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"Let the ambition of the lawyer be to serve the State and protect the rights of his fellow men."
—Lord Sankey.

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The Third Annual Legal Conference.

Owing to the fact that Auckland was by no means fully represented at the Christchurch and Wellington Conferences it was felt by some that the idea of an annual gathering of the profession had not appealed greatly, for some reason or other, to the majority of the members of the Auckland District Law Society; but any such feeling has now been entirely dispelled by the most complete success of the last Conference. Well-attended, and well-organised both on its business and on its social side, the standard set by its predecessors was in every respect maintained.

One of its most outstanding features was the inaugural address delivered by His Honour the Chief Justice. It was valuable, apart from anything else, as a striking illustration to the profession as a whole of the fact that, to use His Honour's own words, those "who leave the Bar and become Judges do not lose their interest in and sympathy with those who were their brother practitioners." The Chief Justice dealt with several matters of importance to the administration of justice and to the profession, and expressed his views also, and with apparent consequence, on several of the remits before the Conference. His observations in favour of the retention of the right of appeal to the Privy Council, endorsed as they were by considerable personal experience of that tribunal, came at a most opportune time, as also did his comments on the suggestion made as to the determination of workers' compensation claims by the Supreme Court. The Chief Justice drew attention, and very forcefully, to a question which somehow or other does not appear to have received much notice in recent years—the "backdoor" entrance to the Bar. As the Attorney-General pointed out, the profession has not at any of its Conferences yet passed any resolution recommending that that mode of qualification should not be allowed to remain, and until this is done there is little chance of Parliament being induced to alter the existing provisions of the Act. Last year, His Honour pointed out, 74 per cent. of the applications for admission to the Bar, from those who were already admitted to practise as solicitors, were based upon five years' practice as a solicitor. Of course, many apply for admission as barristers and solicitors simultaneously, and these applicants must necessarily have qualified by examination, so the percentage of "backdoor" applicants to the total admissions as barristers is considerably less. Nevertheless, the position is very, very serious and the longer the existing state of affairs is allowed to continue the more difficult will it be found to effect any change.

Sir Thomas Sidey's address was also one of the features of the Conference. The Attorney-General reviewed his proposed new legislation on several matters with which the profession is particularly concerned, and it is gratifying to learn that effect is proposed to be given to a few of the remits passed by the previous Conferences. The Attorney-General has always been keenly interested in matters of legal education and he is this year proposing to introduce a bill placing the whole control of legal education in the hands of the New Zealand University. While there is a great deal to be said in favour of this proposal, we venture to express the hope that the Judges or the New Zealand Law Society, or both of them, will retain some effective measure of control. The detailed provisions of the Attorney-General's proposed Bill have not yet been made public, and it is perhaps too early to express any opinion, but at first impression it seems that though the Bench and the profession will be well represented on the proposed Council of Legal Education, it will be possible for the views of that Council to be entirely disregarded either by the Academic Board or by the Senate of the University. The Senate will have the effective control; the Academic Board will merely make, as it does now, recommendations to it; the proposed Council of Legal Education will merely make recommendations to the Academic Board. The University Commission which reported on this subject a few years ago recommended the setting up of a Council of Legal Education having similar powers to those now possessed by the Judges. The present proposals appear to give the Council of Legal Education no powers, in the real sense of the word, at all; but it is impossible at this stage to say any more than that the proposals, in our view, require very careful consideration indeed.

