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"The tide of enactments has now become so strong that practising barristers find it nearly impossible to keep abreast of it."

—Viscount Bryce.

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State of the Law.

Sir Maurice Amos in an article headed "State of the Law," and published in the "Nation," comes to the conclusion that not only is the law of England as a whole bad, but that there is no longer any attempt to mend it. As reported in the "Law Journal" of September 22nd, 1928, he says:—

> "Bentham has shot his bolt; Rationalism has surrendered to the Muse of History and the study of origins; and Blackstone must chuckle among the Shades at seeing the *mos majorum* restored to the national pantheon under the guise of the spirit of the Common Law. There exists no society or professional organisation having for its purpose the methodical criticism of our laws; and our current legal literature is almost wholly innocent of any hint that law is a human product, which can and should be deliberately shaped to the satisfaction of social needs."

Sir Maurice Amos's criticism that our current legal literature is innocent of any suggestion as to how the law should be improved can be admitted. We have previously pointed out that Professor Winfield, writing in the "Law Quarterly Review," gave it as his opinion that while text books were the humblest authority, they should be the most important agencies for improving the form, and to some extent the substance, of the law, but whether text-writers will in future depart from their present general practice of stating merely the principles of the law, as they exist at the time of writing, remains to be seen. Sir John Salmond in his books showed an increasing tendency in the direction advocated by Professor Winfield, and there is no question but that his suggestions for improvement added not only to the interest of the text, but induced more careful scrutiny of the principle involved. While, however, Lawyers may possibly concede that that point of Sir Maurice Amos's criticism is well taken, they are not likely to regard his general statement, "Rationalism has surrendered to the Muse of History and the study of origins," as a valuable contribution to the question of Law Reform.

While Sir Maurice Amos reaches the conclusion that the amendment of the Law really lies with the Profession, save where some powerful lay interest is touched, he does not seem to appreciate the fact that so far as amendment lies with the Profession it will more likely move along the path of change in the form of the Law rather than in positive codification of branches of the Law. It is a mistake to think that such changes are not, perhaps slowly, being made. The complaint of the layman is, generally speaking, not to the principle of law, which when laid down is generally accepted, but to form and procedure.

It is perfectly true that the English lawyer is loth to adopt changes in form or procedure without careful consideration and for the good reason that the result of such changes is not easily foreseen. One of the most notable changes in procedure in New Zealand in late years has been the relegation to Judges of matters of fact in many cases hitherto regarded as within the province of Juries. One of the criticisms directed against that change by some Lawyers was that the sharp division between matters of fact and matters of Law that had to be made when a case involving questions of Law and fact was tried by a Jury would cease to be made when tried by a Judge alone, and, as a consequence, the principles of law involved would suffer both in expression and application. To the layman one of the great advantages of the change was the supposed saving of time involved in trial, and there is no doubt that the lay view was in great part responsible for the change. Careful consideration of trials held under the new system is likely to show that the professional criticism was well founded, and the lay view very wide of the mark. In a recent trial held before a Judge alone, when the plaintiff claimed a sum of £1,200 as damages for wrongful dismissal, and the defendant counter-claimed some £160 or thereabouts for moneys due, the trial lasted for ten days, and the Judge reserved judgment. In the result the learned Judge described the dispute as one of no great moment, and awarded the plaintiff £300 on his claim, and the defendant the amount of his counter claim. The amount recovered by each party was therefore within the jurisdiction of the Magistrate's Court. It is interesting to conjecture what length of time such a case would have lasted had it been tried before a Jury. To safely answer this question many considerations would have to be reviewed and, if the opinion of the learned Judge could be obtained, he might from this case make a most valuable contribution on the question of the expediency of the new rules relating to Juries. Actual cases are the best guides, and although the path of Reform by way of change in form and procedure may be slow, it is the safest and surest method and should be consantly pursued by a vigilant and fresh-minded Profession. Such a method may be less spectacular than what one may assume would be adopted by a person who would come under the description of a Rationalist, and although it might not commend itself to Bentham, would be less likely to promote the mirth of Blackstone than a comprehensive programme of reform based on theory divorced from practice.

Because the principles of English Law are contained in innumerable reported cases it does not follow that the principles themselves are so many that they cannot be without difficulty enumerated. They are, in fact, set out fully and with precision in our text books. Reformers of a certain class seem to require not only the enumeration of the principles themselves, but a category of the facts to which those principles will apply. Such a task English Lawyers regard as futile and inexpedient.

Court of Appeal.

Reed, J.
Adams, J.
MacGregor, J.
Blair, J.

October 2, 3, 4; 12, 1928.
Wellington.

LYSNAR v. DE PELICHET, McLEOD & CO., LTD.

Principal and Surety—Guarantee—Right of Guarantor to Securities Held by Creditor—Guarantee Providing that Creditor Could Apply Payments Received on Account of Principal Debtor in Payment of Debt Without Any Right on Part of Guarantor to Claim Benefit of Such Payment or Other Security or Guarantee Until Creditor Paid in Full —Provision a Complete Bar to Claim by Guarantor to Transfer of Securities of Creditor Until Debt Paid in Full.

Appeal from a judgment of Ostler, J., reported *ante*, p. 76.

Appellant in person.
Myers, K.C., and **Wauchop** for respondent.

ADAMS, J., delivering the judgment of the Court, said that the only question in issue between the parties was whether upon demand being made for payment of the sum of £3,000, the limit of the appellant's liability under the guarantee, the appellant was entitled to require as a condition of such payment that the respondent should transfer to him all the securities held by it in respect of the whole debt of £5,000 and interest then due to the respondent on the current account in respect of which the guarantee was given. That question was determinable on the explicit terms of the guarantee. Reading that document in its plain sense it was obvious that the demand for a transfer of the securities was entirely inconsistent with its provisions. By clauses 3, 4 and 5 the appellant agreed (1) that possession by the respondent of any guarantee from any other person or of any other security should not prejudice or lessen his liability under the guarantee, (2) that the respondent might release any security without discharging or diminishing the appellant's liability, (3) that all dividends and payments received by the respondent from or on account of the principal debtor should be applied as payments in gross without any right on his part to stand in the respondent's place or claim the benefit of any such dividends and payments or other security or guarantee until the respondent had received the full amount of its claim in respect of the current account. By those provisions the appellant contracted himself out of whatever equity, if any, he might otherwise have had to call for a transfer of any securities. The judgment in the Court below was therefore right. If upon payment or satisfaction of its claim against the principal debtor in respect of the guaranteed account the respondent had in its hands any surplus in money or any unexhausted securities, the appellant would no doubt be entitled to that surplus and those securities. In the meantime the respondent was entitled to retain all the securities for its own protection. Appeal dismissed.

Solicitors for appellant: **Coleman and Coleman**, Gisborne.
Solicitors for respondent: **Rees, Bright, Wauchop and Parker**, Gisborne.

Supreme Court.

Reed, J.

August 28; September 19, 1928.
Auckland.

BAGNALL v. CLEMENTS.

Mortgage—Sale through Registrar by Second Mortgagee—Auctioneer's Commission Payable on Gross Value and not on Value of Equity of Redemption—Whether Court Entitled to Enquire into Reasonableness of Charges in Action by Mortgagor against Mortgagee—Whether Responsibility for Charges on Mortgagee or on Registrar—Whether Charges Reasonable—Land Transfer Act 1915, Sections 110 (1), (2), (3), 111.

Action by mortgagor for an order, against the defendant, a second mortgagee, that accounts be taken of the proceeds of the realisation of a mortgage security by the defendant and for enquiries as to what sums were properly chargeable by the defendant against such proceeds. The point raised, so far as the accounts were concerned, was as to what commission was properly allowable to an auctioneer upon a sale by a second mortgagee, through the Registrar, of a property subject to a first mortgage.. A property was sold for £28,000, the first mortgage being £20,000, and the second £5,600, leaving a sum of £2,400 obtained for the equity. The auctioneers in accounting deducted £700, commission on sale, being at the rate of 2½ per cent. on £28,000. There were also charges for advertising. The plaintiff contended that the charge was excessive and that commission should be calculated on £2,400, the price realised for the equity. On behalf of the defendant it was claimed that commission was payable on the whole amount, and evidence was given that this was the practice. The preliminary non-suit point was also raised that as the sale was through the Registrar the Court could not as between mortgagor and mortgagee enquire into the reasonableness of the charge.

McVeagh for plaintiff.
Richmond for defendant.

REED, J. dealing first with the non-suit point raised by Mr. Richmond said that it was contended that the sale being through the Registrar of the Supreme Court the defendant, as mortgagee, had nothing to do with fixing the auctioneer's commission, that being entirely in the hands of the Registrar, and that therefore as between the mortgagor and mortgagee the Court could not enquire into the reasonableness of the charge. Whether or not that contention was sound depended upon the true construction of the relevant sections in the Land Transfer Act 1915. The Registrar became seised of authority to sell upon an application in writing made by the mortgagee under Section 110 (1) "to conduct the sale of . . . land comprised in the mortgage." By Subsection (2) of the same section his duties were defined. First he was required to fix a time and place for the sale, secondly to advertise the sale, thirdly to approve of proper conditions of sale, fourthly to employ an auctioneer, and lastly, to do all necessary acts for carrying out the sale. The question was whether or not the statutory duty "to employ an auctioneer" connoted the duty of making all necessary arrangements with such auctioneer, more especially with regard to remuneration, and whether or not, if that were so, the responsibility was solely that of the Registrar to the exclusion of all liability or responsibility on the part of the mortgagee. Mr. McVeagh for the plaintiff contended that the responsibility still rested upon the mortgagee to control the expenses including the commission of an auctioneer. The Act, it was contended, should be construed with due regard to the law in existence at the time that the provision was first introduced into the statutes, and that the presumption should be applied that the legislature did not intend to make any substantial alteration in the law beyond what it explicitly declared either in express words or by necessary implication. **Maxwell on Statutes**, 6th Ed., 149. That was, His Honour stated, a well recognised principle for the interpretation of statutes as was the further principle, based upon **Heyden's Case**, 3 Co. Rep. 7b, "to contemplate what was the cause and reason of the Act, or in other words the mischief requiring a remedy," see per Lord Halsbury L.C. in **Lord Henry Bruce v. Marquess of Ailesbury**, (1892) A.C. 356, 361; **Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs, and Trade-Marks**, (1898) A.C. 571, 576. The original Conveyancing Ordinance absolutely abolished foreclosure and, in lieu, power to sell was given to mortgagees. No authority, however, was given to a mortgagee to himself purchase at such sale, and the principles of equity prevented him from so doing. That was found to work an injustice; upon default the mortgagee had often either to sell at a price below the amount of the mortgage debt, or assume the onerous position of mortgagee in possession. Therefore a remedy had to be sought and the scheme of introducing an official of the Court—the Registrar—to conduct the sale when the

