitled to be treated as a safe authority to rely upon, and be guided by, notwithstanding that the principle upon which it is based is considered to be in conflict with that upon which the Master of the Roll's decision was rested in **Rigby v. Connol,** 14 C.D. 482." His Honour referred also to the statement of the principle by Lord Wrenbury, in **Amalgamated Society of Carpenters' case** (*cit. sup.*) at p. 470. In **Cope v. Crossingham,** (1908) 2 Ch. 624; (1909) 2 Ch. 148, the plaintiffs asked for a declaration, an injunction, and an order for payment. Eve, J., made a declaration that the proposed distribution of funds and property would be *ultra vires,* and that the defendant trustees held the same upon trust to apply them in accordance with the rules of the society, and reserved leave to apply for an injunction and order for payment. The Court of Appeal affirmed the order of Eve, J., and in addition granted the injunction, but refused to make any order for payment. In **Mayor, Etc. of Lower Hutt v. Yerex,** (1905) 24 N.Z. L.R. 697, Stout, C.J. appeared to have entertained a doubt whether the Supreme Court had power to make such a declaration, but in **Dufaur v. Kenealy and Others,** (1908) 11 G.L.R. 71, Edwards, J., after considering the authorities, was of opinion that the Court had such power, and made a declaration accordingly. So far as His Honour knew that declaration had not been questioned and His Honour proposed to follow it. A declaration was, therefore, made that the defendants held the funds in issue upon trust for the parent union. As the funds had been paid over to the Industrial Association the Court could not grant an injunction restraining the defendants from misapplying them in breach of the trust, and, for the reasons stated, no order for payment could be made.

Solicitors for the plaintiffs: **Wilding and Acland,** Christchurch

Solicitor for the defendant: **P. J. O'Regan,** Wellington.

Ostler, J. June 19; July 20, 1928.
Napier.

NAPIER BOROUGH COUNCIL v. ATTORNEY-GENERAL.

Municipal Corporation — Special Act — Powers — Buildings — Whether Power to Erect Shops, Offices, or Hotels, or other Business Premises on Lands Vested in Corporation—"Any Building"—Effect of Subsequent General Act on Prior Special Act—Whether Power to Reconstruct, Repair, or Alter Existing Buildings—Power to Raise Loan Required for Any Such Purposes on Security of Such Lands Without Consent of Ratepayers—Local Bodies Loans Act 1926—Napier Borough Endowment Act 1876, Section 4.

Originating summons for an order under the Declaratory Judgments Act 1908 construing certain provisions of the Napier Borough Endowment Act 1876, and declaring what powers the Borough had to build on certain lands vested in it by that Act, and to borrow money on the security of that land. Section 2 of that Act provided that the lands described in the first and second schedules to the Act were thereby declared to be an endowment for the use, benefit and improvement of the Borough of Napier. Among the lands in the first schedule was a Section in the Town of Napier, containing 2 roods 2 perches, which was known as the "Market Reserve." The section was situate in the centre of the business portion of the town, and had frontages to three of the principal business streets. The reserve was divided into six lots, and each lot was leased separately. All the leases would expire in March or June, 1929. The buildings on those leases were nearly all constructed of wood, and they were old and out of date. The Borough, in order to make the best use of that endowment wished on the expiry of the present leases to undertake a comprehensive building scheme to cover the whole reserve with a modern building or buildings, and to grant new leases of the premises. Alternatively it might be found better merely to pull down and re-erect the oldest of the buildings, and they desired to know the ambit of their powers under the Act..

Lusk for plaintiffs.
Currie for defendant.

OSTLER, J., said that Section 4 of the Napier Borough Endowment Act 1876 provided that the Mayor, Councilors and Burgesses, in respect of the lands described in the first schedule might from time to time exercise all or any of the powers following:—(1) Raise money by mortgage or debenture, without power of sale, and subject to and with such powers covenants stipulations as they may think fit; (2) Demise or lease for any term not exceeding thirty-five years, without fine or foregift, or let from year to year or otherwise, and with or without any special conditions; (3) Lay out roads through the said lands; (4) Dedicate any part or parts of such lands for public or recreation purposes; (5) Erect any buildings on the said lands or any part thereof. Section 5 gave the Borough certain powers in respect of the lands in the second schedule, and it was to be observed that those powers were much more circumscribed. The Borough might: (1) Enclose, lay out and plant the same or any part thereof; (2) Dedicate such lands or any part thereof for public or recreation purposes.

The first question asked in the summons was whether by Section 4 of the Act the plaintiff was entitled to erect on the Market Reserve shops, offices, hotels or other business premises not authorised by the Municipal Corporations Act 1920, with a view to leasing the same and obtaining a revenue therefrom. His Honour had no doubt that such power was given by the Act. When the Act was passed the Municipal Corporations Act 1867 was in force. That Act conferred very limited powers of building on a borough. See Sections 335, 365, 366. It was contemplated by that Act that any further powers which were necessary for the general benefit of the burgesses should be obtained by means of a special Act: see Section 367. The Napier Borough Endowments Act 1876 was such a special Act, giving the Borough special powers in respect (*inter alia*) of the Market reserve, which was vested in the Borough for its use and benefit. No doubt the Legislature was aware that that Reserve was in the heart of the Borough, and that the most benefit could be obtained from it by building business premises and leasing them. Therefore wide powers of building and leasing were granted. The power was to build *any* buildings on the land or on any part thereof. That gave the Borough the power either to cover the whole reserve with one building or to erect separate buildings on different parts. Any building meant any kind of building. The Act was a special Act and the maxim *generalia specialibus*

non derogant applied. The only argument counsel for the defendant could put forward against that view was that the empowering clauses of Section 4 must be read together, and therefore "any building" must be construed to mean "any building for public or recreation purposes." That that could not be so was shown by the fact that there was power not only to build but also to lease for a long term. If the Borough could only erect buildings for public purposes, and could then lease them for a long term that would effectively prevent their being used for any public purpose. What the Legislature contemplated was a building or buildings suitable for leasing to business men for business purposes. No subsequent statute was indicated as having modified or taken away wholly or in part the powers of building and leasing given by the Act of 1876. No subsequent general Act could affect the powers given by a prior special Act unless a clear intention was shown in that subsequent Act of repealing the special powers given by the earlier Act: see **London and Blackball Railway Co. v. Board of Works,** 26 L.J. (Ch.) 164. The recently decided case of **Tauranga Borough Council v. The Attorney-General,** (1927) N.Z.L.R. 875, was easily distinguishable. There the land was vested in the Borough as an endowment under an Act which contained no special powers and the Borough had, therefore, to rely on the general powers given to it by the Municipal Corporations Act 1920. All that case decided was that a Borough Council had no general power under the Municipal Corporations Act 1920 to expend money in the erection of shops on land vested in it as an endowment.

The second question was whether the Borough was entitled to re-construct, repair, or alter the existing buildings on the section. The answer was yes. Counsel for the Attorney-General admitted that the Borough had this power.

The third question was whether the Borough had power under the Act of 1876 to raise by loan secured on the land the money required for building without taking the steps described in Sections 9 to 13 inclusive of the Local Bodies Loans Act 1926. The steps referred to were the steps which it was necessary for a Borough to take in order to obtain the consent of the ratepayers to the raising of a special loan. Those steps included the taking of a poll. It was contended on behalf of the Attorney-General that the Local Bodies Loans Act 1928 was intended by the Legislature to be a compulsory code applicable to all loans by local authorities. He relied on a passage in the judgment of Cooper, J., in the Mayor, Councillors and Burgesses of the **Borough of Gisborne v. A.M.P. Society,** 31 N.Z.L.R. 972, 975. The case itself was not in point, but in the course of the judgment occurred the following words:—

"It is, in my opinion, clear that when the Legislature incorporated in the Local Bodies Loans Act, 1901, Section 121 of the Municipal Corporations Act, 1900, in its exact words, making it, however, applicable to all local authorities, it intended to transfer to the Act of 1901 all the powers of borrowing which a municipal corporation under its Act had previously had, and intended to create a concrete system of borrowing by local authorities contained in one statute only. and in pursuance of that intention it expressly enacted in the Local Bodies Loans Act the extensive powers of borrowing contained in Section 121 of the Municipal Corporations Act 1900."

What His Honour had in mind in that passage were the general powers of borrowing given to Municipal Corporations in the Municipal Corporations Act, 1900. No doubt the intention of the Legislature was to codify those general powers in one Act. But that left untouched the question whether it was the intention of the Legislature to take away special powers of borrowing given to local authorities by special Acts. A reference to Section 4 of the Local Bodies Finance Act, 1921, made it clear that the Legislature had no such intention. That was an Act to provide for and limit borrowing by local bodies for revenue purposes. Section 4 provided that: "It shall not be lawful for a local authority to borrow money from any person or for any purpose, save under the authority of (a) a special Act enabling it in that behalf; or (b) the Local Bodies Loans Act, 1913, etc." That enactment proved clearly that when the Legislature enacted the Local Bodies Loans Act, 1913, it did not intend to take away any borrowing powers conferred by any special Act. There was nothing in the Local Bodies Loans Act, 1926, to indicate that the Legislature had in any way altered its intention. The Local Bodies Loans Act, 1926, was intended to be a complete code regulating the method to be adopted by local bodies borrowing money, but was not intended to take away special borrowing powers given to local bodies by special Acts. The Napier Borough Endowments Act 1876 was such a special Act. It gave the Borough power to raise money either by mortgage or by debenture, but without power of sale given to the mortgagee or debenture holder. That could only mean a mortgage or debenture secured on the land in question. The mortgagee or debenture holder could not be given power to sell the land upon default by the mortgagor, but except for that the contract might contain any such powers covenants or stipulations as the Borough might think fit. It could, if it wished, give the lender the security of the rents, with power upon default to appoint a receiver. No lender could be expected to lend money on mortgage or debenture without some such security. The Borough was given complete power to borrow on any terms that it could induce the lenders to agree to. The Legislature had entrusted to it the power to make any contract it thought reasonable, except that it could not give a power of sale for default. That answered the objection urged by Mr. Currie that there was no restriction either as to the amount or as to the rate of interest or as to the form of the security. Those matters had been entrusted to the Borough.

The fourth question whether the Borough was entitled to raise a loan secured on the land for the purpose of reconstructing, repairing, or altering the existing building without taking the steps prescribed by the Local Bodies Loans Act 1926, was answered in the affirmative. The greater included the less.

