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We are said to know the Law when we apprehend the reason of the Law.

—Lord Coke

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The Forthcoming Conference.

The second Annual Conference of members of the Legal Profession will be opened by His Excellency the Governor-General, on Wednesday, 3rd April. The Committee in charge of the arrangements are to be congratulated on having obtained His Excellency's consent to open the Conference, not only by reason of the distinction conferred on the opening ceremony by the presence of His Excellency, but also because the Conference may confidently expect from His Excellency a very interesting and excellent address. By the courtesy of the Committee in charge of the arrangements we print in another part of this Journal the programme decided upon. Although Wellington as a City cannot hold out to visitors the exceptional advantages for such a Conference which Christchurch enjoys, there is no reason to doubt but that the arrangements made for the entertainment of visitors will enable them to enjoy a pleasant holiday as well as to attend to the main purpose of the Conference. The remits and papers cover a wide range of subjects and the discussions that will take place should prove both stimulating and suggestive.

The Attorney-General for his Address has chosen the topic of legal education. The Honourable Mr. Sidey has throughout his long public life been always interested in educational questions and served for many years as a member of the New Zealand University Senate so that he will voice an opinion on this subject acquired with full information of the means of education in this Dominion. Inasmuch as the education that should be deemed essential before a solicitor is entitled to practise should assure not only knowledge of legal principles and practice but training in the requirements of character and manner demanded by the Profession, his address may touch upon legislation necessary to assure that, till such training has been undergone, qualification should not be granted. Taken in conjunction with the paper to be read by Sir John Findlay, K.C., on "The Etiquette of the Legal Profession" there should be material before the Law Society which will enable definite proposals for qualification to be framed. Closely allied with the papers of the Attorney-General and Sir John Findlay is that on "The University and the Profession," by Professor J. Adamson who may be expected to speak from the University point of view and to make suggestions under which the conduct of such examinations as are necessary should be subject to a Board comprising both practising members of the Profession and members of the University teaching staff, and for the institution of lectures by actively practising lawyers more frequently than is now the case.

It is difficult to forecast from the title of his paper, "Courts and Court-houses," the line that Mr. A. T. Donnelly proposes to take. He will, no doubt, be both amusing and instructive, and if his paper and that of Mr. P. J. O'Regan on "An Elective Judiciary," are not taken on the same day, the humour that is likely to brighten discussion on these papers will be pleasantly spread. We understand that shortly put, Mr. O'Regan's proposal is that the legal profession should itself be entrusted to elect from its body all those required to fill judicial offices, that is to say, both judges and magistrates, and function through a college of forty elected members who would choose all judges and magistrates by secret ballot. Inasmuch as when preferential, or transferable, or proportional methods of election to the Legislature make their appearance in the newspapers as topics of the moment Mr. O'Regan himself generally is one of the large body of correspondents, he will undoubtedly be prepared to meet the volume of criticism sure to be directed to his scheme and to explain how the effects on his system of tickets, block voting and similar devices usually connected with electoral schemes, will operate. Mr. A. H. Johnstone on "The Profession of a Barrister in New Zealand," and Mr. G. M. Spence on "The Functions of the Law Society," are sure to be interesting, and if Mr. Spence's paper includes some discussion on the practical working of the Law Society, it may lead to useful innovations in the procedure of that body.

A paper that will command more than professional interest is that of Mr. R. L. Ziman on "The Crown in Business: Considered from the Constitutional and Legal Viewpoints." Questions under this heading are of very general interest to the whole of the business community and the legal standpoint will undoubtedly be appreciated in the business world which is at a loss to understand the reason for the advantages given the Crown in litigation concerning business affairs in which the Crown competes with the individual. The question of the Crown in litigation is at present receiving a great deal of attention in England, and is being treated as one urgently demanding reform. There are, however, some exceptional cases in which the favoured position of the Crown in litigation is desirable in the common interest. No doubt Mr. Ziman will make those cases clear, but his paper cannot fail to stimulate the commercial fraternity who will probably find in it conclusive reasons for reforms they have been for years past urging.

Many of the remits such as that relating to "Statements taken by the Police" provide ample material for debate, and it looks as if in order to get through the Agenda Paper, the Conference will have to sit for reasonably long hours on the appointed days. An Agenda Paper which contains so much matter that is attractive and of moment to lawyers, should attract to Wellington large numbers of the Profession, who by the early circulation of the programme will appreciate the efforts of the Committee to render the intrusion of the Conference into the Easter vacation as painless as possible. So much of the matter before the Conference is of public importance that interest in the proceedings will be general throughout the Dominion.

All the signs indicate for the Conference the success it deserves and which we hope it will enjoy.

Privy Council.

The Lord Chancellor.
Lord Shaw of Dunfermline.
Lord Carson.
Lord Atkin.
Sir Charles Sargant.

January 22, 1929.

FINCH v. COMMISSIONER OF STAMP DUTIES.

Revenue—Death Duties—Estate Duty—Expenditure by Deceased in Alterations and Repairs to Family Home Belonging to Deceased's Wife—Not Referable to any Intent to Make a Gift or Improve Value of Estate of Wife—No Gift—Death Duties Act, 1921, Sections 5, 38, 39.

Appeal from decision of the Court of Appeal reported in 3 B.F.N. 210, holding that certain monies spent by the deceased, in alterations and repairs to a house in which he and his wife (the appellant) were both living but which belonged to the wife, were, for the purposes of the Death Duties Act, 1921, gifts to the wife.

G. R. Blanco White for appellant.
A. M. Latter, K.C., and **Cyril King** for respondent.

THE LORD CHANCELLOR delivering the judgment of the Judicial Committee stated that in their Lordships' opinion the appeal succeeded. It appeared that the deceased and his wife were living together in a house belonging to the wife. Both the husband and the wife enjoyed a separate income and the wife's income was habitually under contribution to the household expenditure. The deceased husband's contribution to the joint purse for housekeeping purposes had been kept at a low figure for the purpose of accumulating his capital. In the years 1925 and 1926 the husband caused certain alterations and repairs to be made in the house in which they were both living. The total amount so expended came to £1,982, and was spent under contracts made directly between the husband and the builder who did the alterations and repairs. In those circumstances the Crown claimed that the payments so made to the builder were, for the purpose of the Death Duties Act, gifts to the wife. In order to see whether that contention was well founded it was necessary to look at one or two sections of the Act in question. Under Section 5 of the Act it was provided that the estate of a deceased person should be deemed to include any property comprised in any gift within the meaning of Part IV of the Act made by the deceased within three years before his death. In Part IV under Section 38 the term "gift" was defined to mean "any disposition of property (as hereinafter defined) which is made otherwise than by will, whether with or without an instrument in writing, without fully adequate consideration in money or money's worth." Section 30 provided that the term "disposition of property" meant "any conveyance, transfer, assignment, settlement, delivery payment, or other alienation of property, whether at law or in equity," and by Subsection (f): "Any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of the estate of any other person." Originally it appeared that the Crown based its claim upon Subsection (f), and alleged that the payments to the builder were transactions entered into by the husband with intent thereby to diminish the value of his own estate and to increase the value of his wife's estate. In their Lordship's opinion the facts found by the Commissioner rendered that contention quite hopeless. It was expressly found that there was no reason to believe that the deceased would not enjoy the normal span of life (he was in fact only 53 years of age when he died) or that he would necessarily predecease the appellant, and it was added in the supplementary Statement of Facts that the appellant's estate was as large as that of the deceased. It was further found that the object in the appellant's mind and, as far as she knew, the object in the deceased's mind was simply the improvement of the family home in accordance with their means and station in life.

In their Lordship's view, when the Statute brought in as a gift a transaction entered into with intent to diminish the value of one estate and to increase the value of another, what was hit at by the Statute was a transaction which the person entering into it intended to have the effect stated in Subsection (f). It was not enough merely to prove that the result which was stated in that subsection accrued. The Commissioner in the present case had found that there was no such intention, and, there, the claim under Subsection (f) failed. But in the argument before the Chief Justice it was contended alternatively for the Crown that subsection (a) was applicable, and that these payments to the builder were payments without any adequate consideration in money or money's worth. A reference was made to a decision in New South Wales in the case of **Chadwick v. Commissioner for Stamps,** 19 N.S.W.S.R. 39, where Sir William Cullen said: "If A knowingly and voluntarily spends his money in building upon B's land with B's knowledge and approval he makes a gift to B as effectually as if he handed him the money for the purpose of building on it himself." That one method of making a gift might be by spending money on the property of the donee was no doubt quite true, but the Chief Justice quite obviously did not intend to convey that every expenditure of that kind must necessarily involve a gift, because he went on a little later in his judgment to say: "The fact that A himself has a partial interest in the property is not necessarily proof that the expenditure is not a gift, wholly or in part. According to the circumstances of the case, the facts may show that the expenditure is referable to other considerations." On the facts found in the present case, it seemed to their Lordships quite plain that the payments to the builder were not referable to any intention of making a gift or improving the value of the estate of the wife, but were referable to the desire of the husband to improve the home in which he was living and in which his children were being brought up, and did not constitute either the intention of or in fact a gift to the wife, but merely a provision made by him for his own enjoyment and benefit and for the proper maintenance of his home and his children. For those reasons, which were substantially the reasons set out in the judgment of the Chief Justice in New Zealand with which their Lordships found themselves in full agreement, their Lordships come to the conclusion that the payments were not rightly included in the dutiable estate of the deceased.

Appeal allowed.

Solicitor for appellant: **Harry F. Strouts,** agent for **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.

Solicitors for respondent: **Mackrell, Maton, Godlee and Quincey,** agents for **Crown Law Office,** Wellington.

Supreme Court.

Herdman, A.C.J.

February 26; March 1, 1929.
Wellington.

EASTBOURNE BOROUGH v. WELLINGTON CITY CORPORATION.

Rating—Exemption—Land used "for Purposes of Public Plantations"—Not Confined to Trees Planted by Hand—Land Held and Used for Propagation of Trees and on Which Beech Trees were Growing from Seed Falling from Neighbouring Trees Held to be Within Exemption—Rating Act, 1925, Section 2 (1).

Proceedings to determine whether the defendant Corporation was liable for the payment of rates in respect of certain land at Day's Bay which it occupied. The defendant Corporation asserted that it held the lands referred to for "plantation purposes" and that the land was therefore immune from rates by virtue of an exemption from the definition of "rateable property" contained in paragraph (i) of Section 2 of the Rating Act, 1925. The lands in question were adjacent to the Day's Bay Recreation Reserve which had become vested, some years previously, in the Mayor and Councillors of Wellington, and were in the immediate neighbourhood of land which was covered with trees. Evidence was given that trees growing on part of the land which the plaintiff Corporation sought to rate were destroyed by fire some years ago, but that the land was being restocked with trees in accordance with a settled plan. If, for instance, gorse was present, the affected area was planted with pine trees, wattle and blue gums; but on parts on which gorse had made its appearance an effort was made to cultivate the growth of native trees. It appeared that there was difficulty about transplanting native beech trees successfully but if left alone the land would in time produce trees from seeds that fell naturally on the soil from parent trees in the neighbourhood. A process of regeneration was gradually proceeding where fire destroyed the trees some years ago and a beech wood was gradually making its appearance. Beech trees of all sizes from inches up to six feet and up to sixty feet were to be found on the land, and there was evidence that they were multiplying.

Parry for plaintiff.
O'Shea for defendants.