mortgagee desired to have the opportunity of purchasing was adopted and embodied in the Conveyancing Ordinance Amendment Act 1860. Under that Ordinance the duties of the Registrar, as defined, were practically the same as at the present day, that was to say, to fix a convenient time and place for sale, to approve of the conditions of sale, to employ an auctioneer, and to do all other necessary acts for effectuating the sale, and, if the mortgagee became the purchaser, to execute the conveyance to him. It was clear that the act of the mortgagee in applying to the Registrar to sell the property did not for all purposes substitute the Registrar for the mortgagee. It was the duty of the mortgagee to prepare the conditions of sale for approval of the Registrar; the mortgagor might deal direct with the mortgagee and pay off his mortgage without reference to the Registrar and the mortgagee could sign the release (Section 111); and further, if a third party bought at the auction the mortgagee executed the conveyance. The duties of the Registrar until the day of the sale did not exclude the active dealing with the mortgage in the interval by the mortgagee. There was nothing to prevent the mortgagee exercising his power of sale before the day appointed for the auction, or of assigning the mortgage debt, and as provided by Section 111 he could release it. On the happening of any of those events or if at the sale a stranger became the purchaser of the property, it appeared to His Honour that the Registrar immediately became *functus officio*, and had no further duties to perform. In the last case it became in truth a sale by the mortgagee. That was evidently the view of Cooper J. in **Hamilton v. Bank of New Zealand,** 24 N.Z.L.R. 109, 125. The provisions of the Act, therefore, were all directed to the sale of the property to the mortgagee. Any other dealing with the mortgage was and remained in the hands of the mortgagee alone. The various steps prescribed to be taken by the Registrar were intended to be for the protection of the mortgagor by securing that if the mortgagee became the purchaser he did so in open competition at an auction of which due publicity had been given. If the mortgagee did not purchase then the Registrar had nothing more to do with the matter whatsoever. For all practical purposes it was as if it had never been through his hands. Even when the mortgagee was the purchaser the duties of the Registrar were strictly limited to those definitely imposed upon him by the statute. Thus it was held in **Hamilton v. Bank of New Zealand** (*cit. sup.*) that it was not the duty of the Registrar nor had he the power to fix a reserved price at such a sale. Again in **McGarrigle v. Hepburn,** N.Z. 1 C.A. 20, the Court of Appeal held that it was not the duty of the Registrar on executing a conveyance to the mortgagee to take accounts as between him and the mortgagor. That report was edited by the late Johnston J. who at the time was acting Chief Justice, and no doubt a member of the Court. It was remarkable that the Head note contained the following paragraph:—"It is not the duty of the Registrar to pay the charges attending the sale, or to see that they were reasonable," and yet there was no reference to those matters in the report. As the law stood at the present day there was, His Honour stated, an implied authority for the Registrar to pay the reasonable expenses of and incidental to the sale, for Section 114 made the mortgagee liable to him for them. The use of the word "unreasonable" limited the liability of the mortgagee. It gave him authority to question the expenses. That was not a matter of actual importance as in practice the mortgagee paid the expenses direct. That was recognised in Section 111 which provided that a mortgagor desiring to pay off the mortgage debt before the auction sale was required to pay the mortgagee "the expenses already incurred by the mortgagee in connection with the intended sale." But Whether the mortgagee paid the expenses direct to the auctioneer or indirectly to him through the Registrar, it was the mortgagee and he alone who had to account to the mortgagor in respect of those expenses. See **re Benjamin and Jacobs,** 9 N.Z.L.R. 152, 154, per Williams, J. There was no privity of contract whatsoever between the Registrar and the mortgagor. The mortgagee was entitled to question the account submitted to him by the mortgagor including the charges made for auctioneer's commission. The mortgagor was only entitled to pay reasonable expenses for the service whether made to the auctioneer direct or to the Registrar. It followed that if the expenses charged were not reasonable, no matter to whom they had been paid, the mortgagee was not entitled to be credited with them. In His Honour's opinion, therefore, the action was rightly brought against the mortgagee.

The next question was whether or not the amount charged for auctioneer's commision was unreasonable. The defendant strongly relied on the decision of the Court of Appeal in **Stanley v. Murphy** (1922) N.Z.L.R. 838, 847, per Sim, J. His Honour did not think that decision bound the Court in the present case for the reason that it was a case of a mortgagee selling under his power of sale, whereas the present was a sale through the Registrar. In the case of a sale by a mortgagee under his power of sale the equity might be of considerable value and the remuneration to the auctioneer, calculated as commission on such equity, might be quite adequate. The probability of a substantial equity on a sale through the Registrar was almost nil. The fact that there was no recorded case since the Act came into force in 1860 of the question having been raised was strong presumptive evidence that there had never been a sufficiently large equity of redemption upon a sale through the Registrar to make it worth while. The remarks of Edwards J. (at pp. 140, 141) in **Hamilton v. Bank of New Zealand** (*cit. sup.*) were, His Honour stated, pertinent. His Honour added that the most usual reason for selling through the Registrar was that the mortgagee had little hope of getting his money, and expected to have to buy in. Those considerations distinguished the present case from **Stanley v. Murphy** (*cit. sup.*). In the present case the commission paid to the auctioneers was, on the face of it, extravagantly large compared with the amount coming to the mortgagor. The whole question was whether in the present case the charge of £700 was reasonable. His Honour was satisfied on the evidence that it was customary and usual for auctioneers to charge on the gross value of the property when selling subject to a mortgage, and His Honour thought that such rule applied to sales through the Registrar subject to one or two exceptional cases. The position of land agents was analagous to that of auctioneers. In the Court of Appeal in **Knyvett and Pratt v. Suisted,** (1918) N.Z.L.R. 53, 59, 60, 63, the point was definitely decided that land agents in such circumstances were entitled to charge on the gross value. The evidence as to the usual and customary charge was thus supported by judicial decision. In those circumstances His Honour did not think he was entitled to disregard the general practice because in an individual case it worked hardly. His Honour therefore held that the charge was not unreasonable.

Solicitors for plaintiff: **Endean and Holloway,** Auckland.
Solicitor for defendant: **R. W. F. Wood,** Otahuhu.

Reed, J. September 5; 11, 1928.
Auckland.

FLEMING v. THE ECLIPSE LAUNDRY CO. LTD. (IN LIQUIDATION).

Company—Rectification of Register—Person Induced by Misrepresentation to Take Shares in Private Company and to Pay Deposit—Prompt Repudiation of Shares and Demand for Return of Deposit—Purported Acceptance of Repudiation by Managing Director Subject to Approval of Company—Negotiations with Managing Director and Solicitor to Company to Arrange Security for Return of Deposit—Letter from Solicitor that in the event of Proceedings Being Taken by Such Person the Company Would Not Raise Defence of Delay—Security Arranged for Return of Deposit—Company Refusing to Carry Out Arrangement and Going Into Voluntary Liquidation—Subsequent Commencement of Proceedings for Removal of Name from Register—Liquidation a Bar to Rectification of Register.

Action by plaintiff against the defendant company (in liquidation) to have his name removed from the register of the company. The facts were admitted. The defendant company was a private company consisting of three members. The plaintiff was induced to take 300 shares in the company by misrepresentation of such a nature as clearly to entitle him to repudiate. The shares were allotted on 10th December, 1927. The plaintiff repudiated them on 14th January, 1928, at the same time demanding the

return of the £100 paid by him. The directors of the company were Roxburgh and Dawson of whom the former was managing director. The right of the plaintiff to have his name removed from the register was not contested by Roxburgh who offered in writing, purporting to do so on behalf of the company, to return the £100 within twelve months with 7% interest. He qualified the offer by saying that it must be subject to the approval of the company. The plaintiff wanted security and negotiations took place between Roxburgh and the plaintiff and the parties' solicitors. The company's solicitors, on 25th January offered to give a bill of sale over a motor truck, for £100 payable in twelve months with 7% interest. The plaintiff desired further security over certain plant and this retarded a settlement. On the 1st March, the company's solicitors wrote to the plaintiff's solicitor: "We write, as requested, to acknowledge the fact that you have delayed commencing proceedings in this matter in order that an amicable settlement might be affected and that we have agreed, on behalf of the company, that in the event of your deciding to take action, the defence of delay will not be raised by the company in respect of the period up to the present date." The next day the plaintiff's solicitor accepted on behalf of his client the offer contained in the letter of 25th January. On 19th March the plaintiff's solicitor sent to the company's solicitors a draft bill of sale for perusal. Roxburgh would not carry out the arrangement and nothing further was done about the bill of sale. On 24th April, the plaintiff's solicitor wrote to the company's solicitors requiring that "in pursuance of the agreement to cancel the contract" his client's name should be removed from the register. Nothing in this direction was done by the company. On 9th May the plaintiff issued a writ against the company claiming *inter alia* rectification of the register by removing his name therefrom. In the meantime, Roxburgh had, on 5th May, without any notice to the plaintiff of any meeting for that purpose, entered or caused to be entered a minute in the company's minute-book that the company go into voluntary liquidation, and had signed the same and had procured the signatures thereto of the other two shareholders. Neither the plaintiff nor his solicitor was aware of the resolution when the writ was issued. In the course of interlocutory proceedings leave was given by MacGregor, J., to proceed with the action and the liquidator was defending. The question for consideration was whether or not the plaintiff was, notwithstanding the voluntary liquidation of the company before the commencement of proceedings, entitled to rectification of the register by the removal of his name.

Beattie for plaintiff.

Tong for defendant.

REED, J., said that the case for the plaintiff was that he definitely repudiated the contract to take the shares and that such repudiation was accepted by the company through the medium of Roxburgh, and further, that he requested that his name should be removed from the register, and having no control thereof he was entitled to assume that that had been done. It was contended that he had done all that he could do and that, therefore, the intervening liquidation did not prevent the order being made. If the case were one purely affecting the company shareholders much might be said in support of those contentions, but the creditors of the company were vitally interested. It was said that the sole assets were the truck and the claim on those shares. For the protection of creditors of companies a rule had been established that, in the event of liquidation, a shareholder could not have his name removed from the list of shareholders unless he had, before liquidation not only repudiated the contract but had also got his name removed from the register, or, at all events, had commenced legal proceedings to have it removed. "The doctrine is," said Jessel, M.R., in **Burgess's case,** 15 Ch. D. 507, "that after the company is wound up it ceases to exist, and rescission is impossible. There are then only creditors and co-contributors and no company."The position of shareholders in companies whether solvent or insolvent, was very different after an order to wind up from what it was before the order, and was equally so in the case of a purely voluntary winding-up—**Stone v. City and County Bank,** 3 C.P.D. 282, per Bramwell, L.J., at p. 309. The rule had been modified to the extent that if a shareholder had taken legal proceedings before the commencement of a winding-up to have his name removed, that would be sufficient. **Reese River Silver Mining Co. Ltd. v. Smith,** L.R. 4 H.L. 64. The judgment, His Honour stated, related back to the date of commencing proceedings and had the same effect as if judgment was on that day pronounced removing his name. It was pointed out by Lindley, L.J. in **In re Scottish Petroleum Company,** L.R. 23 Ch. D. 413, 437, that there was a further encroachment on the rule, namely, "That if one shareholder commences a litigation to have his name removed, and there is an agreement between the company and other repudiating shareholders that all the cases shall stand or fall by the result of his litigation, then if that case is decided in favour of the litigant shareholder the others will be relieved—**Pawle's case,** L.R. 4 Ch. 497. But there is no authority that can be relied on for carrying the modification of the rule any further. I say none that can be relied on, for there is a case, **Fox's case,** L.R. 5 Eq. 118, which it is difficult to reconcile with the principle established by **Oakes v. Turquand,** L.R. 2. H.L. 325, and **Kent v. Freehold Land Company,** L.R. 3 Ch. 493."

His Honour stated that **Fox's case** had often been doubted and never followed and quoted the dicta of Baggallay, L.J., and Fry L.J., that mere repudiation of shares without more is not sufficient, but that the shareholder must get his name removed or commence proceedings to have it removed before the winding-up. In **Whiteley's case** (1900) 1 Ch. 365, a shareholder in an action for calls obtained leave to defend upon the ground that he had been induced to take the shares through misrepresentation. Before he could file his counter-claim the company went into liquidation. The Court of Appeal held that the shareholder "did all that could be reasonably expected to assert in a legal proceeding his right to repudiate the share." There was no encroachment there upon the general rule established by the cases, and that rule was quoted as being the law in the leading text-books. **Lindley on Companies** (6th Edn) 1068, **Buckley** (10th Edn.) 98, **Palmer** (12th Edn.) 375. There was no authority to support such an encroachment upon the rule as would occur if the circumstances in the present case were held to constitute a sufficient rescission legal proceedings not having been instituted until after winding-up proceedings had commenced.

Judgment for defendant.

Solicitor for plaintiff: **J. D. McMillan,** Auckland.
Solicitor for defendant: **S. W. W. Tong,** Auckland.

MacGregor, J. September 6, 7; 20, 1928.
Wellington.

DOMINION SECURITIES LTD. v. DUNCAN.

Contract — Construction — Consideration — Res Judicata — Agreement by Member Owing Calls to Pay Amount by Instalments—Action for an Instalment or Alternatively Total Amount Owing—Judgment for Instalment Without Interest—Subsequent Payment of Further Instalments—Default in Prompt Payment of an Instalment—Action Brought for Balance Owing with Interest or Alternatively for Instalment—Parties Acting Upon a Certain Construction of Contract Bound Thereby—Plaintiff Entitled to Recover Only Instalment Owing.