Solicitors for the plaintiff: **Kennedy, Lusk and Morling,** Napier.

Solicitors for the defendant: **Crown Law Office,** Wellington.

Blair, J. March 28, 29, 30; July 14, 1928. Auckland.

ROY AND BENNETT v. AUCKLAND HARBOUR BOARD.

Tort—Negligence—Invitee—Stevedore Employed by Shipping Company Stowing Goods in Harbour Board Shed Near Cargo Chute—Injury Through Bales Falling Over Side of Chute—Duty of Inviter—Whether Warning of Danger Sufficient—Whether Knowledge on Part of Invitee of Danger a Bar to Claim—Whether Full and Complete Knowledge Equivalent to Consent to Risk—Whether Board Discharged Its Duty By Exercising Reasonable Care in Selection of its Officers.

Actions for damages for injuries sustained by plaintiffs when working as stevedores on the Princes Wharf at Auckland, on 27th March, 1927. The plaintiffs were employed by the Union Steamship Company Ltd., unloading a vessel belonging to that company. They were together trucking goods discharged from a vessel and were bringing such goods into a shed and stowing some under a cargo chute leading from the upper floor of the shed to the floor upon which the plaintiffs were working. An employee or employees of other firms interested in handling cargo in the shed were contemporaneously with the plaintiffs working cargo on the upper floor. They were engaged in tipping bales of cloth on the cargo chute near which the plaintiffs were working. The bales so tipped slid down the chute and were met at the bottom by another man engaged upon loading the bales into a cart. A bale instead of going down the chute fell over the side of the chute, struck the two plaintiffs on their heads, and seriously injured them. Separate writs were issued; but by arrangement both actions were heard together. The actions were heard before a special jury of twelve. Issues were put to the jury who found that the accident whereby the plaintiffs were injured was due to the negligence of the Defendant Board in not providing sufficient protection to prevent goods going over the side of the chute and not providing sufficient supervision over the class of goods sent down the chute. They also found that the defendants knew the chute was so unsafe and that the plaintiffs did not contribute to the accident by negligence and did not appreciate or agree to undertake the risk of injury and accident when they worked in proximity to the chute. In answer to issue number 6 asking whether: If the chute was unsafe, the plaintiffs knew that it was unsafe; the jury answered that the plaintiffs did, in so far as they admitted in their evidence, know that the chute was unsafe. In answer to issue number seven they found that the Defendant Board exercised ordinary and reasonable care in the selection of the officer or officers who designed and approved the chute. The jury accordingly assessed the damages to which they considered each plaintiff entitled. On the answers of the jury both sides moved for judgment. The defendant's motion for judgment was founded on the jury's answers to issues 6 and 7. The defendant also moved for a new trial on the ground that the jury's answers to certain issues were against the weight of evidence, but the judgment is not reported on this point.

O'Regan and Sullivan for plaintiff.

McVeagh for Defendant Board.

BLAIR, J., said that he would deal first with the defendant's contention on the jury's answer to issue No. 6. It was necessary at the outset to make plain the position of the Harbour Board with regard to the user of the wharfs and conveniences provided by the Board. The defendant Board was the Port Authority of Auckland and more or less elaborate equipment had been provided by the Board for the handling of shipping and cargo. The Auckland Board followed a different practice in regard to cargo from that in use in other parts of New Zealand, Wellington, for instance. There the Harbour Board took charge of all cargo landed from a ship from the moment such cargo left the ship's rail. The Harbour Board's men took it from the ship's slings, put it into sheds, and delivered it to consignees. All cargo, until delivery was taken by the consignee, was in the custody and under the control of the Harbour Board. An entirely different practice was followed in Auckland. The discharging of cargo was left entirely to the ships and all stevedores employed in the discharging of cargo were either employees of the ships or employees of stevedoring firms employed by the ships. Nor did the Harbour Board in any wise concern itself with delivering cargo from the wharf sheds to consignees. That duty was attended to either by the ships or firms employed by the ships. The Harbour Board for an inclusive charge provided wharfs and storage sheds and equipment, and left to the shipping companies the duty of making use of those wharfs and sheds and equipment. It had nothing to do with the handling of cargo or delivery of same to the consignees. The defendant Board had a storeman in charge of each shed on the wharf, but that storeman did not interfere with handling cargo, his duties as far as cargo was concerned being confined to indicating to the stevedores where the cargo should be placed in the shed in order to avoid confusion. The storeman also collected storage if payable to the Board. The wharfage charged by the Board was an inclusive rate for the use of the wharfs and conveniences and included also one night's free storage. If goods remained in the sheds beyond one night a penal rate of storage was charged, the object being to discourage using the sheds as stores because they were only intended to be used as transit sheds.

It was not disputed that the plaintiffs while working upon the wharf and in the employ of the Union Steamship Company were, *qua* the defendant Board, invitees and not mere licensees upon the wharf, in accordance with the principle of **Indermaur v. Dames,** L.R. 2 C.P. 311. The defendant admitted that as far as plaintiffs were concerned it owed them a higher duty of care than was called for in the case of a bare licensee because plaintiffs were there on lawful business in the course of fulfilling a contract in which both plaintiffs and defendant had an interest. It was, however, contended by Mr. McVeagh that the jury having answered the sixth issue in the way they did, then upon the authorities plaintiffs were not entitled to succeed against the defendant Board. In the shed where the accident occurred there was fixed a notice directing persons in the shed to keep away from the chutes, but it was admitted by Mr. McVeagh that the jury by their answers intended to exclude that notice as being the notice affecting the plaintiffs, Plaintiffs denied noticing those notices and His Honour appreciated that the jury did not attach to those notices any importance as affecting the case because anyone reading the notices might well take them as warning persons to stand clear of the bottom end of the chutes where cargo came sliding down at a rate sufficient to cause injury to anyone standing there carelessly. The accident in that case did not occur through standing in the line of cargo coming down the chute, but was caused by cargo falling over the side of the chute at the top end of it. It was necessary, therefore, to look at the evidence to see what knowledge the plaintiffs admitted.

His Honour after considering the evidence of the plaintiffs stated that it could be seen from that evidence that they both admitted they had always known of the danger to them of packages coming over the sides of the chute, due to the lowness of the sides. That was what caused them the injury they suffered. They were admittedly invitees on the premises. Did that admission they had made disentitle them to judgment ?

In **Indermaur v. Dames,** L.R. 2 C.P. 312, 313, the Court, comprising Kelly, C.B., Channel, B., Blackburn, J., Mellor, J., and Piggott, J., adopted the following words of Willes, J., in the Court below, referring to an invitee :—

> "With respect to such a visitor at least, we consider it well settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know, and that when there is evidence of neglect the question whether such reasonable care has been taken by notice lighting guarding or otherwise and whether there was such contributory negligence in the sufferer must be determined by a jury as a matter of fact."

That was a case of danger unknown to the invitee. In the present case the invitee admitted he knew of the danger. The passage just quoted used the words : "where reasonable care has been taken by notice lighting guarding or otherwise." It had not here been suggested that any notice was given by the Board of the danger due to the low sides of the chute. If notice to the invitee was all that was necessary then notice would not be necessary when the invitee himself admitted he knew of the danger. He did not need notice of what he already knew.

The question that arose in the case was therefore the neat one whether knowledge on the part of an invitee of a danger on the premises to which he had been invited was a bar to any claim by him for damages for injury sustained by him from such known danger. In **Salmond on Torts,** 6th Edn., 445, the question was discussed and the learned author pointed out that there was a conflict of authority on the point, the one alternative being that knowledge on the invitee's part was an absolute bar, and the other alternative being that the invitees' knowledge was not an absolute bar, but operated if at all only as evidence of contributory negligence or of an agreement to waive fulfilment of the occupier's duty. Counsel for the plaintiffs contended that the latter alternative was the correct basis of the occupier's duty. The learned author pointed out that in **Cavalier v. Pope** (1906) A.C. 428, 432, Lord Atkinson definitely accepted the proposition that knowledge was a bar. That doctrine was definitely acted on by Atkins, J., in **Lucy v. Bawden** (1914) 2 K.B. 318. Since the case of **Fairman v. Perpetual Investment Society** (1923) A.C. 74, **Lucy v. Bawden** must be taken as a case of licensee and licensor and was therefore not in point. But in **Brackley v. Midland Railway Company** (1916) 85 L.J.K.B., 1596, the Court of Appeal definitely accepted Lord Atkinson's doctrine as applicable to inviter and invitee. There was also an earlier case **Woodleigh v. Metropolitan Railway Company,** L.R. 2 Ex. D. 384, where a majority of the Court accepted the doctrine that knowledge on the part of an invitee was a bar to his claim. There was also an Australian case—**South Australian Company v. Richardson,** 20 C.L.R. 181, where the basis of the claim and the situation of the defendant were very similar to the present case. The plaintiff's husband had been killed when driving a wagon on the defendant's wharf. There was a line of rails crossing the roadway giving access to the wharf and those rails were negligently permitted to project above the level of the roadway. The wagon collided with the projecting rail and the deceased was thrown out of his wagon and killed. The defence was that the state of the roadway and rails was apparent to all persons and that deceased was aware of and took the risk of crossing and that he was guilty of contributory negligence. The trial judge found as a fact that deceased had knowledge or notice of the condition of defendant's premises and entered judgment for the defendants. On appeal a majority of the Court ordered a new trial and the defendant appealed from this decision to the High Court, which confirmed the order for a new trial. His Honour quoted certain dicta of Griffiths, C.J., at page 85 of that case, and said that it was clear that Griffiths, C.J., held the opinion that knowledge on the part of the injured invitee was not a bar to his claim but only evidence of want of care on his part. Isaacs, J., in the same case after pointing out that the careful statement of the propositions as given in **Indermaur v. Dames** (*cit. sup.*) had been constantly affirmed and acted upon, pointed out that the duty of care on the part of the inviter was not to the premises but to the person of the invitee. Later in his judgment Isaacs, J., made it plain that his view was that knowledge of the danger on the part of the invitee howsoever obtained was an absolute bar to his claim. In that he followed the decisions of **Gautret v. Egerton,** L.R. 2 C.P. 371, and **Cavalier v. Pope** (1906) A.C. 428. He also expressed the view that where a person came upon premises as a matter of right—such as upon railway premises—there was a higher duty of care than in the case of an invitee. It would be seen that upon the point as to whether knowledge was or was not a bar, the Judges in **South Australian Co. v. Richardson** hold opposite views. The view of the third Judge in the case was not stated in the report. In another Australian case **Bond v. South Australian Railways Commissioner,** 33 C.L.R. 273, the plaintiff was injured by falling off the platform of an unlighted railway station. Knox, C.J. and Starke, J., said at page 277 : "The knowledge of the appellant and any notice given to him of the danger is relevant for the purpose of determining whether the respondent took reasonable care and whether the appellant chose to accept

the risk or was guilty of contributory negligence, but the question must be determined as Willes, J., says in **Indermaur v. Dames** as a matter of fact." *Inter alia* **South Australian Co. v. Richardson** was quoted as one of the authorities for the above statement, from which His Honour took it that the third Judge in that case must have supported Griffiths, C.J.'s, view. Their judgment also said :

"The error in the judgment of the Court below resides in the view that the duty of the respondent towards the appellant was discharged if the appellant knew or was informed of the danger, whereas the true rule is as already stated."