HERDMAN, A.C.J., said that he was satisfied that the land which was the subject matter of the action was being held and used for the purpose of propagating trees. The provision under which exemption was claimed read as follows: "Lands, not exceeding in each case one hundred acres in extent, and buildings used for a public mental hospital, a hospital, or light-house purposes, and lands used as quarantine, pilot, or signal stations, or for purposes of public plantations." Mr. Parry, on behalf of the Eastbourne Borough Council argued that only land on which stood forests or woods that had been planted by hand were entitled to exemption. It was conceded that some trees were growing on the land in question and it was admitted that as soon as the defendant Corporation commenced to plant trees it would be entitled to the benefit of the exemption above quoted, but it seemed to His Honour that a collection of trees which was the consequence of the natural seeding in the locality was just as much a plantation as that which was the result of manual labour. His Honour had no doubt that the Legislature when it designed that provision wished to give some advantage to land belonging to the public which was rendered attractive by the cultivation or preservation of trees. Public plantations were plantations which the public owned and could enjoy. A local body might acquire an area of land on which stood an aggregation of trees that had been planted years ago. That, surely, would be land used for a public plantation and if that were so, why exclude land upon which there existed a mass of trees that had been planted by nature or which was to be devoted to the growing of trees for public enjoyment or advantage?

Judgment for defendants.

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

Solicitor for defendant: **J. O'Shea,** City Solicitor, Wellington.

MacGregor, J. February 20; March 6, 1929. Invercargill.

BRODRICK v. GENGE AND PUBLIC TRUSTEE.

Principal and Surety—Mortgage—Covenant by Several Persons to Pay Principal and Interest, One Covenantor Joining as Surety Only—Provision that Mortgagee Must Without Consent of Surety Give Time for Payment Without Releasing Surety—Agreement Without Consent of Surety Increasing Rate of Interest—Subsequent Agreement Without Consent of Surety Reducing Interest—Surety Discharged.

Action to recover the principal and interest alleged to be owing under a mortgage long overdue. By memorandum of mortgage dated 18th May, 1915, the defendant, T. Genge, his brother, D. Genge, and one McDonald covenanted to pay to the Invercargill Savings Bank the sum of £1,000 on 31st March, 1917, with interest at £5 per cent. until actual payment. The money was advanced to the two Genges, and McDonald joined in the covenant as surety only. The mortgage contained a clause providing that the mortgagee his successors or assigns should be at liberty at any time without the consent of the said McDonald to give time for payment of the said principal or any interest for such time or times after the due date as he or they should think fit and that he or they should not be answerable or responsible for any delay or omission in any such respect and providing also that the giving of such time or the omission to call in and take steps to enforce the payment of any such moneys should not release McDonald from his covenants thereunder. The principal sum was not paid on its due date, and on 30th March, 1921, an agreement was entered into between the defendant T. Genge and the plaintiff Bank, raising the rate of interest under the mortgage to 6½ per cent. from 1st April, 1921. By a subsequent agreement between the Bank and T. Genge the rate of interest was reduced to 6 per cent. as from 1st July, 1924. The two agreements to vary the terms of the mortgage were made without the consent or knowledge of McDonald, who was in no way a party to either of them. No interest had been paid since 31st March, 1925, and the principal sum of £1,000 still remained owing. One of the brothers Genge was dead, and the other insolvent. McDonald died on 1st September, 1928, and the Public Trustee was executor under his will. Judgment was claimed against the Public Trustee for the sum of £1,000 as principal, together with £210 interest thereon at 6 per cent. from 31st March, 1925, to 30th September, 1928. The defence set up by the Public Trustee to the action against him was that McDonald was discharged from all liability at law by reason of the alteration of the terms of the mortgage effected by the two agreements between the Bank and T. Genge without McDonald's consent or approval, he being a surety only.

Stout for plaintiff.

Hay for defendant, the Public Trustee.

MacGREGOR, J., said that after full consideration of the various cases cited in argument he thought that McDonald being a surety was released by the alteration of the terms of the mortgage without his consent. A similar question was dealt with by the Judicial Committee in **Egbert v. National Crown Bank,** (1918) A.C. 903, where Lord Dunedin reviewed the earlier cases on the subject (see pp. 908, 909). In 1921, and again in 1924, the Bank chose for its own purposes to enter into an agreement with one of the principal debtors raising the rate of interest payable under the mortgage without consulting the surety. His Honour could see no escape from the conclusion that it thereby released the surety from all further liability under the mortgage. The same result must, His Honour thought, be arrived at from a careful examination of the line of cases commencing with **In re Goldstone's Mortgage,** (1916) N.Z.L.R. 19, 489, and ending with **Public Trustee v. Mortleman,** (1928) G.L.R. 216, in which a like doctrine had been applied to instruments executed under our Land Transfer Act. In His Honour's opinion the present case was not distinguishable in principle from those cases. It appeared that the effect of the agreement made between the creditor and one of the principal debtors to raise the rate of interest under the mortgage had been to create a new compound contract, in substitution for the original contract contained in the mortgage itself. Or, to put the matter in another way, there was an unauthorised variation of the original contract between the principal and the surety, and the clause of the mortgage referred to above admittedly did not apply or extend to that variation. The legal result in either case was the same, i.e., that the surety was thereby discharged from all liability.

On behalf of the plaintiff Mr. Stout argued that the alteration in the rate of interest was not material *qua* the surety here, and did not in any way prejudice his position. Of that question it seemed that the surety himself must be the sole judge: see **Holme v. Brunskill,** 3 Q.B.D. 495. Further it appeared to His Honour that to raise the rate of interest must inevitably tend to prejudice the position of the surety, as it correspondingly diminished the power of the principal debtor to repay the principal debt which was also guaranteed by the surety himself. The full report of the Canadian case cited by Mr. Stout. **(See v. London Guarantee Coy.,** 56 Ont. L.R.) did not appear to be available in New Zealand, and the meagre reference to it in the English and Empire Digest rendered it in His Honour's judgment of little or no value, opposed as it appeared to be to the strong current of English and New Zealand authority in the opposite direction. His Honour referred to the judgment of Cotton, L.J., in **Holme v. Brunskill,** 3 Q.B.D. 495, 505.

Judgment for defendant, the Public Trustee.

Solicitors for plaintiff: **Stout and Lillicrap,** Invercargill.

Solicitor for defendant, the Public Trustee: **W. G. Hay,** Dunedin.

Blair, J. October 23, 24, 25, 28, 1928; February 18, 1929.

IN RE BEDGOOD'S WILL.

Will—Interpretation—Bequest of Nett Proceeds of Sale and Realisation of "Springbank" Property—Sale Prior to Death of Testator—Part of Purchase Price Paid in Cash and Balance Left on Mortgage—Bequest Adeemed by Sale.

Originating summons for the interpretation of the will of the abovenamed testator. By her will the testator devised her property upon trust for sale and conversion and directed her trustees (*inter alia*) to pay the nett proceeds of the sale and realisation of her real estate at Keri Keri, Bay of Islands, known as "Springbank" (subject to a legacy of fifty pounds) to the trustees of St. John's College, Auckland, as an addition to the John King Scholarship Fund. The will was dated 13th March, 1922, and in or about April, 1924, she sold "Springbank" to her nephew for £800 of which £150 was paid in cash and the balance was secured by a first mortgage of the said property to the testatrix. She deposited the £150 in the Savings Bank at Auckland, and operated on the account from time to time as she thereafter required money. At the date of the death there was a sum of £95 to her credit but that credit remained after taking into account other moneys she had paid into that

account. The mortgage by the nephew to the deceased was still subsisting. The question for decision was whether the bequests in the will of the nett proceeds of the sale and realisation of the "Springbank" property had been adeemed or failed wholly or in part.

J. B. Johnston for Public Trustee as trustee of will.
Northcroft for Public Trustee as administrator of Maria King's estate.
Cocker for St. John's College Trust Board.
West for other beneficiaries.

BLAIR, J., said that the sum of £150 paid in cash to the deceased on the sale was not traceable because it had been mixed up with other moneys. The £650 mortgage moneys were identifiable. It was clear that the legacies were specific, they were to be paid only out of the proceeds of the property specified. In such case the rule was that if at the death of the testator he had no property answering that description the legacies failed. His Honour referred to **Wilson v. Bray,** 12 N.Z.L.R. 628; **In re Bridle,** 4 C.P.D., 366, and distinguished **Gilfoyle v. Wood Martin,** (1921), 1 I.R. 105, as a case of very special circumstances. His Honour held that the bequests of the proceeds of the sale of the "Springbank" property had been wholly adeemed.

Solicitors for the Public Trustee as trustee of the will: **Stewart, Johnston, Hough and Campbell,** Auckland.
Solicitors for the Public Trustee as administrator of Marie King's estate: **Earl, Kent, Massey, and Northcroft.** Auckland.
Solicitors for the St. John's College Trust Board: **Hesketh, Richmond, Adams and Cocker,** Auckland.
Solicitors for the other beneficiaries: **Jackson, Russell, Tonks and West,** Auckland.

Blair, J. February 22; 23, 1929. Auckland.

IN RE ODD: EX PARTE COSSLETT.

Bankruptcy—Adjudication—Non-compliance with Bankruptcy Notice—Notice Based on Default Judgment in Magistrates' Court—Rehearing Subsequently Granted—On Rehearing Judgment Given for Larger Amount—Original Judgment and Bankruptcy Notice Founded thereon Vacated.

Summons for adjudication based upon non-compliance with a bankruptcy notice. Judgment by default for £91 1s. 3d. was on the 25th October, 1928, given against the debtor in favour of the petitioning creditor. On the 12th November, 1927, the debtor was duly served with a bankruptcy notice founded on such judgment. The notice not having been complied with the creditor on the 20th November filed a bankruptcy petition against the debtor. The petition came on for hearing on the 30th November when it was adjourned because the debtor disputed the judgment and intimated that he was applying for a rehearing in the Magistrates' Court. This he did and a rehearing was granted. On the rehearing judgment was given for £2 more than the original default judgment.

Simpson for petitioning creditor.
Dickson for debtor.

BLAIR, J., said that the point was taken that a rehearing having been granted the original judgment by default was vacated and therefore the act of bankruptcy founded on such judgment was also vacated. The order for rehearing (Form 61) of the Rules under the Magistrates' Court Act provided: "It is ordered that the judgment in this action and all subsequent proceedings be set aside and a rehearing had," etc. That was the necessary result of a rehearing. The bankruptcy notice upon which the petition was founded was based upon a judgment which was vacated and it appeared to His Honour, therefore, that the effect of that was to vacate the bankruptcy notice. Section 41 of the Bankruptcy Act, authorising the Court to stay or dismiss a petition founded upon a judgment as to which an appeal was pending, contemplated the vacating of a bankruptcy notice on the appeal succeeding. That was not apt to the present case but the principle was.

Petition dismissed.

Solicitors for petitioning creditor: **Hosking and Simpson,** Auckland.
Solicitor for debtor: **J. F. W. Dickson,** Auckland.

Blair, J. February 9; 23, 1929. Auckland.

IN RE TAMASESE'S APPLICATION.

Samoa—Mandate—Powers of Mandatory—Enactment Providing for Transfer to Prison in New Zealand of Persons Sentenced in Samoa to Imprisonment for Six Months *intra vires* New Zealand Legislature—Habeas Corpus Act (Eng.) 1679, Section 12—Foreign Jurisdiction Act, 1890, (Eng.) Section 7—Samoa Act, 1921, Section 210.

Application for writ of *habeas corpus*. Lealafi Tamasese was on 5th December, 1928, at Apia, Samoa, convicted "for that on the 27th day of November, 1928, at Vaimoso he the said Tamasese did resist and wilfully obstruct Police Constable Moore, Hollis, Taylor, Paramore, and others in the execution of their duty." The certificate under the hand of a Judge of the High Court of Western Samoa and under the Seal of that Court then went on to state: "and on such conviction the said Tamasese was thereupon sentenced with hard labour for the term of six calendar months." The conviction was stated in argument to have been made under Section 76 (c) of the Samoa Act, 1921, but His Honour said that the conviction was obviously made under Section 7 of "The Maintenance of Authority in Native Affairs (No. 2) Ordinance, 1928," an ordinance of Western Samoa providing for a fine not exceeding £100 or imprisonment for a term not exceeding one year. On 15th December, 1928, a warrant under the hand of the Administrator and the seal of Samoa was duly issued under Section 210 (1) of the Samoa Act, 1921, transferring Tamasese to Auckland Prison. Accompanying this warrant was a certificate in terms of Section 210 (3). No suggestion was made by counsel for the applicants against the form of these documents. The grounds upon which the application was based appear sufficiently from the report of the judgment.