Action by the plaintiff company claiming to recover from the defendant the sum of £1,600, and a further sum of £364 3s. 4d. for interest accrued to 31st May, 1928. The defendant admitted owing the sum of £200, which he had paid into Court (with a denial of liability), but he denied all further liability in respect of either principal or interest. The defendant, who owed the company £2,700 in respect of calls made upon 3,000 shares held by him in the company, offered by a letter dated 20th December, 1926, to pay the balance owing on those shares by a payment of £300 on 31st December, 1926, a payment of £200 on the 28th March, 1927, and thereafter £200 on each and every quarter day for the next eleven quarters. This offer was accepted by the company by letter dated 22nd December, which also referred to certain "Zeehan investments." The defendant did not pay the first instalment which fell due on 31st December, 1926, and an action was commenced by the plaintiff company for the instalment of £300. By an amended Statement of Claim the plaintiff company claimed (alternatively) the full sum of £2,700 under the original allotment of shares to the defendant. No interest was claimed either on the £300 or the £2,700, although the articles of association of the company provided that any overdue call on shares should carry interest at 8 per cent. The action was defended, but judg-

ment was given against the defendant for the sum of £300 without interest. On 15th July, 1927, the defendant paid this sum of £300. The defendant failed to pay the next two instalments of £200 each, and the plaintiff company commenced a second action against him for £400. Neither the balance of £2,400 due in resepect of calls, nor interest was claimed, and on 15th July, 1927, the defendant without defending the action paid the claim with costs. The defendant subsequently paid two further instalments of £200 without interest, but failed to pay a further instalment of £200, which fell due on 31st March, 1928. Payment of that sum of £200 was tendered in cash to the plaintiff company on 31st May, 1928, but the tender was refused. The writ in the present action was then issued claiming £1,600 principal and £364 3s. 4d. for interest on the calls unpaid from time to time under the original allotment in terms of the company's articles of association.

White and Virtue for plaintiff.
Fotheringham and Willis for defendant

MacGREGOR, J., said that the broad question he had to determine was as to the proper construction and effect of the settlement arrived at between the parties as evidenced by their letters of 20th and 22nd December, 1926. Where both parties had acted on a particular construction of an ambiguous document, that construction, if in itself admissible, would be adopted by the Court: **Pollock on Contract**, 9th Edn., 489, citing **Forbes v. Watt**, L.R. 2 Sc. & D. 214. A party who had acted on one of two possible constructions of an obscure agreement could not afterwards enforce it according to the other: **Marshall v. Berridge**, 19 Ch. D. 233, 241. Those decisions had frequently been acted upon as binding in New Zealand: see for example **Topliss Bros. v. Cobr**, 24 N.Z.L.R., 540. In the present case it appeared to His Honour that not only had both parties acted on a particular construction of the admittedly ambiguous document, but that the Court had already determined as between them that the particular construction was the proper construction thereof. In its first action the plaintiff company itself adopted that construction. The Chief Justice, who gave judgment for the instalment of £300 only, in effect decided (1) that the agreement of December, 1926, did constitute a valid and enforceable contract, (2) that the full sum of £2,700 was not recoverable under the allotment or otherwise, and (3) that no interest was recoverable. In other words it had been solemnly decided by the Court that the true construction of the agreement of December, 1926, was that it was a "valid and enforceable contract" as between the parties to the present action. In its second action the plaintiff company sued for £400, being two further instalments due under the contract of December, 1926. It thus adopted and acted on the construction placed on the contract by the Court. The defendant did the same. He filed no defence, but paid the claim, thus also adopting and acting on the contract so judicially construed. He had since further adopted and acted on that construction by paying further instalments due under the contract, which the plaintiff company in its turn had again accepted as payments legally due to it by contract. His Honour was, in the present new action, asked to say that that particular construction of the same contract was wrong, and to hold that it was not a valid and enforceable contract at all, but a mere *nudum pactum* which should be disregarded by the Court. Such a course was plainly impossible, after all that had taken place. (As to *res judicata*, see **Spencer Bower on Res Judicata**, 3, 102 *et seq.*) In His Honour's opinion the main question in issue in the present action was concluded in favour of the defendant by the operation of the doctrine of *res judicata*.

It was strongly urged by plaintiff's counsel at the hearing that the new agreement of December, 1926, was merely a variation of the old agreement in one particular, i.e., payment by instalments, and that in all other respects the old one remained in force, and that therefore there was no consideration for the promise by the plaintiff company to accept those instalments. It was argued accordingly that the new agreement was void within the well known case of **Foakes v. Beer**, 9 App. Cas. 605. After full consideration His Honour did not see his way to accept those contentions. It appeared to His Honour that the case was governed by the later case of **Raggow v. Scougall & Co.**, 31 T.L.R. 564, where **Foakes v. Beer** (*cit. sup.*) was distinguished by the Divisional Court on facts somewhat similar to those in the present case. The result of varying the terms of an existing contract was to produce, not the original contract with a variation, but a new and different contract, see per **Sankey, J.**, in **Williams v. Moss Empire Theatres Limited** (1915), 3 K.B. 242, 247. The effect of the settlement effected by the parties in December, 1926, was not simply to vary the old contract for the payment of £2,700 with interest thereon, according to the combined terms of the allotment and Articles of Association, but to substitute for it a new and different written contract to pay and accept the sum of £2,700 by instalments and without interest. The settlement so effected was, in His Honour's judgment, not only a compromise of a doubtful claim, but was also a new contract founded on valuable consideration.

Further the claim made for interest could not be supported, as no agreement to pay interest had been proved to exist under the contract of December, 1926. See **Page v. Newman**, 9 B. & C., 381. It did not appear on the face of the instrument of 20th December, 1926, that interest was intended to be paid on the instalments thereby specified. The evidence showed that interest was not even mentioned by either party when that instrument was prepared. If His Honour was right in construing that instrument as a new contract, it was clear that the provision made for interest in the Articles of Association could not be imported into it by implication, or indeed without express reference.

It remained to consider the alternative case made for the plaintiff company by its statement of claim. It was contended that the defendant by his repeated breaches of the agreement had in effect repudiated that agreement, which must be held by the Court to be impliedly rescinded and not binding on the plaintiff company: **Salmond & Winfield on Contracts**, 280. The facts of that case were, in His Honour's opinion, not such as to justify that contention. It was further claimed, however, by the plaintiff company that the contract of 20th December, 1926, was no longer binding on it in view of **Edwards v. Hancher**, 1 C.P.D., 111, but that decision in His Honour's opinion had no application to the present case.

Judgment for plaintiff for £200 paid into Court.

Solicitors for plaintiff: **Young, White and Courtney**, Wellington.

Solicitors for defendant: **Fotheringham and Wily**, Auckland.

Ostler, J. September 15, 1928.
New Plymouth.

RICHTER v. DALGETY & CO., LTD.

***Deaths by Accident Compensation Act, 1908*—Apportionment of Compensation Paid Into Court—No Apportionment in Favour of Infant Children Where Deceased a Married Woman Without Estate—Loss Not Capable of Estimation.**

The defendant company had paid into Court the sum of £950 as compensation under the Deaths by Accident Compensation Act, 1908, in respect of the death of the plaintiff's wife.

North, for plaintiff, asked for an order that the whole amount paid into Court be paid out to the plaintiff, and cited **Bulmer v. Bulmer**, 25 Ch. D. 409, and **Wilson v. Gear Meat Co.**, 29 N.Z.L.R. 48.

Taylor, for infant children of deceased admitted that there were no cases in the reports where a wife had been killed and apportionment made. He referred to **Jennings v. Grand Trunk Co.**, 13 A.C. 800.

OSTLER, J., (orally) said that he would have liked to have ordered part of damages to be laid up as a nest egg

for the children, but the law appeared to be that as the deceased was a married woman without estate and simply performing household duties, the loss suffered by her children was not capable of being estimated in money. An order would therefore be made that the whole sum be paid to the plaintiff.

Solicitors for plaintiff: **Halliwell, Spratt, Thomson and North**, Hawera.

Solicitor for infant children: **L. A. Taylor**, Hawera.

Ostler, J. September 22, 1928.
New Plymouth.

IN RE ZEALA PRODUCTS LTD. (*In Liquidation*).

Company—Liquidation—Claim for Salary and Expenses by Managing Director—Managing Director Appointed by Directors—No Power in Articles to Appoint Managing Director—Appointment *Ultra Vires*—Managing Director Not a Servant and Entitled Only to Expenses—Companies Act, 1908, S. 226.

Motion by liquidator under Section 226 of the Companies' Act, 1908, to determine whether a claim by one, Gane, for salary and expenses amounting to £640 18s. 5d., as managing director of the company should be admitted by the liquidator. The Articles of Association of the company adopted Table A, subject to certain modifications and contained no specific power for the appointment of a managing director. Article 11, however, provided, *inter alia*, that no director should be disqualified by his office from contracting with the company either as vendor, purchaser, servant, or agent or otherwise. Under Section 78, Table A, the directors' remuneration was required to be fixed at a general meeting of the company.

A. K. North for liquidator.
R. H. Quilliam for defendant.

OSTLER, J., (orally) said that he was satisfied that the company had intended to appoint Gane as managing director; that he had intended to accept such office and had acted as such. It had been laid down in **In re Newspaper Proprietary Syndicate, Ltd.** (1900), 2 Ch. 349, that a director was not a servant of the company, and in the absence of any power in the Articles of Association to delegate the directors' duty to a managing director, the directors had no such power, and the contract made by Gane was clearly *ultra vires*. He could not accept the view that Gane was a servant of the company. He was, however, entitled to his expenses. Order made accordingly.

Solicitors for liquidator: **Halliwell, Spratt, Thomson and North**, Hawera.

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

Blair, J. September 12; October 14, 1928.
Hamilton.

ELLIS v. ELLIS.

Divorce—Jurisdiction—Domicil—Judicial Separation—Right of Wife to Acquire Domicil Independently of Husband—Divorce and Matrimonial Causes Act, 1908, S. 21 (3).

Wife's petition for divorce on ground of desertion by her husband. The desertion took place in England in September, 1924, and the wife on 15th November, 1925, obtained a separation order in England. The domicil of the husband was in England. The petitioner had received no maintenance since the desertion. Some of her brothers had gone to reside in New Zealand, and she had in August, 1925, joined them and established her permanent home in New Zealand.

MacDiarmid for petitioner.

BLAIR, J., said that he assumed in petitioner's favour that she had done all that was required to acquire a New Zealand domicile if it were possible for her to acquire a domicile separate from that of her husband. By subsection 3 of Section 21 of the Divorce and Matrimonial Causes Act, 1908, special provision was made for a wife deserted in New Zealand retaining her New Zealand domicile. The petitioner in the present case was deserted in England and came permanently to reside in New Zealand after such desertion. She could not therefore obtain the benefit of Sec. 21 (3). In **Hastings v. Hastings** (1922), N.Z.L.R. 273, Adams, J., on a consideration of the authorities, held that the balance of authority was in favour of the view that where a wife had obtained a decree of judicial separation she was entitled to acquire a domicile independently of her husband. In **Jackson v. Jackson** (1923), N.Z.L.R. 608, 616, Salmond, J., referring to **Hastings v. Hastings** (*cit. sup.*) said that the question would not really arise for definite determination until a wife whose husband was domiciled abroad sued for divorce in New Zealand and claimed to have acquired a separate domicile here in exercise of the power conferred on her by a decree of judicial separation from her husband. That very point arose in the present case, and but for a recent decision of the Privy Council His Honour should, owing to the importance of the question, have referred the matter to the Court of Appeal. But, in **Attorney General of Alberta v. Cook** (1926), A.C. 444, the precise question whether a wife judicially separated could acquire a domicil separate from her husband, came up for decision. The case was, owing to its importance, twice argued before the Privy Council, and the Court decided that the possession of a decree of separation did not entitle the wife to acquire a separate domicil. Petition dismissed.

Solicitor for the petitioner: **R. W. Bennett**, Hamilton.

Smith, J. September 6, 14, 1928.
Wellington.

IN RE WEIR, PUBLIC TRUSTEE v. WEIR.