The standard of the papers read was high. Mr. J. B. Callan, in his paper on "Appeal to the Privy Council," attained, it was properly said, "the highest level reached at any of these Conferences." Probably, as the Chief Justice observed, the question of the abolition of the present right of final appeal is not a live one in this Dominion—nobody in New Zealand wants to get rid of the Privy Council—but nevertheless it was most opportune to have this matter discussed, and so ably discussed, at a time when there is evidenced in certain other parts of the Empire a desire to abolish the tribunal. It is to be hoped that the resolution passed unanimously by the Conference will be taken as a clear indication of New Zealand's attitude in the matter. Mr. H. F. Johnston, K.C., read a thoughtful and valuable paper on "Circumstantial Evidence," and Mr. C. H. Weston's entertaining paper, "Nisi Prius," provided a change from the more serious business of the Conference. Professor R. M. Algie, dealing with "The Position of Mortgagees with Respect to Fire Insurance," drew attention to the lack of security afforded to a mortgagee under the usual policy of fire insurance. It is certain that the majority of the lending public is ignorant of these risks and that in many cases hardship to mortgagees may result; but at the same time it must be recognised that the interests of the insurers are entitled to consideration.

We have not space here to refer to all the remits, the discussions on which will be found fully reported elsewhere in this number. One matter, however, does merit attention here, and that is the decision not to interfere, at present at all events, with the practice of holding the Conferences annually. It is difficult to see how anyone can now be unconvinced of their value and it would have been a pity indeed, in our view, if it had been decided to hold them only biennially.

Court of Appeal.

Myers, C.J.
Herdman, J.
Blair, J.
Smith, J.
Kennedy, J.

March 14; April 3, 1930.
Wellington.

TENCH v. TENCH BROS. LTD.

Company—Private Company—Winding-up—Four Brothers Only Members of Company—Petition for Winding-up on Ground of Wrongful Exclusion of Petitioner from Management of Company—Offer by Petitioner to Sell Shares to Other Members Rejected on Account of Price Demanded—Petition Dismissed by Supreme Court as Frivolous and Vexatious on Ground that Presented Not *Bona Fide* But Merely to Force Purchase of Shares—Jurisdiction Wrongly Exercised—Petition to be Heard on Merits.

Appeal from a decision of Adams, J., staying or dismissing a petition for the compulsory winding-up of the respondent company on the ground that the petition was not filed in good faith for the legitimate purpose of obtaining a winding-up order, but was filed for the purpose of bringing improper pressure to bear upon the directors of the company to force them to purchase the petitioner's shares.

Hoggard for appellant.
Gresson and Gee for respondent.

MYERS, C.J., said that Adams, J., had relied upon the principle stated in **In re A Company,** (1894) 2 Ch. 349, which in effect decided that the Court had an inherent general jurisdiction to dismiss a petition just as it had to stay or dismiss an action which was frivolous or vexatious or otherwise an abuse of its process. But just as it had been held that such a jurisdiction to stay or dismiss an action ought to be very sparingly exercised, and only in very exceptional cases, so it seemed to His Honour that the same principle applied in the case of an application to dismiss a petition to wind up a company. In His Honour's opinion the jurisdiction had not been rightly exercised in the present case. The case relied upon by the learned Judge was distinguishable in certain important respects. Firstly, as was pointed out in **Stiebel's Company Law,** 3rd edn. 786, the petitioner was not entitled to present a petition because he had not held his shares for a sufficient period to qualify him to do so. Secondly, the company seemed to have been an ordinary public company, and not, as in the present case, a private company of the nature, to adopt the language used in **Loch v. John Blackwood Ltd.,** (1924) A.C. 783, of practically a domestic and family concern. It would seem that a special principle applied to a petition for the dissolution of a company which was in substance a partnership in the guise of a private company: **In re Yenidje Tobacco Co. Ltd.,** (1916) 2 Ch. 426; **Loch v. John Blackwood Ltd.** (*cit. sup.*) Remembering that a private company in New Zealand might have as many as twenty-five shareholders, His Honour wished to guard himself against saying that the principle laid down in the two cases cited applied to every New Zealand private company. It was sufficient to say that in His Honour's opinion it applied to the present case, which was the case of four brothers who originally carried on business in partnership in equal shares, and then converted their business into a private company. In **In re Yenidje Tobacco Co. Ltd.** (*cit. sup.*) at p. 434, Warrington, L.J., whose statement was specially referred to in the judgment of the Privy Council in **Loch v. John Blackwood Ltd.** (*cit. sup.*) as an accurate and careful opinion, said: "In substance it seems to me these two people are really partners. It is true they are carrying on the business by means of the machinery of a limited company, but in substance they are partners; the litigation in substance is an action for dissolution of the partnership, and I think we should be unduly bound by matters of form if we treated either the relations between them as other than that of partners, or the litigation as other than an action brought by one for the dissolution of the partnership against the other; but one result which of course follows from the fact that there is this entity called a company is that, in order to obtain what is equivalent to a dissolution of the partnership, the machinery for winding-up has to be resorted to." The special principle stated in that passage seemed not to have been noticed in the decision under appeal.

