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"Laws which are on the Statute Book and which are disobeyed are the most dangerous things in the world."
—Lord Phillimore.

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The English Law Society's Meeting.

The last annual Provincial meeting of the English Law Society held recently at Eastbourne provided some interesting papers on topics of interest to lawyers not only in Great Britain but in the Dominions. Some of the topics considered have already been the subject of discussion in New Zealand. A most interesting paper on "The Organisation of the Solicitors' Profession" was read by Mr. George E. Hughes, of Bath, and it was natural that in such a paper it should be pointed out that the public has always regarded, and still regards to-day, the lawyer with some degree of suspicion and dislike. While asserting that the reason for this dislike is inscrutable, Mr. Hughes connects the feeling of unrest, which he says exists in England at the moment both in the lay mind and in the minds of certain of the Profession, with the number of cases of defaulting solicitors recently before the English Courts. He draws attention to the fact, which we in New Zealand have ourselves perceived, that the Press does not minimise the gravity of such cases and that it is idle for solicitors to shut their eyes. Mr. Hughes also finds, as we do, that the problem is two-fold: first, what should be done for the protection of the public, and, secondly, what should be done to secure greater co-operation within the Profession. It is interesting to note, as is seen from the topics referred to by Mr. Hughes, that discussion in England follows very closely the lines of discussion in New Zealand: for instance among the matters individually dealt with in his paper one finds—protection of the public, compulsory membership of the Law Society, compulsory audit of books, fidelity bonds or fidelity guarantee, co-operation within the Profession, advisory committee, unfair competition, and solicitors' clerks. Perusal of this paper itself will suggest to members of the Profession in New Zealand that they are proceeding on lines which are likely not only to be sound, but to constitute the only safe way of dealing with both branches of the problem facing the Profession to-day.

A paper read by Mr. Gwyther Moore on "The Power of Testamentary Disposition" dealt in some detail with the proposals of Lord Astor, when moving his motion in the House of Lords seeking the appointment of a Select Committee to inquire, in effect, into the matter of authorising the Courts to provide for a widow and children out of the testator's estate where the will is such as to leave them without sufficient means for maintenance and support. The attitude of the House of Lords on this motion was the subject at the time of a good deal of comment by New Zealand papers. It is interesting to note that English critics draw attention to the fact that the New Zealand Family Protection Act does not define the principles but has left that task to the Judges, and that the limitation on the power, to provide only adequate provision for maintenance and support, is laid down in *Allardice v. Allardice*, which went to the Privy Council. Although the circumstances of each case demand a certain degree of elasticity in the application of the rule in *Allardice v. Allardice*, the New Zealand Courts seem to find no great difficulty in its application, and the author of the paper, in outlining the obligations which he considers should go with the corresponding rights, seems to follow very closely the lines upon which New Zealand Judges have developed the decision in *Allardice v. Allardice*. The cases decided under the Family Protection Act provide a good example of Judge-made law, and it is very doubtful whether any rigid statutory provision could have, in the circumstances, given the satisfaction that the sane application by our Judges of the principle laid down in *Allardice v. Allardice* has generally given.

A paper on "Ambulance Chasing," by Mr. E. R. Cook, a summary of which has already appeared in our columns (*ante* p. 340), discloses that in New York a process of employing runners to secure retainers from those involved in running-down cases has been evolved by lawyers in that State. We can congratulate ourselves that we have not yet reached this position.

That the lighter side of subjects of interest was not wholly neglected, is shown by a paper entitled: "Is the Law an Ass?" by Mr. Edward A. Bell, of London. As would be expected from a paper so entitled many dicta and judgments are reported which, however appropriate to the circumstances in the past, to-day appear as the reflections of minds to which one would not *prima facie*, without further information, pay too great respect. It is interesting, however, to notice that certain articles and occupations seem throughout the centuries to lend themselves to judicial scrutiny. The questions as to bathing machines, mixed bathing, and foreshore rights, for example, which led to litigation before Chief Justice Best, in 1820, arose again in the twentieth century, and, as human nature does not appear fundamentally to change with great rapidity, may quite possibly appear again in the twenty-first century, and no doubt our present views will seem then as inadequate as do now the views of Best, C.J., in 1820. The author of the paper in question admitted that his captivating title had rather led him into a morass from which he could not emerge, and the answer to the question put as to whether the Law is an ass had perhaps better be left to some disinterested person from outside. Suffice it to emphasise that he says that Justice and Law are really distinct. It is no doubt easy to suggest what the Law should be; but it is, as a matter of fact, the painful duty of lawyers to deal with the law as it is. The conclusion of the author as to the duty of a lawyer is contained in an extract which he takes from an address by Mr. Hugh McMillan to the assembly of the Canadian Bar Association, namely: "It is by qualifying and amending laws which govern daily life and business in innumerable ways that a lawyer can best serve his fellow citizens." Progress along such lines is always possible and is safer far than by more arresting and evident ways. Those who think that statutory activity and codification will act as a satisfactory substitute will find themselves disappointed. Although it sounds desirable that the Law should be short in order that it can be easily understood by the unlearned, we are afraid that brevity in statement and rigidity in form will always lag behind changing circumstances.

Supreme Court.

Ostler, J. November 22; December 22, 1928.
Gisborne.

IN RE STEPHENS (A BANKRUPT).

Bankruptcy—Order of Payment of Debts—Resolution at Meeting of Creditors that certain Debts should be Accorded Preferential Payment—Deed of Assignment Embodying Terms of Resolution Executed by Most of Creditors—Subsequent Bankruptcy of Debtor—Resolution Passed by Majority of Creditors that Order of Preference Agreed to Under Assignment be Adhered to—Creditor Objecting—Official Assignee Not Entitled to Depart from Order of Preference Fixed by Statute—Remuneration of Trustees for Work Done in Realisation of Estate and Accepted by Official Assignee Held Entitled to Preference as Expenses Properly Payable by the Assignee in the Exercise of His Office—Bankruptcy Act, 1908, Section 120.

Motion by the Deputy Official Assignee of the estate of the above-named bankrupt for the direction of the Court as to whether the order of preference of payments agreed to by creditors under an assignment should be adhered to by him in the distribution of the estate. The business of the bankrupt was by an arrangement with three of his creditors made on 30th August, 1927, carried on under the supervision of one Harper. At a meeting of creditors held on 15th December, 1927, the creditors passed a resolution calling on the bankrupt to assign his estate for the purpose of having it wound up. They further resolved that all claims of Harper for goods and services supplied since 31st August, 1927, and also the sum of £18 15s. 0d. owing to Kendrick Bros., should be accorded preferential payment. They resolved that the order of payment should be: firstly, wages (including remuneration payable to the bankrupt and to Harper); secondly, rent; thirdly, a promissory note for £26 2s. 3d., due in respect of a lorry; fourthly, the claims of Harper and Kendrick Bros., above referred to; and lastly, other creditors. A deed of assignment was drawn up and executed by most of the creditors; but some did not agree to it. The assignees proceeded to realise the estate, but before this was completed Stephens was adjudicated bankrupt on 10th March, 1928. At the first meeting of creditors held on the 26th March, 1928, a resolution was carried by a majority of the creditors that the order of preference of payments agreed to under the assignment should be adhered to. Creditors to the value of £3,191 supported the motion; but it was opposed by creditors to the value of £1,654. The Deputy Official Assignee asked for the direction of the Court as to whether he should in administering the estate have regard to the resolution of the majority of the creditors. All the creditors except one who opposed the resolution withdrew their opposition. That one creditor, Mrs. Martin, still opposed it, although she had originally agreed to the order of preference under the assignment.

Nolan for Deputy Official Assignee.
Brosnahan for majority of creditors.

OSTLER, J., said that it had been argued that by the agreement Mrs. Martin was estopped from raising any objection to the same order of preference being observed under the bankruptcy. In His Honour's opinion that was not so. The fact that she agreed to a certain order of preference of payments under the assignment did not prevent her in the bankruptcy from insisting that the estate be administered in accordance with the law. The question was whether the Deputy Official Assignee in administering the estate of a bankrupt had power to depart from the statutory order of preference fixed by Section 120 of the Bankruptcy Act, 1908, because of a resolution of a majority of the creditors. In His Honour's opinion he had no such power. Section 64 provided that, *subject to the provisions of this Act*, the Assignee should in the distribution of the property of the bankrupt among his creditors have regard to any directions given by resolution of the creditors of any general meeting. That of course meant a resolution which the creditors could lawfully pass. A majority of the creditors could not, against the will of a minority, lawfully pass a resolution altering the order of preference fixed by Section 120: see **Ex parte Emmanuel,** 17 Ch. D. 35; **Ex parte Cocks,** 21 Ch. D. 397; **In re Haydon,** N.Z.L.R. 2 S.C. 372. The Assignee was a statutory official with statutory duties, and he was bound by the provisions of Section 120 in distributing the assets of a bankrupt's estate. Of course if the whole of the creditors agreed to a variation of the order of preference no harm would be done in carrying out that agreement; but if even one creditor refused to agree the rights of that creditor could not be overridden by the majority.

That did not, however, entirely dispose of the matter. The Deputy Official Assignee had elected to treat the trustees of the deed of assignment as his agents. He had accepted the work they had done in the realisation of the estate, and had received from them the proceeds of the assets realised. They were, as his agents, entitled to a fair remuneration for that work and that remuneration would come under clause (a) (i) of Section 120 as costs, charges, allowances, and expenses properly payable by the Assignee in the exercise of his office. All other payments must be made in the order of preference provided for in Section 120.

Solicitors for the Deputy Official Assignee: **Nolan and Skeet,** Gisborne.

Solicitor for majority of creditors: **Brosnahan and Beaufoy,** Gisborne.

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

IN RE GLEESON.

Chose in Action—Assignment—Portion of a Debt Assignable in Equity but Not at Law—Property Law Act, 1908, Section 46.

Motion to determine the priority of certain assignments of part of a debt given by the above-named debtor to one Williamson, E. C. Hayton & Co., and the Waotu Timber Co., Ltd., respectively. This question depended upon whether or not part of a debt can be assigned at law, and the case is reported upon this point only.

Moss for Williamson; **Sheat** for E. C. Hayton & Co.; **Croker** for Waotu Timber Co., Ltd., submitted written arguments.

OSTLER, J., said that in **Mitchell v. N.Z. Loan and Mercantile Co., Ltd.,** 26 N.Z.L.R. 433, the Court of Appeal held that although Section 46 of the Property Law Act, 1905, (now the Act of 1908) was wider in its terms than the corresponding section of the Judicature Act (Eng.), inasmuch as it referred to equitable as well as legal choses-in-action, in fact it was no wider, and the law in New Zealand as to the assignment of choses-in-action was exactly the same as the law in England. His Honour was bound by the decision of the Court of Appeal in that case to treat the words "or equitable" in Section 46 as surplusage, and to construe the section in the same manner as the English Courts had construed the English section. Although there had been some conflict of opinion in the English Courts as to whether a defined portion of a debt could be legally assigned under Section 25 (6) of the Judicature Act (Eng.), the better opinion seemed to be to the contrary: see **Brice v. Bannister,** 3 Q.B.D. 569, 574; **Durham Bros. v. Robertson,** (1898) 1 Q.B. 765, 774; **Jones v. Humphries,** (1902) 1 K.B. 10, 14; **Forster v. Baker,** (1910), 2 K.B. 636, 638; **In re Steel Wing Co.,** (1921) 1 Ch. 354. His Honour respectfully agreed with the reasons given by Bray, J., in **Forster v. Baker** (*cit. sup.*) for holding that the section did not authorise the legal assignment of part of a debt. In His Honour's opinion the law was the same in New Zealand. His Honour accordingly held that all three assignments were no more than equitable assignments, and as the notice was given in each case simultaneously the priority must be determined by the order in date of the assignments.

Solicitors for Williamson: **Moss and Spence,** New Plymouth.
Solicitors for E. C Hayton & Co.: **Wilson, Freeman & Sheat,** New Plymouth.
Solicitors for Waotu Timber Co., Ltd.: **Croker and McCormick,** New Plymouth.

Smith, J. December 7; 10, 1928.
New Plymouth.

IN RE HEIGHTON: EX PARTE LANE.