Will—Construction—Testatrix Leaving Her "Insurance, Property, and Personal Belongings" (except Articles Specified) to Her Son—Direction to Son to Pay All Her Debts and After Such Debts Were Paid if Anything was Left to be Equally Divided Between Her Grandchildren—Son Executor According to Tenor—Bequest to Son Not Comprising Whole Estate But Specific Assets Only—"Property"—Construction "Noscitur a Sociis"—Held to Mean Real Property—"Personal Belongings"—Mortgage Debt Not Payable Out of Residue—Property Law Act, 1908, Section 109.

Originating Summons for interpretation of Will of one F. H. Weir, who died on 17th November, 1927. The Will was in the following terms:—

"I, F. H. Weir, leave my insurance, property, and personal belongings to my son Alf, except my machine and piano I leave to my grand daughter Laura, and my tea-set to my niece Minnie. My son Alf must pay all my debts owing, and after my debts are paid if anything is left to be equally divided between my grandchildren."

The testatrix, prior to her death, resided in her own house at Johnsonville. Her husband, Robert Weir, had disappeared some 28 years before her death and had not since been seen or heard of by his family. There were four children of the marriage, of whom only one, A. J. H. Weir, was living at the death of the testatrix. Of the others, two died without issue, and one died leaving three children. A. J. H. Weir had two children. These five grandchildren of the testatrix were all minors, and they were the grandchildren referred to in the will. None of the grandchildren lived

with the testatrix. The assets of the testatrix at the time of her death included:—Cash in the Post Office Savings Bank, £1 10; articles of household use and ornament and furniture, £26 17s. 9d.; policies of insurance on her life, £63 5s. 3d.; two policies on the life of her son A. J. H. Weir, unvalued; unsecured debts, £30 8s. 4d.; and real estate, £565. Her liabilities included a mortgage debt. The questions arising for the determination of the Court were as to what portions of the estate the testatrix's son Alfred Weir and the said grandchildren of the testatrix were respectively entitled to take under the will.

Kelly for Public Trustee.

Hay for A. J. H. Weir.

Perry for grandchildren.

S. A. Wiren for next-of-kin.

SMITH, J., said that upon the application for probate by the Public Trustee, Alfred Weir was treated as executor of the Will according to the tenor, and probate was granted to the Public Trustee at the request of Alfred Weir, as such executor, pursuant to Section 13 of the Public Trust Office Act, 1908. The Court then acted upon the view that Alfred Weir was the executor of the Will according to the tenor. In His Honour's opinion, the view then adopted was correct. His Honour held therefore that the effect of the Will was to appoint Alfred Weir executor according to the tenor.

The words "and after my debts are paid if anything is left to be equally divided between my grandchildren," created the difficulty of the Will. In the confusion caused by those words, two constructions were possible:—Firstly that the items described by the words "my insurance, property, and personal belongings," were separate and specific and did not comprise the whole estate of the testatrix; that they were left to Alf; that he was appointed executor according to the tenor and was to pay all the debts out of the property of the testatrix as it was liable for the payment thereof, and if anything was left of the residue after payment of debts, it was to be divided equally among the grandchildren, or secondly that the words "my insurance, property, and personal belongings" comprised the whole estate of the testatrix; that the whole estate of the testatrix was vested in Alf as executor according to the tenor upon trust to deliver the machine and the piano to Laura, the tea-set to Minnie, to pay the debts, and thereafter to divide the whole residue of the estate equally amongst the grandchildren. In His Honour's opinion, the first alternative represented the true construction of the Will. The gift to Alfred was prima facie an absolute gift to him. It appeared to be a dominant gift to the only surviving child of the testatrix. Effect should be given to it, if the Will could be construed consistently with it. The words "my insurance, property, and personal belongings," were, His Honour thought, intended to describe different kinds of property. The word "insurance" referred to the insurances upon the life of the testatrix, and upon the life of her son Alfred Weir held by her. The word "property" occurred between the words "my insurance" and "personal belongings." Those two phrases could have no significance if the testatrix intended the word "property" to include what those other words connoted. It might be said that as the word was associated with words describing two classes of personal property, the principle of *noscitur a sociis* applied, and that "property" signified some other kind of personal property. His Honour did not think so. The testatrix disposed of the larger part of her personal estate by the words "insurance" and "personal belongings." The position of the word "property" indicated that the testatrix was not by that word describing the remainder of her personal property, for it was followed by words descriptive of a particular part of her personal property. Again, she was not, His Honour thought, by the general word "property" describing any other specific part of her personal property; for if she had intended to do that, she would presumably have identified, by name, the part she had in mind, as she had done with "insurance" and "personal belongings." Nevertheless, His Honour thought that the principle of *noscitur a sociis* applied in the sense that as "insurance" and "personal belongings" indicated specific parts of the assets of the testatrix, so the word "property" also indicated a specific part of those assets. She was, in His Honour's opinion, describing some specific asset known to her as "my property." For the reasons already given that was not her residuary personalty or any part thereof. In the circumstances it could only have been her real property. It was well established that a testator might show by the context that he used the word "property" in a restricted meaning: **Jarman**, 6th Edn., page 999; **Belaney v. Belaney**, L.R. 2 Eq. 210; 2 Ch. 138; **Jones v. Robinson**, 3 C.P.D. 344. Moreover, as was stated at the Bar and not disputed, it was not unusual in New Zealand for a small freeholder to refer to his house property as "my property." His Honour concluded that the word "property" in the Will meant the realty of the testatrix.

As to the words "personal belongings," the testatrix had provided a key to the meaning of her language. The bequest contained an exception of certain articles, which it would not comprise if given a restricted meaning only. That was a cogent reason for giving language which would otherwise be equivocal a larger signification: **Jarman**, 6th Edn., page 1026; **Hotham v. Sutton**, 15 Ves. 319. His Honour thought that the words "personal belongings," which in the mind of the testatrix included articles such as a piano a sewing machine and a tea-set, included in this Will not only her wearing apparel, jewellery and the like, but also those chattels which contributed to her personal use, enjoyment or convenience as a householder, such e.g., as her pictures, in addition to the piano, sewing-machine and tea-set. His Honour did not think that the testatrix intended the words "personal belongings" to include "furniture" in the strict sense, and Mr. Hay did not contend that they did. A. J. H. Weir was then beneficially entitled to the life insurance moneys, the real estate and the personal belongings of the testatrix as above defined.

The next question arising was to what portion of the estate were the grandchildren beneficially entitled? Alfred Weir as executor according to the tenor was required to pay all the debts of the testatrix. For that purpose, as executor acording to the tenor, he was to hold the whole estate of the testatrix. The greater part of the estate was specificially devised or bequeathed. There remained cash in bank, furniture in the strict sense, and unsecured debts due to the estate. Those constituted the residuary personalty. The debts due by the testatrix, other than the mortgage debt, were primarily payable out of the residuary personalty: 14 **Halsbury**, 285, 286. **In re Pharazyn**, 15 N.Z.L.R. 709, 722. The testatrix in effect applied this principle, and provided that "if anything is left" it is to be divided equally among her grandchildren. The second part of the Will meant, therefore, in His Honour's opinion—"if anything is left" out of those assets which were available for payment of her debts and which were not already specifically bequeathed or devised, that which was left of those assets was to be equally divided among her grandchildren. The incidence of the debts was therefore of importance. The realty devised to Alfred Weir was subject to the mortgage debt. By Section 109 of the Property Law Act, 1908, he was not entitled to have that debt discharged out of the residuary personalty unless the testatrix had directly or by necessary implication so required. See **In re Douglas** (1918) N.Z.L.R. 594. There was in the present case only a general direction to pay the debts. It followed that Alfred Weir, taking the realty, was not entitled to any assistance in discharging the mortgage debt from the residuary personalty of the testatrix. That of course did not diminish the rights of the mortgagee: Sec. 109 (3), Property Law Act, 1908. Alfred Weir as executor according to the tenor would have held and the Public Trustee, in his stead, held the residuary personalty upon trust primarily for the payment of the debts of the testatrix other than the mortgage debt and "if anything is left" of the residuary personalty after payment of those debts, it was to be divided equally among the grandchildren. The grandchildren were therefore beneficially entitled to share equally among themselves in the residuary personalty of the testatrix after payment of her debts, other than the mortgage debt.

Solicitors for the Estate: **Solicitor to the Public Trust Office**, Wellington.

Solicitors for A. J. H. Weir: **Mazengarb, Hay and Macalister**, Wellington.

Solicitors for grandchildren: **Wylie and Wiren**, Wellington.

Solicitors for next-of-kin: **Perry and Perry**, Wellington.

The Annual Conference

And the New Zealand Law Society.

By W. J. Hunter, LL.B.

The "Evening Post" of June 4th last, in a very able and sympathetic leading article, after discussing Mr. Wright's paper dealing with Government by Regulation, proceeds as follows:—

> "The Lawyers' Parliament has done much for the enlightenment of public opinion by its discussion of this important matter, but we trust that it is taking steps to continue the process. Between its sessions it will need, like the Parliament which it criticised, an executive to carry on its business and keep its views before the public, and whether this will be best done by the Council of the New Zealand Law Society or some other body with special and limited functions is a matter which it is beyond our province to discuss."

It seems appropriate that the very important question here raised by the "Post" should be considered and discussed by the profession before the next Conference meets, and the purpose of this article is to discuss to what extent the existing machinery for the government of the profession is sufficient to ensure that the decisions of the profession as a whole, as expressed in Conference, shall be carried out by what is in effect its Executive, namely, the New Zealand Law Society. For the sake of convenience I will refer to some of the Rules of the Society in detail, although it may be that an apology for so doing is due to those readers of this Journal to whom they are familiar.

Amongst the Objects of the Society there are enumerated in Rule 2:

> "To promote good feeling and encourage proper conduct amongst the members of the legal profession; to consider and suggest amendments of the law; to scttle points of difference; and generally to watch over the interests of the legal profession."

All barristers and solicitors of the Supreme Court of New Zealand, who for the time being are members of any District Law Society, are members of the Society.—(Rule 3). There is no provision in the Rules, however, for the members of the Society to meet together for discussion of their problems, and it is here that the existing machinery has proved insufficient. It seems to me that the Rules should be amended by providing that an Annual Conference shall be held and defining its objects and powers, and perhaps its procedure. All members of the Society were invited to the First Conference and while the response was very gratifying, the number present and desiring to speak was not so large as to cause any difficulty. It may be, however, that in time it will be necessary to provide that the District Societies shall not send more than a certain number of delegates, to be ascertained in proportion to the number of their members, and that no more than a certain number of members from any District Society may be heard upon any one subject, but at present I think it is very desirable that all members of District Societies should be entitled to attend.

Rule 4 provides that the New Zealand Law Society shall be governed by a Council which shall have the sole management of the Society and of the income and property thereof for the purposes and benefit of the Society. For these purposes the Council may appoint a Committee or Committees of its members, and may delegate to any such Committee such of the powers of the Council as it thinks fit. The Council consists of members elected annually by the District Law Societies, the larger Societies having each three representatives and the smaller one each. Rule 9 provides that the Council shall meet at Wellington at least three times a year on the second Friday after the day appointed for the commencement of each of the periodical sittings of the Court of Appeal in each year, or on such other days as shall be fixed by the President or the Council. Meetings of the Council may be summoned for any time or place by the President, or by any four members of the Council. Rule 12 provides that there shall be a Standing Committee of the Council which shall sit at Wellington, at times to be appointed by the President, when the Court of Appeal is not sitting. Such Committee consists of the President, Vice-President, and Treasurer, any members of the Council practising in Wellington, and any Wellington barristers or solicitors appointed as proxies for members at the last preceding meeting of the Council unless such members themselves attend. Any other member of the Council has the right to attend and vote at any meeting of the Standing Committee, but, as he need not be notified of the meeting, this seems to be a privilege of doubtful value. The Standing Committee (Rule 13) has all the powers of the Council.

At the First Conference a Committee of Christchurch members was set up to carry into effect the resolutions of the Conference. That Committee held a number of meetings, considered the various resolutions passed, met the Attorney-General, and conveyed to him such of the resolutions as seemed to come within his province, and left all the resolutions in the hands of the New Zealand Law Society for such further action as it should think fit. The most important from the point of view of the future welfare of the profession was, in my judgment, that expressing approval of some scheme of Solicitors' Guarantee, and although this has not yet received legislative enactment, I have not the slightest doubt that the work done by individual members, by District Law Societies, and by the Council of the New Zealand Law Society in connection with this matter has not been wasted and will in due course receive its reward.