Isaacs, J., was also a member of the Court and he reiterated the opinion he had already expressed in **South Australian Co. v. Richardson,** that knowledge of the existence of the danger was a bar to the claim. When discussing the basis of liability to an invitee, Isaacs, J., pointed out that the duty arose solely from the invitation, that the invitee was not compelled to accept the invitation, and if the inviter when inviting him informed him of specific danger the invitee accepted at his own risk so far as that danger was concerned. It would appear that Isaacs, J., when he spoke of warning the invitee of the danger meant that it must be a full and complete warning of all possible dangers and such as necessarily to qualify the accep-t ance of the invitation. Any danger which was not included in the express or implied warning was an "unusual" danger. It seemed to His Honour that, when examined, the views of Isaacs, J., and the views of the other Judges were reconcilable. If it were admitted that when an invitation was qualified, the acceptance of that invitation must be taken as subject to a like qualification, the measure of duty to an invitee must necessarily be qualified by the nature of the invitation. A jury when considering the measure of duty must have regard to the qualifications on his liability for care which the inviter expressly or impliedly stipulated for. An invitee into a draper's shop did not expect to undertake the risks that an invitee into a factory full of moving belts and machinery knew he was undertaking. The measure of duty to the invitee was different, according to the circumstances of each case, and having established that measure of duty the question arose whether the defendant had failed to provide it. Proof of knowledge in whole or in part of the risks on the part of the invitee was evidence relevant to the degree of duty on the part of the inviter. The line of demarkation between such a disclosure of circumstances as would amount to a qualification of the invitation and the line of demarkation of a disclosure of circumstances such as would afford a defence of *volenti non fit injuria* or a defence of contributory negligence could not be defined. The truth was that a qualification of the invitation necessarily touched also the question of the defences of *volenti non fit injuria* or contributory negligence. Knowledge or notice of a danger qualified the invitation and necessarily reduced the duty of care on the part of the inviter, and like knowledge or notice on the part of the sufferer increased his duty of care for his own protection. The whole of the question of what implication of care was included in the invitation and the question whether the sufferer, with knowledge of the risks he ran, voluntarily undertook them, and also the question whether the sufferer was himself negligent were all questions of fact to be determined by a jury. When in **Bond's case** Isaacs, J., said that full and complete notice or knowledge was a bar to a claim His Honour took it that Isaacs, J., meant that as a matter of fact, and not as a matter of law, he would take that to be a bar to any claim. He must have meant knowledge which left no inference of fact but one open, because the duty of care undertaken by the inviter had in fact been fulfilled. His Honour's view in that respect was strengthened because in **Bond's case** Isaacs, J., joined with the rest of the Court in giving judgment for the appellant on the ground *inter alia* that full and complete knowledge on the appellant's part sufficient to disentitle him to judgment had not been proved.

His Honour's view of the result of an examination of the Australian cases showed that a majority of the Judges supported the view that knowledge on the part of the plaintiff did not constitute a bar and that notice given to him or knowledge of danger possessed by him were relevant facts touching the degree of care called for on the part of the inviter and touching also the question of contributory negligence. Sir John Salmond, in his book on Torts (5th Edn., page 448) after an examination of the authorities said :—

"The greater duty to an invitee cannot well be less than a duty to use care to make the premises safe and cannot be limited to a duty of warning."

The latest decision touching the duty of the inviter to invitee was **Le Tang v. Ottawa Electric Railway Company** (1926) A.C. 725 The judgment of the Court fully bore out the headnote of the case which said :—

"In Canada as in England the maxim *volenti non fit injuria* affords no defence to an action for damages for personal injuries due to the dangerous condition of the premises to which the plaintiff has been invited on an errand of business unless it is found as a fact that he freely and voluntarily with full knowledge of the nature and extent of the risk he ran expressly or impliedly agreed to incur it."

The Court rejected the contention that knowledge alone was a bar, and on page 730 quoted with approval Lord Bowen's statement in **Thomas v. Quartermaine,** 18 Q.B.D. 685, 696.

In the present case it was to be observed that the special jury which tried the case was careful in its answer to the issue of knowledge. They did not give an unqualified affirmative answer. It might well be said that they intended to say that plaintiffs while they knew bales had fallen off the chute did not have "full and complete" knowledge of the danger. It must not be overlooked also that there was a specific issue put to the jury on the defence of *volenti non fit injuria* (Issue 4) and they answered it against the defendant Board. **Le Tang v. Ottawa Electric Railway Co.** (*cit. sup.*) was express authority binding on His Honour that unless defendants established that defence they could not succeed. His Honour must reject the contention that knowledge alone of a danger was a bar to a claim by an invitee against an inviter. Such knowledge was relevant to the question of the extent of the duty of care on the part of the inviter and was relevant also to a defence of *volenti non fit injuria* or a defence of contributory negligence.

The next defence of the defendant Board arose on the question of the jury's affirmative answer to the 7th issue : "Did the defendant Board exercise ordinary and reasonable care in the selection of the officer or officers who designed and approved the chute ? It might be taken as a fact that all Harbour Boards exercised care in the selection of their officers, engineers and superior servants. His Honour had no doubt that such an issue if put to any reasonable jury concerning any Harbour Board in the Dominion could only be answered in the affirmative. That defence if available to Harbour Boards would render them immune from all actions arising out of the mistakes or negligence of their engineers or any other officer in their employ. The defendants submitted that the principle of *respondeat superior* had no application and that the only duty of the Board was to exercise reasonable and ordinary care in the selection of its officers appointed under the power conferred by Section 47 of the Harbours Act 1923, and that the case fell within the rule in the application of which **Auckland Hospital Board v. Lovett,** 10 N.Z.L.R. 597 was an example. That case was clearly distinguishable from the present. The relationship of master and servant did not exist between a house-surgeon of a Hospital and the Board which appointed him. In a work such as the equipment of wharf sheds the engineers no doubt recommended the installation of certain equipment, but it was the Board itself which said whether it would or would not act on such recommendation. It therefore retained the power of controlling the work and in that respect there was a clearly marked distinction between a Hospital Board appointing a doctor and a Harbour Board installing equipment recommended by its engineers. The Court of Appeal in **Auckland Hospital Board v. Lovett** (*cit. sup.*) following **Mersey Docks and Harbour Board Trustees v. Gibbs,** L.R. 1 H.L. 93, adopted the principle that in the absence of something to show a contrary intention, the Legislature intends that the body the creature of the Statute shall have the same duties and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same thing. The Court said that if a private individual did what a Hospital Board did respecting the providing of medical attention to the public such private individual would not be liable for the negligence of the doctor, and that, therefore, a private person not being liable a public body was equally not liable. If a private person were to provide the wharfs and conveniences provided by a Harbour Board and charged dues for so doing could it be said that he was not to be liable for the negligence of his servants in the installation or working of such conveniences ? Williams, J.'s decision in **Otago Harbour Board v. Cates,** N.Z.L.R. 2 S.C. 123, cited by the defendants did not seem to His Honour to contain anything supporting the contentions of the defendants. There must have been many cases of claims for negligence against Harbour Boards but His Honour was unaware of any in which the present contention was advanced. In **Gallsworthy v. Selby Dam Drainage Commissioners** (1892) 1 Q.B. 348, a mandamus was granted against a local authority compelling it to make a rate to meet a judgment for damages due to negligence of their servants and that notwithstanding provisions in the statute incorporating such authority limiting its expenditure on the works. In the argument a distinction was sought to be made between "officers"

of the Board and "servants" of the Board. Assuming an engineer or draughtsman was an "officer" and not a "servant" it did not make such an officer free to carry out his ideas or designs untrammelled by any interference by the Board. The second contention of the defendants, in His Honour's opinion, failed.

Solicitors for plaintiffs: **J. J. Sullivan**, Auckland.

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

Smith, J. May 24; July 9, 1928. Wellington.

IN RE CAMERON'S ESTATE.

Executor and Administrator—Commission—Trustees Carrying on Sheep-farming Business—Commission for a Period Already Allowed by Order of Court—Application for Further Commission—Usual Commission Five Per Cent. on Net Income—Whether Special Circumstances Justifying Allowance on Gross Income—Whether Further Commission could be Allowed in Respect of Period Covered by Previous Order of Court.

Motion for an order allowing further commission to the executors of an estate in respect of their administration during the period of two years from 1st July, 1925, until 30th June, 1927. A previous order for remuneration had been made on 4th June, 1926, allowing the trustees the sum of £200 as remuneration for the year from 1st July, 1924 to 30th June, 1925. The trustees had since 8th May, 1913, been carrying on the business of the testator, which was that of a sheep-farmer at Glendhu. The period of distribution would not arrive until the year 1933, when the youngest child would attain 21 years of age. The management of the trust estate was in the hands of a salaried manager, and the duties of the trustees were those of supervision, attending to the business correspondence and the management of the finances. The principal executor stated that owing to the fact that a cousin of the deceased was farming an adjoining property and was, therefore, in a position to keep in touch with and supervise the management of Glendhu, it was unnecessary for him to make visits of inspection to the property. The net balance of income on the Farming Account for the year ended 30th June, 1926, was £1,803 7s. 4d., and for the year ended 30th June, 1927, was £1,681 11s. 3d. The affidavits and accounts filed in connection with the estate showed that in 1913, when the trustees took over the estate, the *corpus* of the estate stood at the sum of £13,000 taken at standard values. Upon the same basis the *corpus* stood at £19,593 as at 30th June, 1927, after (a) deducting two debit balances, viz. £2,802 in 1925-1926, and £2,265 in 1927-1927, and (b) adding a profit on the sale of the Hutt property which stood in the books at £4,035 and was sold for £6,375. The actual cost of this property to the state was however £7,285. The debit balances were largely due to the large payments made to the widow of the testator and one of the executors, who had taken the infant children to England to be educated. The principal executor had impressed upon the widow the need for strict economy in the expenditure upon the maintenance of herself and children, and the education of her children, and she had begun accordingly to curtail her expenditure. When the last order for remuneration was made, the trustees had promised to spend £1,000 on scrub-cutting. The accounts filed with the application showed that £895 0s. 7d. was spent in scrub-cutting for the year ended 30th June, 1926, and the sum of £1,388 16s. 0d. for the year ended 30th June, 1927. The trustees appeared to have complied substantially with their promise, if the period of two years were taken into consideration.