Bankruptcy—Bankruptcy Notice—Stay of Execution—Seizure by Bailiff Under Writ of Execution of Goods Not Property of Judgment Debtor—Subsequent Issue of Bankruptcy Notice—Judgment Creditor Insisting After Issue of Notice that Goods Seized Were Property of Judgment Debtor—Estopped from Denying that Goods Property of Debtor—Bankruptcy Notice Invalid—Bankruptcy Act, 1908, Section 26; Bankruptcy Amendment Act, 1927, Section 2.

Application under Rule 87 of the Bankruptcy Rules to set aside a bankruptcy notice. On 1st October, 1928, one Lane obtained judgment in the Supreme Court against one Heighton for £207 10s. 1d., and on the same day issued a writ of execution upon the judgment. On 2nd October the sheriff acting by his bailiff under the writ seized a motor car which he claimed as the property of Heighton. On 4th October, 1928, Lane issued, and on 5th October served, a bankruptcy notice on Heighton based on the judgment. One Finer claimed that he had purchased the car from Heighton and issued a writ against the bailiff for possession of the car and damages. The bailiff, supported by Lane, filed a defence; the action was set down for hearing but was settled a few days before the hearing of the present proceedings, on the ground that the car was the property of Finer before seizure.

North in support of motion.
O'Dea to oppose.

SMITH, J., said that Lane had supported the seizure of the car as the property of Heighton, from the 2nd October, 1928, until a few days prior to the hearing of the present proceedings. It was claimed that Lane was not in a position on 4th October, 1928, to issue a bankruptcy notice, in that although he had a final judgment against Heighton, execution thereon had been stayed. It was clear that a stay of execution was not limited to an express order of the Court to that effect. A stay of execution might be implied from circumstances—see **Re a Debtor: Ex parte the Debtor,** (1908) 1 K.B. 344. In **Ex parte Ford: In re Ford,** 18 Q.B.D. 369, where goods taken in execution under a judgment were claimed by a third party and an interpleader order was made, it was held that the interpleader order operated as a stay of execution, and therefore that the judgment creditor could not issue a bankruptcy notice. The same principle was approved by Vaughan Williams, J., in **In re Follows: Ex parte Follows,** (1895) 2 Q.B. 521; but in **In re a Debtor: Ex parte Smith,** (1902) 2 K.B. 260, the Court held that where the sheriff had seized only goods not belonging to the judgment debtor, there was nothing illegal or irregular in the issue of a second writ of *fieri facias* before any return had been made to the first; and that in those circumstances there was nothing to prevent the judgment creditor from issuing a bankruptcy notice in respect of the judgment debt. The effect of the case last cited was, His Honour stated, expressed in divergent terms in **Williams on Bankruptcy,** and in the article on Bankruptcy in **Halsbury.** In **Williams,** 12th Edn., 23, the learned authors made no reference to the precedent withdrawal by the sheriff from the goods seized. In 2 **Halsbury** 29 the learned author stated the effect of the case to be that "a withdrawal by the sheriff from execution on goods not belonging to the debtor did not prevent the issue of a second writ of *fi. fa.* against the debtor's goods, and therefore did not operate as a stay of execution within that provision." His Honour found it unnecessary to decide whether the precedent withdrawal by the sheriff was necessary in fact before the judgment creditor became entitled to issue a second writ of execution and so enable him to issue a bankruptcy notice in lieu thereof. In His Honour's opinion, the judgment creditor was estopped as against the judgment debtor from alleging that at the time the bankruptcy notice was served the goods seized were not those of the judgment debtor. The judgment creditor insisted that they were. By such insistence, he necessarily claimed that the amount to be realised on such goods must go in reduction of the judgment debt. Until he withdrew from that position, he must in His Honour's opinion, be held as against himself to be executing a writ upon the goods of the debtor. He could not both approbate and reprobate at the same time. **Knight v. Coleby,** 5 M. & W. 274, was authority for the proposition that a debtor may be estopped by his conduct notwithstanding a rule in the debtor's favour established by **Miller v. Farnell,** 6 Taunt. 370, viz., that if a judgment creditor caused a sheriff to execute a writ of *fi. fa.* by seizure he could not have a writ of *capias ad satisfaciendum* until the *fi. fa.* was completely returned and executed and that this was so even though the execution creditor abandoned the seizure of the goods. In the present case, if Lane maintained, as he did, at the time he served the bankruptcy notice on Heighton that the goods seized by the bailiff pursuant to the writ of execution were the goods of Heighton, he thereby involved Heighton's solicitors (as appeared from Lane's own affidavit) in legal correspondence and argument, with consequent necessary expense to Heighton. It was true that Heighton maintained that the goods were not his, but he had been damnified by Lane's attitude. Lane did not merely allow the sheriff to act. He maintained that the sheriff's seizure was good. His Honour thought, therefore, that until Lane withdrew from that position he was estopped from alleging against Heighton that the goods were not Heighton's. He was consequently estopped from alleging that he had not issued execution against Heighton, and as there had been no return to the writ when the bankruptcy notice was served, it followed that there was then in existence an implied stay of execution upon the judgment. Lane was, therefore, not entitled to serve the existing bankruptcy notice, and an order would accordingly be made under Rule 90 of the Bankruptcy Rules setting it aside.

Solicitors for applicant: **Wilson Freeman & Sheat,** New Plymouth, agents for **Halliwell, Thomson, Horner & North,** Hawera
Solicitors for creditor: **Spratt & Kinmont,** Hawera.

Smith J. November 5; 10, 1928.
New Plymouth.

IN RE BONNER'S LEASE.

Landlord and Tenant—Lease—Renewal—Perpetual Option to Renew Under First Schedule or to Have New Lease Offered for Sale under Second Schedule of Public Bodies Leases Act, 1908—"Fair Annual Rent"—Provision that No Improvements to be Taken into Account in Making Valuation under First Schedule and that Words in Second Schedule Providing for Valuation of Buildings and Improvements be Omitted—Basis Upon Which Rent to be Fixed for Renewed Lease under First Schedule—Single Arbitrator Purporting to State Case Before Umpire Appointed—Arbitration Act, 1908, Section 20—Public Bodies Leases Act, 1908.

By Memorandum of Lease dated 28th January, 1921, the Borough of New Plymouth leased certain farm land to one Bonner for a term of eight years and one month. The lease provided that at any time not being less than six months before the expiration of the term the lessee should be entitled by notice in writing to the lessors (at the option of the lessee to be stated in such notice) either to a renewed lease of the land demised in accordance with the provisions of the First Schedule of the Public Bodies Leases Act, 1908, or to have a new lease of such land offered for sale by auction in accordance with the provisions of the Second Schedule of that Act and so on from time to time in perpetuity. It was provided that all the provisions of such First or Second Schedules as the case might be, except as modified by the lease, should apply. The lease further provided that in the event of the lessee requiring a renewed lease in accordance with the provisions of the First Schedule no improvements whatever should be taken into account in making the valuation referred to in Paragraphs 2 and 3 of the First Schedule; that the term of either lease should be twenty-one years, and in the event of the lessee electing to adopt the provisions of the Second Schedule the words "or a valuation of any specified descriptions of buildings or improvements as the Leasing Authority thinks fit" in the first paragraph thereof should be deemed to be deleted therefrom. The lease also contained a provision that upon the serving of the notice of election the provisions of the First or Second Schedules as the case might be should come into force. The lessee duly gave the prescribed notice and elected to take a renewed lease of the land in accordance with the provisions of the First Schedule of the Public Bodies Leases Act, 1908. Pursuant to Clause 4 of that Schedule, the lessors appointed Mr. Vickers, and the lessee Mr. Richards, their Arbitrators in order to make a valuation of the fair annual rent to be paid during the renewed term. By Clause 5 of the First Schedule, the arbitrators were required, before commencing to make the valuation, to appoint an umpire. Before an umpire was appointed under Clause 5

of the First Schedule, Mr. Richards raised the question as to what was the proper basis upon which the arbitrators should proceed to ascertain "the fair annual rent" for the term of the renewed lease, and suggested a method of valuation. Mr. Vickers asked that an umpire be appointed before this question was considered, but Mr. Richards declined to assist until the method of valuation to be adopted had first been agreed upon. Mr. Richards eventually notified Mr. Vickers that as they could not agree upon a method, he Richards, would apply to the Supreme Court for a direction on the matter, and he asked Vickers to join in the application. Mr. Vickers declined. Mr. Richards thereupon, purporting to act under Section 20 of the Arbitration Act, 1908, stated and filed a Special Case for the opinion of the Supreme Court, supporting it by an affidavit purporting to state the facts of the case. Mr. Vickers filed a reply, and the Solicitor to the lessors also filed an affidavit setting out the correspondence between the Solicitors engaged.

Quilliam for lessor.
Coleman for lessee and Richards.

SMITH, J., stated that when the curious proceeding came on for hearing counsel for the lessors took the point that Mr. Richards had no power in himself to state a case under Section 20, but he then waived the point, and joined in asking for the opinion of the Court. It was clearly incompetent for one of two arbitrators, in an arbitration involving the appointment of an umpire, to state a case on his own account for the opinion of the Court. The facts must first be found. The arbitrator referred to in Section 20 must be an arbitrator capable of finding the facts on his own account. Where an umpire was to be appointed it was the umpire who was to find the facts and state the case. Where parties to a lease desired to ascertain in advance the proper construction of the right of renewal, an appropriate procedure was the issue of an originating summons for the purpose, as in **Cox v. The Public Trustee,** (1918) N.Z.L.R. 95. As, however, both parties invited the opinion of the Court His Honour proceeded to express his opinion on the questions raised.

Clause 2 of the First Schedule to the Public Bodies Leases Act, 1908, required that a valuation should be made of the fair annual rent of the land demised, so that the rent so valued should be uniform throughout the whole term of the renewed lease. An express provision in the lease required that no improvements whatever should be taken into account in making the valuation referred to in paragraphs 2 and 3 of the said First Schedule; Clause 3 of the Schedule construed in the light of the express provision meant the same thing. By Clause 13 of the lease, the new lease to be granted to the lessee was to contain provisions as to renewal similar to those contained in the old lease. The effect of that was to give the lessee at the expiration of his renewed term the right again to elect whether he would take a further new lease under the provisions of the First Schedule to the Act, or whether he would have a new lease of the land offered for sale by auction in accordance with the provisions of the Second Schedule. The right to make that election under a lease held under the First Schedule was given in perpetuity. Under the Second Schedule two separate valuations were to be made, viz.: (1) a valuation of all the buildings and improvements then on the land, and whether made during or before the commencement of the term, and (2) a valuation of the fair annual ground-rent of the land, without the buildings and improvements. Before the expiration of the old lease, the right to a new lease, containing the same provisions as were contained in the old lease (including the provision for valuation and for the offer of a new lease for sale by auction) was to be offered by the lessor by public auction at the upset annual rent, as determined by the arbitrators or the umpire appointed pursuant to the Second Schedule, without the buildings and improvements so valued as aforesaid, subject to the payment by the purchaser of the value of the buildings and improvements as determined by the valuation. If any person other than the lessee became the purchaser, that person must pay in cash to the lessor in trust for the lessee the amount of the value of the buildings and improvements and accept a lease at the annual ground-rent at which the right to the lease was purchased by him.

The principle of the provisions of the lease under consideration was that a lessee holding a lease under the provisions of either the First or Second Schedules should not pay rent based in any way upon his improvements. Where a lessee had in the first place accepted a lease of unimproved land and had improved it during the first term, he could at the end of that term either continue under the First Schedule and pay a fair annual rent arrived at by a valuation, in the making of which no account whatever had been taken of the improvements; or he could require that the lessor should sell by public auction the right to a new lease at an upset fair annual ground-rent subject to the condition that a purchaser of the lease other than himself should pay him the value of the improvements made by him. It was clear, therefore, that the fair annual rent referred t in Clause 2 of the First Schedule was the fair annual ground-rent.