Hall Skelton for applicant.
Meredith and Hubble for the gaoler.

BLAIR, J., said that the application came before this Court on two grounds, the first being that there was no jurisdiction to impose imprisonment on Tamasese because that was an attempt to enforce payment of a civil debt by means of imprisonment. In order to establish that ground it would be necessary to go behind the warrant and conviction and (assuming it were possible for the Supreme Court so to do) it would be necessary to have before that Court full details of all steps prior to conviction together with copies of all documents. None of these details had been supplied and Mr. Hall Skelton intimated that he accordingly abandoned that point. If after considering the facts anterior to conviction Counsel for the applicant should consider there was any justification for a further application to the Supreme Court based on such facts, it was open for him so to do: **Eshugbayi Elecko v. Officer Administering Algeria,** 139 L.T. 527.

The basis of the application was that Section 210 of the Samoa Act, 1921, was *ultra vires* the New Zealand Legislature. Subsection (1) of that section enacted: "Every person sentenced to imprisonment or committed to prison for six months or more may by warrant under the hand of the administrator and the seal of Samoa be transferred to some prison in New Zealand named or described in the warrant." It was claimed that to require a man to serve his sentence out of Samoa as provided by Section 210 conflicted with the principle of Section 12 of the Habeas Corpus Act, 1679, which Act was by the effect of Section 349 of the Samoa Act, 1921, made applicable to Samoa. It was contended that it was not possible for the New Zealand Parliament to make the Habeas Corpus Act inapplicable to Samoa because it derived its power of legislation regarding Samoa, not from the Imperial Parliament, but from the prerogative powers of the King himself, and that those prerogative powers were limited in that the King was incapable of depriving any dependency of the Crown of its rights under the Habeas Corpus Act. As a proper understanding of the ambits of New Zealand's powers and duties was necessary for the decision of this case, His Honour said that he would attempt shortly to indicate what those powers and duties were, with a view of endeavouring to remove what he believed to be certain misconceptions on the subject.

It was necessary first to note that prior to the war and Treaty of Peace Samoa was a German possession and administered by German officials. By the Treaty of Peace Germany renounced not to Great Britain but to the Allied Powers all Germany's rights in Samoa. The Allied Powers in whose favour this re-

nunciation was made had not handed over these rights and powers to Great Britain but had retained them and the dominant authority administering Samoa to-day was the Council of the League of Nations. It was necessary that somebody be appointed by the League of Nations to attend to the details of administering the affairs of Samoa and accordingly His Britannic Majesty on behalf of New Zealand was asked to perform that duty, and agreed to do so through the Government of the Dominion of New Zealand. Thus it was that the Government of New Zealand became what might be called the Administrator of Samoa, not on its own behalf or on behalf of Great Britain, but for and on behalf of the League of Nations. The document which imposed that duty on New Zealand was called a mandate. The preamble of that mandate recited that His Britannic Majesty for and on behalf of the Government of New Zealand had agreed to accept the mandate and "*has undertaken to exercise it on behalf of the League of Nations.*" Article 2 provided that "*the mandatory* shall promote to the utmost the material and moral well being and social progress of the Inhabitants of the territory." New Zealand in administering the affairs of Samoa was a mere servant bound to obey the directions of its master the Council of the League of Nations. By Article 6 of the Mandate the mandatory was required to make an annual report to the Council of the League of Nations detailing the measures taken to carry out the obligations undertaken. Thus would it be seen that so far as Samoa is concerned New Zealand was a mere servant or trustee which had undertaken to obey the League of Nations. It followed also that if New Zealand were to fail in its obligations to the Samoan people the League of Nations would no doubt take steps to have appointed another mandatory who would better fulfil those obligations. His Honour had not overlooked the point referred to by Mr. Hall Skelton that the preamble of the Samoa Act itself recited that the mandate was conferred "Upon His Majesty to be exercised on his behalf by the Government of the Dominion of New Zealand." A similar recital appeared in the mandate itself, but the Court of Appeal in **Tagaloa v. Inspector of Police,** (1927) N.Z.L.R. 883, held that the Government of New Zealand was intended to be the mandatory. New Zealand was required by the mandate to "promote to the utmost the material and moral well being and social progress of the inhabitants." It might be that Tamasese and his adherents did not agree with the methods adopted by New Zealand, but he would admit that although those methods might not be the methods which he and his adherents advocated and would adopt if the duties under the mandate were in their hands, New Zealand in adopting the course it was adopting did so because it believed its methods to be the best for the attainment of the desired objects. It was the Council of the League of Nations which was the judge as to whether the methods adopted for promoting the material and moral well being and social progress of Samoa were wise or unwise. Tamasese was not the judge of this and neither was New Zealand.

Mr. Hall Skelton submitted that Section 210 was *ultra vires* the New Zealand Legislature. His whole argument was based on the erroneous assumption that His Majesty conferred the mandate on New Zealand. As previously explained the mandate came from the League of Nations. Mr. Hall Skelton's argument postulated that because the mandate reached New Zealand per medium of His Majesty this mediation of His Majesty derogated from the grant. In other words his argument meant that although the fullest plenary powers were conferred on the mandatory by the giver of the mandate yet because His Majesty became the nominal recipient on behalf of New Zealand the powers that reached New Zealand had lost some of their potency. If the fullest plenary powers left the League of Nations on their way to New Zealand but in the process of transition some of these powers did not reach New Zealand, what then happened to them, and where were they now? His Honour could not accept such a contention, but even were he inclined so to do he thought that it was a necessary inference from **Tagaloa's case** that New Zealand, as regards Samoa, possessed authority as plenary and ample as the Imperial Parliament. Mr. Hall Skelton admitted that the Imperial Parliament could abrogate the Habeas Corpus Act. It would seem to follow therefore that the only authority which was given legislative authority over Samoa could do the same.

That really disposed of the whole of applicant's submissions. But there were other points which His Honour should notice. Section 12 of the Habeas Corpus Act which formed the whole basis of applicant's argument provided that no resident of England, Wales, or Town of Berwick-on-Tweed should be sent prisoner into Scotland, Ireland or Jersey, Guernsey, Tangier or islands or places beyond the seas. Read literally that has no bearing on the present application. Section 7 of the Foreign Jurisdiction Act, 1890, (53 & 54 Vict. C. 37) provided that where a person was convicted in a British Court in a foreign country and sentenced to imprisonment the sentence should be carried into effect at such place as might be directed by order-in-council. Under that provision only an order-in-council was necessary to imprison out of the foreign territory.

Application dismissed with costs.

Solicitors for applicant: **Hall, Skelton and Skelton,** Auckland.
Solicitors for the Gaoler: **Meredith, Hubble and Ward,** Auckland.

Blair, J. February 20; 22, 1929.
Auckland.

THAMES BOROUGH v. CONGREGATIONAL CHURCH TRUSTEES.

Rating—Exemptions—"Lands Occupied by Churches"—Building Owned by One Religious Denomination and Used as Church by that Denomination and Another—Partially Destroyed by Fire—Not Repaired or Used as Church During Rating Year in Question—Attempts to Sell to Other Denomination During Year and Subsequent Sale—Building Not a "Church" Within Meaning of Exemption—Use Determining Character of Premises—Sacerdotal Character Abandoned—Quaere Whether "Occupied" Means "Used and Occupied"—Rating Act, 1925, Section 2.

Claim by the plaintiff Corporation for rates in respect of certain land at Thames belonging to the defendants. The rates claimed were for the year commencing 1st April, 1926, and ending 31st March, 1927. On the land was a church belonging also to the defendants which had prior to 12th February, 1926, been used for church services. The services were conducted as a Union church composed of both Congregationalists and Baptists, the latter having the considerable majority of adherents. On 12th February, 1926, a fire partially destroyed the church and rendered it unfit for use until repaired. Prior to the fire negotiations were on foot for the Baptists to acquire the church. Further overtures were made to them after the fire, but without result. The property, still unrepaired, was in September, 1926, placed in the hands of a land agent for sale, who advertised it as suitable for an auction mart or garage. The Moderator of the Congregational Church said that this was done to bring the Baptists to the purchasing point, and that they would not have allowed the building to be sold for anything but a church. The usual authority was, however, given to the agent. The Baptists eventually bought the damaged church, taking possession on 1st April, 1927. No church services were held from 9th February, 1926, until after it was repaired. The defendants claimed exemption upon the ground that the lands were "lands occupied by churches and chapels or cemeteries other than cemeteries owned by private persons for pecuniary gain or profit" within section 2 of the Rating Act, 1925.

A. H. Johnstone for plaintiff.
Glaister for defendant.

BLAIR, J., said that it appeared clear that the defendants after the happening of the fire had no intention of repairing the church for the purpose of holding services there. Their members in Thames had become so few as not to justify the continuance of services. From their point of view they wanted another denomination—the Baptists—to take it off their hands, and they took steps, which ultimately proved successful, to that end. To His Honour's mind, whether the offer to sell for a non-religious purpose was genuine or not, the fact remained that from the defendants' point of view it was no longer to be used by them as a church, however desirable it was that its character as a church should not be lost. The legal position appeared to His Honour to be the same whether there had been complete or only partial destruction of the building. In its partially destroyed condition it was useless as a church and it was thus in the same position as if the fire had swept the land clean. Instead of being an active and live church it was the ruins of a church and the owners of the ruins had not any intention of themselves restoring those ruins, although they desired that another body should buy the ruins, restore them, and resume services in them. The ruins as far as defendants were concerned were a property for sale although they proposed to take steps to see that the purchaser put them to religious uses.

It was not disputed that the words "church or chapel" did not refer to use by a religious society, or body, but to use by being built on by means of a church or chapel: **Perpetual Trus-**

tees v. Mayor of Dunedin, 34 N.Z.L.R. 877. The first question, therefore, was whether the land was occupied by a "church or chapel." The land was certainly covered with a building that had been a church and used as a church. But it was a "church" in the period in question? As His Honour understood the term "church" it meant a building for public worship. The size of the building or the grandeur of its architecture did not make a church; many churches used buildings of the humblest description. It was the sacerdotal element in a building that made it a church. The Congregationalists after the happening of the fire had decided that they would no longer hold services there, nor would they repair the building in order that another denomination could so so. The building appeared to His Honour to have lost its sacerdotal character, and the land and building was in the defendants' hands as a property for sale. In His Honour's opinion, therefore, the land during the rating year in question was not occupied by a "church," and the exemption did not apply.

Another point taken by Mr. Johnstone was that the word "occupied" in the exemption meant "used and occupied"; and that unless the building was used as a church the land was not occupied by a church. In one sense, user by way of holding services was what converted what otherwise was an ordinary building into a church, so that there must be both occupancy and user for the specified purpose to give a building its sacerdotal character: See **Borough of Karori v. Taine,** 2 G.L.R. 297. In **Wanganui Borough v. Wanganui High School Board** (1923) N.Z.L.R. 515, which was a case of land bought for, and intended to be used for, a school site. Chapman, J., refused to exempt because an intention to use was not "used." The words of the exemption claimed in that case were "lands and buildings used for the purposes of a secondary school." That case turned on the word "used," which was not in the exemption relied upon in the present case. In **Mayor of Miramar v. Devoy,** 34 N.Z.L.R. 1072, portion of a building was dedicated as a church, but the remaining portion was used for purposes other than a church. It was held that the other use took the premises out of the exception. That decision was consistent with the view His Honour had already expressed that a non-sacerdotal use of the building took it out of the category of "church." Most of the exceptions in that part of the Rating Act had the word "used," but the exemption in the present case selected the word "occupied." His Honour did not think it necessary for the purposes of the present case to hold that the word "occupied" meant "used and occupied." His Honour based his decision on the ground that user determined the character of the premises, and accordingly came to the conclusion that in the rating year in question the premises in question were not a church within the exemption.