For the trustees on the present motion the usual allowance of £200 per annum was claimed. Counsel opposing was willing to submit to an order for 5% on the net income for the period in question.

Evans for motion.

Hoggard to oppose.

SMITH, J., said that the usual rule in respect of trustees carrying on a sheep-farming business was to allow 5% on the net income—**In re Kerr, Kerr v. Cook** (1904) N.Z.L.R. 1,—unless, as was said by Cooper, J., in that case, there were "very special circumstances justifying an allowance upon the gross income." Mr. Evans pointed out in the present case that the trustees had increased the *corpus* from £13,000 in 1913 to £19,593 at standard values as at the 30th June, 1927; that the work was very much the same although the responsibilities had increased owing to two bad years. It was contended in reply, by Mr. Hoggard, that those did not constitute "very special circumstances," that the allowance for each year must stand by itself, and that the trustees had to some extent been the cause of the present bad years by permitting the scrub to gain on the property and by acceding to the large demands made by the widow for income. In His Honour's opinion, the remuneration allowed for each year must stand by itself, and that appeared to be the view taken by Stout, C.J., in the judgment which he delivered on the first application for commission in the estate on 24th of November, 1917. In other words, when commission was allowed before the final passing of accounts (Section 20 (2) of the Administration Act, 1908) the claims by the executors for commission were fully satisfied up to the date of each order; and they were so satisfied in respect of all income earned by the estate up to the date of such order. If not, the Court would be leaving at large questions for future discussion which would grow dim with the passage of time, and the beneficiaries would be left in a state of uncertainty as to the claims by the trustees in respect of work done by them in previous years. His Honour was not prepared to say that such special circumstances had arisen as would justify any greater allowance than 5% on the net increase; but the question was disposed of by the prayer of the petition for remuneration filed on 20th of September, 1917. The executors there, stating the principle upon which they claimed remuneration as required by Rule 8 of the Administration Rules of 1913, asked only for a commission of 5% upon the net income and dividends. In His Honour's opinion it was not possible for the executors at the present stage to ask for an allowance upon gross income, and His Honour had already held that the net income of preceding years could not be taken into account.

Order made, allowing to the executors commission of 5% upon the net income from the farming operations and upon the amount of dividends (if any) received by the executors in respect of the period between 1st July, 1925, and 30th June, 1927.

Solicitors for motion: **Bell, Gully, Mackenzie and O'Leary**, Wellington.

Solicitors to oppose: **Findlay, Hoggard, Cousins, and Wright**, Wellington.

A Point of Etiquette.

In our issue of May the 29th we published a ruling of the General Council of the Bar upholding, in effect, despite the Lord Chief Justice's observations to the contrary, the right of counsel defending a prisoner on a charge of murder to remind the jury that the punishment for the crime is death. More recently the question has again been raised. Mr. Justice Avory in a murder case at the Maidstone Assizes, told the jury, in his summing up:—

> "The observations made by the learned counsel about the sentence which it might be my duty, and would be my duty, to pronounce are not calculated to assist you; they are only calculated to deter you from doing your duty, because in effect it is an invitation to you not to find a true verdict because you do not like the consequences which may follow upon it. That is, in other words, an invitation to you not to do your duty."

And commenting upon this passage in the Court of Criminal Appeal, the Lord Chief Justice said:—

> "It is satisfactory to find that when an appeal of the kind referred to—an irrelevant appeal not to do their duty—was made to a jury it did not always succeed."

The Supreme Court Bench.

A Complete Change in Eleven Years.

The untimely death of Sir William Sim has removed from the Supreme Court Bench the last of its pre-war Judges; indeed, the personnel of the Bench has changed completely in less than eleven years. In this state of affairs the following information is of interest:—

The Bench in 1913.

CHIEF JUSTICE

Sir Robert Stout, K.C.M.G.

JUDGES

Mr. Justice Williams
Mr. Justice Denniston
Mr. Justice Edwards
Mr. Justice Cooper
Mr. Justice Chapman
Mr. Justice Sim

In 1914, after the retirement of His Honour Mr. Justice Williams, two new appointments were made.

The Bench in 1914.

CHIEF JUSTICE

Sir Robert Stout, K.C.M.G.

JUDGES

Mr. Justice Denniston
Mr. Justice Edwards
Mr. Justice Cooper
Mr. Justice Chapman
Mr. Justice Sim
Mr. Justice Hosking
Mr. Justice Stringer

No further alteration occurred until early in 1918, when His Honour Mr. Justice Denniston retired, and the then Attorney-General, the Hon. A. L. Herdman, was appointed. Since then there have been many changes.

The Bench To-day.

CHIEF JUSTICE

Sir Charles Perrin Skerrett, K.C.M.G.

JUDGES

Mr. Justice Herdman
Mr. Justice Reed
Mr. Justice Adams
Mr. Justice MacGregor
Mr. Justice Ostler
Mr. Justice Blair
Mr. Justice Smith.

The circumstances demand that the best and most experienced—and only the best and most experienced—of the available men be appointed to the present and future vacancies. There is at the present time no room for considerations of party or creed, or any other consideration than that of the appointment of the very best men available and willing to accept the office. We cordially agree with the concluding sentence of the editorial article in the "Evening Post" of the 3rd September: "It is a very momentous responsibility that is now cast upon the Government."

The Late Sir William Sim.

Tributes of Bench and Bar.

The high esteem in which the late Sir William Sim was held by Bench and Bar alike has been amply demonstrated by the tributes voiced throughout the Dominion. In our last issue we included the tributes of the Attorney-General and His Honour Mr. Justice MacGregor, at Wellington, and we publish below, as representative of the views of the Profession elsewhere, the eulogies expressed at gatherings of Bench and Bar at Dunedin and Christchurch, and of His Honour Mr. Justice Frazer in the Court of Arbitration.

DUNEDIN.

Mr. W. R. Brugh, President of the Otago District Law Society, said: "May it please your Honour, I wish to refer to the death of our highly-esteemed and well-loved judge, Sir William Sim. It is but three months ago that the members of this Bar, under the presidency of the late Sir William, met to pay tribute to the memory of the late Sir John Hosking, a former colleague of his both on the Bench and at the Bar. The loss which we mourn to-day is a more poignant one than even the late Sir John Hosking, in that Sir William Sim never broke the continuity of his service in this district. It is quite unnecessary for me to refer to the great many activities which the deceased gentleman undertook when he was a distinguished and brilliant leader of this Bar. Suffice it for me to say in passing that there were giants in those days. The late Sir William's success as a Judge automatically followed his success as a Barrister. Three months ago, in paying tribute to the memory of his old friend, the late Sir John Hosking, he stated that when a learned man dies his learning dies with him. Now, Sir William was more than a learned man; he was a man of outstanding ability as well. To properly define his mentality would beggar superlatives. His mind was so incisive, so keen, and his logic so mathematical, that to practise under him was an honour and an inspiration. He could have succeeded in any sphere; the highest honours any sphere could have bestowed would have been his. But it is as a lawyer we knew him best, and it is as a lawyer we honour his memory to-day. The great tribute to his legal ability remains wrapped up in the law reports of New Zealand for a past number of years. Those who knew Sir William best knew that behind a somewhat austere manner there beat a kindly human heart. We bow to the majesty of King Death, whose chill hand in one short wave has stilled an intellect which comes to us but once in a generation. To his relatives, and especially to his widow, Lady Sim, we, in halting terms, offer our heartfelt sympathy."

His Honour Mr. Justice Ostler, said: "Mr. Brugh, and Gentlemen of the Bar of Otago, I feel it a privilege to be able in this Court to join with you in paying a tribute to the memory of a man who in a very real sense I regarded in the light not only of a friend, but actually as an elder brother, for it was in this city and in this Court that he so firmly established his reputation as a sound lawyer, and it was principally in this Court that he confirmed the reputation he had so well deserved, and by his daily work over a long course of years established his title to be remembered as one of our greatest Judges.

"I was not privileged to know him or to be closely associated with him for so long as some of you, but for the past four years, nearly, I have been in intimate touch with him, and have been able to observe the qualities of his well-stored mind, his methods of work, his habits, and his character. He was good enough to share my room in Wellington during sittings of the Court of Appeal, which placed me in the enjoyment of a great privilege, and I had many precious opportunities of discovering his outlook on life. Apart from his fine mind and his great store of legal knowledge, what struck me most about him was the simplicity of his character and tastes. He was unmarred by the slightest trace of pomposity or conceit. He hated ostentation, and shunned publicity. He liked to push back all formality and go to the heart of the matter. Under a somewhat austere exterior beat a kind heart, and I shall always remember the kindly way in which he received and treated me when I was first appointed a Judge. I was nearly twenty years his junior. I was only two years old when he was called to the Bar, and had not commenced as a law student when he was already an acknowledged leader of the Bar. But he treated me from the commencement as a brother, and was always ready to help me and advise me in my inexperience. It is not necessary for me to say anything further than has been said as to the greatness of Sir William Sim as a Judge, or of the value of his public service, to members of the Dunedin Bar. He was one of yourselves. You all knew him, and you must have felt instinctively that the high traditions of the Bench were always safe in his hands.

"So physically fit did he keep himself by his simple life and regular habits that I had hoped that he would not only be able to continue his work for another two years, when he would have come to the retiring age, but that after that his bodily vigour and powers of mind would have been undiminished, and he would have been able to accept the higher honour of representing the Dominion on the Judicial Committee of the Privy Council, an honour for which he was well qualified. That was not to be, but I am sure that if the choice had been his he would have chosen no other method for his end than that which the fates decreed—that he should die in harness, in the full vigour of his intellect, doing his duty and performing his high functions to the end. I trust that this thought will be some comfort to those near to him who are now passing through the dark shadows of grief."