His Honour did not think that the contention of either counsel as to the principle upon which the ground-rent should be valued was correct. The words "no improvements whatever shall be taken into account in making the valuation" appearing in the lease referred, in His Honour's opinion, not only to those improvements on the land at the time of the valuation, but also to all improvements which a prudent lessee would make during the ensuing term. It must be assumed that the covenants of the lease would be observed and that at the end of the term, the lessee had the power to obtain the value of all the then existing improvements from some person other than the lessors. On that basis the lease provided that "no improvements whatever shall be taken into account." The duty of the arbitrators, therefore, in fixing, as between the lessors and the lessee, a rent for the land, was to put out of consideration altogether all improvements existing or likely to be made during the existing term by the lessee, and the right to be paid for them. They must then determine what a prudent lessee would pay as a fair annual rent for the land in its unimproved state for a term of 21 years; but in order that the rent might be fair, they must, otherwise than as hereinbefore explained, take into account the provisions of the lease. Making allowance for the differences in the terms of the leases in question, the following cases seemed to His Honour to be ample authority for the views above expressed: **D.I.C. Limited v. Mayor of Wellington,** 31 N.Z.L.R. 598; **Re Lund's Lease,** (1926) N.Z.L.R. 541; **Hamill v. Wellington Diocesan Board of Trustees,** (1927) G.L.R. 197; **In re Brechin and the D.I.C. Ltd.,** (1928) N.Z.L.R. 241. In His Honour's view **Gosford v. Alexander and Others,** (1902) 1 Ir. R. 139, had no application to the present case.

Counsel for the lessee asked His Honour to extend the language of the Judges in the New Zealand cases cited, and to specify the factors which the valuers should take into account in fixing the fair annual rent. His Honour was both unable and unqualified to accede to that request. The function of the Court was to deal with questions of law. The construction of the language of a lease to determine the true principle to be adopted in the fixation of a new rent was a question of law; but beyond that the Court could not go. See per Lord Watson in **North and South Western Junction Railway Company v. Assessment Committee of the Brentford Union,** 13 A.C. 592, 594. His Honour, therefore, declined to specify formulae. His Honour, however, for the guidance of the arbitrators, referred to the treatment of the term "unimproved value," by Hosking, J., when delivering the judgment of the Full Court in **Cox v. Public Trustee,** (1918) N.Z.L.R. 96, 99, and further pointed out that where an annual rent for land was to be fixed, it was wrong in principle to assume that it must necessarily be some percentage of the capital value: **Duthie v. Valuer-General,** 20 N.Z.L.R. 585.

Solicitors for lessor: **Govett, Quilliam and Hutchen,** New Plymouth.
Solicitors for lessee: **Rutherfurd, Macalister and Coleman,** Stratford.

Smith, J. December 5; 10, 1928.
New Plymouth.

GIBSON & GIBSON v. COMMISSIONER OF STAMP DUTIES.

Revenue—Stamp Duty—Declaration of Trust—Gift of Monies by Father to His Daughter to Enable Her to Complete Purchase of Land from Third Person—Gift Made on Date of Execution of Transfer—Subsequent Execution of Deed of Trust by Daughter Expressed to be in Consideration of Such Gift—Deed of Trust Not Exempt from Conveyance Duty—No Contemporaneous Instrument of Conveyance "by the Creator of Trust to the Trustee"—Stamp Duties Act, 1923, Section 101 (3).

On 19th June, 1928, Mrs. Coleman agreed to purchase from one Goodson a leasehold farm property, which the latter had bought in as mortgagee through the Registrar of the Supreme Court, on 29th May, 1928. By memorandum of transfer dated 4th July, 1928, the Registrar transferred the land to Mrs. Coleman in consideration of £3,038, and, to enable the transaction to be completed, Mrs. Coleman's father, H. G. Gibson, made her a

gift of £862. The declaration made for the purpose of assessment of gift duty showed the gift as being made on 5th July, 1928, although the money was in fact given contemporaneously with the completion of the transfer and to enable it to be completed. On 5th July, 1928, Mrs. Coleman executed a deed of trust between herself as settlor and H. G. and H. B. Gibson as trustees. The deed of trust recited the fact that H. G. Gibson had found the said sum of £862 for the settlor to complete the purchase, and that in consideration of such payment the settlor had agreed to declare the trusts and to enter into the covenants in the deed of trust contained. The memorandum of transfer was duly stamped with conveyance duty. When the deed of trust was presented for assessment, the Assistant Commissioner of Stamp Duties assessed it under the Stamp Duties Act, 1923, Section 101, with a duty of £15 5s. 10d. A case was stated under Section 39 of the Act, the question for determination being whether the deed of trust was within the exemption conferred by Section 101 (3) of the Act as being "a declaration of trust which was contemporaneous with an instrument of conveyance of the trust property by the creator of the trust to the trustee."

Taylor for appellants.

Weston for respondent.

SMITH, J., held that the deed of trust was not within the exemption conferred by Section 101 (3) of the Stamp Duties Act 1923. Section 101 (3) exempted a declaration of trust only when it was contemporaneous with an instrument of conveyance of the trust property by the creator of the trust to the trustee. It was clear that there had been no instrument of conveyance by the creator of the trust to the trustee. The instrument of conveyance was from the Registrar of the Supreme Court at the request of Goodson to Mrs. Coleman, the creator of the trust. The conveyance was a conveyance to the creator of the trust and not a conveyance by the creator of the trust to a trustee. The transaction was clearly outside the terms of the exemption.

Appeal dismissed.

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

Solicitor for respondent: **C. H. Weston,** New Plymouth.

Smith, J. December 5; 10, 1928.
New Plymouth.

LANE v. HEIGHTON.

Practice—Set-off of Cross Judgments—Judgment of Defendant Against Plaintiff in a Separate Action Set-off Against Plaintiff's Judgment Against Defendant in Present Action—Both Judgments Inclusive of Costs—Preservation of Solicitor's Lien Rule 302 of Code.

Motion by defendant Heighton for an order for leave to set-off the amount of his judgment in a separate action in which he was plaintiff and Lane (plaintiff in the present action) defendant, against the amount ordered to be paid by him, as defendant, to Lane, the plaintiff in this action. The parties were the same as were involved in an application to strike out a bankruptcy notice reported on p. 345. On 20th July, 1927, Heighton obtained judgment in the Magistrates' Court against Lane for £146 9s. 6d., inclusive of costs. On the 1st October, 1928, Lane entered final judgment in the present case against Heighton for the sum of £207 10s. 1d. inclusive of costs. On 4th October, 1928, Heighton obtained a certificate of his judgment from the Magistrates' Court pursuant to Section 145 of the Magistrates' Courts Act, 1908, and on 6th October, 1928, final judgment was signed thereon in the Supreme Court.

North in support of motion.

O'Dea to oppose.

SMITH, J., said that as decided in **Hansen v. Aputari,** 31 N.Z. L.R., 368, the judgment carried interest from the date of the judgment in the Magistrates' Court. Each party had a judgment debt against the other in the Supreme Court. Each judgment was against the other in the same right, and not in any representative capacity: see **David v. Rees** (1904) 2 K.B. 435, 443. Each judgment carried interest at the same rate. The judgments were, therefore, mutual in their nature. The power of the Court to allow cross-judgments to be set off was conferred by Rule 302. The object of that Rule was explained by Brett, M.R., in **Edwards v. Hope,** 14 Q.B.D. 922, 926; see also **Reid v. Cupper,** (1915) 2 K.B. 147, 149. The objections taken to the granting of leave to set-off in this present case were: (1) That the whole matter could have been settled on the bankruptcy notice, and that a set-off had been offered on the execution; (2) That there was no power to allow a set-off as to costs in separate actions. As to the first objection, His Honour had held (ante p. 345) that the bankruptcy notice was invalid, and need not be further considered. The execution had been abandoned because the goods of the wrong person were taken. As to the second objection, the judgment of the Court of Appeal in **David v. Rees,** (*cit. sup.*), showed that in England the provisions of Order LXV, Rule 14 and LXV, Rule 27, Sub-rule 21, with regard to the power of the Court to set-off costs between parties, were confined to cases in which the cross-judgments for costs were in the same action or proceeding, and that those provisions did not extend to cases in which the judgments were in separate and independent actions. That decision had been questioned, but held to be binding in England by the Court of Appeal in **Reid v. Cupper,** (*cit. sup.*). In New Zealand, the matter was settled, His Honour thought, by the terms of Rule 302, which specifically referred to "cross-judgments for money," whether for debt, or damages, and costs, or for costs alone. What was to be set-off was the final judgment for money, including the costs where allowed.

As regards the preservation of the solicitor's lien, Rule 302 was again specific. It must not be prejudiced by the set-off. In England the Court had a discretion as to whether it would allow a set-off, notwithstanding the existence of the solicitor's lien. The present English practice appeared to be that, *prima facie*, the Court ought not, owing to the existence of a solicitor's lien, to refuse a set-off, if as between the parties to the action it would be fair and just to allow it, and if no fraud or imposition had been practised on the solicitor by collusion between them: **Puddephatt v. Leith** (No. 2), (1916), 2 Ch. 168. It did not appear from the English cases that the existence of any separate writ of execution was necessary to give the Court jurisdiction to make the order granting leave to set-off. In His Honour's opinion, it was fair and just that leave should be granted in the present case, subject to the solicitor's lien for costs in the present action. His Honour was not aware of the exact amount of these costs as between solicitor and client, and they must be referred to the Registrar for taxation as between solicitor and client: see form of order in **Blakey v. Latham,** 41 Ch.D. 518, 524. The defendant would, therefore, be granted leave to set-off his judgment entered on the 6th August, 1928, against the judgment entered in this action on the 1st October, 1928, subject to any lien the plaintiff's solicitor might be found to have for costs in the present action.

Solicitors for defendant: **Halliwell, Thomson, Horner & North,** Hawera.

Solicitors for plaintiff: **Spratt & Kinmont,** Hawera.

Frazer, J. December 5; 13, 1928.
Auckland.

MOWBRAY v. TAKAPUNA BOROUGH.

Municipal Corporation—Subdivision of Land—Mandamus—Council Refusing to Approve of Plan Because of Risk of Pollution of Water Supply if Buildings Erected on Land Subdivided—Refusal *ultra vires*—Powers as to Refusing Approval to Plans Defined—Excess of Jurisdiction and Not Merely Erroneous Exercise of Discretion—Right of Appeal Not Excluding Remedy by Mandamus as Jurisdiction Exceeded—Mandamus Not Futile—Mandamus Granted—Municipal Corporations Act, 1920, Section 335.

Action for a mandamus to compel the Council of the Borough of Takapuna to approve of a plan of subdivision of land. An order *nisi* was granted by Herdman, J., on 4th November, 1927. The plan of subdivision showed the land in question divided into five allotments. The Council considered the plan and resolved not to approve it, but stated that it would approve of a fresh subdivisional plan covering allotments 2, 3, and 4 on the original plan. The reason for this refusal to approve of the plan was that as part of the land sloped towards Lake Pupuke—

the only source of water-supply for the North Shore—there would be a risk, if lands sloping towards the Lake were built on, that the water of the Lake would be polluted.

McVeagh for plaintiff.

Meredith and Lowrie for defendant.