Judgment for plaintiff.

Solicitor for plaintiff: **Stanton, Johnstone and Spence,** Auckland.

Solicitors for defendant: **Glaister and Ennor,** Auckland.

Kennedy, J. February 25; March 2, 1929. Auckland.

WALKER v. GUILLARD BLUE METAL QUARRY CO. LTD.

Nuisance—Interim Injunction—Pollution of Stream—Nuisance Complained of Existing Twelve Months Before Action Brought—Only Complaint Four Months Before Action Brought—No Evidence of Substantial Injury—Court Not Satisfied that Plaintiff Would Suffer Irreparable Injury from Delay Consequent on Refusal of Injunction—Defendant Consenting to Inquiry at Trial as to Damages Suffered Between Issue of Writ and Trial of Action and to Judgment being Entered for such Damages—Interim Injunction Refused.

Motion by plaintiff for an interim injunction to restrain the defendant company from polluting a stream. The plaintiff was the owner and occupier of a farm on the banks of the stream, and the defendant company carried on, higher up the stream, the business of a metal crusher. Since January, 1928, the defendant company had used the water of the stream to free crushed metal from clay. The water used was carried by a pipe to a washer; clay which was washed off, fell into a truck and was then deposited away from the stream while muddy water, with clay in suspension, flowed back into the stream. In the meantime some clay, carried in suspension, settled and the water still carrying clay in suspension flowed down stream through and along the plaintiff's farm. A writ claiming £250 damages and an injunction was issued and served on 12th February, 1929. Four days thereafter the plaintiff made the present application.

Lovegrove for plaintiff.
Towle for defendant.

KENNEDY, J., said that there was a contest as to whether, by reason of the operations of the defendant company, the stream was rendered less fit for any purpose for which it might otherwise be used. His Honour would not, however, review the evidence, as in view of the fact that the matter might proceed to trial, it was proper that the Court should not further refer to the facts established than to state them so far as was necessary to dispose of the application: **Woodbridge v. Bellamy,** (1911) 1 Ch. 326, 338. The ultimate question between the parties would be decided on the evidence called at the trial. His Honour was satisfied on the evidence before him that the water flowing through and along the plaintiff's farm was not reasonably fit for human consumption and was not rendered less fit for that purpose by the operations of the defendant company. There had, however, been pollution and the stream was, in His Honour's opinion, less fit for the use of animals and possibly for some domestic purposes other than use for human consumption. The evidence did not, however, establish substantial injury. In His Honour's opinion an interlocutory injunction should be issued only if it appeared on the evidence that the plaintiff would suffer irreparable injury in the sense of material damage which could not be adequately remedied by damages: **Attorney-General v. Hallett,** 16 M. & W. 569; **Dyke v. Taylor,** 3 De G.F. & J. 467. His Honour was not so satisfied. The matter of which the plaintiff complained, had obtained, according to the plaintiff's pleadings, for one year prior to the action being brought, and during that time the plaintiff had but once complained and that was over four months before action was brought. It was difficult to believe that a matter, which the plaintiff allowed without action to endure for twelve months, would, if it endured for the further two months which must elapse before the action came to trial, cause him material damage which could not be adequately remedied by damages. His Honour decided that the evidence did not establish that the plaintiff would suffer irreparable injury between the date of the commencement of the action and the date of the hearing if an interlocutory injunction was not issued. During the argument His Honour asked counsel for the defendant company whether he would undertake, on behalf of the defendant company, if the interlocutory injunction were refused, to consent to an inquiry at the trial of the action as to the damages which might be suffered by the plaintiff between the date of the issue of the writ and the trial of the action and if he would then consent to judgment for such damages as the plaintiff might prove he so suffered, and he intimated that such undertaking would be given. His Honour proposed to embody that undertaking in his order which would be that, the defendant company by its counsel having undertaken to consent to an inquiry at the trial of the action as to the damages which the plaintiff might suffer between the date of the commencement of the action and the trial thereof and, in the event of such damage being shown to be due to the operations of the defendant company infringing the plaintiff's legal right, to consent to judgment therefor, application for an interlocutory injunction be refused, but liberty be reserved to the plaintiff to make further application should the pollution now obtaining be in the meantime increased to his injury.

Solicitors for plaintiff: **Lovegrove and George,** Auckland.
Solicitors for defendant: **Towle and Cooper,** Auckland.

Court of Arbitration.

Frazer, J. February, 5; March 2, 1929. Wellington.

MUIR v. J. C. HUTTON (N.Z.) LTD.

Workers Compensation—Accident—Sudden Death of Worker While Doing Heavy Work—Worker Suffering from Disease of Heart of Long Standing—Dependant of Worker Entitled to Compensation—Evidence of Special Strain Not Necessary—Test Whether Strain of Work Contributed to Death of Worker.

Claim by plaintiff for compensation in respect of the death of her husband. The deceased was aged 48 and had been employed by the defendant company in its bacon factory for nineteen years. About nine years before these proceedings he had had an attack of muscular rheumatism, but except for occasional pains in the chest, to which he attached no significance, he had apparently enjoyed good health since. On 3rd September, 1928, he was employed for some time in pushing carcases of pork from a freezing chamber to a distance of 200 yards. He was then put on to assist the foreman in stacking heavy bundles of cartons. The bundles were carried about 20 feet, and stacked to a height of 5 ft. 6 ins. or 6 ft. After about a quarter of an hour at that work, the deceased, who had just carried a bundle weighing 89 lbs. and placed it on top of the stack, was walking back for another bundle, when he staggered and fell, and died within a minute or two. It was claimed that his death was caused by accident arising out of and in the course of his employment. A post mortem examination of the body disclosed long-standing disease of the aortic valve, with dilatation of the left ventricle and thickening of the heart muscle. The condition was one of chronic aortic endo-carditis. Death was due to aortic disease. The medical witnesses agreed that if the deceased had consulted a doctor after the condition of his heart had become observable, he would have been warned against heavy work. It was common ground that the aortic disease was of long standing, and that the heart had been progressively deteriorating for some years. The medical witnesses stated that the deceased might have died while walking or sitting in a chair, but that an effort of any kind might have hastened his death.

P. J. O'Regan for plaintiff.

H. F. O'Leary for defendant.

FRAZER, J., delivering the judgment of the Court, said that before the decision of the English Court of Appeal in **McFarlane v. Hutton Bros. (Stevedores) Ltd.,** 20 B.W.C.C., 222, it was considered that proof of some special strain, of however slight a nature, was necessary in such cases to establish an accident within the meaning of the Act. His Honour referred to the cases of **Clayton and Co. v. Hughes,** 3 B.W.C.C., 275, and **Barnabas v. Bersham Colliery Co.,** 4 B.W.C.C., 119 and to a note appearing in Ruegg's Workmen's Compensation, 9th Edn., 49. In **McFarlane v. Hutton Bros. (Stevedores) Ltd.** (*cit. sup.*) however Lord Hanworth, M.R., said, in the course of his judgment: "A man may suffer an accident, and be entitled to recover in respect of the injury caused by the accident within the meaning of the Workmen's Compensation Act, although the strain which sets up and puts in motion the cause of his death may arise in the ordinary exercise of his work which he is employed to do, and is not of a special or momentary nature." It did not follow, of course, that every man who died at his work from heart disease could be said to die from the effects of an accident arising out of and in the course of his employment. There must be evidence that the strain of the work he had been doing had contributed to his death, and that, but for that work, he would not have died at that time. Each case must be decided upon its own special facts. The question that the Court must put to itself in every case was that propounded by Lord Loreburn, in **Clover, Clayton and Co. v. Hughes** (*cit. sup.*): "Did he die from the disease alone, or from the disease and the employment taken together?" The present case presented the history of a man doing strenuous work, pushing carcases of pork from a freezing chamber, and then, for ten or fifteen minutes, undertaking particularly heavy lifting work. Within a few seconds after carrying a bundle weighing 89 lbs., and lifting it on to a stack, he suddenly collapsed, and died a few minutes later. The medical evidence was that his heart was in so advanced a condition of disease that any strain or effort might have hastened his death. It was impossible to assert, definitely and dogmatically, that if the deceased had not performed the heavy work that he had been doing that morning he would not have died when he did, or that he would have died at that time if he had not been doing that work. There was evidence, however, that the man's heart was diseased; that any strain or effort would be detrimental to it; that he had, owing to the nature of his work, been undergoing a continued strain beyond the limits that a medical practitioner would have considered reasonable for a man in his condition of health; and that he collapsed and died while at that work. The obvious inference was that the work the deceased was doing so acted upon his diseased heart, by exhausting its last reserve, as to bring about its collapse. Judgment for plaintiff for £1,000, and £32 14s. 6d. funeral expenses.

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

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

Frazer, J. February 6; March 2, 1929. Wellington.

MICHALICK v. McGREGOR.

Worker's Compensation—Owner of Land Granting License to Fell and Remove Dead Timber with Incidental Rights Not Liable to Pay Compensation to Bushman Engaged by Grantee of Such License—Contract by Owner of Land with Grantee a Contract for Grant of Timber Rights, Not a Contract for Execution of any Work—Worker's Compensation Act, 1922, Sections 13, 63.

Claim by plaintiff against the defendant, the owner of certain land in the Tangitu Survey District to recover compensation in respect of the death of her husband, a bush contractor, who died from injuries received through a tree falling on him while he was working on the defendant's land. The defendant had by agreement granted to one Emily Archer license to fell, remove and carry away from his land all dead timber standing or lying thereon, with incidental privileges as to laying tramlines, constructing mills, etc. The grantee was to pay the defendant a royalty of 4s. per 100 feet, on all timber removed from the land. She also agreed to supply the defendant with 10,000 feet of sawn timber free of cost, and to cart a number of posts and strainers for the defendant at specified rates. The grantee had engaged the deceased and others to fell and remove the timber on her behalf and while so doing, the deceased was fatally injured.

P. J. O'Regan for plaintiff.

H. F. Johnston for defendant.

FRAZER, J., delivering the judgment of the Court said that it was clear that the contract between the grantee and the deceased was a contract to cut standing timber, and that she was accordingly liable, under Section 63 of the Workers Compensation Act, 1922, to pay compensation for his death, in the same manner as if he had been a worker under a contract of service. In order to make the defendant liable to pay compensation, the plaintiff invoked the provisions of Section 13 of the Act, by which any principal who contracted with a contractor for the execution of any work was deemed, for the purposes of the Act, to be the employer of the contractor's workers, and was made jointly liable with the contractor for payment of compensation in the event of any of those workers being injured or killed by accident. The liability of the principal was limited by Subsection 4 of Section 13. In the opinion of the Court, the agreement made between the defendant and the grantee was not a contract "for the execution of any work" by or under the grantee, except in so far as related to the carting of posts and strainers, which could properly be regarded as severable from the rest of the contract. In essence and substance, the agreement was a contract for the sale of timber in *situ* and for the grant of rights incidental thereto. Even if the agreement could be regarded as coming within Subsection (1) of Section 13, the work of cutting timber was not directly a part of or a process in the trade or business of the defendant, and so did not comply with the condition set out in Subsection (4) (a). The defendant was a farmer, not a sawmiller or a timber merchant, and the contract into which he entered was not for clearing his land, but was for the sale of dead timber thereon. The conditions set out in Subsection (4) (b) were not complied with, for the payment to be made by the defendant to the grantee for carting posts and strainers involved a payment of less than £20. In any event, the deceased was not employed at the time of the accident in doing the work for which a payment was to be made by the defendant to the grantee.