The petitioner claimed *inter alia* that under the company's articles of association he was not removable from the directorate, but that on or about 10th October, 1928, his three brothers, the other shareholders, in breach of faith amended the articles so as to remove him from the directorate of the company and had since then prevented him from investigating the affairs of the company and had kept from him all matters relating to the management of the company, and that since October, 1928, the keys of the premises of the company had been removed from the company's office and that he had been prevented from obtaining access to any of the keys, and had been prevented from in any way exercising any control over the affairs of the company. There were other grounds alleged, but His Honour did not consider it necessary to refer to them. Subsequently the petitioner offered to sell his shares to the other three, but the negotiations eventually fell through, and ultimately the petition was presented. The petitioner asked a price for his shares which the brothers appeared to have thought excessive; but on the other hand they offered a price which the petitioner claimed to be substantially less than the value of the shares. If the petitioner was right in his allegations as to his removal from the directorate and as to the acts of the other three brothers which followed thereon, it was but natural that he should be desirous of disposing of his shares and that he should require to have their fair value. It had to be remembered that in the circumstances of the case it would be difficult if not impossible for him to find a purchaser outside the membership of the company. It might well be that the petitioner was attempting to obtain an unfairly high price while the three brothers were not prepared to pay more than an unfairly low price for the shares. Upon that point it was not possible, nor would it be proper, at the present stage to express an opinion. Nor would it be proper on the material at present before the Court to express any opinion upon the merits of the petition. One of the cases upon which Mr. Gresson strongly relied was **Re Horwood and Co. Ltd.,** 21 N.S.W.S.R. 750; but all that need be said of that case was that it was not the hearing of an application to stay proceedings, but the actual hearing of a winding-up petition on the merits. In the present case the petition was not being heard on its merits: the question was merely whether an order should be made staying or dismissing the petition as an abuse of process, and thus preventing a hearing on the merits. His Honour therefore said no more than that in his opinion, on the material before the Court, the jurisdiction to make the order appealed from was wrongly exercised. The petitioner was entitled to proceed with his petition and have it heard on its merits in the ordinary course.

HERDMAN, BLAIR, SMITH and KENNEDY, JJ., delivered separate judgments concurring.

Appeal allowed.

Solicitors for appellant: **Findlay, Hoggard, Cousins, and Wright** Wellington.
Solicitors for respondent: **L. W. Gee,** Christchurch.

Myers, C.J.
Herdman, J.
Blair, J.
Smith, J.
Kennedy, J.

March 28; April 4, 1930.
Wellington.

IN RE M.

Solicitor—Striking Off Roll—Failure to Have Trust Account Audited as Required by Regulations—Professional Misconduct—Duty of Law Society—Attitude of Court—Law Practitioners Amendment Act, 1913, and Regulations Thereunder.

Application by New Zealand Law Society for removal of the name of the above solicitor from the roll of solicitors. The facts appear in the report of the judgment.

Van Haast and Free for New Zealand Law Society.
D. M. Findlay for the solicitor.