FRAZER, J., stated that Section 335 of the Municipal Corporations Act, 1920, required the approval of the subdivisional plan by the Borough Council before any part of the land comprised in a subdivision could be disposed of. Counsel for the defendant Corporation submitted that the power to approve necessarily implied the power to refuse to approve, and that mandamus would not lie where the Council had *bona fide* exercised a discretion. The Borough Council had carefully considered the plan submitted to it, and had been prepared to approve it as to part of the land, but had refused to approve it as to allotments 1 and 5, because of the risk of pollution of the water of the lake, which was the only source of water supply for the North Shore boroughs and their population of 25,000 persons. If land sloping towards the lake were built upon, there would be a grave risk of pollution, and it was considered that sooner or later the land would be built upon, if subdivided. Section 335 (2) did not expressly give power to refuse approval of any plan of subdivision. Subsections (1) and (2) were capable of the construction that the power given to the Council was limited to requiring amendment of a plan before it gave its approval. Section 335 affected private rights of property, inasmuch as it restricted the right of an owner of land to subdivide and dispose of its property as he thought fit. In such cases, a statute must not be construed so as to take away rights which already existed before the statute was passed, unless there were plain words which indicated that such was the intention of the legislature: **In re Cuno,** 43 Ch. D. 12, 17. The Public Health Act, 1875 (Eng.) expressly provided (Section 158) that where a notice, plan or description of any work was required by any by-law to be laid before an urban authority, such authority should signify its approval or disapproval of the work. Section 335 contained no reference to disapproval, and the more reasonable construction was that it gave the Borough Council no power to prevent an owner from subdividing a block of land, or to require him to omit part of the block from his plan of subdivision. If the proposed subdivision contravened some statute or by-law, the Borough Council could refuse to approve it on that ground—**Wright v. Eastbourne Council,** 83 L.T. 338; but Section 335 in itself conferred no power of disapproval. Under Subsection (2) of that Section the Council might require the owner to make further provision for the construction of streets or the making of reserves. Those were matters of detail and public convenience only. The subsection then went on to say that the Council "may require such other alterations of the plan as it considers proper." Under the power given by those words, the Council could require the grouping or lay-out of the allotments to be altered so as to harmonise with other subdivisions, or it might require the dimensions of the allotments to be increased in order to avoid possible contraventions of the building regulations, or it might require corners to be rounded off. It appeared to His Honour that the words "such other alterations" ought to be read *ejusdem generis* with the words relating to the construction of roads and the making of reserves, and be construed as being restricted to amendments in matters of detail intended for the greater convenience of the public and for harmonising the lay-out of the particular subdivision with any general scheme of town-planning or borough improvement. The constitution of the Board of Appeal set up under subsections (3) and (4) seemed to be more consistent with this construction than with the alternative construction. It was difficult to imagine that the Legislature would have empowered such a board to deal finally with a question that involved the arbitrary abrogation of the right of a property owner to sell or otherwise dispose of portion of his land. His Honour was of opinion, therefore, that the Takapuna Borough Council was not entitled to refuse to approve of the plan of subdivision submitted to it by the plaintiff, but was entitled only to require such amendments thereto as were specified in Section 335 (2) to be made as a condition precedent to the approval of the plan. As to the argument that the jurisdiction of the Court was ousted by the provisions of Section 335 relating to the setting up of a board of appeal, there was authority for the proposition that mandamus would not lie where an effective remedy by way of appeal existed; but in the present case the right of appeal did not arise, for the Borough Council had acted in excess of its jurisdiction, and the right of appeal given by the section was obviously confined to matters within the jurisdiction of the Council. Counsel for the defendant Corporation contended further that a mandamus would not issue when it would be futile or inoperative: **Reg. v. Wilson,** 43 L.T.N.S., 560. He submitted that a mandamus in the present case would be futile, for the Borough Council would refuse permission to a purchaser of an allotment on the lake slope to erect a dwelling on his allotment. It was a matter of doubt whether this submission was well founded, and counsel for the plaintiff stated that the question might be litigated in the near future. It was undesirable, in the circumstances, that His Honour should deal with that aspect of the case, beyond saying that the only by-law on the subject submitted at the hearing was one prohibiting the erection of any building of any kind upon or over the lake or any part of the shore thereof, except with the permission of the Lake Takapuna Board of Control. That body had gone out of existence, but its by-laws had been saved, and were at present administered by the North Shore Boroughs (Auckland) Water Supply Board. The by-law specifically referred to was made in pursuance of the Regulations gazetted under Section 100 of the Reserves and other Lands Disposal andPublic Bodies Empowering Act, 1913, which empowered the Board of Control to make by-laws (*inter alia*) prohibiting the erection of any building upon the lake or the shore thereof, or within such distance of the water of the lake as the Board should think fit. There were also general powers relating to the prevention of pollution of the lake water, and for prohibiting any persons from allowing sewerage and house drainage to enter the lake. It was impossible for the Court, in these proceedings, to find definitely that the North Shore Boroughs (Auckland) Water Supply Board or the Takapuna Borough Council had or had not power to prohibit the erection of a properly drained and sewered dwellinghouse on any part of the lake watershed, irrespective of its distance from the water of the lake. It was sufficient for the purposes of the action to say that it had not been shown that a mandamus, if issued, would be futile and inoperative.

Counsel for the defence argued, lastly, that a mandamus could not be granted where the local authority had *bona fide* exercised its discretion, even if it had misconstrued the statute: **Reg. v. Cotham,** (1898), 1 Q.B. 802, 806. It appeared to be beyond dispute that the Council was influenced by an extraneous consideration in refusing to approve the plan. It did not address itself to considering the merits of the plan or the words of the Act, but decided to withhold approval of any and every subdivision of land situated on the lake watershed, because of the possibility of the water of the lake becoming contaminated in the event of houses being erected on the watershed. If the Borough Council had had jurisdiction to approve or disapprove of the plan of subdivision, a mandamus would not issue merely because it had acted erroneously within its jurisdiction. The Court would not interfere whether the error were one of law or of fact, so long as the Council had exercised a *bona fide* discretion, and had not manifestly disregarded the plain words of the statute, or been influenced by manifestly improper considerations. The Borough Council could not, however, assume a jurisdiction that it did not possess, and that was what it affected to do in the present case. It had jurisdiction to approve or to amend, and it had done neither. See **Reg. v. Bowman,** (1898) 1 Q.B. 663, 668.

His Honour accordingly held that the plaintiff was entitled to the issue of a writ of mandamus ordering the Takapuna Borough Council to consider and approve, in accordance with and subject to the provisions of Section 335 of the Municipal Corporations Act, 1920, the plan of subdivision submitted to it by the plaintiff.

Solicitor for plaintiff: **D. R. C. Mowbray,** Auckland.
Solicitors for defendant: **McGregor and Lowrie,** Auckland.

Frazer, J. December 4, 13, 1928.
Auckland.

DROMGOOL v. COMMISSIONER OF STAMP DUTIES.

Revenue—Death Duties—Estate Duty—Ante-Nuptial Agreement in Consideration of Marriage to Convey to Wife After Marriage Property Subject to Mortgage and to Discharge Mortgage Thereon on Due Date for Wife's Benefit—Property Occupied by Husband and Wife—Land Not Conveyed to Wife—Mortgage Discharged but New Mortgage for Smaller Amount Substituted—Rent from Property When Let for Short Period Collected by Wife—Rates and Taxes Paid by Husband—No Laches Debarring Wife of Right to Conveyance—Abandonment of Right to Have Mortgage Discharged—Property Not

Part of Dutiable Estate of Deceased Husband—Amount Secured by Mortgage on Property Not Deductible as Debt Due to Wife—Death Duties Act, 1921, Sections 5 (1) (c), 40, 42 (1).

Case stated pursuant to the provisions of Section 62 of the Death Duties Act, 1921.

Michael Dromgool deceased, who died on 15th February 1926, was married on 1st November, 1910. On that day, prior to the solemnisation of the marriage, the deceased, by a memorandum of agreement made with his intended wife, agreed that, in consideration of the intended marriage, he would within one month of the marriage convey to her absolutely for her sole and separate use certain land, subject to an existing mortgage for £500, and that upon the due date for the repayment of the mortgage moneys he would discharge the mortgage, to the intent that she should hold the land free from encumbrances. There was a house on the land, which the deceased had occupied as his home before the marriage, and Mr. and Mrs. Dromgool made it their permanent home after the marriage, and continued to occupy it until the death of the deceased. The property was never conveyed to his wife, and the title remained in the name of the deceased until his death. He was assessed for, and paid, all land tax, rates and other charges in respect of the property. The mortgage for £500 fell due on 27th March, 1914, and the deceased, without the knowledge or consent of his wife, raised a fresh mortgage of £400, and paid off the mortgage for £500. The mortgage for £400 remained on the property at the deceased's death. The deceased informed his wife later of what he had done, and promised to release the new mortgage out of the first money he had available. The house was let for a year from July, 1919, and the rent was usually collected by Mrs. Dromgool's sister and paid over by her to Mrs. Dromgool, who was then residing at Mangere, with her husband. During a period of seven weeks, while his wife was in hospital, the deceased collected the rent. Mrs. Dromgool made a statutory declaration stating that at the time of the letting in question a written agreement was prepared and signed, in which she was named as lessor. The agreement has, however, been lost. The question arising was whether such property was rightly included in the dutiable estate of the deceased.

McVeagh for appellants.

Meredith for respondent.

FRAZER, J., said that the relevant statutory provisions were Sections 5 (1) (c), 40, and 42 (1) of the Death Duties Act, 1921. The agreement in question was admittedly a voluntary contract, in that the consideration (the intended marriage of the parties) was a good consideration in law, but was not an adequate consideration in money or money's worth. The substantial question involved was whether Mrs. Dromgool *bona fide* assumed possession and enjoyment of the property not less than three years before the death of the deceased, and thenceforth retained such possession and enjoyment to the entire exclusion of the deceased or of any benefit to him by contract or otherwise. Counsel for the respondent argued that either: (a) the deceased had entered into an agreement to convey the property to his wife, which he had never fulfilled, but had kept the property himself so that the gift lapsed, or (b) if anything effectual had been done, it constituted a gift of property of which the exclusive possession and enjoyment had not been assumed by Mrs. Dromgool within the meaning of Section 5 (1) (c) Dealing first with the contention that the deceased had not fulfilled his agreement, it was to be noted that Mrs. Dromgool's solicitors had the custody of the document until after the death of the deceased, and there was no suggestion that its cancellation was ever discussed. The deceased did not fulfil his undertaking to pay off the mortgage of £500, and clear the title, but he paid off £100 and raised a fresh mortgage for the balance, which he promised his wife he would pay off as soon as he had money for the purpose. The fact that Mrs. Dromgool resided on the property was equivocal as evidence of possession, for she would naturally live with her husband, whether the home were his or hers. On the other hand, in 1919, nine years after the marriage, she let the house for a year and received the rent. That pointed to the recognition by the deceased of the binding nature of the agreement to convey, even though he had not carried it out fully by executing a conveyance and paying off the mortgage. It was not unreasonable that, when husband and wife were living together, the wife should refrain from pressing for the conveyance to her of the legal title, though, but for the letting of the house by Mrs. Dromgool, in 1919, one might properly conclude that the deceased had decided not to carry out his agreement, and that his wife had acquiesced in his decision, and so abandoned the agreement altogether. His Honour thought, however, that the circumstances indicated that Mrs. Dromgool was quite satisfied with the possession and equitable ownership of the property under the agreement, and did not think it necessary to press for a conveyance. The fact that she let the house and received the rent indicated that she had no doubt as to her ownership, and the deceased apparently acquiesced in her action. The payment by the deceased of the rates and taxes on the property did not affect the wife's ownership and possession: **Union Trustee Coy. v. Webb,** 19 C.L.R., 669.

Counsel for the respondent submitted that the long delay of Mrs. Dromgool in enforcing her rights constituted such laches as to disentitle her to specific performance of the contract. Time was not, however, essential where the claimant was in possession of the property, provided the possession was referable to the contract. In His Honour's opinion, the admitted facts showed that Mrs. Dromgool's possession was referable to the agreement of 1st November, 1910. The plaintiff had not been sleeping on her rights, but relying on her equitable title, without thinking it necessary to have her legal right perfected, and time, therefore, would not run as laches to debar the plaintiff from asserting her rights: Fry on Specific Performance, 6th Edn., 517. His Honour did not think that Mrs. Dromgool could be held to be debarred from asserting her title to the property. Her long acquiescence in the inaction of the deceased in regard to freeing the title from encumbrances placed her, however, in a different position respecting the mortgage for £400, and indicated that she had abandoned her right to have the title cleared.

As to the question whether the gift was not within Section 5 (1) (c), His Honour already held that Mrs. Dromgool's possession was referable to the contract evidenced by the memorandum of agreement. Her possession was *bona fide,* and the fact that the deceased also lived on the property, by virtue of the marriage subsisting between them, did not prevent that possession from being to the entire exclusion of the deceased or of any benefit to him "by contract or otherwise," for there was no contract by which he reserved any rights over the property, and the words "or otherwise" must be construed *ejusdem generis* with "contract": **Attorney-General v. Seccombe,** (1911) 2 K.B., 688. It was held in **Union Trustee Co. v. Webb,** 19 C.L.R., 669, that the fact that a man lived with his wife in her house did not prevent her possession from being to the exclusion of any benefit to him by contract or otherwise. Counsel for the respondent argued that in that case and in the cases of **Lord Advocate v. McTaggart Stewart,** 8 S.C., 5th ser., 579, **Attorney-General v. Seccombe,** (*cit. sup.*), and **Commissioners of Stamp Duties v. Byrnes,** (1911), A.C. 386, the legal estate had been conveyed to the respective donees. His Honour was unable, however, to see that Mrs. Dromgool's possession and enjoyment of the property were any the less her possession and enjoyment, whether she had the legal estate or only the equitable estate therein. His Honour accordingly held that the property was not properly included by the respondent in the estate of the deceased for death duty purposes, and that the appellants were not entitled to have the sum of £400 secured by mortgage thereon deducted from the estate of the deceased as a debt due to Mrs. Dromgool.