Judgment for defendant.

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

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

A Verdict-Getting Remark.

Counsel addressing the Court at Auckland: "I do not intend to quote any law to your Honour because that would be like carrying coals to Newcastle."

Family Protection Act, 1908—Part II.

A Review of the Decisions Thereunder.

By A. C. Stephens, LL.M.

(Continued from page 13)

APPLICANTS FOR RELIEF (Ctd.)

Widower.

Order made in favour of widower: *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Brown v. McCarthy*, 26 N.Z.L.R. 762; *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139; *Golightly v. Jefcoate*, 33 N.Z.L.R. 91; *Hooker v. Guardian Trust and Executors Co.*, (1927) G.L.R. 536.

Order refused to widower on the grounds that he had been guilty of misconduct and that he had sons who were able to contribute to his support: *Geen v. Geen*, 33 N.Z.L.R. 81.

Children.

An order is not readily made in favour of adult children: *Rush v. Rush*, 20 N.Z.L.R. 249. If the estate is large and the testator makes insufficient provision for children who are poor and unable to maintain themselves, the Court will order proper provision to be made for them though they are adults; but if the estate is small and the children are adults and have other persons on whom they can rely for maintenance, it is doubtful whether the Court will interfere: *Handley v. Walker*, 22 N.Z.L.R. 932.

For a general statement of the principles on which the relief is granted, see the extracts from *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A. and *Welsh v. Mulcock*, (1924) N.Z.L.R. 673 C.A., quoted above.

The Act covers a child unborn at the date of the will: *Public Trustee v. Brown*, 34 N.Z.L.R. 951.

The Act does not extend to grandchildren: *Pulleng v. Public Trustee*, (1922) N.Z.L.R. 1022.

The Act does not cover an illegitimate child: *E. v. E.*, 34 N.Z.L.R. 785 C.A.; see also *Re Herd*, (1923) G.L.R. 118. But where illegitimate children are beneficiaries under the will they will not be deprived of their interest on an application by other persons entitled to apply under the Act simply on the ground of illegitimacy: *Worthington v. Ongley*, 29 N.Z.L.R. 1167.

Provision has been made by agreement between the other beneficiaries for children absent from the Dominion: *Hunt v. Public Trustee*, 29 N.Z.L.R. 307.

In the following cases the Court ordered provision to be made in favour of adult children: *Handley v. Walker* (supra); *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Munt v. Findlay*, 25 N.Z.L.R. 488; *Kerr v. Bridge*, 25 N.Z.L.R. 907; *Re Bleasel*, 25 N.Z.L.R. 974; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Hunt v. Public Trustee* (supra); *Hoffmann v. Hoffmann*, 29 N.Z.L.R. 425; *Allardice v. Allardice* (supra); *Re Green*, 13 G.L.R. 477; *Glasgow v. Glasgow*, 13 G.L.R. 647; *Re Raymond*, 14 G.L.R. 560; *Plank v. Plank*, 32 N.Z.L.R. 898; *Re Estall*, 16 G.L.R. 185; *Davidson v. Sundstrum*, 33 N.Z.L.R. 212; *E. v. E.* (supra); *Severn v. Public Trustee*, (1916) N.Z.L.R. 711; *Lean v. Tipping* (No. 2), (1917) G.L.R. 355; *Re Higgins*, (1918) G.L.R. 387; *Cook v. Webb*, (1918) N.Z.L.R. 664 C.A.; *Brown v. Public Trustee*, (1918) G.L.R. 209; *Fletcher v. Usher*, (1921) N.Z.L.R. 649; *Allen v. Manchester*, (1922) N.Z.L.R. 218; *Rose v. Rose*, (1922) N.Z.L.R. 809 C.A.; *Pulleng v. Public Trustee* (supra); *Re Herd*, (1923) G.L.R. 118; *Corbey v. Boonstra*, (1923) G.L.R. 433; *Gardiner v. Boag*, (1923) N.Z.L.R. 739; *Welsh v. Mulcock* (supra); *Smith v. Public Trustee*, (1927) N.Z.L.R. 342; *Re Roper*, (1927) N.Z.L.R. 731; *Copeland v. Wakelin*, (1927) N.Z.L.R. 846.

In *Collins v. Public Trustee*, (1927) N.Z.L.R. 746, the Court made a generous allowance in favour of infant sons by way of lump sum subject to an annuity for the widow.

In the following cases the Court refused to make an order in favour of adult children: *Allardice v. Allardice* (supra); *Re Green* (supra); *Glasgow v. Glasgow* (supra); *Re Raymond* (supra); *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144; *Ray v. Moncrieff*, (1917) N.Z.L.R. 234; *Gardiner v. Boag* (supra); *Sollitt v. Fairhead*, (1924) G.L.R. 533.

Failure on the part of the testator to educate his children will be taken into account: *Cook v. Webb*, (1918) N.Z.L.R. 664, 671, C.A. But see also *Allardice v. Allardice*, 29 N.Z.L.R. 959, 969 C.A.

Apparently there is no duty resting on the executor to apply on behalf of the infant children of the testator: *Spelman v. Spelman*, (1920) N.Z.L.R. 202. See also *Re McCarthy*, (1919) N.Z.L.R. 807.

RELEVANT CIRCUMSTANCES.

The Court takes all the relevant circumstances into account in deciding whether an order should be made under the Act. The following statement contains a list of the chief factors which appear to have influenced the Court. I use the word "appear" advisedly because in some cases the relevant circumstances appear only in a preliminary statement of facts or in the headnote to the report and are not mentioned in the judgment at all, although they must have been considered by the Court in the framing of the order. In other cases a statement of facts appears in the judgment but the order is made without reference to any particular circumstance.

1. **The age and state of health of the applicant and ability to earn a living.** *Allardice v. Allardice*, 29 N.Z.L.R. 959, 974, C.A.; *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Cook v. Webb*, (1918) N.Z.L.R. 664 C.A.; *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, C.A. (This point is mentioned in the large majority of cases under the Act).

It is important to have medical evidence on questions of health: see *Cook v. Webb*, (1918) N.Z.L.R. 664, 670 C.A.

It is still to be settled whether the state of health of the applicant at the time of the application can be taken into account where the ill-health has arisen subsequent to the death of the testator: see *Milne v. Cunningham*, (1917) N.Z.L.R. 687, 692.

2. **The provision (if any) made by the testator for the applicant under the will.** *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Re Bleasel*, 25 N.Z.L.R. 974; *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Plank v. Plank*, 32 N.Z.L.R. 898; *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144; *Allen v. Manchester*, (1922) N.Z.L.R. 218.

The Court has required the applicant to abandon the provision made for him by the testator under the will as a condition of the making of an order under

the Act: *Rush v. Rush*, 20 N.Z.L.R. 249; *Laird v. Laird*, 5 G.L.R. 466. See also *Fletcher v. Usher*, (1921) N.Z.L.R. 649.

3. **The amount of property possessed by the applicant.** *Munt v. Findlay*, 25 N.Z.L.R. 488; *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Allardice v. Allardice*, 29 N.Z. L.R. 959 C.A.; *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Parish v. Valentine*, (1916) N.Z.L.R. 455; *Severn v. Public Trustee*, (1916) N.Z.L.R. 710; *Murphy v. Public Trustee*, (1921) G.L.R. 152; *Allen v. Manchester*, (1922) N.Z.L.R. 218; *Welsh v. Mulcock*, (1924) N.Z.L.R. 673 C.A.

The Court has refused to make such an order as will enable the applicant to keep his own capital intact: *Parish v. Valentine*, (1916) N.Z.L.R. 455.

The acquisition of property by the applicant between the date of death of the testator and the time of the application will also be taken into account. *Plimmer v. Plimmer*, 9 G.L.R. 10, 19, 27, C.A.; *Rowe v. Lewis*, 26 N.Z.L.R. 769.

4. **The size of the estate.** *Re Phillips*, 4 G.L.R. 192; *Laird v. Laird*, 5 G.L.R. 466; *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Hoffman v. Hoffman*, 29 N.Z.L.R. 425, 429; *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A.; *E. v. E.*, 34 N.Z. L.R. 785 C.A.; *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, 682, C.A.

5. **The character and conduct of the applicant.** (Subsection (2) Section 33). *Re Bleasel*, 25 N.Z.L.R. 974; *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139; *Geen v. Geen*, 33 N.Z.L.R. 81; *Ray v. Moncrieff*, (1917) N.Z.L.R. 234; *Fletcher v. Usher*, (1921) N.Z.L.R. 649: Cf. *Re Estall*, 16 G.L.R. 185.

Improvidence on the part of the applicant will be taken into account by the Court: *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144.

6. **The provision (if any) made for the applicant by testator before his death.** *Munt v. Findlay*, 25 N.Z.L.R. 488; *Hoffman v. Hoffman*, 29 N.Z.L.R. 425.

If the testator has maintained the applicant in the past an order will be more readily made in his favour: *Golightly v. Jefcoate*, 33 N.Z.L.R. 91; *Allardice v. Allardice*, 29 N.Z.L.R. 959, 969, C.A.

In the case of children the Court will also take into account the testator's failure to educate his children where such failure results in a decreased earning power on their part: *Cook v. Webb*, (1918) N.Z.L.R. 664, 671, C.A. Cf. *Allardice v. Allardice*, 29 N.Z.L.R. 959, 969 C.A.

7. **The earning capacity of anyone who is legally liable to maintain the applicant.** *Handley v. Walker*, 22 N.Z.L.R. 932; *Allardice v. Allardice*, 29 N.Z.L.R. 959, C.A.; *Geen v. Geen*, 33 N.Z.L.R. 81; *Davidson v. Sundstrum*, 33 N.Z.L.R. 212; *Severn v. Public Trustee*, (1916) N.Z.L.R. 710.

8. **The moral claim and financial position of anyone who would be adversely affected by the making of provision for the applicant.** *Laird v. Laird*, 5 G.L.R. 466; *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Plimmer v. Plimmer*, 9 G.L.R. 10, C.A.; *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Re Koehler*, (1920) N.Z.L.R. 257; *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144, 147; *Rose v. Rose*, (1922) N.Z.L.R. 809 C.A.

An order in favour of the applicant will be made more readily where it can be made so as to affect only strangers or persons who are not closely related to the testator. See *Kerr v. Bridge*, 25 N.Z.L.R. 907; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Davidson v. Sundstrum*, 33 N.Z.L.R. 212; *Cook v. Webb*, (1918) N.Z.L.R. 664, 672, C.A.; *Collins v. Public Trustee*, (1927) N.Z. L.R. 746.

The Court will take into account the fact that the order will operate against a person who has dependents even though they are illegitimate: *E. v. E.* (supra).

The measure of assistance given to the testator by the person opposing the making of an order is relevant: *Lean v. Tipping* (No. 2), (1917) G.L.R. 355; *Rose v. Rose* (supra); *Gardiner v. Boag*, (1923) N.Z.L.R. 741.

It is doubtful how far an applicant's claim should prevail against the rights of persons who were beneficiaries under the will of the testator and who morally if not legally were the owners of the property which was bequeathed to them by the will. See *Milne v. Cunningham*, (1917) N.Z.L.R. 687, 692. Contrast *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139.

9. **The assistance given to the testator by the applicant in the accumulation of the estate or otherwise.** *Handley v. Walker*, 22 N.Z.L.R. 932; *Laird v. Laird*, 5 G.L.R. 466; *Heagerty v. Considine*, 34 N.Z.L.R. 905; *Pulleng v. Public Trustee*, (1922) N.Z.L.R. 1022. Contrast *Carroll v. Carroll*, (1917) G.L.R. 600.