MYERS, C.J., delivering the judgment of the Court, said that the practitioner was convicted and fined on 8th November, 1929, for failing for a period of one month to cause his trust account for the year ended 31st March, 1929, to be audited as required by the regulations made under the Law Practitioners Amendment Act, 1913. That fine was imposed by way of punishment for a breach of the law. The provisions of the statute and regulations relating to the audit of solicitors' trust accounts were

very salutary provisions designed to protect the interests of clients and the public generally. After the conviction and fine, the Law Society very properly took the matter up and called upon the practitioner to explain his conduct, and also to have his trust account promptly audited. The practitioner ignored the Law Society, and neglected to have his trust account audited until several weeks after the present proceedings were commenced, and indeed until after the commencement of the present sitting of the Court. It was said that the omission of the practitioner was due merely to carelessness and that there had been no dishonesty on his part. That seemed indeed to be so, as the trust account had been audited not only for the period in question, but also to 25th March, 1930, and had been found to be correct. Nevertheless such neglect might, the Court thought, amount to professional misconduct, quite irrespective of the offence against the regulations, and of the punishment for that offence. The present case was, however, the first case of the kind that had come before the Court, and as the practitioner's conduct had been due to no more than carelessness, gross though it might be, their Honours thought that the position would be sufficiently met by ordering him to pay the Law Society's costs. The Court desired, however, to make it plain, firstly that the Law Society, as indeed it had recognised by the attitude it had taken up in the present case, had a duty in matters of such a kind, secondly that a practitioner would not be permitted to ignore the Society in the performance of that duty, and thirdly that the Court was not disposed to treat lightly conduct such as that for which the practitioner in the present case had been brought before the Court.

Practitioner ordered to pay the costs of the New Zealand Law Society fixed at £15 15s. 0d. and disbursements.

Solicitors for New Zealand Law Society: **Gray and Sladden,** Wellington.

Solicitors for M.: **Findlay and Moir,** Wellington.

Myers, C.J.
Herdman, J.
Blair, J.
Kennedy, J.

March 26; April 4, 1930.
Wellington.

IN RE CAVANAGH.

Family Protection—Testator Leaving Estate to Invalid Widow and to Daughter During Life of Widow and After Death of Widow Life Interest in Bulk of Estate to Daughter with Power of Appointment Over Corpus—Estate Not Large—Daughter Looking After Testator and Invalid Wife for Several Years Before Testator's Death—Application by Able-bodied Sons and Other Daughter in Poor Circumstances for Provision Out of Daughter's Share—Circumstances at Date of Testator's Death to be Regarded—Probability of Daughter Having to Nurse Invalid Widow for Long Period and of her Remaining Spinster and Becoming Unfit for Work Important Considerations—Claim of Daughter Paramount—No Provision Made for Applicants.

Appeal from a decision of Smith, J., reported ante p. 23, where the facts are fully stated. The proceedings had been commenced in December, 1911, by the respondents and others within twelve months from the death of the testator, who died on 19th January, 1911. The testator's widow was then alive. She died only quite recently, and the case was then proceeded with before Mr. Justice Smith, who made an order that the executors should pay to each of the four respondents the sum of £250 out of the estate of the testator, such sums to be paid out of an amount of £3,000 directed by the testator's will to be set aside and invested for the benefit of the appellant. It was from that order that the present appeal was made.

Cooper for appellant.
Smith for respondent.

MYERS, C.J., said that the case raised no new questions of principle. It fell to be decided on the principles laid down in **Allardice v. Allardice,** 29 N.Z.L.R. 959: (1911) A.C. 730, as elaborated in more recent cases such as **Allen v. Manchester,** (1922) N.Z.L.R. 218. It was in the application of those principles to the circumstances of the case that the difficulty lay. Every case must of course be decided upon its own facts and circumstances; but His Honour thought that care should be taken, in applying the principles to the facts of the particular cases that came before the Court, to see that the pendulum was not allowed to swing too far.