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

Solicitor for respondent: **V. R. S. Meredith,** Auckland.

Rules and Regulations.

Cinematograph Films Act, 1928. Regulations for the censorship and registration of cinematograph films.—Gazette No. 94, 17th December, 1928.

Hospitals and Charitable Institutions Act, 1926. Regulations as to appointments to positions to which Section 38 of the Act relates.—Gazette 93, 13th December, 1928.

Inspection of Machinery Amendment Act, 1927. Order-in-Council prescribing fees payable for inspection of machinery and boilers.—Gazette No. 96, 20th December, 1928.

Magistrates' Courts Act, 1928. Consolidation of Rules and Regulations.—Gazette No. 95, 18th December, 1928.

Orchard and Garden Diseases Act, 1908. Regulations governing control of certain diseases.—Gazette No. 96, 20th December, 1928.

Leading English Cases.

Some of the Year's Decisions of Dominion Interest.

In reviewing, so far as full reports are available at the time of writing, the English decisions of Dominion interest decided during the past year, it is necessary to make the observation that the reader must not, owing to considerations of space, expect to find all the cases of importance referred to; rigid care has been exercised in their selection and in the main cases on branches of the law dealt with in the course of an average practice have been preferred to cases dealing with the more specialized branches. Omissions, however, there must necessarily be. It may be as well to draw attention to the possibility of some of the decisions included being ultimately reversed on appeal.

ADMINISTRATION.

Under *Administration* an interesting decision is found in *In re Anderson-Berry, Harris v. Griffith*, (1928) Ch. 290, where the Court of Appeal held that sureties who have entered into the usual bond for the proper administration by the administrator of an intestate's estate are entitled to apply to the Court for relief *quia timet*, and will be granted the same by way of indemnity against their liability in a case where they have reasonable ground for anticipating jeopardy owing to a threat by the administrator, persisted in up to the issue of the writ, to distribute the estate in contravention of the bond without providing for contingent liabilities.

BANKRUPTCY.

In the realm of *Bankruptcy, In re Kooperman*, (1928) W.N. 101, attracts attention. The broad rule of conflict of laws is that a foreign bankruptcy does not operate as an assignment of any immovables of the bankrupt situate in England—*Dicey*, 4th Edn., 477. Kooperman was adjudicated bankrupt in Belgium and his property included certain English leaseholds. Astbury, J., appointed the Belgian trustee receiver of the leaseholds with authority to sell them and retain and deal with the proceeds as trustee in the Belgian bankruptcy.

In re Johns, Worrell v. Johns, (1928) Ch. 737, illustrates that familiar principle of the law of bankruptcy that a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws. In this case a son executed a mortgage in favour of his mother by which it was agreed that out of the sum to be advanced (£1,650) the mother should retain a bonus of £1,000. There was a proviso to the effect that if the mortgagor should not before the death of the mortgagee become bankrupt he could, on the death of the mortgagee, discharge his obligation by repaying the £650 without interest; but if the mortgagor became bankrupt in the life of the mortgagee the mortgagee could, as against his trustee in bankruptcy, claim not only the £1,000 (retained to satisfy the bonus) but also all moneys actually advanced with interest at 5%. The mortgagor became a bankrupt in the lifetime of the mortgagee and, on the death shortly afterwards of the mortgagee, the question arose as to the rights of the mortgagor's trustee in bankruptcy. Tomlin, J., held that the proviso was really a device to secure that something more was to come to the mortgagee if the mortgagor became bankrupt than if he did not, and was bad as being in violation of the bankruptcy laws; the mortgagee was entitled to hold the property as security only for the moneys actually advanced with interest at 5%.

Under Section 40 of our Bankruptcy Act, 1908, the Court may dismiss a creditor's petition if satisfied that for "sufficient cause" no order ought to be made. In *In re a Debtor, ex parte Lawrence*, (1928) Ch. 665, the creditor was owed two instalments of a debt which together were of sufficient amount to entitle him to present a bankruptcy petition against the debtor. The debtor tendered payment of one instalment but the creditor refused to accept it; if the tender had been accepted the amount remaining due to the creditor would not have entitled him to present a bankruptcy petition. The creditor lodged a bankruptcy petition against the debtor but the Court (Astbury and Tomlin, JJ.) refused to make an order, holding that the creditor's refusal to accept the tender was "sufficient cause" within Section 5 (3) of the English Bankruptcy Act, 1914, the counterpart of Section 40 of our Act of 1908.

BILL OF SALE.

Section 25 (1) of our Chattels Transfer Act, 1924, dealing with the question of defeasance, finds its English counterpart in Section 10 (3) of the English Bills of Sale Act of 1878, so *Stott v. Shaw and Lee Ltd.*, (1928) 2 K.B. 26, a decision on the latter subsection, should be noted. A bill of sale provided that the grantor would pay to the grantee the principal sum and interest on a named date. A contemporaneous mortgage, given as part of the same transaction and as a collateral security for the principal sum, provided for repayment by instalments subject, however, to the rights of the mortgagee to require repayment on the date named in the bill of sale. The Court of Appeal held that the bill of sale was not void as being made subject to a "defeasance or condition."

COMPANIES.

An important decision as regards the liability of liquidators is *In re Windsor Steam Coal Co.*, (1928) Ch. 609, which decides the short point that a voluntary liquidator of a company is not a trustee within the meaning of Section 68 (17) of the English Trustee Act, 1925 (see definition in Section 2 of our Act of 1908) and is therefore not entitled to the indemnity given to trustees by Section 30 (1) of the English Act (see Section 82 of N.Z. Act). *Lynde v. Nash*, (1928) 2 K.B. 93, as to non-compliance with the statutory requirements as to issue of the prospectus will also repay perusal.

CONTRACT.

Prima facie a contract which makes no provision for its determination is intended to continue and has no limit of time. *Crediton Gas Co. v. Crediton Urban District Council*, (1928) Ch. 447, illustrates how, by the nature of the contract and by its provisions, this *prima facie* presumption may be rebutted and such a contract held not to be perpetual.

DIVORCE.

Of several important decisions under this heading, only two can here be noted. *Woodland v. Woodland*, (1928) P. 169, decides that a decree for restitution of conjugal rights estops the parties from alleging subsequently that there never was a valid marriage. *Dewe v. Dewe*, (1928) P. 113, decides that a bankrupt is not relieved of his common law liability to support his

wife by the discharge of his liability, on being adjudged bankrupt, under a separation deed to maintain his wife, whether she has proved in the bankruptcy for the capital value of the weekly sums which he covenanted under the deed to pay, or whether she has not proved in the bankruptcy.

ESTOPPEL.

As to *res judicata*, *Conquer v. Boot*, (1928) 2 K.B. 336, is interesting. The defendant had contracted to build a bungalow for the plaintiff and had failed to perform his contract properly. The plaintiff brought an action in the County Court for damages setting forth a number of matters of which he complained, and obtained damages. He later brought another action alleging further breaches of the same contract and giving particulars. The Divisional Court held that the cause of action was the same in both actions, and that, the matter being therefore *res judicata*, the plaintiff could not recover further damages.

FOREIGN JUDGMENT.

Ellerman Lines Ltd. v. Read, (1928) 2 K.B. 144, decides that the fact that a British subject has actually obtained judgment in a foreign Court does not prevent an English Court from granting an injunction restraining its enforcement where it is shown to have been obtained by a breach of contract or by fraud.

GIFTS.

Under this heading there is, as to *donatio mortis causa*, an interesting case in *In re While, Wilford v. While*, (1928) W.N. 182. On the morning of June, 29th, the testator, being then in expectation of death, verbally informed his wife that he wished her to have all the money standing to his credit at the K. Branch of B.'s bank, and also a further sum which he wished debited against his account at B.'s bank at S. At his request the manager of the K. Branch was asked to call immediately, but did not do so. The wife, as the bank manager was not present, made out a cheque for £200 drawn on the S. Branch, and the testator signed it. By an error she dated the cheque July 29th instead of June 29th. At the same time she made out a cheque for £94 on the K. Branch, this being the amount to the testator's credit there. The testator signed this cheque also, and handed it to his wife. Later the sub-manager of the K. Branch arrived, and the wife handed both cheques to him with instructions to pay them into the K. Branch and open an account there in her name for £294, the amount of the two cheques. The sub-manager left the testator's house with the two cheques at about 11 a.m. and took them to the branch of the bank which was only a few minutes' walk away. The cheque for £200 was subsequently returned marked "Post Dated" after having been paid into the wife's account at the K. Branch. The testator died a little over an hour after the sub-manager left the house. Tomlin, J., held that the widow was entitled to retain the proceeds of the cheque for £94, but was not entitled to receive out of the testator's estate the amount of the post-dated cheque.

HUSBAND AND WIFE.

Arnold and Weaver v. Amari, (1928) 1 K.B. 584, deals with the liability of a husband to his wife's solicitors for costs in divorce proceedings instituted against his wife. There a husband took divorce proceedings against his wife on the ground of her adultery. She consulted a solicitor who put in a defence denying the charge and briefed counsel to appear for her. At the hearing the wife failed to appear and a decree was made dissolving the marriage on the grounds alleged in the petition. The wife's counsel applied for costs, but as no security for her costs had been obtained no costs were granted. The wife's solicitor brought an action to recover the costs from the husband on the ground of his wife's agency of necessity at common law. Sankey, J., found as a fact that the solicitor had acted without negligence, honestly believing that the wife was innocent and that she would be successful in her defence, but held, nevertheless, that in the circumstances the wife had no authority to bind her husband so as to make him liable for the costs of her defence.

(To be continued)

Nullification of a Statute.

The Recent Case of R. v. Laws.

R. v. Laws (1928), "*The Times*," 6th November, affords a most extraordinary example of the practical nullification of a statute by the Courts. The appellant, aged seventeen years, had been charged with carnal knowledge of, and indecent assault on, a girl of fifteen. By the Criminal Law Amendment Act, 1922 (Eng.), an accused, in a charge of indecent assault, is unable to put up the defence of reasonable cause of belief as to the age of the girl, although that defence is available to one accused of the much graver charge of carnal knowledge. In the case under discussion the charge of carnal knowledge was abandoned because of the defence open thereon to the accused; the prisoner was, however, convicted of the lesser offence. Avory, J., sentenced the accused to four months' imprisonment, and expressed the hope that some day somebody would have the sense to remedy that state of things. The Lord Chief Justice (Lord Hewart) and Swift and Acton, JJ., heard the appeal; Lord Hewart applied the epithet "grotesque" to the existing state of the law, and said: "The Court cannot alter the statute, but it can deal with the sentence." This their Lordships proceeded to do by reducing the sentence to one day's imprisonment.

"This power of the judges," writes "Outlaw," in the *Law Journal*, "to make the sentence conform with their views, not only of the gravity of a crime, but with their views of what the legislators ought to have said, opens a prospect of exciting speculation which loses its thrill only when one remembers the wisdom and mental sobriety of the English Bench. For, disliking, as so many of them must do, the Parliamentary estimates of right and wrong, what doth hinder them from so agreeing together in this matter of sentences as to make certain parts of the Criminal Law a dead letter? Such (and other) powers they have that, were they to abuse them, there is hardly any limit to the excitement and general disorder which might ensue.

"Suppose they utilised the aforesaid powers, or some or any of them, as a means to enforce their right to increased wages? But we know instinctively they never will. It is beyond the power of any man to instil into their august minds these revolutionary ideas. They will go on trying to make sense of the unintelligible statute; they will continue to help the Legislature."

The Attorney-Generalship.

Some Notes on the History and the Holders of the Office in New Zealand.