10. **The intention of the testator as shown by the terms of the will.** *Laird v. Laird*, 5 G.L.R. 466; *Hoffmann v. Hoffmann*, 29 N.Z.L.R. 425, 429; *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, 682, C.A.; *Smith v. Public Trustee*, (1927) N.Z.L.R. 342. Cf. *Collins v. Public Trustee*, (1927) N.Z.L.R. 746.

11. **The consent of the person against whom an order under the Act will operate.** *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Hunt v. Public Trustee*, 29 N.Z.L.R. 307.

12. **The absence of other applicants under the Act:** *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Russell v. Dunn*, 9 G.L.R. 510; *Collins v. Public Trustee*, (1927) N.Z. L.R. 746; *Hooker v. Guardian Trust and Executors Co.*, (1927) G.L.R. 536.

13. **The style of living to which the applicant has been accustomed.** *Re Phillips*, 4 G.L.R. 192; *Laird v. Laird*, 5 G.L.R. 466; *Allardice v. Allardice*, 29 N Z L.R. 959, 969, C.A.; *Bell v. Hunter* (No. 2), 34 N.Z. L.R. 1068, *Cook v. Webb*, (1918) N.Z.L.R. 664; *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743; *Armstrong v. Armstrong*, (1921) G.L.R. 184; *Allen v. Manchester*, (1922) N.Z.L.R. 218, 222. But see also *Welsh v. Mulcock*, (1924) N.Z.L.R. 673 C.A.

14. **The existence of persons dependent upon the applicant or the defendant or in receipt of assistance from him.** *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Lean v. Tipping* (No. 2), (1917) G.L.R. 355; *Paxton v. Nicholson*, (1918) G.L.R. 393; *Rose v. Rose*, (1922) N.Z.L.R. 809 C.A.; *Welsh v. Mulcock*, (1924) N.Z.L.R 673, 682, C.A.; *Re Roper*, (1927) N.Z.L.R. 731.

(To be continued)

It is most unfortunate that now-a-days commercial cases are decided by heterogenous juries, often including women, who know nothing of bills of lading though they may know a good deal about bills of sale.—Lord Riddell.

Lord Halsbury.

His Life and Times.

Permission has been granted to the " NEW ZEALAND LAW JOURNAL *" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.*

EARLY DAYS.

The day Hardinge Giffard was called, he got his first brief. One of the well-known firm of Morgan and Humphreys, solicitors, called on his father and said, "What are you going to do with young Hardinge?" On hearing that he had just been called to the Bar, he said he would give him a brief. When the brief arrived, it was to prosecute a man who had spat twice in another man's face. Hardinge won his case, and the offender was fined two guineas—a guinea a spit!

The same solicitor advised him to join the South Wales Circuit, and it was a fortunate choice, for just at that time there was a dispute between the solicitors on the Circuit and the Bar, and as a protest the solicitors decided to brief the new man, who had joined after the difficulty had arisen. Hardinge, therefore, among others, got the opportunity of a start, which is not always the good fortune of a beginner.

Indeed, he was a fortunate man in every way. Not only for the opportunities that came to him, but in the possession of the quick and daring intelligence which seized and utilised them, when another might have let them pass. Within a year his father, writing in 1851, says that he hears "from a man on his Circuit that Mr. Hardinge Giffard did everything that was to be done there last time," and ends with the confident prophecy, "That young man will be Lord Chancellor. Remember my words."

The Criminal Bar was a very close borough in those days, and the work was mostly in a few hands, among whom were Hardinge Giffard and Poland. Hardinge Giffard acted for the Humphreys. He soon became the leader in that Court, and practised largely there until 1866, when he took silk, and so had to vacate his post as Junior Counsel to the Treasury.

It is interesting that Giffard began at the Old Bailey, because Macaulay once wrote, speaking of the Old Bailey Bar, that "Advocates have always here used a licence of tongue unknown at Westminster Hall, which has not often proved the nursing mother of a Lord Chancellor." Giffard was an apt pupil, and soon made his way. He possessed a virile force, a combativeness, a strength of conviction, and a pertinacity which carried all before him. He was absolute master of his trade, and possessed, as the world soon came to recognise, an innate genius for the Law.

In 1851 Giffard joined his brother John in Chambers in Chancery Lane. John was the Chancery Reporter, and afterwards County Court Judge at Totnes, which was a Liberal appointment. The brothers were two of the untidiest men in the world, and the state of their Chambers, as described by the author of *Fifty Years at the Bar* was, to say the least of it, picturesque.

In 1852 Poland persuaded Giffard to join him in the basement of 7 King's Bench Walk, where he remained till 1865, when he took silk. They then removed to 5 Paper Buildings. The other members of the Chambers were Tom Allen, Giffard's lifelong friend, and Harry Giffard. In the same year Hardinge Giffard was married to Miss Humphreys. She brought him comfort and peace, freedom from pecuniary anxieties, and opportunities of distinction in his profession. Their married life was a very happy one. Their first home was in Gloucester Place, Portman Square.

The first case in which Giffard appeared in the High Court was before Lord Campbell, and Giffard fell victim to an attack of extreme nervousness, hesitating and stammering. Lord Campbell, who was not the most patient of men, leaned over from the Bench, saying, "For God's sake, get on, young man!" which so stimulated Hardinge that he did get on, and was never again nervous in Court.

Giffard's first case of real importance was *Feret v. Hill* on May 29, 1854, and he afterwards attributed his success in London to the remarks that were made of him in it. The Court was very much against him, and indeed every conceivable prejudice was against the case he was arguing. The case was this:—

In February, 1853, the plaintiff, Feret, asked the defendant, Hill, to let him certain rooms in a house, representing that he wanted them for the purpose of carrying on a perfumery business, and giving references.

A lease of the rooms was accordingly granted by Hill to Feret. Feret took possession of the rooms, but instead of carrying on the business of a perfumer, he used them for an improper and illegal purpose. Whereupon the defendant gave him notice to quit immediately, and, upon his refusal to do so, forcibly expelled him. Feret accordingly brought an action of ejectment against the defendant. The argument turned upon the question whether the misrepresentation by the plaintiff of the purpose for which he intended to use the premises made the contract void. When his leader, Massey Dawson, had failed to convince the Bench of four Judges, Giffard succeeded in putting the case so well, arguing that the agreement having been made, and the plaintiff let into possession, the estate passed so as to prevent its being diverted by a collateral fraud, that they were all convinced and gave judgment in favour of the plaintiff.

A LUCKY ESCAPE.

In 1854 Giffard was in a case at Cardiff, which had serious, and might have had fatal results. He was engaged in speaking before Lord Campbell when a madman called Willoughby made a disturbance in Court, objecting violently to his conduct of the case, and making wild and extravagant accusations against judge and counsel. A few weeks later Giffard was waiting, robed, at the Old Bailey, when Willoughby suddenly appeared, pulled out a pistol, and saying, "Do you remember Cardiff?" fired it point-blank in Giffard's face. Luckily the pistol was a muzzle-loader, and, as he had neglected to put in a wad, the bullet jerked out as he raised it, and was later found in Giffard's sleeve. But the explosion at such close quarters burnt his cheek, and left a scar.

Willoughby was indicted for feloniously wounding Hardinge Giffard with intent to murder. Messrs. Ryland and Locke prosecuted, and Mr. W. Clarkson defended. While Mr. Clarkson was cross-examining Giffard, Willoughby repudiated him as counsel, refusing to accept his services. This raised a point of law, which was discussed, and Lord Chief Baron Pollock decided

that counsel could not be forced upon a prisoner who preferred to conduct his own case.

Clarkson therefore withdrew, and the prisoner was found "Not guilty, on the ground of insanity," and was sentenced to detention during Her Majesty's pleasure.

"Hardinge treated the affair very lightly," says Sir Harry Poland, who was present.

A Phenomenal Memory.

Lord Halsbury's memory was quite extraordinary. Countless examples could be quoted, but these few may serve. His son, the present Earl of Halsbury, joined the Chester Circuit in 1906, and was shown an old brief of his father's. It was a very large brief, dated 1855. There was not a mark on it except on the last page, where the times of three trains to London were jotted down. On returning to London, he asked his father about the case, and he remembered every witness, what each had said, which broke down, and which were believed. He told him of the two important letters which won the case, the name of the judge, and every detail of the affair. Fifty-one years before!

Over and over again, when a point of law was put to him, he would remember, not only the case, but the volume and the page of the Report, where it was to be found, the judge who decided the point, and who argued it.

He was a very quick worker, and never made a note, which his wonderful memory made unnecessary. For this reason he had the reputation of not reading his papers.

Sir Harry Poland told a story about Giffard attending a political debating society, called the Belvedere. The leader of the Radicals was called Southwell, who made a brilliant speech that brought down the house. But unfortunately for him he had not allowed for Giffard's memory. He remembered not only the speech, but the real author, and where it was printed. The book was produced, and that was the end of Mr. Southwell!

Giffard and Campbell.

Lord Campbell was a difficult man to get the better of. In a case in which he was very much against Giffard, it became obvious that sooner or later he would have to rule on a point of law. Under the practice in those days, one way of challenging a judge's ruling was by way of a Bill of Exceptions, a document on parchment, prepared by Counsel, setting out the point and the ruling. The judge, under the penalty of a very severe fine, was bound to sign this, and on this the appellate tribunal gave their decision.

Foreseeing that the judge was going to decide against him, Giffard prepared the Bill of Exceptions, and upon Campbell's ruling, immediately handed it in. Campbell was angry, but equal to the occasion. He said at once, "I cannot sign this Bill. It does not accurately set out the point nor the ruling."

"In what way is it inaccurate?" asked Giffard.

"No, no," said Campbell. "It is not the duty of a judge to say how a Bill of Exceptions should be drawn. All I say is that this one is inaccurate. If you will present me with one accurately drawn, I will sign it."

In another case, Giffard did get the better of Campbell. The whole question turned on whether Giffard's client was drunk. Campbell, in his summing up, told the jury that there was plenty of evidence that he was drunk and none that he was sober. Giffard protested, and was told to sit down.

"I will sit down when I have done my duty to my client and not before," he said. "The evidence that he was sober is that immediately after the occurrence he drove a pair-horse carriage 16 miles in the dark along country roads, without an accident."

The judge was annoyed, but the jury agreed with Hardinge Giffard.

Giffard continued to forge ahead in London as well as on Circuit. Curiously enough his practice in London was mostly confined to the Chancery side, though he has often been called an Old Bailey lawyer, and it was said he had made his name at the Old Bailey. It was not the case at that time, though later on he became conspicuously successful there. And other of his friends, besides his proud father, were venturing on prophecy. "Bob" Orridge betted 10*l* that within twelve years Giffard would be Attorney-General, and end his days as Lord Chancellor.

Sir Harry Poland, with whom Giffard shared Chambers for about 15 years, speaks of him in these words:—

"Hardinge Giffard was a wonderful man, a kindly, cheerful friend, ever with a jest on his lips, a fine lawyer, a great advocate, a classical scholar, and—an immoderate reader of novels. He did well on Circuit, and well everywhere. He had the most retentive memory of any man I have ever known. He was never at a loss. He saw into a man as soon as he had read the brief. He knew his man every time. I never knew his equal at cross-examination and he was ahead of Ballantyne, who alone approached him in that difficult art."

(To be continued)

Bench and Bar.

Mr. J. W. Macdonald, the Public Trustee, has had conferred upon him in the delayed New Year Honours, the distinction of C.M.G.

Mr. P. H. Harper, the new appointee to the Magisterial Bench, was born in 1884, and is the fourth son of Mr. George Harper, of Christchurch. He was educated at Christchurch Boys' High School, and received his legal training in his father's office. He was admitted as a barrister and solicitor in 1907, and then practised on his own account at Levin. Later he entered into partnership with Mr. J. L. C. Merton, but the partnership was subsequently dissolved, Mr. Merton practising at Palmerston North, and Mr. Harper continuing to practice at Levin.