It seems to the writer that, in order to meet the changed and changing circumstances of the profession to-day, the Rules of the New Zealand Law Society, with the addition of a provision for the holding of an Annual Conference and defining its duties and objects, are sufficiently wide to meet the needs of the profession. I think, however, notwithstanding the valuable work done by the Standing Committee, that three meetings of the New Zealand Law Society in each year are not sufficient, and that there should be five or six. I think, also, that the provision (Rule 16) requiring notice in writing at least twenty-one clear days before a meeting of the business to be brought before it might, in these days of swift communication, be reasonably amended by requiring only ten days' notice: the effect of the present Rule sometimes is to postpone the consideration of urgent business for months. And it seems to me that a meeting of the New Zealand Law Society, either alone or in conjunction with a local committee, should be held at the conclusion of each Conference to consider and deal with its decisions.

Relief Against Forfeiture.

RENEWALS OF LEASES.

Each of the last two sessions of Parliament has seen a statutory extension of the principles contained in Sections 93 and 94 of the Property Law Act, 1908. Under those Sections (as is well known) restrictions are imposed on forfeiture of leases for breach of covenant or condition, and the Supreme Court is empowered to grant relief to lessees against forfeiture. The provisions in question were introduced into the statute-law of New Zealand by Sections 92 and 93 of the Property Law Act, 1905, which followed, with slight alterations and additions, the wording of Section 14 of the English Conveyancing and Law Property Act, 1881. The New Zealand Act, like the English Act, did not apply to a condition for forfeiture on the bankruptcy of the lessee or on the taking in execution of the lessee's interest, or, in the case of a lease of licensed premises, to a covenant not to do or omit any act or thing whereby the license may be lost or forfeited; nor did the Acts affect the law relating to re-entry or forfeiture in case of non-payment of rent. The English Act also excluded cases of forfeiture for breach of covenant not to assign, sub-let, or part with the possession of the land leased, and contained certain further exceptions; but these were not excluded from the scope of the New Zealand enactment.

In England, by Section 2 of the Conveyancing and Law of Property Act, 1892, cases of forfeiture on the lessee's bankruptcy were brought within the Act, but only to a limited extent and with various exceptions. Last year, in New Zealand, by Section 13 of our Bankruptcy Amendment Act, 1927, restrictions were imposed on forfeiture on the bankruptcy of the lessee similar to those imposed on forfeitures falling within Section 94 of the Property Law Act, 1908, and the Court is now empowered to grant relief to the Official Assignee or any lessee or under-lessee whose interests are affected, in the same way as to lessees under Section 94: so the exception contained in Section 94, of forfeitures on bankruptcy, is inferentially repealed.

This year, by the Property Law Amendment Act, 1928, provisions for relief similar to those in Section 94 are applied to the refusal by a lessor to grant a renewal or new lease under a covenant with the lessee to that effect in the lease, where such covenant is conditional on performance by the lessee of his covenants in the lease, and the lessor's refusal is on the ground that the lessee has failed to perform his covenants. This extension of the principles of Section 94 has been considered necessary because of instances of arbitrary and inequitable refusals by lessors—especially Native lessors—to grant renewals, taking advantage of the state of the law regarding conditional covenants to renew.

Of the English cases *Finch v. Underwood*, 2 Ch. D. 310, a decision of the Court of Appeal in 1876, shows clearly the previous state of the law on this subject. There, a landlord covenanted to grant a fresh lease at the expiration of the term, "in case the covenants and agreements on the tenant's part shall have been duly observed and performed," provided that notice should be given 21 days before the end of the term. When notice was given, there was a breach (though not a serious one) of the lessee's covenant to repair. The Court of Appeal held that the tenant was not entitled to a renewed lease, because the granting of it was subject to a condition precedent that the covenants of the lease should have been kept, which condition was not complied with. James, L.J., said: "The case is one of condition precedent; it is not a case of forfeiture, and none of the considerations applicable to forfeiture apply to it. . . . . No doubt every property must at times be somewhat out of repair, and a tenant must have reasonable time allowed to do what is necessary; but where it is required as a condition precedent to the granting of a new lease that the lessee's covenants shall have been performed, the lessee who comes to claim the new lease must show that at that time the property is in such a state as the covenants require it to be. . . . . I think he is not entitled to excuse himself by saying that the want of repair is trifling." Mellish, L.J., said: "The tenant must take the covenant to renew as he finds it; if it contains conditions precedent he must comply with them before he can claim the benefit of it, and if he has not done so a court of equity cannot relieve him." As this case was decided before 1881, the Court was evidently referring to the equitable jurisdiction to relieve against forfeiture which existed (and which still exists, in the case of forfeiture for non-payment of rent) apart from statute.

Finch v. Underwood, (*cit. sup.*) was discussed, with the earlier authorities, by Kay, J., in *Bastin v. Bidwill*, (1881) 18 Ch. D. 238. He considered that the cases showed that it is a matter of construction in each instance whether the language amounts to a condition precedent, and (if so) whether the condition is that there shall be no breach of covenant existing at the time of notice, or no breach existing at the expiration of the term, or that there shall have been no breach at any time during the term.

In 1910, the decision of the Privy Council in the New Zealand case of *Greville v. Parker*, (1910), A.C. 335, settled the doubt which, in spite of the explicit statements quoted above from *Finch v. Underwood* (*cit. sup.*) seems to have existed, as to whether the statutory provisions against forfeiture apply to conditional covenants for renewal. In that case, the lease gave the lessee an option of renewal, conditionally on the observance by him of his covenants in the lease. Chapman, J., in the Supreme Court, following *Finch v Underwood* (*cit. sup.*) and *Bastin v. Bidwill* (*cit. sup.*), and quoting the first sentence of the statement of James, L.J., given above, held that the plaintiff, who had been guilty of divers breaches of covenants, was not entitled to a renewal. The Court of Appeal nevertheless held that Sections 93 and 94 of the Property Law Act, 1908, applied, and granted relief thereunder to the lessee against the lessor's refusal to renew. The Privy Council, however, restored the judgment of Chapman, J., saying: "There are no words in Section 94 which in terms purport to enable the Court to give relief against failure to perform a condition precedent, and, in view of the admitted state of the law on this subject both at home and in New Zealand up to that date (the passing of the legislation) one would expect to find clear words used by the Legislature if it was intended to confer relief of so novel a character on persons not specially meritorious."

Edwards, J., who had delivered the judgment of the Court of Appeal in *Greville v. Parker* (*cit. sup.*), subsequently in a later case criticised the Privy Council's decision very caustically, but followed it—see *Chrystall v. Ehrhorn*, (1917) N.Z.L.R. 773, at pages 777 and 778. Sim, J., however, in *Dunedin City Corporation v. Searl*,

(1916) N.Z.L.R. 145, at pages 153 to 155, considered the Privy Council's decision more dispassionately. The point then before him, however, was not the Court's power to relieve against refusal to renew, but the point, which arose in *Greville v. Parker*, (*cit. sup.*) only incidentally, whether "lease" in Section 93 includes an agreement for lease where the tenant has become entitled to have his lease granted although he may have subsequently lost that right because of some breach of covenant or condition.

To illustrate the hardship which this "admitted state of the law" may involve, reference may be made to *Birch v. Prouse*, (1922) N.Z.L.R. 913. A lease contained a covenant for renewal on notice "if the lessees shall have duly and punctually observed and performed all the covenants of the lease." Rent had been paid irregularly, but was fully paid at the time the notice of desire to renew was given. Reed, J., felt regretfully compelled to hold that the lessee, having failed to comply with the condition precedent of duly and punctually paying the rent at the times specified, had lost his right to call on the lessor to renew the lease, and that *Greville v. Parker* (*cit. sup.*) precluded the Court from granting any relief. Further, it is said that unscrupulous lessors have gone so far as to refuse to perform conditional covenants for renewal, where the breach of condition relied on was simply that the lessee (who had covenanted to duly and punctually pay rates and taxes) did not pay rates within 14 days of the local authority's demand for payment.

Now, however, where a lessor has covenanted to grant a renewal or new lease subject to the performance or fulfilment of certain covenants, conditions or agreements by the lessee and the lessor has refused to grant such renewal or new lease on the ground of the lessee's default in such performance or fulfilment, the Property Law Amendment Act, 1928, enables the lessee to apply to the Court for relief, and gives the Court power to grant relief if it thinks fit, including power to order the lessor to grant the renewal or new lease as if there had been no default by the lessee. Relief may be on such terms as to compensation, damages or costs as the Court may decide; and the fact that the lessor may have granted any estate or interest to any person other than the lessee is no bar to relief (the Court being authorised to cancel or postpone such person's estate or interest, with or without compensation as it thinks just); nor is it a bar that the lessee has failed to give the lessor any prescribed notice of his intention to require the renewal or new lease. Renewals of leases of Native land ordered by the Court are to be confirmed under the Native Land Act as a matter of right. Application for relief must be made within three months after the lessor's refusal, or within three months after the commencement of the Act, *i.e.*, 19th September, 1928. The Act is retrospective; and in the case of leases which have expired before the commencement of the Act, the second of the alternative periods mentioned is alone allowed.

The principles on which the Court will apply the new powers given to it by this year's enactment will evidently be similar to those on which the powers conferred by Section 94 of the Property Law Act are applied. In the latter case, the Court has a very wide discretion in granting relief; no rules can be laid down for guiding that discretion, but the Court will in each case consider all the circumstances and the conduct of the parties—*Hyman v. Rose*, (1912) A.C. 623.

It may be noted, in concluding, that doubts have been expressed whether cases such as that before the Court in *Loughnan v. Jamieson*, (1928) G.L.R. 64, come within the provisions of the new Act. The lease in question there provided for a valuation of both ground-rent and improvements before the end of the term, each party appointing a valuer, but either lessor or lessee being entitled to proceed with the valuation without the other if the other failed to take the steps incumbent on him; and a new lease was to be set up for auction on the basis of the valuation (any purchaser being required to pay to the original lessee the value of the improvements), but, if no outsider purchased the new lease, then the lessee was bound to accept it. Neither party had taken any steps to have the valuation held before the end of the term; and Adams, J., held, on originating summons, that the lessee had lost all right to a new lease under the clause of the lease referred to. The new Act has been drafted with both eyes on *Greville v. Parker* (*cit. sup.*) and *Birch v. Prouse* (*cit. sup.*); but it may be that the Court will hold that renewals conditional on revaluation, as in *Loughnan v. Jamieson* (*cit. sup.*) come within its terms.

N. F. L.

Rules and Regulations.

Cemeterics Act, 1908. General regulations as to cremation.—Gazette No. 81, 25th October, 1928.

Defence Act, 1909. Regulations for New Zealand Military Forces, 1927 amended: Section II, Confidential Reports: Section II, Appointments to First Commissions in Territorial Force; Section VI, Examination of Officers for promotion, etc., N.Z. Territorial Force; Section VII, Military Law; Section X Flag Stations and Flags.—Gazette No. 75, 18th October, 1928.

Electric Power Boards Act, 1925. Amended regulations as to keeping of accounts of Electric Power Boards.—Gazette No. 82, 1st November, 1928.

Inspection of Machinery Amendment Act, 1927. Land Air-receiver regulations.—Gazette No. 75, 18th October, 1928.

Land and Income Tax (Annual) Act, 1928. Land Tax payable in one sum on 7th November, 1928, at office of Commissioner of Taxes, Wellington.—Gazette No. 75, 18th October, 1928.

Slaughtering and Inspection Act, 1908. Amended regulations re immature carcases intended for human consumption.—Gazette No. 82, 1st November, 1928.

Unclaimed Moneys Act, 1908. Notice by Secretary to the Treasury regarding return of unclaimed moneys required to be prepared and Gazetted by all companies, banks, life-insurance offices, company liquidators, and all persons and firms carrying on business as traders in New Zealand and acting as agents or private bankers for individuals or companies.—Gazette No. 75, 18th October, 1928.