When New Zealand became for a second time part of the Dominions of the British Crown, by virtue of the proclamation of Governor Hobson, in 1840 (the previous annexation by Captain Cook having been deliberately disclaimed by the Imperial Parliament in statutes of 1817, 57 Geo. III c. 53, preamble—and later years), it was as a dependency of the Colony of New South Wales, and accordingly its citizens enjoyed the ministrations of the Attorney-General of that jurisdiction. When, by Letters Patent of 16th November, 1840 (N.Z. Gazette, 1841), the Islands of New Zealand were "erected into a separate territory by the name of Her Majesty's Colony of New Zealand," an Attorney-General was one of the original members of the Executive Council with which the jurisdiction was furnished—the others being the Colonial Secretary for the time being, and the Colonial Treasurer for the time being. (These officials were, of course, likewise members of the nominated Legislative Council brought at the same time into existence). The first holder of the office of Attorney-General was Francis Fisher, Esquire, where appointment was ratified on 3rd May, 1841, and whose tenure of office lasted for three months only. Later in the same year William Swainson was appointed to the position, and he held office during the whole of the Crown Colony period.

With the advent of representative government the office of Attorney-General became a ministerial portfolio, held from 1856 to 1865 in somewhat rapid succession by the Hon. Mr. (afterwards Sir) Frederick Whitaker (in three ministries), the Hon. Mr. (afterwards Sir) William Fox (twice), Mr. Henry Sewell (thrice), the Hon. Mr. (afterwards Mr. Justice) T. B. Gillies, and the Hon. Mr. Prendergast (afterwards Sir James Prendergast, C.J.).

By the Attorney-General's Act, 1866, enacted for reasons that do not appear in the meagre Hansard reports of those days, the office was made permanent, the holder being appointed during good behaviour and removable only on the address of both House of Parliament. Mr. Prendergast, who held the position when the Act was passed, received appointment to the statutory position. The circumstances of his appointment appear in correspondence laid before Parliament in 1870, and this includes an undertaking by the Government of the day, ratified by the next Government in office, to offer him the next puisne Judgeship falling vacant, the Chief Justiceship being excepted. He remained in the office until his appointment to the office of Chief Justice, in 1875, when the Act of 1866 was repealed and the office of Attorney-General might, in the discretion of the Government be either a non-political appointment or a post in the Executive Council, and might or might not be held by a member of either House of Parliament. In any event he was to hold office during pleasure only—Attorney-General's Act, 1876. This provision remained on the statute-book (from 1908 as part of the Civil List Act, 1908) until 1920, when the Attorney-Generalship was placed exclusively in the list of Executive Council offices by the Civil List Act of that year. In practice, the option reserved in 1876 to make the office non-political was never exercised, and the post has always been held by Parliamentarians. The list of holders includes Sir Frederick Whitaker again (who retained it during part of his Premiership), the Hon. Mr. Stout (afterwards Sir Robert Stout, C.J.), who held it for three different periods, the Hon. Mr. (afterwards Mr. Justice) Connolly, and Sir Patrick Buckley. When the latter ceased to hold office, in 1895, no appointment was made for the best part of a decade. By this time the position of Solicitor-General (created for the first time for a few months in 1867-8), had become a permanent civil service position, filled during this period by Mr. W. S. Reid, to 31st October, 1900, and from 1st November, 1900, by Dr. F. Fitchett. In 1903 the office of Attorney-General was again filled, the Hon. Mr. Albert Pitt, M.L.C., being given the position, and the list of twentieth-century Attorneys-General continues with Sir John Findlay, the Hon. (now Mr. Justice) A. L. Herdman, the Rt. Hon. Sir Francis Bell, the Hon. Mr. W. Downie Stewart (who held office for four months in 1926), Mr. F. J. Rolleston, and the present holder, the Hon. Mr. T. K. Sidey.

During the Crown Colony period the detailed supervision exercised by the British Government relieved the Attorney-General from the onus of settling constitutional questions to any great extent, and his chief function was the promotion, and probably in great measure the drafting, of legislative measures. Prominent among these was the great Conveyancing Ordinance of 1842, in which the first Chief Justice, Sir Wm. Martin, is believed also to have borne a share (T. F. Martin, *Conveyancing in N.Z.*, p. iv.). Here, and in the old Regulae Generales of the Supreme Court affecting a fusion of law and equity, and in the contemporary constitution of the Anglican Church in New Zealand, are seen the concrete enactment of reforming ideas which in older countries had not passed beyond the stage of Royal Commissions' reports and Parliamentary blue-books.

With the commencement of responsible government the ambit of duties increased, and among the legal opinions of the office which have been permitted to see the light of day are many on questions affecting ministerial responsibility, native rebels, the responsibility of colonial governors, the relations of the two Houses of Parliament, and other constitutional and inter-colonial topics. During the provincial period the central government, under legal advice, had the duty of recommending the approval or disallowance of provincial ordinances—a duty extending nowadays only to the ordinances of the Island Councils of the various Cook Islands, and of the Legislative Council of Western Samoa. With the commencement of the Dominion period, the responsibilities of the Attorney-General were again enlarged, and his advice is now required on various matters of Imperial and International law.

His duties as regards domestic legislation developed with the increase of the functions of government, his position in charge of the two departments of the Law Drafting Office—the Bill Drafting Department, and the Compilation Department—being statutorily regulated by the Statutes Drafting and Compilation Act, 1920. A landmark in this respect was the Consolidated Statutes of 1908, during Sir John Findlay's tenure of office. Shortly afterwards, under the same Attorney-General, Professor (afterwards Sir John, and later the Hon. Mr. Justice) Salmond became Parliamentary Draftsman and Solicitor-General, and among the statutes of this period, important from a jurist's point of view, are the Declaratory Judgments Act, 1908,

the Oaths Act, 1910, the Native Land Act, 1909, and the Destitute Persons Act, 1910.

The period of the European War laid fresh burdens on the Attorney-General, in the nature not only of emergency legislation, but also of administrative work, due to the sudden extension in all directions of the Crown's sphere of action—a tide that has not yet altogether receded. The duties of this period were borne by the Hon. Mr. Herdman, till 1918, and thereafter, and down to the reconstruction of the Reform Ministry, in 1926, by the Rt. Hon. Sir Francis Bell. The name of the last holder of the office, Mr. F. J. Rolleston, will probably be more associated with the Motor-vehicles Insurance (Third Party Risks) Act of last session, than with the large number of consolidating statutes and less spectacular remedial measures relating to conveyancing, procedure, company law and "lawyers' law" generally, passed under his sponsorship.

Easter Conference.

Arrangements to Date.

Arrangements for the Second Annual Legal Conference to be held in Wellington, from Wednesday, April 3rd to Friday, April 5th, are already well in hand.

The Committee set up by the Council of the Wellington District Law Society consists of the following gentlemen: Present Members of the Council—Mr. H. F. Johnston (President), Mr. C. G. White (Vice-President), Messrs. H. H. Cornish, R. Kennedy, P. Levi, M. F. Luckie, W. Perry, G. G. G. Watson, and A. A. Wylie; additional members added—Messrs. M. Myers, K.C., H. E. Evans, L. H. Herd, W. E. Leicester, A. J. Mazengarb, H. F. O'Leary, D. Perry, F. C. Spratt, and C. A. L. Treadwell. Mr. W. E. Leicester has been appointed Conference Secretary.

While the final details of the programme have not at the time of writing been definitely settled, it will include on its business side the reading of papers, discussions thereon, and the discussion of remits. Sir John Findlay, K.C., has consented to read a paper on "The Etiquette of the Legal Profession." On its social side there will be a reception and dance, a dinner, and outdoor sports, and entertainment will also be provided for the ladies accompanying members. The Attorney-General (The Hon. T. K. Sidey) has also offered to provide some form of entertainment for those attending the Conference, and his offer has been accepted with great appreciation by the Committee.

It has been resolved to invite to attend the Conference and the social functions, the Judges and ex-Judges of the Supreme Court, the Attorney-General, the Solicitor-General, the Minister of Justice, the Magistrates resident in Wellington, and the Public Trustee. The Prime Minister, the Mayor of Wellington, the President of the British Medical Association, and the President of the New Zealand Society of Accountants are among those to be invited to the dinner.

The following letter which has been sent by the Conference Secretary to the Secretary of all District Law Societies, is published for general information:—

"Dear Sir,

Second Annual Legal Conference.

"It has been decided to hold the Second Annual Legal Conference at Wellington, from Wednesday, April 3rd to Friday, April 5th, 1929, and my Committee cordially invites all members of District Law Societies to be present.

"The suggested business programme covers the reading of papers, discussions thereon and discussions on remits. There will be social functions consisting of a Reception and Dance, a Dinner, and Out-door Sports, and in addition, entertainment will be provided for ladies accompanying visiting members.

"Will you kindly forward to me, by February 23rd, at latest: (1) Any remits that your Society would like to put forward for discussion at the Conference. These will be considered by the Remits Sub-Committee, which will make a selection should the number supplied be more than can conveniently be dealt with at the Conference. (2) A list of the names of members and ladies proposing to attend the Conference.

"In arranging the First Legal Conference (the success of which my Committee hopes to repeat) it was found necessary to ask the Secretaries of some of the District Law Societies to get into personal communication with the members. I should be glad if you would follow this procedure in this case as it is very necessary that the information requested may be in my hands by the time mentioned, in order that satisfactory booking and catering arrangements may be made.

"With your assistance and co-operation, my Committee feels sure that a large number will attend the Conference and find it pleasurable."

"W. E. LEICESTER,
Conference Secretary."

Taranaki District Law Society.

Medical—Legal Dinner.

At the suggestion of the Taranaki Branch of the British Medical Association, a medical—legal dinner was held at the White Hart Hotel, New Plymouth, shortly before the vacation. The function was attended by some thirty-five members of the District Law Society and some fifteen members of the British Medical Association. Among the guests were His Honour Mr. Justice Smith and Mr. Houston Smith, an English Barrister visiting Taranaki. Following the dinner, an adjournment was made to the Burwood Cabaret, where, under the presidency of Dr. G. Home, President of the Taranaki Branch of the British Medical Association, toasts were honoured. Messrs. P. O'Dea and C. H. Weston, for the Law Society, and Drs. Gordon and G. H. Thomson, for the Medical Association, then opened a discussion of the question—one of mutual interest to the two professions—"When is a man drunk?" After a lengthy and interesting discussion, to which a large number of those present contributed their views, it was unanimously decided to make the function an annual one.

Forensic Fables.

THE ATHLETIC TEMPLARS WHO CLIMBED THE DENT DU CHIEN.

Two Athletic Templars, the Long Vacation having Set In, Proceeded to the Alps as Soon as Their Respective Clerks Permitted them to Do So. For they were Keen Mountaineers. The Athletic Templars Rejoiced in their Freedom. They Laughed Aloud to Think that they had Left Behind them Solicitors, Briefs, Managing Clerks, Statements of Claim, and all the Paraphernalia of the Law. Arrived in Switzerland

they Determined to Do, Once More, the Dear Old *Dent du Chien* by the Difficult Route. Across the Glacier, Leaving the *Cuisine du Cardinal* on the Left, Skirting the Moraine, and so Up the South-West Face. Did the Athletic Templars Enjoy the Climb ? Of Course they Did. Did they Discuss the Beauty of the Eternal Peaks and the Glory of the Untrodden Snows ? By No Means. For the First Four Hours they Debated whether the Judgment of the Court of Appeal in *Finkelheim v. Cohenstein* was Correct. Between the Hut and the Summit (Eight Hours) they Compared the Forensic Giants of the Past with the Pigmies of To-day. And During the Descent (Six Hours) they Speculated as to the Judicial Changes which would Probably Take Place in the Month of October.

Moral : Have a Change.

The defence of an *alibi* is not now so popular as it was, say, a century ago, and there are in America already indications that its popularity may soon be even further diminished. In a recent case at Washington, U.S.A., evidence was given to show the possibility of a burglar being at both places within a certain time by means of airplane transportation.

London Letter.

Temple, London,
21st November, 1928.