Mr. G. T. McDowell, who has for the past six years been managing clerk to Messrs. Goldstine & O'Donnell, of Auckland, has commenced practice on his own account at Rotorua.

The following admissions to the Profession have been made recently at Wellington: Mr. H. K. Bullock (Barrister and Solicitor); Messrs. C. R. Barrett and R. I. Hawkins (Solicitors on the Roll admitted as Barristers); Messrs. H. F. Bollard, I. A. Hart, and N. J. Lewis (Solicitors).

Legal Conference.

Full Programme of Functions and Business.

We are now able to publish the full programme of functions and business for the Second Annual Legal Conference.

FUNCTIONS.

Wednesday, 3rd April—

12.15 p.m. – Civic reception at Town Hall.

4 p.m. – Reception by Attorney-General (Hon. T. K. Sidey) and Mrs. Sidey at Parliamentary Buildings.

8 p.m. – Reception and Dance at the Adelphi Cabaret, Cuba Street.

Thursday, 4th April—

11.30 a.m. – Motor Drive for Ladies.

1 p.m. – Lunch for Ladies at Brown Owl, Akatarawa.

7.30 p.m. – Dinner for Men at Kirkcaldie and Stains Ltd.

8 p.m. – Bridge Party for Ladies at Adelphi Cabaret.

Friday, 5th April—

Golf and tennis at Heretaunga, at a starting time to be arranged. The "New Zealand Law Journal" has donated a cup for the golf competition.

4.0 p.m. – Afternoon Tea at Heretaunga as the guests of the President of the N.Z. Law Society (Mr. A. Gray, K.C.) and Mrs. Gray and the President of the Wellington District Law Society (Mr. C. G. White) and Mrs. White.

BUSINESS.

1. Roll-call at Dominion Farmers' Institute, Featherston Street, at 9.15 a.m.
2. Opening of Conference by the Governor-General, Sir Charles Fergusson, at 10 a.m.
3. Inaugural Address — "Legal Education" — Hon. T. K. Sidey.
4. Paper—"The Etiquette of the Legal Profession" —Sir John Findlay, K.C.
   Discussion thereon.
5. Remit:
   (a) "That this Conference urges the New Zealand Law Society to do all in its power to ensure that the amendment to the Law Practitioners Act, 1908, dealing with a Solicitors' Guarantee Fund be passed into law, at the first available Session of Parliament.
   (b) "That a deputation from this Conference wait upon the Hon. the Attorney-General and urge that the above mentioned bill be taken up as a Government measure." —(CANTERBURY.)
6. Paper—"The Crown in Business—Considered from the Constitutional and Legal Viewpoints."—Mr. R. L. Ziman.
7. Remit: "That the recovery of debt or damages by or against a Government Department should be placed upon the same footing in all respects as the recovery of a debt or damages by or against private traders, and that the institution of and the defending of proceedings by or against Government trading departments in the name of His Majesty is an abuse of the royal prerogative and enables Government trading departments to come into Court with the enormous leverage of the royal prerogative to the detriment of and with injustice to private traders, and that the Crown Suits Act and the law generally be altered so that actions by or against a Government Department may be instituted by or against such Department in the name of such Department and not in the name of His Majesty the King."—(CANTERBURY.)
   Discussion on paper and remit.
8. Paper—"An Elective Judiciary."—Mr. P. J. O'Regan.
   Discussion thereon.
9. Remit: "That it is imperative that the Profession take concerted action to consolidate its position and regain lost ground in view of the increasing inroads which are being made by Land Brokers on the conveyancing work of Solicitors."—(SOUTHLAND.)
10. Paper—"The University and the Profession"—Professor J. Adamson.
    Discussion thereon.
11. Remit:
    (1) "That the Destitute Persons Act be amended to permit a Magistrate, hearing any information or complaint laid pursuant to that Act, to make an order for the taking of evidence before another Magistrate, and that a similar right to have evidence taken be given to Defendants in By-law cases and cases under the Motor Regulations."—(WANGANUI).
    (2) "That the whole question of the taking of statements by the Police in connection with any crime, committed or suspected, should be investigated, and that in all cases where such a statement is demanded, the position should be governed by a regulation providing for the witness being previously informed that he is entitled to have present with him at the taking of the statement his Solicitor or a friend."—(HAWKE'S BAY.)
12. Paper—"The Profession of a Barrister in New Zealand."—Mr. A. H. Johnstone.
    Discussion thereon.
13. Remit: "That this Conference endeavour to have inserted in Fire Insurance Policies a clause providing that the insurance of the Mortgagee's interest shall not be invalidated by any act or omission on the part of the mortgagor or owner, nor by the unoccupancy of the premises or any other increase in risk without the knowledge of the mortgagee, with a proviso that the mortgagee will inform the company of any increase of risk known to him, and pay any additional premiums required by the circumstances."—(CANTERBURY).
14. Paper—"Courts and Court-houses."—Mr. A. T. Donnelly.

15. Paper—"The Functions of the Law Society."—Mr. G. M. Spence.

16. Remits:
    (1) "That the New Zealand Law Society should, at the commencement of each year, settle the holidays to be observed by the legal profession."—(TARANAKI).
    (2) "That Section 61 of 'The Law Practitioners Act' be amended, the maximum number of the Council to be eleven instead of nine."—(WELLINGTON).
    (3) "That 'The Law Practitioners Act' be amended to permit either a Barrister or a Solicitor to voluntarily remove his name from the Roll."—(CANTERBURY).
    (4) "That no Solicitor shall be entitled to practice as a Solicitor on his own account until he has attained the age of twenty-five years."—(CANTERBURY).

    Discussion on paper and remits.

17. Remit: "That this Conference views with grave concern the dangers arising from the provisions regarding customary hire-purchase agreements in 'The Chattels Transfer Act, 1924,' and the constant extension of the articles to which these provisions apply, and urges that means be devised to protect purchasers of chattels to which such provisions may relate."—(NELSON).

18. Remit: "That the rules of procedure in the Supreme Court in both Civil and Divorce proceedings should be revised with the object of simplifying and reducing the number of forms of process and pleading."—(WELLINGTON).

In our last issue we published the names of the visitors as notified by the Canterbury, Gisborne, Marlborough, Nelson, and Wanganui District Law Societies, and we publish below the names of those from the other District Law Societies who are attending the Conference and also the names of those Wellington practitioners who have to date signified their intention of attending:—

HAWKE'S BAY DISTRICT LAW SOCIETY: Mr. and Mrs. W. E. Barnard, Mr. and Mrs. C. V. Chamberlain, Mr. and Mrs. H. de Denne, Mr. and Mrs. P. W. Dorrington, Mr. M. R. Grant, Mr. and Mrs. C. B. E. Harker, Mr. and Mrs. H. Holderness, Mr. and Mrs. W. E. Lawry, Mr. W. J. Langley, Mr. H. B. Lusk, Mr. N. J. McKay, Mr. S. H. Morrison, Mr. L. A. Rogers, Mr. and Mrs. E. Sandeman, Mr. and Mrs. W. G. Wood.

TARANAKI DISTRICT LAW SOCIETY: Mr. and Mrs. A. G. Anderson, Mr. H. R. Billing, Mr. and Mrs. A. Coleman (Hawera), Mr. and Mrs. A. Coleman (Stratford), Mr. and Mrs. R. C. Hughes, Mr. and Mrs. R. V. Kay, Mr. S. Macalister, Mr. and Mrs. W. Middleton, Mr. and Mrs. C. E. Monaghan, Mr. and Mrs. L. M. Moss, Mr. and Mrs. N. H. Moss, Mr. and Mrs. R. H. Quilliam, Mr. and Mrs. I. W. B. Roy, Mr. J. H. Sheat, Mr. G. M. Spence, Mr. L. A. Taylor, Mr. and Mrs. P. Thomson, Mr. R. R. Tyrer.

AUCKLAND LAW SOCIETY: Mr. J. L. Hogben, Mr. A. H. Johnstone, Mr. R. P. Towle, Mr. F. L. G. West, Mr. and Mrs. H. J. Wily, Miss Stewart, Mr. R. L. Ziman, Mr. and Mrs. J. Stanton, Mr. W. H. Cocker.

OTAGO LAW SOCIETY: Mr. F. B. Adams, Mr. Aspinall, Mr. H. L. Cook, Mr. and Mrs. A. Duncan, Mr. and Mrs. A. James, Mr. A. C. Stephens, Mr. and Mrs. A. H. Tomkinson, Mr. W. G. Hay, Mr. C. B. Barrowclough, Mr. W. D. Taylor.

SOUTHLAND LAW SOCUETY: Mr. and Mrs. F. G. Hall-Jones, Mr. and Mrs. H. J. Macalister.

WESTLAND LAW SOCIETY: Messrs. H. Lovell, W. P. McCarthy, Molony, L. E. Morgan, I. Patterson, G. A. Revell, Wilson.

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THE CUPS FOR COMPETITION AT GOLF

London Letter.

Temple, London,
15th January, 1929.

My dear N.Z.,—

I am, as I write, wishing you all a very prosperous New Year and a happy one; a fortnight too late on my own account and about two months too late, I suppose, when the time is added for the mail to reach you? Whatever any one else might be in the circumstances, I am unrepentant; however late I am, and however much to blame for being late, I continue to hope, and hope aloud, that for your country, your profession, and yourselves, 1929 may be a year of progressive happiness and prosperity and may, by the time the wish reaches you, have already shown itself to be a year of that character and tendency.

A month's silence has been due to an unforseen prolongation of my stay in the United States. There I saw something of American lawyers and law; just enough to impress upon me that the subject is one to be discussed not lightly and least of all upon a superficial impression. I hope to have established a professional contact which may develop into a closer touch, with the incidental result that later on I may be in a position to undertake with you a comparative discussion. Suffice it, for the moment, to say that the excursion was far from uninteresting but that I am glad to be back in our ancient Temple again.

If I may plague you for one more minute, only, with my own affairs so far as they can have any public interest, I may add that before I went I was confronted with the fact of the re-organisation of the Office of the Parliamentary Counsel, and with the offer of part and lot in the new organisation. This would have meant, of course, giving up private practice and settling down forever to the exacting work of drafting Bills of Parliament, on the Government's behalf. The Office is one of distinction and responsibility; its work brings its members into close touch with national business and the Ministers of the day; scholars of great achievement have served, and serve, it; the remuneration is not mean and is certainly not precarious. But . . . .; and for those reasons I remain practising at the Bar! The re-organisation takes place upon the passing of Sir Frederick Liddell from that Office to the position of Counsel to the Speaker; Sir William Graham-Harrison succeeds him, and my only real regret in my decision is the self-denial of a near association with so eminent an intellect and so human a heart. It is an odd reflection that a man, so essentially connected with the Laws of this Realm, should be so little known not only to the lawabiding subjects but even to the general mass of lawyers. He is, however, as was his predecessor, a very great man.

The death of Mr. Justice Salter is, indeed, a sad loss. It is not excessive to say that none of His Majesty's Judges in any Division commanded, at the date of its sudden occurrence, a higher respect or a deeper affection. The soundness of his judgment, the infallible courtesy of his demeanour, the kindness of his character were so marked and so equally balanced that had you, at any moment, enquired of any member of our Bar as to our best type of Judge of the day, it is almost certain his name would have been quoted. He made it all seem so easy: so easy to be considerate, so easy to be quiet, and so easy, thereafter, to be wise. It is inevitable, appreciating a man after his death, to tend a little to the favourable view; and I must say that, if I have ventured to enlarge upon the characteristics of our Judicature as at present constituted, the truth is that the standard is very high and the attributes I have mentioned are widespread. Allowing for that, however, it remains the plain fact (and every Judge on the Bench would probably endorse it) that Salter, J., was the accepted model, and there can be no appreciation of him, expressed in obituary reference and read by you after his death, which was not felt during his life.