Counsel (cross-examining native witness as to an alleged feud of long standing between two brothers, owing to one eloping with the other's alleged daughter): Is it not a fact that, according to native custom, if a man took his brother's daughter to wife, her father would strike him down with an axe?

Witness: Yes.

Counsel (forcefully): Then how can you account for it that when Haira came back with her from the bush, Hori did not at once strike him down with his axe?

The Judge: Perhaps he had buried the hatchet.

London Letter.

Scotland,
13th September, 1928.

My dear N.Z.,

We are now a little more than half-way through our long vacation, and in the dead calm which usually there exists. The Legal Year, 12th October, 1927, to 31st July, 1928, is now, except for the outstanding fees, finally a thing of the past. The Legal Year 1928-1929 is hardly yet in sight; only the faintest ripples of its coming storms yet appear. Our client, the solicitor, humanised by the holiday habit, either leaves us entirely alone or writes to us as one human being writing to another. By the date of my next letter to you he will have begun to develop again his less amiable propensities, and there will be a cutting edge to his enquiry as to when he may have the pleasure of seeing us again in town? The re-awakening of business at the end of September is always, in my experience, a very much more rapid process than its going to sleep at the beginning of August. So far as I am concerned, however, the ripples abovementioned, come from eight thousand miles, from the Federated Malay States, where also they know not the blessedness of Long Vacating! But Privy Council Appeals have a leisurely way with them; and my Lords of the Judicial Committee are never in any very great hurry to re-commence their sittings.

I have no legal news for you and no legal rumours, and all I know about the law is that Charles J. sitting as Vacation Judge has made absolute a number of decrees *nisi* in divorce. There is nothing that a Vacation Judge may not have to do; but if you want his aid in substantial matters you have to show some state of emergency, and, for the most part, to search him out at his country home and tactfully divert his attention to your case from his domestic pursuits. I know of one junior who came into quite a substantial litigation in those circumstances. In some lesser, but urgent, case of his own he had travelled into the very depths of the country and tackled Hamilton, J., (I believe it was) in his garden on a warm summer afternoon. As he made his way back to the station, riding in the only vehicle there plying for hire, he met a hot and dusty individual plodding wearily in the direction of the Judge's residence. The individual, with many apologies, stopped the cab and enquired of its occupant in what direction and at what distance the Judge's residence lay? Our counsel was readily able to inform him, having just come thence. The individual then explained that he was a solicitor, that he had been unable to obtain his usual counsel's aid and had therefore to come himself upon his urgent petition. He wondered if, by chance, our friend knew the Judge and in what mood he would be likely to be found, upon a business interruption? Upon being informed that our friend, being counsel, had just . . . the solicitor immediately briefed him, got thankfully into the cab, had it turned about and proceeded to instruct the junior in the case before him, refusing to spare even a moment to hear any further word of the case now behind him. You may conceive the warmth and cordiality of the welcome the junior received from the Judge, who was hardly delighted to see return that applicant he had with difficulty disposed of a little while ago.

I hope I am guilty of no presumption or impertinence in saying that I read with deep regret the announcement in the London "Times" of the death of Sir William Alexander Sim, your senior puisne Judge? Even upon a distant view I had ventured to form a high opinion of him and his attainments: the attention, which in the Privy Council his judgment at first instance in the Crown Milling Appeal compelled, reflected his judicial ability: and I shall be surprised if his work, upon your equivalent of our White Book appearing over the title, no doubt very familiar to you, "Stout and Sim," does not enjoy a very high reputation in New Zealand? My acquaintance with that text-book was short and to one point only; but, upon that one of your rules of procedure with which I was then concerned and which is in effect a replica of our own Rules of the Supreme Court in the same context, I read as lucid and yet as learned an exposition of principle and practice as I have ever come across. As well as our old and familiar "White Book" we have, as no doubt you know, a "Red Book" of more modern origin but perhaps of equal authority; together, these two books represent the lucubrations, many times revised, of our greatest procedure experts and administrators; even so, to be perfectly frank, I preferred, for utility purposes, the little I read of "Stout and Sim" to any of the mass which I have read in either of our books. It may be that there is always a novelty about food we are not used to, which gives it an illusory advantage; I shall take an early opportunity to read further and test my first opinion, which, I think, I have mentioned to you before. However that may be, I am afraid that I can have, and have, little doubt that you have lost, in "Sim, J." a great lawyer and a valuable Judge.

I shall hope to hear from good authority, and soon, something of the character and personality of the Judge: of only one thing can I be certain, from reading some of his judgments, and that is that he had plenty of both, character and personality. And indeed I fancy that you have little to complain of in this (or in any other substantial) respect, as to your Bench; you seem to pay less than half our price and to get just as good a man notwithstanding! I refrain, however, from congratulating you upon that; it is an instance in which the end does not justify the means, the result does not justify the economy. It must be in spite of what you pay them, and not by means of what you pay them, that you have been lucky enough to get the Judges you have; it is not your cheese-paring which is clever, but their disregard of it which is creditable. I will go so far as this, that it is because we (alone of all countries apparently) pay our Judges well that you have a worthy Bench! This is no wild fancy or merely paradoxical absurdity. We make it worth the while of a good man at law to become a Judge, and so we obtain good Judges and set a standard, to the world, therein. The existence of this standard is an instigation and an incentive to the aspirations and ideals of good men elsewhere; amongst English-speaking peoples, a Judge of the High Court or, if it be necessary to mark the slight difference of title, a Judge of the Supreme Court, represents something which it must be worth any man's while at whatever sacrifice to attain to be. . . . This would never have come about but for our more generous system and I am moved to write thus by the fear that it may not continue to be, if you, and other States, continue to take the risk which your parsimony in remunerating your Judges necessarily involves. . . .

I must say, it is great fun lecturing a State,

Yours ever,

INNER TEMPLAR.

Early Taranaki.

Sidelights on its Legal History.

Compiled from Notes of Mr. R. Clinton Hughes, by L. A. Taylor, LL.B.

COURTHOUSE.

The first Courthouse in New Plymouth was a wooden building situated at the corner of James Lane and Devon Street on the Eastern side of James Lane—the entrance was from Devon Street. At the back of the Courtroom a raised dais or platform ran across the building and constituted the Bench. Crossing this, one descended by two or three steps into a long narrow room occupied by the Magistrate and the Clerk of the Court. Adjoining the Courthouse was the little prison, comprising three stone cells and a yard, the whole surrounded by a stone wall. The first gaoler was one Thomas Heal, an old Waterloo Veteran. From the platform temporarily constructed near the entrance electoral announcements and hustings speeches were made to people standing in the street.

RESIDENT MAGISTRATES.

The first resident Magistrate in New Plymouth was Captain King. Born in 1783, he joined the Navy at the age of 12, was present at the battle of St. Vincent, in 1797, and, after an exceedingly gallant and brilliant career, retired into private life in about the year 1814. On the establishment of the New Plymouth Company, he was appointed Chief Commissioner and came to New Zealand, being appointed Magistrate on his arrival. The amalgamation of the Plymouth and New Zealand Companies caused his retirement, but he was re-appointed shortly afterwards and he held the office for many years. With the European section of the population, he had little work, but the Maori section gave him more than enough to do in averting ruptures. Mr. King was largely intermediary between the Government and the people and the respect of the latter for him was testified in tangible fashion when he retired from the office. Mr. King had no previous judicial training, but common sense and sincerity more than atoned for that loss. Tradition has it that he stated to a prisoner that the presumption was guilt until innocence was proved—a warning which was probably the more effective.

Josiah Flight was the next Magistrate. He was appointed in July, 1852, and continued to hold office until May, 1868. Captain King still retained the title of Resident Magistrate. The position of Mr. Flight seemed to be an important one, for it was his duty to report to the Government on all the affairs and events of importance in the district. A letter-book of Mr. Flight provides much material for a history of the early days of Taranaki. The first letter dated 1st January, 1853, relates to a Memorial from settlers for the alteration of the road from New Plymouth to Mangorei. His letters were addressed to the Local Governor of New Ulster which was the name by which the North Island was then known.

WILLIAM BAYLY AND THE MOTUROA NATIVES.

As indicative of the diplomacy which it was necessary to use in dealing with the Native population an incident concerning Mr. William Bayly and the Moturoa Natives may be repeated. In November of 1851 Mr. Bayly informed the Inspector of Police that certain articles had been stolen by Natives from his house at Moturoa, and he demanded the issue of a warrant for the arrest of the offenders. But, instead of granting the request, the inspector decided to obtain the Natives' version. He therefore interrogated them in their own Kainga and ascertained that for some time there had been bad feeling between Bayly and the Natives because some of their cattle had been trespassing on his wheat crops, and that, having found one of their beasts lying wounded on Mr. Bayly's property, they had attributed the wounding to him. They had consequently removed his goods in order to compel satisfaction. Being satisfied that no *animus furandi* was shown, the resident Magistrate parleyed with the Natives and finally prevailed upon them to make restitution of the household articles and to submit the question of distress damage feasant to the Queen's tribunal. This course was adopted and peace preserved.

DIFFICULTIES OF THE MAGISTRATES.

As illustrative of the exceedingly delicate duties required of the early Magistrates in New Plymouth there may be cited the dispute between the Maoris Katatori and Rawiri. It can be readily understood that the claims by occupation alone, or by even slighter tokens of possession than that of occupation, led to frequent clashes between the Natives before and after the advent of the Pakehas. In this case, the latter Maori intimated his willingness to sell part of his land to the Government and arranged to demonstrate the boundaries at a given time. This fact was noised abroad and came to the ears of Katatori. He trumped up a claim to the land and sent a message to Rawiri proscribing the sale. The message being treated with contempt, Katatori sent a second, and to support his claim, went to the land agreed to be sold and dared Rawiri and his party to approach. Katatori, "more Maoriana," fired a gun once into the air and then into the ground as indicating his determination to hold what he claimed; but Rawiri, nothing daunted, advanced. A sanguinary conflict followed, Rawiri losing four men, he himself being greviously wounded, and three others of his party less so.

Mr. Flight, on hearing of the dispute and conflict, was exceedingly distressed and adopted every artifice to calm the Natives on both sides. Rawiri died next day and his desire to be buried where he fell (indicating potestas over the ground) went within an inch of precipitating an inter-tribal conflict, but happily, Katatori gave way to the persuasions of the Magistrate, and raised no opposition to the burying of Rawiri in the disputed ground.

A further difficulty which the Magistrates of those days had to meet and deal with was the action of some Pakehas in attaching themselves, for one reason or another, to disaffected Natives. On one occasion at least, Mr. Flight, for the safety of the settlement, was compelled to order a certain settler to remove himself from contact with the Natives to a certain point. Fearing that recurrences similar to the Katatori-Rawiri dispute might embroil the European population, the Magistrate called the responsible citizens together and while refusing to supply arms to Maoris or Pakehas an application was sent to the Colonial Secretary for a force of militia to be on hand in case of need. The Government adopted the suggestion and consequently detachments of the 58th and 65th regiments were stat-

i oned in New Plymouth. It will be appreciated that occurrences such as those noted above brought about a feeling of insecurity and a sense of peril among the settlers. In fact, so delicate did the position become that, in 1855, the Magistrate conscripted the whole white population as special constables, and all underwent certain military training.

FIRST CAPITAL OFFENCE.

In 1854 occurred the first capital offence by a European, a man named Joseph Cassidy being indicted for the murder of a Mrs. Rodgers, of Omata. The trial in the Supreme Court was held at Auckland.

ESTABLISHMENT OF DISTRICT COURT.

By the year 1858 the volume of litigation in the Magistrate's Court warranted the setting up, and establishment of, a District Court. Mr. Flight applied for the office and stated that out of seven appeals from judgments delivered by him none had been allowed. A Mr. William Halse, a solicitor trained in London, was, however, appointed first District Judge.

GOVERNMENT INTERFERENCE IN THE ADMINISTRATION OF JUSTICE.