My dear N.Z.,

There is no news of great importance in the realm of the Courts here. A non-jury case before Rowlatt, J., **Fenton Textile Association Limited v. Thomas,** deals with a claim upon a solicitor in respect, not of his own conversion, but of his knowledge of his client's conversion said to have been operated through him. It goes on from day to day to the great satisfaction (no doubt) of those engaged in it. Birkett leads for the plaintiff Association, and of him I think I have told you all you need to know ; Croom-Johnson leads for the defendant, and of him I expect that this is his first big show and his future much depends upon what he makes of it. One day no one has ever heard of you, and no one seems to take any notice if he does hear of you ; the next, everybody on earth knows you intimately by name, and the necessary percentage has a brief for you. It is rarely, I think, a sensational achievement of a very distinguished performance which produces this result : it is that unknown quantity, whatever it may be, which the advertiser seeks when he embarks upon advertisement. At the beginning of this term, few people knew of the existence of Croom-Johnson outside the circle of his acquaintances : he only took silk a short time ago, and he was one of those essentially un-silk-like juniors. At the end of this term either his reputation will be made for all time, or he will be forever committed to the ranks of mediocrity. I would not care to take a bet : whether he will prove to be compact and thorough, or little and fussy, I am sure I do not know. An old-hand of a litigating clerk, intermediary between me and a professional client who came to me when Croom-Johnson ceased to be available as a junior, has always prophesied that Croom-J. may not come off as K.C. We shall see ; probably quite soon now.

There is also another case of inordinate length, which is not being reported but which gives great pleasure to those engaged in it none the less, as it concerns something like £420,000, is of interest to most of the underwriting fraternity, has already lasted a fortnight (before Wright, J., who is said to be none the worse and none the better a Judge by reason of his sudden and surreptitious marriage the other day) and is good for another fortnight, yet. Hardly bears thinking of, does it, by those not involved ? Of course, we all agree (who are not in these actions) that the fees taken out of them are beyond all reason and most deleterious to the profession. When litigation is necessary, then it is impossible : I really think that our dear leaders might knock off a little of their huge demands in the way of fee, when they know from the outset that they are in for twenty-five or so refreshers, don't you ? Much as I like them both, there they are, Birkett and Jowitt, day by day drawing an enormous sum from litigation and, by the same token, killing it day by day. I think there is no doubt about it in any informed mind. Of the current decisions, perhaps the most interesting is that of Tomlin, J., on the extent of the statutory priority given by our Company's Act (and, I guess readily, by yours) to certain debts in a liquidation, and the limitation of that extent to the floating charge. **Green v. Green** may possibly be worth

your noting and enquiring into, upon the power of a Court to make an order for the custody of children, neither legitimate nor legitimatized: the matter arose on an appeal from Charles, J., on circuit (where undefended divorce cases are taken in some numbers these days, as you know) to Lord Merrivale.

As to Lord Merrivale, by the way, I may inform you (no doubt quite inaccurately and unreliably) that he may well be the new Lord of Appeal in Ordinary to be added permanently to the strength of the ultimate Court of Appeal, yours or ours, if the long-delayed, because unreasonably long-disputed, Bill, authorising the strengthening, becomes an Act. I regard the possibility of the allocation of Lord Merrivale to this appellate function with mixed feelings: he is a very courteous Judge and a very judicial Judge, but how much brains there is behind it all I am neither able to assess for myself nor can ascertain from any better assessors. We were not vastly impressed by his powers, so far as I remember, at the hearing of the New Zealand Appeals now two years ago. His Bar laugh at him a little, though I may say we laugh at his Bar a great deal. I am not so sure that, given freedom and time to develop the bent, he would not turn out well as an appellate Judge. Believe me, as my thesis proceeds I become quite enthusiastic in his regard. But then! He is essentially a loveable man, for whom even those who know him as little as I do must always hope the best. There is a kindliness behind his solemnity which we, having experienced it, can never quite forget or leave out of the reckoning. Another name canvassed in this respect is Mr. Justice P. O. Lawrence. I do not know why, except that he has the knack of promotion. Opinions differ as to him: I think he deserves his good future. There is no kindliness about him, however.

The Judicial Committee of the Privy Council continues, to date, to occupy itself with Indian appeals, though a Crown colony appeal is reported: an "undue influence" case from the Straits Settlements of which I dare hardly attempt to name—*Inche Noriah binte Mohammed Tahir v. Sheik Allia bin Omar bin Abdullah Bahashuan!* As to its decision a strong board (Lord Hailsham, L.C., Viscount Sumner, Lord Atkin) laid down some useful principles as to what constitutes in a legal advisor, undue influence even if there be good faith. In the case of *In re Villar: Public Trustee v. Villar* the Master of the Rolls, Lawrence and Russell, L.JJ., dealt with that not quite original limitation in a will of a gift not to take effect "until twenty years after the death of the last survivor of all the lineal descendants of her late Majesty Queen Victoria living at my death." *La question qui s'impose* (to adopt a French expression which I love) is, what on earth (or off it) moves testators to do this sort of thing? Neither Astbury, J., at first instance, nor the Court of Appeal attempted to answer it. Lastly there has been a not uninteresting decision in the Divorce Court as to the possibility (in appropriate circumstances) of giving effect to a confession of adultery, though the offended spouse let ten years elapse before acting upon it.

In last night's debate upon the Appellate Jurisdiction (Salaries and Pensions) Bill, which authorises the appointment of two additional members of the Committee and of one additional Lord of Appeal in Ordinary, the Attorney-General, in moving the necessary financial resolution upon the House of Commons going into committee for the purpose, made a sad reference as to Lord Cave's point, made on another occasion and in another place, as to Lord Haldane's altruistic and health-damaging work to save the situation which the shortage of Judicial Committee members caused; and sad indeed it is to think that two such distinguished members of the Boards, as were these, have since died. Otherwise the A.-G. made good his case mainly by the demonstration of how the increase of Indian Appeals must produce congestion worse congested with all Empire Appeals, unless something is done about it. It seems likely that he has achieved what he meant to achieve and what has so frequently been begun in the Lords but never finished in the Commons, in recent experience. The resolution being agreed to and reported to the House, there should now be no more delay or doubt about the reconstitution, on businesslike lines, of your Court of Ultimate Appeal. You may therefore proceed to multiply causes, if you will be so good, to keep their Lordships (and others) busy!

There is much discussion and excitement about "The Well of Loneliness," which, a cloud of expert witnesses were prepared to inform the London Police Court Magistrate, was not obscene, and which the London Police Court Magistrate (very properly refusing to hear them: and how could they be acceptable as experts, unless possibly as experts in Obscenity? Heaven forbid I should suggest anything derogatory of any of them, except as to their belief in their own wisdom; I mean, how else could they in law call themselves experts for the purposes of that case) very properly as I suspect held obscene. All this fuss makes one die to be reading the book, of course: it is no good trying to be good, is it, since once a thing is forbidden, confound it all, we must have it? Possibly what interests you more is the personality of Sir Chatres Biron, the London Police Court Magistrate in question and the very doyen of all London Police Court Magistrates. He is a man of silvered hair, great dignity, great distinction and no mean humour, and is a figure in the less advertised departments of London Society. It is something to be able to say you know him personally, and when you do know him personally you discover him to be essentially quiet and unaffected, gentle but firm, anything on earth but very exuberant. I am inclined to regard as so much blather the outpourings of the Press upon the Monstrous Injustice of Suppressing these Works of Art and of Cramping the Style of Modern Literature. You may take it, I think, that it was an "unpleasant" book, none the less so (and very possibly the more so) because it was well written. I cannot believe that Sir Chartres could possibly have professed to have read it and to have formed the opinion of it which he unequivocably pronounced, unless it is to be so described. I do not know what you think about these things, but I get rather tired of "literary gents" when they assume to teach us what, of the things they write, are good and what are bad. They assume to be judge in their own cause, and are, I think, perhaps the worst type of that very bad type of Judge. If, at any rate, it is to be the literateur against the lawyer in this matter, I am quite content to go into the fray wearing Sir Chartres' colours, or I am quite prepared to bet blindly that anyone, who has responsibility for the actual morals of any actual young person, would, on a perusal, support at once his finding and ignore the niceties of the critics and indeed of Mr. Asquith's letter on the subject in this morning's "Times."

As to domestic developments, I refer principally to the flaring up of the question mildly raised in the above-mentioned debate in the House of Commons: is Lord

Birkenhead to continue to enjoy his ex-Chancellor's pension? If you are interested in his personality I must refer you, deliberately, to this morning's "Times," (London "Times": 22 November, 1928) since therein is a lengthy letter of his own writing, which, as well as hammering in his argument, itself discloses much of his personality. It comprises a somewhat bitter, and perhaps a little deserved, personal attack on Sir Henry Slesser, who is reminded of his own past obscurity. The whole thing is regrettable, and there seems to be no useful purpose served by our Profession carrying on, in the columns of the press, its personal battles.

The other matter is of a more pleasing nature, a succinct but impressive note as to the efficiency of their Lordships of the Judicial Committee with reference to their supposed extreme age and declining faculties. It is a letter from a well known member of the Canadian brotherhood of the law, a man so familiar with Privy Council practice as to be most qualified to express an opinion. He admits the fact (commented upon as much in your country and as to its appeals no doubt as in other dominions and colonies) of age, deafness, and a tendency to the comatose; but he immediately demonstrates, what I think we all feel in our calmer moments of judgment, that there is the heavy compensation of a remarkable experience and expertness derived from it, and he concludes with the submission that a very long recollection of his own, and any careful research of anyone else's does and must go to show that points laid before their Lordships have rarely if ever been shown to have been missed, and that their decisions reflect no such shortcomings as would be inevitable if the criticism under discussion was substantive and effective. I hope I do not dwell at undue length on this Tribunal? To me it is a prime Imperial factor, and I have ventured to assume, always, that it is the subject upon which you most desire me to keep you informed. To sum up the foregoing: It is not without reason that moderated and polite complaint has been made by those addressing the Judicial Committee, on occasions, as to a certain defect in the Judges addressed; it is, however, a complaint to be admitted only so far as it applies to the manner of listening, and it has no warrant, if it is extended to anything more serious; and, in any case, steps are being taken, as fast as slow-going Parliament will permit, to remedy the situation and, over and above this, the present Chancellor has by his own efforts already effected a noticeable, indeed remarkable, improvement.

Yours ever,
INNER TEMPLAR.

Lord Haldane's Last Judgment.

The last judgment of the late Viscount Haldane as a Law Lord was read in the House of Lords after his death, in an appeal relating to the taxation of costs, in which the arguments were heard in April last. Viscount Dunedin, who read the judgment, prefaced it by saying that before his death Lord Haldane had prepared a judgment in the case, and as the conclusion at which he arrived was the same as that which would be arrived at by the vote of the House, he proposed, in accordance with precedent, to read the judgment.

Correspondence.

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

Sir,

Water—Natural or Reasonable User.

Your correspondent "John Doe," in his letter appearing in your issue of the 11th December referring to my article upon the above subject, says that the case in the Privy Council the subject of my remarks "really turned on a point of pleading." It is quite true that the case in the Courts of Guernsey and the pleadings there had reference only to whether there was a written agreement, as easements cannot be created there by prescription but only by some written agreement; and inasmuch as only a verbal agreement of 1872 was pleaded, the plaintiff appellant failed in the local Courts. It is, however, quite clear that when the case came before the Privy Council their Lordships, in effect, said in their judgment that it was not a question of pleading, holding in fact in the language of the old pleaders that the plea was demurrable and no answer to the appellant's claim, and that the appellant's case in no way depended on the agreement of 1872, which was only a matter of history. Their Lordships proceed to point out:—

"The law of Guernsey differing in this respect from some other systems, does not allow of the constitution of ordinary servitudes or easements except by grant. But the right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural inherent in property; it is a question of nomenclature whether it is or is not called a servitude. Their Lordships do not doubt that the law of Guernsey in this matter is the same as that of every other country whose jurisprudence is traceable to Roman sources. Indeed, even the countries ruled by the common law have accepted the Roman rules. It is true that the Romans designated this right as servitude, but they explained the distinction by dividing servitude into three classes: natural, legal and conventional—and it is to the first class that this belongs."

Then follows the statement of the law I quoted in my remarks on the subject. Their Lordships point out that the right of the superior proprietor is not quite absolute and state as exceptions thereto that a lower proprietor would not be bound to receive water foreign to the upper proprietor's land or eavesdrop water. Lord Dunedin cites no judgment of the English Courts deciding the question in issue, for the reason apparently that there is no authoritative reported decision on the subject. Such of the English text writers as have come to a different conclusion cite certain cases wherefrom they logically deduce the result they arrive at, but when these authorities are carefully examined it will be seen that the facts do not support their conclusion. This shows, as Lord Halsbury pointed out in *Quinn v. Leatham*, (1901) A.C. 404, how dangerous it is to draw an inference that may be quite logical from particular decided cases.—Yours, etc.,

BARON.