CHRISTCHURCH.

Mr. K. Neave, President of the Canterbury Law Society, said: "May it please your Honour, we are met to-day to voice in some small measure our regret at the sudden passing of the Hon. Mr. Justice Sim. Death and the age retirement of honourable members of the Supreme Court have taken heavy toll of late of His Majesty's Judges, and the lamented death of Mr. Justice Sim is a tragedy for the Bench, the Bar in particular, our profession as a whole, and, indeed, the whole community. Mr. Justice Sim had come to be considered almost belonging to our Judicial District, as, for many years past, dating from about the time of his retirement from the Arbitration Court, he constantly presided over this Court in Christchurch. In this manner, he became known to most of the members of the legal profession in Christchurch and Canterbury, and we all feel deeply sensible of the loss we have sustained. As one who seldom practises in the Courts, I feel that I am personally unfitted to express in adequate words the heavy and almost irreparable loss that the profession has suffered, but I was privileged to know Mr. Justice Sim, and I shall always appreciate that I was so privileged. We thank you for affording us this opportunity of expressing in your Court to your Honour and to his sorrowing relations our deep regret at the passing of a Judge so eminent and so competent."

Mr. Justice Adams said: "I am pleased to see so many members of our learned profession here to do honour to my late colleague. It was my privilege to become acquainted with him almost fifty years ago, when he went to Dunedin to begin that career during which he earned the respect and the admiration of every person of discernment in the Dominion, and covered himself with honour. In 1879, or early in 1880, he arrived in Dunedin, having passed his examinations, and having been admitted to the Bar. From that time I had an acquaintance with him that ripened into knowledge and friendship. For upwards of twenty years from 1883, when I was admitted to the Bar, I was in constant association with him, and had opportunities to observe him and to get to know him. At the Bar he showed a fine appreciation of the honourable traditions of the profession to which he was so great an ornament. His courage, honour, and integrity were equalled only by his knowledge and skill as an advocate. His first desire, from his earliest days, I think, was not to acquire wealth so much as to advance and assist in the administration of the great principles of justice. When he left the Bar and accepted an appointment as Judge and President of the Arbitration Court he acted in line with his sympathy and leanings in connection with social questions. He took on the Bench, and into all special work, special qualifications, in regard to which my friend, the learned Mr. Justice Fraser, yesterday said in felicitous terms all that can be said.

During the whole period of his administrations on the Bench, until I left the Bar, I often was before him in the Courts in Otago and in the Court of Appeal. Every occasion of my meeting with him gave fresh emphasis to my impressions of earlier years. He was a diligent student, a great reader, a man of great courage, high principles, and profound knowledge of law, with a keen analytical mind. He, during many years, gave of his best to his clients in his earlier days, and to the public later in discharging the duties of the high offices he held. I shall add only this: That while, to the public view, he displayed all the qualities that make a great Judge, those whose privilege it was to know him in respect to his social side will have many pleasant memories of his personal charm and his capacity for friendship."

COURT OF ARBITRATION.

Mr. Justice Frazer said: "It is with very deep regret that I refer to the death of Sir William Sim. For several years before his translation to the Supreme Court Bench he was Judge of this Court, and perhaps it is not too much to say that it was while he was Judge of the Court of Arbitration that his most valuable work was performed. It is to Sir William Sim that we are indebted for a series of clear, precise and luminous judgments that have guided this Court in its exposition of the principles and practice of the judicial settlement of industrial disputes up to the present time. While different opinions may be held regarding the value of our system of industrial arbitration, nobody will challenge the importance of having its principles clearly enunciated and built up into a logical ordered system. In connection with the Workers' Compensation Act,

which is administered by this Court, Sir William Sim was responsible for a mass of valuable case law, and in more than one instance he correctly anticipated judgments of the House of Lords on difficult points of construction. By his passing, New Zealand has lost a man who can with all sincerity be regarded as a sound lawyer and a great Judge. He was all through his life a diligent scholar and student; he possessed a keen, logical intellect, that unerringly sought the heart of any problem presented to it; he was a tireless worker, and never put less than his best work into anything he did, and above all, he was a man of the highest integrity. He was unsparing of himself, and it was the high standard of duty he set for himself that made him at times impatient of careless and ill-prepared work on the part of others. Though he despised anything in the nature of weak sentimentality, those of us who were privileged to know him well knew his understanding of, and general sympathy for, the weaknesses of human nature. Though his keen sense of duty made him a strict Judge, he was never a harsh Judge. These qualities, if I mistake not, are those that go to the making of a great Judge.

"Personally, I have lost a friend whom I have known since I was a boy, and one who was always willing to discuss with me and give me his opinion on many problems that have confronted me in my work. I gratefully acknowledge his valuable assistance. To his widow and family, we offer our heartfelt sympathy."

Confessions of Adultery.

Blair, J., seems to have gone, in *Wilkie v. Wilkie* (1928) N.Z.L.R. 406, considerably beyond the authorities when he said:—

> ". . . I think it well to make it clear that in my opinion admissions, written or verbal, by respondents are not proof of adultery, but amount to no more than corroborative evidence of adultery when other facts tending to prove adultery have been established."

Why should confessions of adultery be on a different plane from any other form of confession? It is submitted that a confession of adultery may be acted on by the Court if it pleases whether there be other evidence or not. Cockburn, C.J., in *Robinson v. Robinson and Lane*, 1 Sw. & T. 362, at p. 393, stated the true rule when he said:—

> "This Court . . . is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is established; and if, therefore, there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them."

Of course, such an admission is evidence only against the person making it. Ostler, J., pointed this out when he dismissed the co-respondent last year from a suit heard in Palmerston North. In that case the evidence consisted of letters by the respondent admitting adultery with the co-respondent. There was no other evidence against the co-respondent.

The admission of a respondent of adultery may be most suspicious, it may have been collusive, and for these reasons should be regarded with grave suspicion, but that a Court should not accept an admission as sufficient evidence if it pleases is, it is submitted, not the law.

LEX.

Scrutinising Impending Legislation.

The Profession's Duty to the Public.

A Paper read at the Taranaki Law Society's Conference,
By ALFRED COLEMAN.

(*Continued from page 210*).

A second classical example of interference with common law rights was Section 86 of the Public Trust Office Amendment Act, 1921-22, which enacted:—

> "(1) Where any deceased person whose estate is being administered by the Public Trustee was at the time of his death liable under the covenants, express or implied, in any mortgage, and it is, in the opinion of the Public Trustee, expedient in the interests of his estate to sell, convey, or transfer the property subject to such mortgage (whether to a beneficiary or to any other person), the Public Trustee may serve on the mortagee, or his agent or solicitor, a notice of his intention to sell, convey, or transfer the property subject to such mortgage.
>
> "(2) The mortgagee may within one month from the date of service on him of such notice apply in a summary manner to a Judge of the Court for such relief as he thinks fit, and serve a copy of such summons on the Public Trustee. On the hearing of such summons the Judge may make such order as he thinks fit.
>
> "(3) If no such summons is served on the Public Trustee within the said period of one month, the Public Trustee may thereupon sell, convey, or transfer the land subject to the mortgage, and neither the Public Trustee nor the assets of the estate shall be liable under or in respect of any covenant, agreement or stipulation, express or implied, in the said mortgage either directly or by way of indemnity, or otherwise howsoever.
>
> "(4) The provisions of this section shall not operate to deprive the mortgagee of any rights other than his right to sue the Public Trustee on any such covenant, agreement, or condition expressed or implied in the said mortgage.
>
> "(5) Where the Public Trustee is directly liable under any such covenant, agreement, or condition the mortgagee may, after such sale, conveyance, or transfer as aforesaid, pursue his rights under any such covenant, agreement, or condition against the purchaser or transferee in all respects as if such purchaser or transferee had been originally named as mortgagor under the said mortgage.
>
> "(6) Where the liability of the Public Trustee in respect of such mortgage arises not directly thereunder, but by way of indemnifying any predecessor in title, such predecessor in title may, after any such sale, conveyance, or transfer as aforesaid, exercise and pursue any right or remedy against the purchaser or transferee which he theretofore had or possessed against the Public Trustee in all respects as if such purchaser or transferee, and not the Public Trustee, had been his immediate successor in title.
>
> "(7) The Public Trustee shall not be entitled to the protection of this section unless all interest and other moneys accrued, due, and payable under such mortgage have been paid up to the last interest due date prior to the issue of the aforesaid notice."

This constituted a blow to the contractual rights of one of the parties to a mortgage. It could be justified on no ethical grounds whatever. It was purely for the convenience of the Public Trust Office. Sub-sections (4) and (6) are unique illustrations of interference in private contractual rights by departmental legislation. Owing to the action taken by the profession towards protecting their clients' undoubted rights, the legislation embodied in Section 14 of the Finance Act, 1924, came into being. The Public Trust Office had to recognise private contractual rights and Section 86 of the Amendment Act of 1921-22 was repealed,

the repeal being tucked away in an obscure subsection of a Finance Act, instead of where it properly should have figured, that is, in an express Public Trust Office Amendment Act. A further improper piece of legislation was, however, enacted by Section 14 of the Finance Act, 1924, in the direction of making void certain covenants in mortgages. The section reads :—

"(1) Any covenant or stipulation in a mortgage executed after the commencement of this Act whereby the mortgagor covenants that the moneys secured by such mortgage shall become due and payable or that any power of sale or entry into possession shall become exercisable in the event of the Public Trustee becoming administrator of the estate of the mortgagor, or in the event of the estate coming into the hands of the Public Trustee, or any other covenant, stipulation, or condition adversely affecting or tending to adversely affect the mortgagor in the event of the Public Trustee so becoming administrator of the estate of the mortgagor, shall be null and void.

"(2) In this section the term 'administrator' includes executor, trustee, guardian, committee, agent, or attorney; and the terms 'mortgage' and 'mortgagor' mean a mortgage, or mortgagor within the meaning of the Property Law Act, 1908.

"(3) Section eighty-six of the Public Trust Office Amendment Act, 1921-22, is hereby repealed."

It is impossible to argue that a mortgagee and mortgagor should not be at liberty to agree amongst themselves as to what covenants should or should not be included in their contract. Departmental legislation over-riding the people's rights could go no further.