In 1864 occurred what seemed to be an interference by the Government in the administration of justice in New Plymouth. Mr. F. D. Fenton, the law officer, wrote to Mr. Flight stating that the Government was displeased with the manner in which the case of *Paratene and Nikorima v. Bishop* (a case of cattle rescue) had been dealt with, and said that should there be a recurrence of cases of the kind the Government would feel it their duty to make some other provision for the administration of justice in New Plymouth. On the 30th March, 1864, Mr. Flight made what apparently was regarded as a satisfactory reply, for he continued in office until May, 1868, when he resigned.

SUBSEQUENT MAGISTRATES.

Mr. Flight's successor was Mr. H. R. Richmond who was then Superintendent of the province, the ostensible object of this appointment being to lessen public expenditure by uniting the two offices. He was in time succeeded by Mr. H. E. Kenny who entered upon the performance of his duties on the 13th December, 1869. Mr. Kenny had the advantage of a good training and had practised in Auckland ; he worthily upheld the dignity of the Court. His military instincts, derived from his father, Colonel Kenny, led him to join the local rifle volunteer company of which company he became Captain.

Mr. Kenny's successor was Mr. C. E. Rawson, son of Dr. T. E. Rawson, M.D., who was appointed in the year 1877. He entered the service on the 9th March, 1865, as bailiff and assistant clerk. He had, like other settlers, been driven off his farm in 1860, and served some years as a volunteer at 2/6 a day, and doubtless was glad to get a permanent billet. Mr. Rawson held office until March, 1889.

CLERKS OF THE COURT.

The first Clerk of the Court was Mr. Ritchie, a Scottish lawyer, who had acquired an excellent practice in New Plymouth. His residence and office was in the building now occupied by Smart Bros., on the corner of Brougham and Powderham Streets. When the war broke out, in 1860, Mr. Ritchie was appointed quartermaster of the militia and volunteers. Disease broke out in the crowded little beseiged town and swept off a large number of the inhabitants, among whom were Mrs. Ritchie and one of her children. Probably it was this misfortune added to the privations of a war period that led Mr. Ritchie to indulge in drink. He gave up his appointment as quarter-master, his practice disappeared, and he ended his days in Dunedin.

Mr. Ritchie was succeeded by Mr. E. S. Willcox, in 1861, and the latter was in turn succeeded in August, 1867, by H. E. Kenny. Mr. Kenny's salary was, as Clerk of the Court, £150, as Registrar of the Supreme Court £100, and as Relieving Officer £25.

Mr. C. E. Rawson was appointed Clerk of the Court on the 10th December, 1869, and, upon his being elevated to the Magistracy in 1877, his office was filled by Mr. A. H. Holmes.

THE LEGAL PROFESSION.

The history of the legal profession in New Plymouth commences in 1852, with the firm of Standish and Norris. Mr. Standish was the grandfather of Mr. Standish of the present firm of Messrs. Standish and Anderson. By 1870 there had been but a slight increase in the profession, the solicitors then practising being Mr. G. D. Hamerton, who practised under the name of Standish and Hamerton, Messrs. W. Halse and E. Carthew. To these were added, in September, 1870, the names of R. Clinton Hughes and A. S. Douglas, articled clerks who had just been admitted by Sir George Arney, C.J. There was no further addition for many years.

SOLICITORS' COSTS.

Until 1865 the Court was not accustomed to award costs to Solicitors appearing in Court, but in November of that year, a rumour having reached New Plymouth that costs were given in other places, the Magistrate, Mr. Flight, wrote to the Resident Magistrates at Canterbury, Wellington, Nelson and Dunedin, asking what was the practice in their Courts. The result was satisfactory to the profession.

Executions.

Those persons who still believe in capital punishment might well study two documents. The first is the lists of the Court of Criminal Appeal which has had to deal in the past term, on almost every occasion of its sitting, with two or even three murderers' appeals. The deterrent effect of the gallows does not very clearly appear from these figures.

The other document which we commend to our readers' serious attention is a grim little pamphlet entitled, "Executions," by Mr. E. Roy Calvert, the Secretary of the National Council for the Abolition of the Death Penalty. Mr. Calvert is not a sensasionalist; all his statements are carefully documented from official reports, some of which we believe have not been published before. The result is a work which effectively destroys the last shred of our belief in the stereotyped evidence that "the execution was carried out expeditiously and without a hitch."

—"Justice of the Peace and Local Government Review."

Summary of Legislation.

The following practical summary of last Session's legislation is published for general information; the classification adopted below is for practical convenience and general indication of subject matter—many of the Acts might, with propriety, be classified under one or more of the headings adopted.

1. CONSOLIDATION.

(a) Acts prepared under Statutes, Drafting and Compilation Act, 1920, introduced and passed in each case as strictly consolidating measures.

Inspection of Machinery. (1st January, 1929). Consolidating 1908 Act and four amendments.

Magistrates' Courts. (1st January, 1929). Consolidates the 1908 Act, its six amendments, and two sections from Finance Acts. The conflict between S. 75 (5) (a), and S. 75 (5) (e) of the 1908 Act is, by S. 82 (5) (a), resolved in favour of the latter.

Noxious Weeds. (1st January, 1929). Besides consolidating five statutes, this Act consolidates various Orders in Council extending the list of weeds deemed noxious when so declared by a Local Authority. Some scientific names have been brought up to date.

Orchard and Garden Diseases. (1st January, 1929). The names of some of the pests are altered to accord with the latest scientific nomenclature. Pests added at various times by Order in Council are incorporated.

Post and Telegraph. (1st January, 1929). Consolidates the Post and Telegraph Act, 1908, the Post and Telegraph Department Act, 1918, the whole of nine amending Acts, and odd sections from six other Acts.

Public Works. (1st January, 1929). This is probably the most important consolidation of the year; 29 previous enactments are affected, of which 22 will now be entirely repealed.

(b) Enactments which repeal and recast, with more or less substantial alteration, the previously existing law.

Auctioneers. (1st April, 1929, except S. 5, extending present licenses, which takes effect immediately). The licensing of auctioneers is assimilated to the licensing of land-agents, and the public notices of intention to apply for licenses of both kinds may be combined, and the applications heard together. The duty of approving applicants is transferred from local bodies to magistrates. Pawnbrokers (as at present), publicans, and undischarged bankrupts are disqualified. Licenses may be obtained on behalf of a firm or company. A fidelity bond for £500 is required for each license, with a maximum of £2,500 for all licenses granted to one applicant. The proceeds of bonds go to compensate customers for the auctioneer's default. Licenses may be cancelled for misconduct. Future licenses will run from 31st March, to which date existing licenses may be extended on payment of an apportioned fee. A register of auctioneers will be kept and gazetted every May. Auctioneers must have a registered office for service of documents. The present requirement of a trust account for proceeds of sales of real property is dropped; so is the prohibition of night auctions, and the requirements that fish, fruit, and vegetables must in all cases be sold to the highest bidder.

Divorce and Matrimonial Causes. (1st January, 1929). The alteration of substantial rights is slight, but that of arrangement and wording considerable. Sections of the English Act are in many cases substituted for previous New Zealand provisions. Amongst other changes several Sections have been dropped from the 1908 Act: S. 29 (that an agreement between parties cannot bar a petition, as to which see now **Hyman v. Hyman**, 1928, W.N. 181), S. 68 and 69 (as to affidavits sworn abroad), S. 70 and 71 (as to forgery and perjury), and S. 74 (giving a husband, in terms, the same rights as a wife) have been dropped. Except in the case of adultery, collusion is only a discretionary bar to relief. S. 2 (3) of the 1921-22 Amendment, seems to be omitted. A wife retains her New Zealand domicile not only when deserted, but also when separated by agreement.

Education Reserves. (1st January, 1929). Introduced as consolidation, but made the subject of several amendments. S. 6 of the 1908 Act has been altered, and S. 7 of the 1924 Amendment omitted. The power of High School Trustees to borrow money is varied (S.20), and control is given by Order in Council over funds held by the Public Trustee (S. 23).

Public Reserves, Domains, and National Parks. (1st April, 1929). Parts I and II are a re-enactment, with some modifications, of the Public Reserves and Domains Act, 1908, and its amendments. Part III enables Crown land, forest land, scenic reserves, and existing public reserves and domains to be declared National Parks, and National Park Boards to be constituted for their control. Travelling expenses may be paid to members, and they have the powers of Domain Boards and somewhat wider extra powers, including power to cater for tourists, and enlarged powers of borrowing. Various acts of vandalism in such parks are declared offences. The special Acts controlling Egmont National Park and Tongariro National Park are not affected.

Rabbit Nuisance. (1st January, 1929). An important measure of consolidation and simplification. The three kinds of Boards under the 1908 Act become one kind, save that they may rate according to (1) stock carried, (2) acreage occupied, or (3) rateable value (which will presumably be the unimproved value or otherwise as determined under the Rating Act, 1925). Existing boards continue their present rating basis; that for a new board is fixed by Order in Council on its creation. A board may alter its rating basis by bare majority at a ratepayers' poll held for the purpose, save that the stock carrying basis may not be reverted to. General rates are subsidised by the Crown. For the sake of security to lenders, even where general rates are on the stock carrying basis, special rates are to be on the rateable value. Holders of less than ten acres, or of holdings carrying less than 100 "stock-units" (one cattle-beast counting as five sheep), as the case may be, do not count as ratepayers. The size of boards depends on the area of the district, with a maximum of six members for 20,000 acres or over—one to be a rabbit inspector. As well as convicts, bankrupts, persons of unsound mind, and others usually excluded in similar Acts, rabbiters by occupation are excluded from membership of boards. Where the electors do not exceed forty, a majority in number and voting power may by nomination appoint the board without a poll. Postal voting may be introduced by regulations. Borrowing powers are limited to £3,000 a year, and to a total of £6,000 for any board. As to destruction of rabbits, inspectors may enter and destroy rabbits on Crown land (not alienated in fee or for a less estate, or in private occupation; including Native customary land), and on Native freehold land not held in severalty or in actual occupation. They may enter private lands to inspect, and serve notice requiring destruction, and on default may enter and destroy rabbits. The cost of such destruction may be sued for, and if the judgment remains unpaid for three months the Public Trustee may sell the land. Apparently notice need not be given to a mortgagee, but he gets the balance (if any) of the purchase money. The land is not sold for a bid of less than the judgment and costs. The importation or keeping of live rabbits requires a permit from the Minister.

Surveyors Registration. (1st January, 1929). The old Surveyors' Board becomes the Survey Board; the Surveyor-General is chairman, the other four members (being registered surveyors) are appointed by the Minister of Lands, two on the recommendation of the Surveyors' Institute. Fees and allowances may be paid to members. "Licensed" surveyors are transmuted into "Registered" surveyors. A register is established, with machinery similar to that in other recent Acts for regulating professions. The register is to be gazetted annually. The former powers of removal from the register and suspension are somewhat extended, and the Board may impose costs at an inquiry. Appeal lies to a Magistrate and two assessors. Improper use of titles, initials, etc., is an offence punishable by a fine of £50. The rule-making power of the Board is extended.

2. FARMING, INDUSTRIES AND COMMERCE.

Cinematograph Films. (1st January, 1929; Part III., 1st October, 1929). Part I repeals and replaces with slight amendment, the Cinematograph-film Censorship Acts of 1916 and 1926. Part III replaces the Explosive and and Dangerous Goods Acts in their application to cinematograph-film; otherwise the Act is new law. A Register of Films is established, and no film not publicly exhibited before the commencement of the Act may be exhibited unless registered by the maker, the renter (which means the person engaged in distributing the film to exhibitors), or, if there is no renter in New Zealand, the exhibitor. A ticket goes with the film, showing its length, classification as "British" or "foreign," and whether it counts for renters' quota or for exhibitors' quota (as to which, see below). If a film wears shorter, notice must be given. The ticket must be projected as part of the film, combined with the Censor's certificate. The Act aims at securing a renters' quota (rising from 7½ per cent. in 1929 to 20 per cent. in 1936), and exhibitors' quota (rising from 5 per cent. in year ending September, 1930, to 20 per cent. in year ending September, 1937), of British films. The quota provisions apply to films over 3,000 feet long, and (by exclusion of others) practically to dramatic pictures only. Renters must be licensed and furnish returns; small renters may pool their returns for quota-ascertainment. Exhibitors must be licensed and furnish returns. Contracts for bookings are limited to a period of twelve months, supply to commence not more than six months after date of contract. Existing contracts infringing this law become void in twelve months from date of contract, or after 31st March next, whichever date is the later. An exhibitor may by notice reject up to 5 per cent. of films proposed to be tendered to him under a contract, and to reject foreign films so far as necessary to obtain in substitution sufficient British films for his quota. Renters' income-tax is fixed as not less than 12½ per cent. of gross receipts. (The Act substantially follows recent Imperial legislation.)