Lord Atkin, addressing the Magistrates' Association recently: "This is the first time I have appeared before the Magistrates and I appreciate very fully now the extreme importance of enabling a prisoner to receive legal aid."

Bench and Bar.

His Honour the Chief Justice left for England on the 29th ult. He will be resuming his duties in May next.

The appointment to the existing vacancy on the Supreme Court Bench, of Mr. Robert Kennedy of the firm of Luke and Kennedy, of Wellington, should give general satisfaction. Mr. Kennedy was born on the 18th May, 1888, and was educated at the Southland Boys' High School and at Victoria University College. Among his earlier academic honours may be mentioned those of his duxship of the Southland Boys' High School, his topping of the list in both the junior and senior Civil Service examinations, and his winning of a junior university scholarship. At the University he won a Senior Scholarship in 1908, took his B.A. degree in 1909, and in the following year those of M.A., with first class honours, and LL.B. In 1911 he graduated LL.M., again with first class honours. He was also successful in being awarded in 1910, the Jacob Joseph Scholarship in Arts and Law. In 1911 he was admitted as a barrister and solicitor; in the following year he entered into partnership with Mr. A. J. Luke and soon acquired an extensive and varied practice at the Bar. Mr. Kennedy has been for some years a member of the Council of the Wellington District Law Society, and held, in 1925, the office of President of that body.

Mr. S. E. McCarthy died at Christchurch on 26th December. The late Mr. McCarthy was born in Victoria, in 1857, came to New Zealand in 1862, and went to work at the early age of ten years. In January, 1870, he entered the legal office of Gibson and Kirk-Turton, and later was in the office of the late Mr. C. C. Kettle, at Dunedin. In 1876 he was articled to Mr. Bathgate, of Bathgate and Buchanan and, after the completion of his articles, was, in 1882, admitted as a solicitor. In 1883 he commenced practice at Naseby and remained there until 7th October, 1895, when he was appointed Magistrate and Warden for the Wakatipu, Vincent and Roxburgh division of the Otago Mining District. In February, 1900, he was appointed to Invercargill as Magistrate and Warden, and eight years later was transferred to Napier. In 1917 he was appointed to Wellington, and in the following year went to Christchurch as Senior Magistrate in succession to the late Mr. H. W. Bishop. Mr. McCarthy retired from the Magisterial Bench on 31st January, 1922, and has since until recently practised in Christchurch.

Mr. C. D. Kennedy died at Napier on the 17th ult. The late Mr. Kennedy was born in Napier, in 1858, and was educated at the Napier Grammar School. In 1877 he entered the Survey Department and qualified as a surveyor before he was of age to practice. In 1880 he commenced practice on his own account, and soon built up an extensive and varied connection. He was consulting engineer to several local bodies and an expert on the question of flood control. In 1888 he qualified as a solicitor, and in the following year passed the Barristers' Examination. Shortly afterwards he entered into partnership with Mr. H. B. Lusk, an association which continued until his retirement from active practice in 1910. Mr. Kennedy served for some years on the Councils of the Napier City and the Hawke's Bay County, and was Chairman of the Hawke's Bay Rivers Board from 1917 to 1923.

Mr. Gifford Marshall has retired from the firm of Marshall, Izard & Barton, Wanganui. Messrs. W. A. Izard and M. C. Barton have taken Mr. A. B. Wilson into partnership, and will continue their practice under the same name as before.

Mr. T. C. Webster, of Auckland, has been joined in partnership by Mr. W. H. King, lately managing clerk to Messrs. Jackson, Russell, Tunks and West. The practice will be conducted under the style of Webster and King.

Mr. J. A. Scott and Mr. W. G. L. Mellish, of the firm of Scott & Mellish, Wellington, have dissolved partnership and are both practising in Wellington on their own account.

Mr. J. M. Stevenson has been admitted into partnership by Messrs. Jacob & Billington, Auckland. The style of the firm will be Jacob, Billington & Stevenson.

Mr. Julius Hogben, lately a partner in the firm of Neumegen & Neumegen, Auckland, has commenced practice on his own account in Auckland.

Mr. R. I. Hawkins, lately of the staff of Messrs. Gray & Sladden, has commenced practice on his own account at Wellington, and has taken over the practice formerly carried on by Miss Hinemoa Hopkins.

Mr. Brian Dunningham has been admitted into partnership in the firm of Dignan, Armstrong, Jordan, Jordan and Dunningham, of Auckland.

Messrs. F. C. Ellis and L. C. Adams have commenced practice together in partnership at Auckland under the style of Ellis and Adams.

Conduct in the Courts.

A South Australian Measure.

The Law Courts (Maintenance of Order) Act, passed by the Legislature of South Australia last year, is an unusual measure. It gives any Court power, if it is of the opinion that any person appearing before it behaves towards the Court or a witness in an abusive, insulting, threatening or disrespectful manner, or is guilty of persistent and unnecessary repetition or prolixity in examining a witness or addressing the Court, to refuse to hear him further in the proceedings in question. The Court may adjourn the case and order the offender to pay the costs of such adjournment. If the offender apologises, the refusal to hear and the order for adjournment may be rescinded. It is made an offence for any person to attempt, after the Court has refused further to hear him, to continue to address the Court or question any witness, the penalty being conviction with imprisonment for one month or a fine not exceeding £50.

Legal Literature.

Cases in Constitutional Law.

By D. L. KEIR, M.A., and F. H. LAWSON, M.A. (pp. xxvii ; 465 ; 13 : Oxford University Press.)

It would unquestionably be an excellent thing if this new work by Mr. D. L. Keir and Mr. F. H. Lawson were prescribed in our University Colleges as a standard text-book for the subject "Constitutional History and Law" as now defined for the Law Examinations. In this reviewer's time at the University undue prominence was given to the historical side of the subject and the the case law, and especially the modern case law, was either lightly passed over or completely ignored ; the necessary result was that the student considered the subject one of the most futile in the whole course. Where any importance at all was attributed to cases it was to such ancient, though admittedly important, decisions as *Bates's Case* (1606), *Darnel's Case* (1627), *The Case of Proclamations* (1611), *Godden v. Hales* (1686) and so on. But in the present scholarly treatise constitutional law is resuscitated. The old leading cases are, of course, not ignored ; some still retain places of prominence while the rest are relegated to their proper sphere. Taking, for example, the opening chapter dealing with legislation—a branch of the subject correctly placed first—the three decisions to which the greatest importance is attributed are *Rex v. Halliday* (1917), *Chester v. Bateson* (1920), and *Kruse v. Johnson* (1898). The introductory notes (a feature of every division of the work) to this chapter are also essentially modern and are in this respect typical of the whole treatise. We read, for instance, of the severe criticism to which the rule that the Crown is not bound by Act of Parliament in the absence of express words or necessary implication has been subjected in *Cayzer, Irvine and Co., Ltd. v. Board of Trade*, (1927) 1 K.B. 269, where the Court, however, found it unnecessary to determine the point, and of how during the late war the maxim *salus populi suprema lex* was used to justify a benevolent interpretation of statutes to the advantage of the Executive, it being pointed out that on only two occasions during that time of crisis was a regulation declared by the Courts to be invalid. In the second chapter on the subject of the prerogative it is of necessity mainly the old cases that are discussed, though it is refreshing to see *The Zamora* (1916) included. Space, however, does not permit of discussing, as one is tempted to do, this new volume chapter by chapter ; one can only state that the titles of the other sections are : Parliamentary Privilege ; Taxation ; Judicial Control of Public Authorities ; Remedies Against the Crown and Its Servants ; The Crown and Justice ; Allegiance ; The Crown and Foreign Affairs ; The Powers of the Crown in Time of War ; Military Law, Maintenance of Order and Martial Law ; The Overseas Dominions of the Crown. The chapter on Judicial Control of Public Authorities is excellent and should be read by everybody interested in the problem of the growth of bureaucratic government.

As to the general treatment of the subject it may perhaps be observed that it should not be assumed from the title of the work that it is merely an annotated collection of cases, for the truth is that in the lucid and accurate introductory notes to each section one finds in the aggregate a comprehensive treatise, not, perhaps, on the whole of the law of the constitution (for that is not the design of the authors) but on just those aspects of the subject which are of the greatest practical importance and which are comparatively neglected in the majority of the existing text-books.

New Books and Publications.

Federal Bankruptcy Law and Practice. By D. Claude Robertson and J. B. Tait (with a Foreword by the Hon. F. G. Latham, C.M.G., K.C., Commonwealth Attorney-General). (Butterworth & Co. (Aus.) Ltd.). Price £3/5/–.

Stevens' Mercantile Law (Australian Edition). By H. B. Rydge. (Butterworth & Co. (Aus.) Ltd.). Price £1/5/–.

Jolliffe's Local Government in Boroughs. Supplement to Fourth Edition. By J. Christie. (Ferguson & Osborn Ltd.). Price 10/6.

County Court Precedents of Claims. By His Honour Judge McCeary. (Butterworth & Co. (Pub.) Ltd.). Price £1/15/–.

Justice and Police in England. By A. Lieck. (Butterworth & Co. (Pub.) Ltd.). Price 6/–.

The Justice of Peace and Local Government Review Annual, 1928. (Butterworth & Co. (Pub.) Ltd.) Price 7/–.

Yearly County Court Practice, 1929. (Two Volumes). (Butterworth & Co. (Pub.) Ltd). Price £2/5/–.

Passing Off. The Law as to Imitation and Deception in Trade. By Holroyd Pearce. (Solicitors' Law Stationery Society). Price 10/6.

Procedure at Meetings. Tenth Edition. By Albert Crew. (Jordan & Sons Ltd.). Price 6/–.

Gibson's Guide to Stephen's Commentaries. Nineteenth Edition. By A. Weldon, H. G. Rivington, M.A., and A. C. Fountaine. (Law Notes). Price £1/9/–.

Collected Papers of Paul Vinogradoff. Vol. I. By Hon. H. A. L. Fisher. (Oxford University Press). Price £2/7/–.

Ridge's Constitutional Law. Fourth Edition. By S. E. Williams. (Stevens & Sons Ltd.) Price £1/3/–.

International Law. Vol. I, "Peace." By Oppenheim. (Longmans Green). Price £2/7/–.

Acta Academae Universales Jurisprudentiae Comparativae. Vol. I. By Klemer Balogh. (Sweet & Maxwell Ltd.). Price £4/12/6.

Wright and Hobhouse's Local Government and Local Taxation in England and Wales. Sixth Edition. By C. Oakes. (Sweet & Maxwell Ltd.). Price 15/–.

The Measure of Damages in Maritime Collisions. Third Edition. By E. S. Roscoe. (Stevens & Sons Ltd.). Price 15/–.

Cockle and Hibbert's Leading Cases in Common Law. Second Edition. By W. N. Hibbert, LL.D. (Sweet & Maxwell Ltd.). Price £2/7/–.

Trial of Eugene Marie Chantrelle. Edited by A. Duncan Smith. (Notable British Trials). (Butterworth & Co. (Aus.) Ltd.). Price 9/–.

Law of Libel and Slander. Second Edition (with a foreword by Hon. Mr. Justice McCardie). By C. Gatley, D.C.L., LL.D. (Sweet & Maxwell Ltd.). Price £2/18/–.

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LEGAL NOTICE.

R. I. Hawkins, LL.B., wishes to announce that he has commenced the practice of his profession and will take over the practice formerly carried on by Miss Hinemoa Hopkins, Solicitor, National Bank Building, Featherston Street, Wellington.

Julius Hogben, LL.B., Barrister and Solicitor (formerly with Messieurs Neumegen & Neumegen) is now practising his profession on his own account at offices: Nos. 508-9-10 Colonial Mutual Building, Queen Street, Auckland.

Telephone: 44-318.

Messrs. Jacob & Billington announce that they have admitted Mr. John Melville Stevenson to partnership as from this date. The firm's practice as Barristers and Solicitors will be continued at the under-written address under the style of:

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Mr. Gifford Marshall has retired from the firm of Messrs. Marshall, Izard & Barton, Solicitors, Wanganui, as from the 31st December, 1928. Mr. A. B. Wilson has joined Mr. W. A. Izard and Mr. M. C. Barton and the practice will continue to be carried on under the style of Marshall, Izard & Barton.

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