As a last illustration, which also illustrates a somewhat different unjust statutory position, I will mention the case of *Olson v. Cruickshank* (1924) N.Z.L.R. 900. It has always been the case in our system of law, for over a hundred years at least, that any person who considers himself aggrieved by the findings of a lower tribunal can appeal to a higher Court for relief. This apparently does not entirely apply to Licensing Cases. This was an appeal against the decision of a Magistrate who convicted a licensee and ordered the endorsement of the license. On appeal to the Supreme Court Mr. Justice Stringer upheld the conviction, but said (at p. 906) :—

"At the same time I desire to say that if I were able to do so I should vary the sentence imposed by the Stipendiary Magistrate by striking out that part of it which directs an endorsement of the license. Considering that the conviction proceeds upon the application of some technical principles of the law of contract, and that not only were there no previous convictions against the appellant for breaches of the Licensing Act, but the sergeant of police testified to the general good management of the hotel by the appellant, and that her part in the particular transaction was innocent, and considering also, that the endorsement of the license might involve the appellant in heavy pecuniary loss, I should not, if I had a free hand, have directed such an endorsement.

"The Justices of the Peace Amendment Act, 1923, now gives the Supreme Court when dealing with appeals from Justices, 'power to confirm, reverse, or modify, within the limits warranted by law, the term of any sentence of imprisonment or the amount of any fine or other sum of money ordered to be paid.' If the Act had been so worded as to give the Court in considering appeals a general power to confirm, reverse, or modify, any sentence imposed by Justices, which I cannot but think must have been the real intention of the Legislature, I should have been able to make what I consider would in this case be a reasonable and proper modification of the sentence. The specific words of the last part of the section appear to me, however, to preclude me from doing so."

Now the endorsement of a publican's license is a very heavy penalty and may, under certain circumstances, involve the licensee in the loss of thousands of pounds for a comparatively trivial offence, as in the case referred to. Surely there should be a right to have a second mind to consider the penalty. In a criminal case a theft of £5 could be dealt with by a Jury, and in a civil claim of £50 there would be a right of appeal. In licensing cases there is apparently no appeal from an endorsement though thousands of pounds may be at stake. It is clear that the law here needs rectification. It is possible that under Section 326 of the new Justices of the Peace Act, 1927, a Judge could now, on appeal, deal with the point raised in *Olson v. Cruickshank*, but it is not clear that it is so.

A further most important illustration of interference with private rights is contained in Section 64, Subsection (2) of the Rural Intermediate Credit Act, 1927, which reads as follows :—

"In addition to the security required by the last preceding subsection every loan granted under this Part of this Act shall be collaterally secured by an instrument of guarantee, signed by one or more sureties approved by the District Board, whereby such sureties undertake to answer for the default or the borrower in respect of the repayment of the loan or in respect of the payment of interest thereon, to such extent as may be therein specified, being not less in any case than twenty per centum of the amount of the loan originally granted. Any Company may, notwithstanding anything to the contrary in its memorandum or articles of association, guarantee the repayment of any loan granted under this Part of this Act or the payment of interest on any such loan."

The effect of the last sentence of this subsection is most important. No matter whether a person invests money in a company on the distinct understanding that that company is precluded by its memorandum and articles of association from giving guarantees, and although it may have been on this very representation that a person may have been induced to take shares in such company or a creditor to give credit to such company, yet the Act, without giving such shareholder or creditor any relief, cuts at the very foundation of the contract between the company and the shareholder, and enables the company to do something which, had it been originally empowered to do it under its memorandum and articles of association, might have induced the shareholders or creditor to have nothing to do with it. Everyone knows that the memorandum and articles form the contract between the company and its shareholders, and it is contrary to every principle of common justice that, for purposes entirely outside the objects which the shareholders, the company, or its creditors have in view, the rights of shareholders and creditors should be interfered with as is done by the Act and extraordinary powers outside the original objects of the company should be conferred on the directors by statute for the benefit of persons outside the company.

The above are only a fraction of the examples that could be cited, not merely of unwise legislation, or even of legislation which in some consequential way works unfairly. The two first, at least, are instances of a positive interference with common-law rights and who can say that those rights were oppressive, unfair, or unjust. Is not the case not rather the other way, with the result that injustice has been perpetrated ?

Like the medical profession we are experts, and I suggest that, like that profession, it is our duty to our fellow-men, not merely to give individual service, but to give to the powers that be united, and, if necessary, public, expression of our views in the matters upon which we claim expert knowledge. Admittedly the greatest difficulty one sees at present is the lack of machinery and organisation to effect what I suggest; but if the will existed on our part to do what I think is our duty to our country no doubt arrangements could be made to overcome these deficiencies. Some attempt in the direction indicated has been made in the past, but those

arrangements were altogether too haphazard and incomplete to be productive of any degree of usefulness. Possibly the greater number of those present do not see eye to eye with me in this matter; but I shall be quite satisfied if, as the result of my ill-prepared and rather unsystematic paper, I have succeeded in drawing attention to what I consider to be a duty on our part, and which I am quite sure is called for, and which some day in all probability may become generally undertaken.

In conclusion I would like to touch on another matter which though not forming any part of my theme is at least in some degree related to it and that is the growing interference on the part of the State in private business and enterprise. As a profession we have no politics, but I can at least say this, that for unknown reasons there has never been so much State interference with private business as as in the last few years. The farmers, banking, commercial, professional and legal circles are sick of it and cannot understand how it has all come about. No doubt it is chiefly attributable to the heads of Departments in the Civil Service, who seek on all occasions to study Departmental convenience and magnify their Departments and Departmental activities as much as possible. How all this may affect the people at large they do not care. Ministers of the Crown appear to be helpless and entirely at the dictation of the Under-Secretaries and other Departmental Heads. We must take some initial action and have some body who can speak for us on this matter. Neither the British Empire nor the United States was created or built up by State interference in business—rather they realised that the less the State interfered in business the better for the country and for business.

I hope members will jointly and severally express their views on this matter in the proper directions and on every possible opportunity.

Bills Before Parliament.

Auctioneers. See ante p. 177. This Bill has been reported from the Statutes Revision Committee with many amendments. The alteration of greatest interest to the Profession is the omission of Clause 34 requiring proceeds of sales by auction to be paid into trust account, and Clause 41 making it an offence to fail to pay such moneys into trust account. The power of making regulations by Order-in-Council conferred on the Governor-General by Clause 47, has also been considerably curtailed.

Canterbury Provincial Buildings Vesting. (Hon. Mr. McLeod). Constituting special board and vesting Canterbury Provincial Buildings therein.

Dangerous Drugs Amendment. (Hon. Mr. Young). Section 13 of Dangerous Drugs Act, 1927, amended: (a) by omitting from Subsection two all words after the words "Justice of the Peace," and substituting the words "to be dealt with as hereinafter provided"; (b) by omitting from Subsection three the word "such" occurring after the words "Pending the laying off." Section 25 of principal Act amended by omitting from Subsection two the words "and every information for an offence against Part II, shall be laid by a Medical Officer of Health."

Divorce and Matrimonial Causes. See ante p. 193. The only alteration made by the Statutes Revision Committee is the addition of the following subclause to those in Clause 10, defining the grounds for divorce: "(k) That the respondent, being the husband of the petitioner, has been guilty of rape or of sodomy or of bestiality since the celebration of the marriage."

Industrial Conciliation and Arbitration Amendment. (Right Hon. Mr. Coates). No award relating to agricultural, pastoral or dairying operations, or to any other work effected on a farm, or to the manufacture or production of butter, cheese or other products of milk, or to persons engaged (whether as employers or workers) on a farm or in such manufacture or production to be made before 1st September, 1929, without consent of parties. Existing awards not affected. No existing award to which foregoing provisions of this Section relate shall be amended or extended before such date without consent of all parties thereto, and in the case of an extension of any such award, without consent of all industrial unions, industrial associations, or employers added by the Court as parties thereto.—Clause 2. Industrial Conciliation and Arbitration Amendment Act, 1927, repealed.—Clause 3.

Land and Income Tax (Annual). Hon. Mr. Downie Stewart). Fixing rates of land tax and income-tax for year commencing 1st April, 1928.

New Zealand Citizens. (Right Hon. Sir Robert Stout). Every person born in New Zealand to be a New Zealand citizen.—Clause 2. Every British subject who has the right to become a resident in New Zealand shall after two years' residence therein be a New Zealand citizen.—Clause 3. Alien naturalized in New Zealand and who has after such naturalization resided two years in New Zealand, Cook Islands, or Western Samoa, to be New Zealand citizen.—Clause 4. Statute not to confer on any citizen previously an alien any political rights save those conferred by the Statute under which naturalized.—Clause 5. Every New Zealand citizen to be liable to be tried and punished in New Zealand for any violation of the provisions of any Statute, notwithstanding that violation took place out of New Zealand, if he is found at any time in New Zealand, Cook Islands, or Western Samoa.—Clause 6. Act reserved for Royal assent.—Clause 7.

Public Works Amendment. (Hon. Mr. Williams). Section 116 of principal Act amended by repealing Subsection one thereof and substituting following Subsections:—

"(1) Except as otherwise provided in this section, where the owner of any land sells any part thereof not having a frontage to an existing road, street, or private street, he shall provide and dedicate as a public road or street a strip of land of not less than sixty-six feet in width which will give access to such part from some existing road, street, or private street:

"Provided that this subsection shall not apply with respect to the sale of land to the owner of adjoining land; or to the sale of land in any case where the local authority in whose district the land is situated, having first satisfied itself that the land sold or intended to be sold is not intended to be used as a site for a dwellinghouse, resolves on that ground that the requirements of this subsection shall not apply.

"(1A) In any case of subdivision to which the provisions of section one hundred and eighty-seven of the Municipal Corporations Act, 1920, are applicable, there shall be substituted for the requirements of the *last preceding* subsection a requirement to provide and dedicate a strip of land of the width of the street authorized pursuant to the said section one hundred and eighty-seven.

"(1B) Any local authority, other than a Borough Council, may in any case by resolution authorize the provision and dedication within its district of a public road of a less width than sixty-six feet but not less than forty feet, but otherwise in accordance with this section; but no such resolution shall take effect unless and until it has been approved by the Governor-General in Council.