Companies Amendment. (6th October, 1928, but retrospective in part). If a compromise or arrangement between a company and (1) its creditors, (2) any class of them, (3) its members, (4) any class of them, is proposed, the Court may order a meeting to be held, and if three-fourths in value (present in person or by proxy) agree, may sanction the compromise, which becomes binding on the company and the creditors, etc. Reorganisation of share-capital is included. The Court may also adopt proceedings taken before the Act was passed. S. 260 of the 1908 Act is repealed. Nothing is said about the effect on express provisions of the Articles of Association. The preferential claims on liquidation are changed to follow the order of the Bankruptcy Act. Where a receiver is appointed for floating-charge debenture-holders, if the company is not being wound up, he must pay persons who would be preferential creditors on liquidation, in priority to debenture holders, subject to recoupment out of assets (if any) available for general creditors.

Industrial Conciliation and Arbitration Amendment. (19th September, 1928). Until 1st September, 1929, except by consent of all parties, no award may be made, nor any existing award extended or amended, which relates to agricultural, pastoral, or dairying operations, or other farm work, or the manufacture of milk products. Repeals (and in effect extends for another year) the Industrial Conciliation and Arbitration Amendment Act, 1927.

Industrial Conciliation and Arbitration Amendment (No. 2). (9th October, 1928). Any new or existing industrial agreement or award may, with the parties' consent, have inserted into it a basis for calculation of wages, to hold good for five years. This is not to extend the duration of an agreement or award on any other topic.

State Fire Insurance Amendment. (6th October, 1928). The State Office may undertake earthquake insurance or any other class of insurance (over property) commonly undertaken in New Zealand or elsewhere by fire insurance companies.

3. PROFESSIONS AND TRADES.

Electric Wiremen's Registration Amendment. (6th October, 1928). A special form of registration, with a special register, is provided for persons thought fit to perform only certain kinds of wiring-work. Various provisions as to wiring-work are made more stringent. Where a source of supply is not controlled by an electrical supply authority, the Public Works Department will test the wiring. An Order in Council may require that stage-lighting be operated only by registered wiremen. It is an offence not to disclose the name of the person who did any wiring-work on any premises.

Engineers Registration Amendment. (9th October, 1928). A right to registration under the Act of 1924 is conferred on licensed surveyors who satisfy the Registration Board that before the coming into force of the principal Act they had "substantial practical experience in engineering as part of their practice or employment." Application must be made within six months of the passing of the Act. There is a right of appeal from the Registration Board to a Magistrate and two assessors as under the principal Act.

Music Teachers Registration. (1st January, 1929). Establishes a Music Teachers Registration Board, Registrar of Music Teachers, and Register of same, admission to which is obtained by possessing a diploma recognised by the Board, by satisfying the Board that one is otherwise competent to teach, or (for two years only) by having been engaged as a music teacher for at least twelve months immediately preceding the commencement of the Act. There are the usual machinery provisions for cancellation of registration for imprisonment for any offence, or for being guilty of any improper conduct, which (respectively) in the opinion of the Board renders a person unfit to be registered. (What kind of offence and/or conduct will that be?). It is an offence for an unregistered person to use words titles or initials indicating registration. Allowances may be paid to members of the Board. The Act will be administered by the Education Department.

Opticians. (1st January, 1929). "To practise as an optician" means "to employ any methods for the estimation of errors for refraction of the human eye, and to prescribe or adapt lenses to correct such errors." It is an offence to practise as an optician, not being a registered optician. Registration of opticians is effected by a Board, comprising the Director-General of Health as Registrar, two practising opticians, and two medical specialists. Members other than the Registrar may receive allowances and travelling expenses. A person may be registered who (a) has practised as an optician for the last four years, if he applies within a year, (b) gives proof of training and holds recognised diplomas, or (c) passes an examination under the Act and has three years' training in New Zealand. There are usual provisions for registration, cancellation of registration, appeal to a Magistrate and two assessors, and annual gazetting of the register. It is an offence for a person to hold himself out as either a registered optician or as qualified to test eyesight, unless he is registered as an optician or a medical practitioner. Further, it is an offence for anyone, registered under the Act or not, except a registered medical practitioner, to purport to practise "medical or surgical treatment of the eye." Only a medical practitioner, or person directed by him, may use drugs to measure the powers of vision or to treat a disease of the eye. Saving provisions authorise a registered chemist to dispense or apply drugs to bathe the eye, or remove foreign bodies from the eye; a wholesaler to supply wholesale spectacles and lenses; a person to sell ready-made spectacles from a permanent place of business; a person from filling the prescription for spectacles of a registered optician or medical practitioner.

Surveyors' Institute Amendment. (1st January, 1929). The principal Act, which dealt with two matters, the Institute and the Surveyors' Board, is repealed as regards the latter (now provided for by the Surveyors' Registration Act, 1928), and for the future relates only to the New Zealand Institute of Surveyors. Slight amendments are made as to the administration of the Institute, and "licensed surveyor" is changed to "registered surveyor" wherever it occurs. Entrance to the profession is, by effect of the amendments, no longer a matter in which the Institute has any legal concern. See also Surveyors' Registration Act, noted above in Part 1 (b), (Consolidation).

(To be continued)

Legal Literature.

Lushington's Affiliation and Bastardy.

Fifth Edition: By ALBERT LIECK.

(pp. 199: Butterworth & Co. (Publishers) Ltd.)

Lushington's Law of Affiliation and Bastardy is a book too well-known to need any commendation here, and in the present edition has been ably brought up-to-date. The book contains a comprehensive statement of the relevant English Statute law and of the important judicial decisions. One peculiar merit of the book, due to its first author, is, as the present editor truly says, that the very full summary of the decided cases obviates reference to the original reports, often very old ones, and makes the work self-contained to an extent unusual in text-books. The section dealing with corroboration is particularly well done, and includes a reference to the recent South African case of *R. v. Segal*, (1926), 90 J.P.N. 679 as to admissions by agents, a point upon which there is, apparently no English High Court decision. The subject of gestation and the rules relating to the presumption of legitimacy and its rebuttal are dealt with in some detail in one of the appendices, the working of the rules laid down by the Courts being illustrated by reference to the headnotes of, and quotations from, the judgments of the leading cases. Bastardy agreements are also dealt with. Altogether this is an admirable book, excellent in its method and arrangement, and clear and thorough in its treatment of the subject.—J.D.W.

New Books and Publications.

The Students Conflict of Laws (An Introduction to the Study of Private International Law based on Dicey). By C. Leslie Burgin, LL.D., and Eric G. M. Fletcher, LL.B. (Stevens & Sons). Price £1/15/-.

The Law in Relation to Aircraft. By Laurence A. Wingfield, M.C., D.F.C. and Reginald Brabant Sparkes, M.C. (Longmans Green). Price 15/-.

Criminal Appeal Reports: Index-Digest of Volumes 1-20. By Herman Cohen. (Sweet & Maxwell). Price £1/15/-.

The Law of the Liability of Property Owners and Occupiers for Accidents. By William Findlay. (Sweet & Maxwell, Ltd.). Price £1/4/-.

A.B.C. Guide to Companies Act, 1928. By H. W. Jordan and S. Borrie. (Jordan). Price 6/-.

Fixture Lists.

Below are the fixture lists for the November sittings of Supreme Court at Auckland and Wellington, as settled before the commencement of the respective sittings. Fixtures made for dates before the publication of the Journal have been omitted.

Auckland Fixture List.

November—

13th.—Brittain (Singer) v. The King (Meredith)
Woods (Gould) v. Richards.

15th.—Campton (Meredith) v. Vacuum Oil Co. Prop. Ltd. (Mahony).
Jones (Mason & Mason) v. Myers (Finlay).

16th.—Thorburn (Fraer) v. The Colonial Sugar Refining Co., Ltd. (Richmond).
Casey (Meredith) v. The Auckland City Council (Johnstone).

19th.—Prisoners for Sentence. Banco.
Thames Borough Council (Johnstone) v. The Congregational Church Trustees (Ennor).

20th.—Simpson (Cocker) v. Wingate.
The King (Meredith) v. Turner (Dromgool).
Hilford (Snedden) v. Anderson (Beckerleg).

21st.—Bedford (Lovegrove) v. Hartford Fire Insurance Co.
Challinor (McVeagh) v. Mason Bros. (West).
Clapcott (Lovegrove) v. McLeod Ltd.

22nd.—Undefended Divorce.
Dobbie (McVeagh & Fleming) v. Dobbie (Anderson & Snedden).

23rd.—James (Leary) v. Standard Insurance Co. & Vaile.
Carder (Fawcett) v. Clavie (Prendergast).

26th.—Watts (Grant) v. Warde (Reyburn).

27th.—Sutcliffe (Hall-Skelton) v. Winstone (Finlay).

28th.—O'Leary (Johnstone) v. Electric Products and Gramophones Ltd.
Kirkness (Hogben) v. Sheldon.

29th.—Shepherd (Hanna) v. Sunderland (Addison).
Warner (Ready) v. Bevins (Mason & Mason).

30th.—Bankruptcy.
Gustafsson (Thomson) v. Martin (Johnstone).

December—

3rd.—Prisoners for Sentence. Banco.
Sale (McVeagh) v. Tamaki Road Board (Johnstone).

4th.—Smith (Steadman) v. Thomson.

5th.—Smith v. Thomson (continues).

6th.—Hanna (Hanna) v. Fisher and Another (Meredith and Goulding).

7th.—Collins (Taylor) v. Walker (McVeagh).

10th.—Moses (West) v. Auckland City Council.

11th.—Gosse (McVeagh) v. Kibblewhite.
Bank of N.Z. (Towle) v. Noble.

12th.—Armitage (Sexton) v. Murray Deodoriser Co. (Goodall)
Te Aroha Dairy Co. (Goodall) v. Armitage (Sexton & Manning).

13th.—Hanna (Beckerleg) v. Buckley Ltd. (Webster).

14th.—Bankruptcy.
Seagar (McVeagh) v. McArthur.

17th.—Olliffe (Towle) v. Olliffe (Schramm).
Clifton (Gould) v. Scott.
Banco.

18th.—The Public Trustee (Johnstone) v. Royal Insurance Co.

19th.—The Public Trustee v. Royal Insurance Co. (continues).

Wellington Fixture List.

November—

13th.—Harris (as Executrix of the will of Charlotte Harris) (Scott) v. Smith (Brown).
Taylor (Spratt) v. Davies (Herd).

15th.—Schneideman (O'Leary) v. Schneideman (Mazengarb).

16th.—Jude (O'Leary) v. Benjamin (Jackson).

26th.—Clark (Boys) v. Capon (Luckie).
Mill (O'Regan) v. The Mayor, Councillors and Citizens of Wellington (O'Shea).

27th.—Cullen (Scott) v. Cullen (Tripp).

28th.—Zimmerman (Hogg) v. Butler (Butler).

29th.—A. D. Kennedy & Co., Ltd. (Beere) v. Hannafin (O'Donovan).

30th.—Milligan (Treadwell) v. Bedford (Kennedy).

December—

3rd.—Priestley and Another (Hay) v. Martin (Cornish).

4th.—Sinclair (Hay) v. The Public Trustee (as the Executor of the will of Duncan Henry Hibbs Sinclair (Rose).

5th.—C. & A. Odlin Timber and Hardware Co., Ltd. (Kennedy) v. Homer (Leicester).

6th.—The Official Assignee in Bankruptcy (Hogg) v. Foote (Treadwell).

7th.—Tucker (Boys) v. Nesbitt (O'Donnell).

10th.—Scott (Kennedy) v. The American Trading Co. of Australia.

17th.—Power (Anyon) v. H.M. The King (Fair).

18th.—Hallinam (Mazengarb) v. Hallinam (Johnston).