In the present case the total net value of the testator's estate was something over £3,700. The sum of £3,000 was set aside for the appellant; the residue going to the youngest sons of the testator. It might well have been contended that the respondents should be allowed something out of that residue. It was quite likely that in a competition between the respondents and the two younger sons it might have been held, applying the principles that had been laid down, that the respondents should each be awarded a small sum and that such sums should be taken out of that which was left to the two younger sons. The respondents, however, had expressly refrained from making that contention and had attacked the amount given by the testator to the appellant, and their claim had been and was that an allowance should be made to each of them and that the sums so allowed should be taken out of the £3,000. Under the will the income from the whole estate during the widow's lifetime was to be paid as therein provided for the benefit of the widow and the appellant. After the widow's death the sum of £3,000 was to be set aside and appropriated and invested upon trust to pay the income thereof to the appellant during her life and upon her death upon trust for such person or persons and in such manner as she should by any deed will or codicil appoint and in default of and subject to such appointment in trust for such person or persons as would have taken the same had the same been the absolute property of the appellant at the time of her death. Whether or not that amounted to a general power of appointment so that the appellant could appoint to herself and reduce the principal sum into her own possession it seemed to His Honour to be quite unnecessary to consider.

Although the proceedings did not come before the Court until nearly 18 years after they were commenced, it was plain enough that the position had to be regarded not according to the circumstances at the present time but according to the circumstances at the time of the testator's death. See per Salmond, J., in **Welsh v. Mulcock,** (1924) N.Z.L.R. 673, 687. The material facts at the date of the testator's death were as follows: Three of the respondents were sons, all of whom had many years before left the family home and established their own homes. They were all able-bodied men. No doubt their circumstances might be difficult but nevertheless each of them seemed always to have been able by his own exertions to maintain himself and his family. The fourth respondent was a daughter of the testator, forty-seven years of age, whose husband had always been able to support her and her family, though apparently he had been unable to save anything from his earnings. That daughter had been married for something like 23 or 24 years. At the time of the testator's death the appellant was 27 years of age. For some ten years the testator had been an invalid. His wife also was an invalid, partially paralysed, and bedridden. For about ten years, ever since the appellant left school, she seemed to have had the sole care of her parents, and when the testator died she was left with her invalid and partially paralysed mother on her hands to take care of. How long that state of things was likely to continue was of course highly problematical—in point of fact the widow lived for no less a period than 18 years. In those circumstances His Honour could not help thinking that the testator after making provision for his wife owed a first and paramount duty to the appellant. It was at least extremely probable that the appellant might by reason of the circumstances be doomed to a life of spinsterhood. As a matter of fact that was not the case because she married some years after the testator died, but she nevertheless continued to look after her invalid mother as she had done previously. There was also the very great probability that if the widow lived for a substantial period the care and attention which it was necessary for the appellant to devote to her might have in the result completely broken down the appellant's health and left her unfit for any kind of work. Such were the facts and possibilities at the date when the will was made and also at the date of the testator's death; and it would have been natural for him to take them into consideration. No doubt if he had left a very large estate and had given the bulk of it to the appellant it might have been quite proper for the Court to make an order under the Family Protection Act in favour of the respondents. But that was not the case. The effect was in His Honour's opinion, firstly, that, in the circumstances, the testator's paramount duty was to the appellant, and secondly that, having regard to the facts and the possibilities, what was left to her was none too much. In **Allardice v. Allardice** (*cit. sup.*) the Court refused to make an allowance in favour of able-bodied sons who were able to maintain and support themselves and who had no burdens. In the present case the sons were able-bodied

men able to maintain and support themselves. It was true that in the present case the sons had burdens, but, even so, although it could not be said that a testator had no moral duty to an adult son capable of earning his own living, His Honour thought that the principle of making an allowance in favour of able-bodied sons, who were able to work and maintain and support themselves even if they had burdens, might easily be carried too far, having regard to the apparent object of the provisions of the statute. There were cases where an allowance had been made to sons—for example, **Rose v. Rose,** (1922) N.Z.L.R. 809. But in that case the competition was only between sons. It was not the case as in the present case of a competition between sons and a daughter who by reason of the special circumstances of the case was entitled to paramount consideration.