"(1C) Any Order in Council made for the purposes of subsection *one* A or subsection *one* B hereof may be absolute or may be subject to such conditions with respect to the building-line as may be therein imposed. Where any such conditions are made the provisions of subsection three of section one hundred and seventeen hereof shall apply, with the necessary modifications, as in the case of an Order in Council made under the authority of that section."

For the purposes of Section 117 of principal Act any division of land to which that Section relates, whether into two or more allotments, shall be deemed to be a subdivision of that land for the purpose of sale if at least one of the allotments is intended for disposal by way of sale.—Clause 3. Stopping of roads by local authorities: Section 131 of principal Act repealed and substitution therefore.—Clause 4. Section 132 of principal Act repealed.—Clause 5. Section 10 of Amendment Act, 1911, amended.—Clause 6.

Local Bill.

Napier Borough and Napier Harbour Board Enabling.

London Letter.

Temple, London,
18th July, 1928.

My dear N.Z.,

I am afraid that the London "Times," though it had room and to spare for its divorce court reports (and why it persists with that type of law news no lawyer can ever make out), did not see its way to report the hearing, on Monday, 9th July, of the special petition of Mr. Nelson for leave to appeal to the Judicial Committee of the Privy Council from the order of the Administrator, banishing him from Samoa. But our newspapers are past praying for, and for them we will no longer pray. (You remember the story of which this reminds me? Our diplomatic representative in China, upon whose quarters the hosts of murderous brigands were advancing but to whose frequent, and ever more pressing despatches, no comforting answer of assistance was sent, and the ultimate despatch, describing the still nearer approach of the enemy; making a last, urgent plea for help; detailing how the danger was, even as the despatch-writer wrote, said to be on the point of realisation: . . . and concluding, "In which case, I shall no longer have the honour to remain, Sir, Your humble, obedient servant. . . ." So we might say here: "And your petitioner will no longer pray, etc.") Let us do our reporting ourselves; and I suppose, after all, we know as much about it as most people, though we do not pretend to have read every word of every witness before the Skerrett Commission!

Stafford Cripps, K.C., led for the petitioner, and, though he kept his end up and never lost the thread of his argument, notwithstanding their Lordships' frequent, and pertinent, interruptions, he did not put up very much of an argument nor make a very formidable fight of it. I think we should have had something more stirring if, for example, we had heard your Myers at the rostrum on Mr. Nelson's behalf. There he could not have been, however, for he had appeared, as you remember, for your Government in earlier proceedings, his cross-examination being described as "bitter and offensive" by a petitioner who spoke with the same harshness of your Government, your Ministers, your Press, your whole judicature, your Chief Justice (who, if one accepted the impression given by the petition, would be a blustering brute, indeed!) and everything and everybody, whether in New Zealand or Samoa, in any way concerned with his affairs: from the Administrator, who removed him, down to the stenographer, who recorded his evidence! However, this was all in his petition to the League of Nations, which was not intended, probably, to be so closely scrutinised by those concerned with his Petition to the Privy Council; we did not, of course, expect Cripps to treat us to that sort of eloquence, but we did expect more shafts to his attack and more aspects to his argument. He had two or three points only; and, when the Chancellor, Lord Dunedin, Lord Sumner, Lord Atkin and Lord Darling (Lord, what a Board! I wish we could have put up the like when your people were over here: I think they would have then agreed that we *can* produce things, when we set our mind to it), when their Lordships put the answers to him, he did little more than repeat the points.

It was a hopeless petition, in any case. Manifestly there can be no appeal to the Judicial Committee, except from a Court, as any man can see with his naked eye, who studies the Act of 3 William IV: "the Judicial Committee Act, 1833." Manifestly there can be no appeal from the orders of the executive, as anyone can see who regards the **Mgomini case**: 22 Times Law Reports, 413; and manifestly the Administrator was an administrator and was not a court nor a judicial officer, when he was telling Mr. Nelson to quit. No doubt this was all depressingly present to Cripps' mind; and I must give him credit for the many ingenious turns and twists he gave to his arguments to overcome these initial impossibilities. But what I should have liked to hear was something a little less ingenious and bespeaking the rotten case; something a good deal more hearty, and hinting at the most terrible miscarriage of justice and the intolerably forlorn position of a virtuous man struggling against adversity with no hope from the onslaught of tyranny unless it be that in such circumstances there is for every man under the British flag, whether by reason of the "Law" mentioned in the Act, or the "Statute" mentioned in the Act or the "Custom" mentioned in the Act, or notwithstanding the Act altogether, an appeal to His Majesty's judgment. . . I do not suggest that you may usefully address the Judicial Committee in this romantic way; but you are more likely, on occasions, to succeed before them, and, indeed, before the Bench on the Last Day I make no doubt, if you speak in this determined spirit. Nor do I think Mr. Nelson was in anyway a good man struggling with adversity: but I was hoping that someone, for the moment at any rate, should be made to think he was, so that Jowett, K.C., leading for us, and surely the most handsome and, in voice, appearance and manner, the most attractively equipped advocate of the day, might address to that person the many arguments which had with such labour been prepared, first upon the facts derived from a careful perusal of the other enquiries into this Samoan business, and second upon the law and as to the origin and resulting limitation of the jurisdiction of the Privy Council and its Judicial Committee. The latter most interesting research was undertaken in order to stop up all possible holes and to be sure that this claim to be heard by the Council might not be justified by some relic of the King's original jurisdiction left in him, notwithstanding the creation of the King's Bench Division and the Courts of Equity. Incidentally, be it said, the research was substantially assisted by your practice text-book "**Stout and Sim,**" in which is to be found as quick and as sure a guide to the prerogative writs as I have ever come across.

The Pace case proceeded upon the lines which I (and everybody else) foresaw, to the conclusion which everybody else (and I) anticipated. Merriman and Birkett seem to have done exactly what I led you to expect of both. Ah! But I could be the most wonderful prophet there ever was, if only the matters about which one was called upon to prophecy were always as easy as this one. The trial was stopped at the close of the prosecution's case.

As to the Savidge Enquiry Reports: did I prophecy there? I was a fool if I did not, for if anyone expected anything but a compromising effort, and a miserably apparent effort at that, from the two majority Reporters, then that somebody can never have known Mr. Withers or have appeared before Sir Eldon Bankes. They appeared as men born to moderation and bred in moder-

ation and with moderation badly on the brain; and it was, I suppose, inevitable that these two eminently-respectables must whitewash the police, a mistake to begin with, and must make a mess of their white-washing, a misfortune to go on with: thus we lawyers are left the laughing-stock of the laymen, whose representative, Mr. Lees Smith, M.P., has shown himself so infinitely superior, as a Judge, to both of them! Quite a minor tragedy here; and most of us, at the Temple, are rabid on the subject, for, though it be little we care about Sir Leo and the Lady, we do value our detachedness from the police and our utter inaccessibility to the forces of tyranny. And mark you this, our Police, notably through the counties and in the provincial towns, and indeed in London, too, and in our other cities, are as magnificent to-day as you have ever thought, or been taught to think, they were: they need no whitewashing nor protection from investigation, and where instances require attack they are quite strong enough to stand correction and quite superb enough to need correction, if they show the least fault. The whole thing is a mess-up: Sir Archibald Bodkin made a bad mess of it, at the start, and now Sir Eldon Bankes and Mr. Withers have made a worse mess of it at the end. The mercy is that nothing diverts the solid, stolid British public from the right conclusions at which it almost invariably arrives by instinct, *flair*, or what you will, and notwithstanding the reasoning of the Judges, the arguments of orators, the artfulness of the Press or the Reports of the Most Eminent Commissioners!

I think that on an earlier occasion I called your attention to the Champerty case, boldly brought, by a sufferer, against an enterprising solicitor? I ought then to call your further attention to the fact that the decision of Branson, J., and a Common Jury has by the Court of Appeal been reversed, but on a technical ground only, as the Master of the Rolls was careful to point out. The Court of Appeal agreed that the charges of champerty and maintenance had been proved, but that a plaintiff, showing no special damage, could not in any event succeed in this class of action: (**Wiggins v. Lavy**: decided, 16th July).

Another dismal finish!

Yours ever,

INNER TEMPLAR.

Canterbury Law Students' Society.

The functions of the Society this year have so far been of an eminently satisfactory nature. Both the Annual Dinner and Dance have been held and have certainly been a success socially, if not financially. A Moot held some few weeks ago, before Mr. M. J. Gresson, was a well-attended evening. Messrs. K. G. Archer, M. J. Burns, and A. W. Smithson were senior counsel, supported by Messrs. E. S. Bowie, A. C. Perry, and J. A. Kennedy.

The Annual Debate with the Canterbury College Dialectic Society has also been held, Messrs. C. E. Purchase, E. B. E. Taylor, and R. A. Young representing the Society.

The second Moot was indefinitely postponed owing to the illness of Mr. W. J. Hunter, who was to have been judge, and there are two more lectures to be delivered, by Mr. W. R. Lascelles and Mr. A. W. Brown, respectively, before the session closes.

Forensic Fables.

THE LANGUID LEADER AND THE DUCAL ACTION.

There was Once a Languid Leader. He Despised Old-Fashioned Methods and did not Think Much of his Contemporaries. Though the Languid Leader was both Learned and Industrious he Preferred to Pose as a Dilettante. Sometimes he Remarked that he Only Practised at the Bar because it Provided him with a Certain Amount of Pocket-Money. Often he would Say that it was an Old Woman's Job. Shortly after the Languid Leader had Taken Silk a Painful Dispute Arose between the Bogglesdale Rural District Council and the Duke of Agincourt. The Rural District Council

Asserted, and the Duke Denied, that there was a Right of Way over his Grace's Best Grouse-Moor. As the Passage of Citizens along the Sky-Line would Absolutely Ruin the Third and Fourth Drives the Duke Consulted his Family Solicitor and a Chancery Action was Duly Launched. The Duke Retained Mr. Topnot, K.C., the Great Real Property Lawyer, to Present his Claim for Damages, a Declaration and an Injunction. The Rural District Council Delivered a Defence and Counter-claim which Bristled with Law and Fact. Two Days before the Case Came On, Mr. Topnot, K.C., was Attacked by Influenza and Returned his Large and Well-Marked Brief. Consternation Reigned in the Ducal Camp. The Family Solicitor, not without Misgivings, Approached the Clerk of the Languid Leader. That Experienced Official Undertook that if the Fee were Substantially Increased (as Time was so Short) his Employer would Give the Matter his Close Attention. On the Eve of the Day Appointed for the Trial the Duke of Agincourt, the Family Solicitor, the Managing Clerk and the Junior Counsel Attended at the Chambers of the Languid Leader for the Final Consultation. The Languid Leader had Studied the Brief with Care and Knew the Case Inside Out. But he was not Going to Give the Show Away. He Received the Party with

Vague Cordiality and Thought it Well to Mistake the Duke of Agincourt for the Managing Clerk. He then Observed that he had Only been Able to Glance at the Pleadings, and Opined that the Case was about a Cargo of Chinese Pickled Eggs. When this Misapprehension was Rectified the Languid Leader Exhibited no Emotion. After the Junior Counsel had Explained the Outstanding Points, the Languid Leader Yawned and Said he was Afraid he must be Going to the House. The Duke of Agincourt Left the Consultation Speechless with Rage and Indignation. On the Morrow the Languid Leader Delivered a Dashing Speech and Cross-Examined the Defendants' Witnesses into Cocked Hats. When All was Happily over the Languid Leader Received the Congratulations of the Duke of Agincourt with Easy Nonchalance. He Explained that One Case was Much Like Another and that it was Quite Easy to Pick a Thing Up as You Went Along.