Sir Malcolm Macnaghten, K.C., who is appointed in his stead, will be the name well known to you of a quietly efficient and universally liked son of a very distinguished father. He has the reputation, made for the most part perhaps before the Judicial Committee of the Privy Council, of being an able lawyer. He will be no discredit to our Bench; whether or not he will add to its distinction remains very much to be seen. I am prepared to bet, with a little of my money but by no means with all, that he will.

To turn to the other side of our profession, the retirement of Sir Cecil Coward from the widely reputed firm of solicitors, Coward, Chance and Company, is a matter for comment. When you come to think of it, our great London firms occupy a singularly important position in the order of civilised things and their immaculate fame is a thing to be very proud of. Sir Cecil, retiring from active work at something over eighty years of age, may (though I doubt if he does) take full credit for sustaining this prestige in his time. Of the many responsible functions he has exercised, with a fine gift for law and a genius for human affairs, not the least have been in association with the out, posts of the Empire. New Zealand comes early, and high, in his list, as you probably know better than I. You may not however, know that he was originally called to the Bar; no firm of solicitors has a higher standing than that to which he, abandoning advocacy, became attached. He is, it almost goes without saying, an ex-President of the Law Society.

So much for the recent past. As to the near future we wait, all agog, the selection of the new Lord of Appeal in Ordinary. A persistent rumour that Stewart Bevan, K.C., will shortly become Solicitor-General cannot be traced to its source, but may imply that the Attorney-General is about to take this promotion. Other possibilities which are canvassed are that Lord Merrivale will go to this post, or that one of the following will be appointed: Lord Justice Greer, Lord Justice Russell, or Mr. Justice Tomlin. There is a strong tendency to back the last-named, but nothing, I think, is known and what is confidently stated is the merest guesswork in reality.

And lastly we approach the period of the year when the forthcoming list of new King's Counsel is foreshadowed and the names of most of the applicants are known. Most interesting of all, at least on the common law side, are Donald Somervell and John Dickinson, two perfectly delightful men and Juniors with as big practices as exist these meagre days. If it is true they have applied (and there is no reason to doubt the news that they have) there can be no question of their being duly honoured. If this happens, there must be a considerable redistribution of junior work, though it is probable that no one man will get all, or a very large share of, their released clientele. Their arrival amongst

the Silks will cause a considerable disturbance, also, but of a less welcome nature. Two lesser men, but not unfit candidates, are J. F. Eales, and Marshall Freeman whose origin was of the Birmingham local Bar, but whose prospects need not be doubted on that account. Not a few of our busy leaders thus originate; Birmingham is notoriously loyal to its own productions even upon their being carried away to London, as they probably will if they succeed as Juniors and as they necessarily must be if they take Silk.

Of the sudden, almost surreptitious, marriage of the Lord Chancellor only one thing is to be said: it is likely to be an essentially and especially happy one. This I am told by those who know Lord Hailsham personally; and this I am more inclined to believe from my slight but valuable acquaintance with Lady Hailsham. There is humanity, in large quantity and high quality, on both sides.

Yours ever,
INNER TEMPLAR.

Legal Literature.

Salmond's Law of Torts.

Seventh Edition: By W. T. S. STALLYBRASS.
(pp. xlvii; 641; 45. (Sweet & Maxwell, Ltd.)

The seventh edition of this work is still essentially Sir John Salmond's book, and the editor has rarely forgotten this fact. So far as the law has remained the same he has retained the words used by the late author. Where new law has been made, or older law explained, or new theories brought to bear upon the law, he has done his task in a manner which the late author would no doubt have fully approved. If it means anything to say so, the present editor's style is a little less practical and a little more academic than that of Sir John Salmond. It might be that he would be happier in discussing theories and tendencies than in setting out clearly and logically the state to which the law has attained. This is by no means a fault; for the student reader it is probably a virtue.

The previous editions are so well known that it is proposed in this review merely to point out one or two of the alterations and additions which the present editor has seen fit to make. In chapter I he has gone further in adding an excursus dealing with the question as to whether there is a general law of tort. The view set out in the excursus is probably more widely accepted than the view of Sir John Salmond, and one may go practically as far as saying that it is now the generally accepted view. One can trace so many instances of the development of new torts that it seems impossible to say that the number of torts has become fixed and cannot be added to. Novelty can be no more than a presumptive argument against an action in tort. It may be said, however, that the clear statement which Sir John Salmond made, and the expression of his arguments, brought the matter more clearly under consideration and, therefore, in formulating this theory, even though it be not accepted now, he did a great service to the study of this branch of the law. On the question of negligence, the editor again differs from the author. Dr. Winfield's view of this is worth stating. He concludes that until the nineteenth century, there was no tort known by the name of negligence though many wrongs which would now be classed under that heading were redressed by the law in some other way. It developed into an independent tort but it has not yet lost its other meaning of a particular method of committing certain torts or indeed of some legal wrongs that are not torts at all. Dr. Winfield states that between 1841 and 1921 there are at least thirty-five references by judges to "the action for negligence." The subject of contributory negligence is clarified to some extent by the paragraph headed: "The doctrine of alternative danger." This is a particularly valuable addition. The question of liability in employment of independent contractors is very interesting to read in the light of excursus A. The editor raises the question as to whether fault in itself is the test in a tort, or whether on the other hand the test is becoming which of two innocent parties should bear the loss. He states that the former view has no inherent virtue as opposed to the latter, and that the latter is growing in importance. Valuable additions are made in the chapters dealing with remoteness of damage on which the law has been brought up to date. The very indefinite state of the law as regards the waiver of torts is well brought out. It seems wise to have set out the rule in *Rylands v. Fletcher* in a separate chapter, especially in view of the very excellent excursus B, which is worthy of study by the reader. A further excursus is added at the end of the chapter on defamation. This excursus deals with the nature of the defence of fair comment and, though a little more involved than the others, is very short. Since the last edition, the question of intimidation has come up for discussion in the case *Sorrell v. Smith*, (1925) A.C. 700. It has, therefore, become necessary to re-write part of this chapter. One cannot but agree with the editor that it is a great pity that when the House of Lords has the opportunity of bringing "order into chaos" it does not do so. Of course, on the other hand, the duty of the Court is to decide the case before it and not necessarily to go into law generally.

In conclusion, one cannot but state that the seventh edition of a very famous book is worthy of the best intentions of its late author, and that if he were able to express his thoughts concerning it, he would undoubtedly approve it.

W. A. BEATTIE.

Legislation of the Day.

Eve, J., at a recent dinner of the Incorporated Law Society of Plymouth, proceeded to express the general dissatisfaction of the Judges with the trend and quality of modern legislation. Some of his points were:— (a) recent legislation has imposed an excessive strain on the legal profession; (b) in bulk and complexity it is beyond all precedent, and if further ill-digested statutes are to be added, the burden will become almost unbearable; (c) those responsible for a statute use words which do not correspond with the intention of the statute; and (d) what the draughtsmen set out is so hopelessly mangled as to be beyond recognition, and in such cases the responsibility ought to be transferred from those who drafted a Bill to those who mangled it.

Correspondence.

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

Privilege of Communications between Solicitor and Client.

I have read with interest your editorial article in your issue of the 19th February entitled "Privilege of Communications between Solicitor and Client." I appeared in support of the summons for production which is reported under the name of *Keep Bros. v. Birch and Bradshaw Ltd.*, (1928) N.Z.L.R. 360, and while at the present time I do not propose to make any comment either on the judgment or on your article, I take this opportunity to state the facts somewhat more fully than they are reported in order that the judgment may be properly construed.

Birch and Bradshaw Limited was an incorporated company carrying on business in Auckland as a dealer in painters' and paperhangers' supplies. It imported largely from abroad. Keep Brothers were an English firm who acted as its buying agent in England. Birch and Bradshaw Limited was managed by a Mr. Minter who was also a Director.

As is reported, Birch and Bradshaw Limited gave security for its debt to Keep Bros. a few days prior to going into liquidation, and on a debenture which formed part of such security Keep Bros. subsequently sued the liquidator of Birch and Bradshaw Limited. The liquidator pleaded that the debenture was void as a fraudulent preference.

It appeared on inspection of the documents discovered by Keep Bros. that there were letters in respect of which privilege was claimed. The liquidator of Birch and Bradshaw Limited then issued a summons for the production for inspection of four letters. At the hearing of the summons Counsel for Keep Bros. admitted that three of the letters must be produced but contended that the fourth letter was privileged from production. One of the letters which it was so admitted must be produced was a letter written by Mr. Minter to Keep Bros. Its actual contents were not known at the time but it was written to and received by Keep Bros. immediately prior to their instructing solicitors in New Zealand to obtain security for their debt.

Upon receipt of such instructions from Keep Bros. their solicitors in New Zealand apparently communicated with Mr. Minter and then discussed the matter with him. They subsequently wrote to Birch and Bradshaw Limited and made certain suggestions as to the form of the security which should be given to Keep Bros.

Mr. Minter as manager of Birch and Bradshaw Limited wrote in reply thereto agreeing to the suggestions and concluding: "Nobody could have their (Keep Bros.) interests more at heart than the writer and it was solely my suggestion to them to appoint legal representatives in case action was necessary."

This letter gave some indication as to the contents of the letter which Mr. Minter had written to Keep Bros. and on receipt of which Keep Bros. had instructed their solicitors in New Zealand. It was on these facts, namely that Mr. Minter had written to Keep Bros. obviously with the intention of enabling them to obtain a preference over the other creditors, and that they had on receipt of such letter instructed solicitors in New Zealand to act for the purpose of obtaining such security, that I claimed the right to production for inspection of the letter from Keep Bros. to their solicitors in New Zealand, upon the ground that the letter was written for the purpose of effecting the transaction which it was alleged was a fraud.—Yours, etc.,

R. H. MACKAY.

Auckland.

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

re Solicitors in the Employ of Government Departments.

Section 6 of the Regulations of the 2nd November, 1922, governing the Native Trustee says, *inter alia*:—

> "The Native Trustee may fix the scale of charges to be paid to solicitors in respect of the preparation, perusal, and completion of securities to or instruments for the Native Trustee, and for the discharge, renewal, or variance of such securities, and generally for the transaction of legal business for the Native Trustee. Such scale, with such modifications as the Native Trustee directs, shall apply where the work is done by the Office Solicitor, and in that case the money received shall be paid into the Native Trustee's Account."

My client has been sued by the Native Trustee in the Magistrates' Court for a sum certain. There is added to the claim the usual plaint fee and £1 solicitor's fee. In answer to a note of mine raising the question whether the solicitor's fee could be collected in view of the fact that the plaint was signed by a solicitor in the employ of the Native Trustee, the Native Trustee has cited the above regulation. Exigencies compelled capitulation, but I doubt very much whether the regulation enables the Trustee to make the charge. My view is that the regulation empowers the Trustee to fix the scale of charges to be paid to outside solicitors for and in respect of conveyancing work done for him.

To make the regulation apply to the work done in the common law branch, he is compelled to rely upon the general clause which gives him the power to fix generally the scale of charges for the transaction of legal business for the Native Trustee. The regulation then goes on to say that "such scale" shall apply to the Office Solicitor; but the Native Trustee cannot alter the charges on a summons. They are fixed by the Magistrates' Court Act, though I suppose that the proceedings would be accepted if nothing were claimed as solicitor's fees. He certainly could not claim more than those fixed by the various proclamations. Moreover, the word "scale" is not apt to describe common law work at all. No scale governs it. What is meant is the ladder-like series of charges which vary with the magnitude of the property dealt with in conveyancing matters.

I would be glad to have the opinion of other members of the Profession on the point.—Yours, etc.,

L. A. TAYLOR.

Hawera.