Moral: Keep It Up.

Correspondence.

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

Service by Post.

I understood that the N.Z. Law Society some years ago engaged the services of a Barrister in Wellington to watch new legislation which might prove detrimental to the profession. I would like to know if this arrangement is still in existence and, if so, why the amendment to the Magistrate's Courts Act providing for service by post was allowed to pass. At present in a large territory such as the MacKenzie County in South Canterbury very great difficulty is experienced by my firm in having Magistrate's Court processes served.

It is a well known fact that defendants deliberately avoid service by registered post. In places where defendants reside at distant sheep stations and the Court only sits at periods of about three months, Magistrate's Court proceedings under this new system of service prove almost useless for the collection of moneys. As a result practitioners are greatly hindered in their work and their clients suffer considerable pecuniary loss as a result of defendants being provided with an easy means to avoid service.

I trust that the matter will be taken up officially with a view to amending legislation.

"JUNIOR MEMBER."

21st August, 1928.

[The Under-Secretary for Justice, when shown a copy of the above letter, stated that it was precisely for the benefit of defendants in such districts as the Mackenzie Country that the provisions as to service of process by registered post were enacted. The difficulty mentioned by our correspondent could, he said, be overcome by issuing summonses at such time before the three-monthly sitting of the Court as to allow of personal service being effected should the defendant not accept service by registered post. The arrangements made some years ago by the New Zealand Law Society as to the watching of new legislation are still in existence, and have, we are informed, proved most useful. All new legislation—and not only legislation which might prove detrimental to the Profession—is watched and reported upon by Counsel engaged.—ED. "N.Z.L.J."]

The Privy Council.

The Lord Chancellor's Comments on the Judicial Committee.

Speaking at the Lord Mayor of London's annual entertainment of His Majesty's Judges, held recently, at Mansion House, Lord Hailsham made some observations on the Judicial Committee of the Privy Council which are of particular interest to practitioners in the Dominions.

The Lord Chancellor said that he was sorry to notice that it had become necessary to drop that part of the Administration of Justice Bill before the House of Commons which related to the Judicial Committee of the Privy Council. He himself had presided at the hearing of every Crown Colony and Dominion appeal that had occurred since he became Lord Chancellor, and he had been profoundly impressed by the importance of the maintenance of that great link of Empire between England and the Dominions overseas. He was not sure that the public realised how great a strain was sometimes placed on that link. There were altogether, to-day, with himself, seven persons whose duty it was to man the Committee of the Privy Council in the House of Lords, and as they always sat in two divisions it meant that there were fifteen places to fill and seven men whose duty it was to fill them. They had, first of all, from time to time the assistance of one or other of the Judges from the Dominions overseas. All that week he had had sitting with him the Chief Justice of the Supreme Court of Canada, and the Committee were all grateful for the help he had been able to bring. In addition, there was the assistance given by the ex-Lord Chancellors, who, for no reward, were in the habit of lending their services, and they owed a great deal to men like Lord Haldane, Lord Finlay, and Lord Buckmaster, for the efforts they had made. In recent years some of the Judges, when they retired after years of service, had likewise given their voluntary and unpaid help in discharging the duties of the Privy Council in the House of Lords. He did not think that people realised how much was owing to men like Lord Phillimore, Lord Wrenbury, Lord Warrington, and others, who, quite unostentatiously, gave up their leisure in order to help the Committee to do good work for the Empire. That voluntary help, it was apparent, could not always be forthcoming. Necessarily, too, some of the members of the Privy Council who were in the House of Lords must be advancing in years and not gaining in physical efficiency, and he thought it was a great misfortune when an effort was made to strengthen the Judicial Committee by the addition of two members, to hear the Indian Appeals—a measure which was passed for the third year unanimously in the House of Lords, and a measure which had been accepted by the Indian legislature who would contribute half the salaries necessary—the petty jealousy of an insignificant clique in the House of Commons, masquerading under the guide of economy, should have jeopardised the far more vital interest of the efficiency of that great body. He referred to this only because he was conscious that the Judicial Committee imperatively needed strengthening, and because he knew that that strengthening could only be achieved by arousing public opinion to a sense of the urgency of the need, and a sense of the vital importance of the interests at stake.

Bench and Bar.

The firm of McCallum, Mills & Co., Blenheim, has been dissolved by mutual consent. The former partners, Mr. R. McCallum and Mr. C. H. Mills, will both practice on their own account at Blenheim.

Mr. R. A. Cuthbert has severed his connection with Messrs. Garrick & Co., and has commenced to practice on his own account. The firm is being carried on by Messrs. F. I. and F. W. M. Cowlishaw.

Recent admissions at Christchurch include Mr. E. S. Bowie, LL.B., as Barrister and Solicitor, Messrs. H. de R. Flesher, M.A., T. K. Papprill, and L. J. Williamson, as Solicitors, while Messrs. R. C. Abernethy and A. W. Smithson, who have been practising as Solicitors, have been admitted to the Bar.

The following admissions to the Profession have been made at Wellington: F. B. Anyon (Barrister); J. M. McKenzie (Solicitor).

Mr. G. Craig, Comptroller of Customs, has been recommended for the University of New Zealand's degree of Doctor of Laws. Mr. Craig took the degree of LL.B. in 1908, and that of LL.M. in 1915.

Rules and Regulations.

Chattels Transfer Act, 1924. Cinematograph projection machines and lighting and other equipment peculiar thereto, added to the class of chattels defined in Seventh Schedule to Act.—Gazette No. 63, 16th August, 1928.

Customs Act, 1913. Antiques and works of art as approved by the Minister to be admitted to New Zealand free of duty. Gazette No. 63, 16th August, 1928.

Extradition.—Treaty with Lithuania applicable to Commonwealth of Australia, Dominion of New Zealand, Union of South Africa, Irish Free State, Newfoundland and India, as from 4th May, 1928.—Gazette No. 63, 16th August, 1928.

Fisheries Act, 1908.—Regulations for trout-fishing in Grey Acclimatization District.—Gazette No. 63, 16th August, 1928. Amended regulations for trout and perch-fishing in the Waimarino and Wellington Acclimatization Districts.—Gazette No. 66, 30th August, 1928.

Health Act, 1920.—Drainage and plumbing regulations applicable to Boroughs of Inglewood, Stratford, Patea, Te Awamutu, West Harbour; Town Districts of Helensville, Henderson, New Lynn, Howick and the Leamington District.—Gazette No. 66, 30th August, 1928.

Land Act, 1924.—Amending regulations providing for management and protection of Lake Taupo Landing Reserve.—Gazette No. 66, 30th August, 1928.

Public Works Amendment Acts, 1924 and 1927; Motor Vehicles Act, 1924.—Amendments to regulations 7 and 8 of Motor Lorry Regulations, 1927.

Stamp Duties Act, 1923.—Clause 8 of regulations of 4th March, 1924, relating to discount on stamps revoked and substitution therefor.—Gazette No. 63, 16th August, 1928.

Legal Literature.

"Stephen's Commentaries on the Laws of England."

General Editor: G. C. CHESHIRE, D.C.L., M.A.
Nineteenth Edition: Volumes 4: pp. 385, 593, 585, 578.
Butterworth & Co. (Publishers) Ltd.

That well-known work, "Stephen's Commentaries," so familiar to upwards of three generations of students in England, has passed through several phases according to the numerous changes in the law which have taken place and the angle at which the law as a whole has been regarded. It is essentially an introductory work to more detailed study, and its success depends upon the convenience of its arrangement, the careful selection of the principles treated, and the accuracy and adequate fullness of that treatment. A student who reads through the work intelligently cannot fail to assimilate and to appreciate the great fundamentals of our Law: the principles are not obscured in a mass of bewildering detail, a fault which this reviewer feels characterises several of the works at present in use in our Universities.

The present Edition has been entirely re-arranged and largely rewritten. The aim of the editors and authors has been to shorten and simplify the book by confining it, as far as possible, to an exposition of general principles, an aim which would appear to have been successfully achieved by the learned editors and authors. Leading cases are cited freely, but not *ad nauseam*, throughout the work and appropriate excerpts from judgments given. Volume I contains a general introduction, an account of the sources of English Law, a description of the Courts and of civil procedure and a general account of the Law of Status, and is brought to a close by a most interesting chapter on the Legal Profession. Volume II consists solely of the English Law of Property—realty and personalty being treated together—and is perhaps of the least value to the student in this country. Volume III treats of Contracts and Torts, these branches of the law being most lucidly expounded. Volume IV deals with Criminal Law and Constitutional Law. Each Volume has its own index.

New Books and Publications.

British Year Book of International Law 1928. (Oxford Press). Price 19/-.

The Crown and the Courts. The Case for Reform. By J. W. Gordon, K.C. (Stevens & Sons). Price 1/3.

Patent Law and Practice. By Griffiths. (Stevens & Sons). Price 9/-.

Outline of the Law of Contracts and Torts. Third Edition. By A. M. Wilshire. (Sweet & Maxwell). Price 9/-.

Annual Register, 1927. (Longman's.) Price £1/15/-.

Swiss Federal Code of Obligations. By Dr. G. Wettstein. (Sweet & Maxwell Ltd.) Price £1/-/-.

"Women are invariably angry in the witness-box; for the rules of evidence happen to be peculiarly repressive of feminine conversation."—Lord Darling.