HERDMAN, J., dissented.

BLAIR and KENNEDY, JJ., delivered separate judgments concurring in the allowing of the appeal.

Appeal allowed.

Solicitors for appellant: **Cooper, Rapley and Rutherfurd,** Palmerston North.

Solicitors for respondents (other than J. Wolland): **Smith and McSherry,** Pahiatua.

Solicitor for John Wolland: **T. W. Page,** Eketahuna.

Myers, C.J.
Herdman, J.
Smith, J.
Kennedy, J.

March 25; April 4, 1930.
Wellington.

IN RE OTAGO AND SOUTHLAND BRICK, TILE AND POTTERY MAKERS' AWARD.

Industrial Conciliation and Arbitration—Award—Validity—Hours of Work—Award Providing for Employees in Factory Working More Than Forty-eight Hours per Week—Award Not Inconsistent With Factories Act—Industrial Conciliation and Arbitration Act, 1925, S. 150—Factories Act, 1921, S. 17.

Case stated for the opinion of the Court of Appeal as to whether a certain clause of the Otago and Southland Brick, Tile and Pottery workers' award was inconsistent with S. 17 (1) of the Factories Act, 1921. The clause in question provided: "Twelve hours shall constitute a shift for kiln-burners and any time worked in excess of twelve hours shall be paid for at the overtime rates prescribed in clause 2 (c) hereof; provided that where shifts of less than twelve hours are now being worked employers and workers may agree by mutual consent to continue the existing arrangement. None of the other provisions of this award except the preference clause shall apply to kiln-burners.

Ongley for the union.

Stevenson for the employers.

HERDMAN, J. (delivering the judgment of MYERS, C.J., HERDMAN and SMITH, JJ.) said that the statute creating the Court and defining its jurisdiction contained a provision (S. 150) which declared that no award of the Court should contain any provision that was inconsistent with any statute which made special provision for any of the matters before the Court. A brick kiln being a factory within the meaning of the Factories Act, 1921, the Court was invited to determine whether S. 17 (1) of that Act or the award of the Court of Arbitration should prevail.

Subsection (1) of S. 17 certainly did *prima facie* fix the limit of time during which a male worker might be employed in a factory, but subsection (3) provided that "where in any award of the Arbitration Court, whether made before or after the commencement of this Act, provision is made for limiting the working hours in any trade, this section shall in respect to such trade, and so long as such award continues in force, be read and construed subject to the award." Their Honours could discover no ground for deciding that there was any inconsistency between the award and the statute. On the contrary, there was every reason for deciding that the award and the enactment were consistent, for did not subsection (3) of S. 17 of the Factories Act expressly provide that, "this section shall . . . be read and construed subject to the award?" In the plainest language the statute recognised the authority of the Arbitration Court to fix hours of employment in a factory which might differ from the limit of working time fixed by the Act. Had subsection (3) not been present in S. 17 and had the Court of Arbitration provided in an award for the employment of kiln-burners for more than 48 hours, a clear case of inconsistency would have existed. But as it happened that subsection (3) of Section 17 had been enacted the award became paramount. It had been given the stamp of superior authority. The word "limiting" having been used in subsection (3) of S. 17 it was contended that no award could override the statute unless it provided for hours of labour that were less than the limit of time fixed by the statute. But subsection (3) did not speak of an award which limited the hours of labour to a period of time less than that fixed by subsection (1). Moreover, subsection (3) made S. 17 subject to the provisions of an award whatever they might be. The words "limiting the working hours" which appeared in subsection (3) meant, their Honours thought, defining or fixing the hours of employment in the course of the settlement or determination of an industrial dispute. Lastly, it could not be said that subsection (3) of Section 17 had been repealed by implication. It stood as part of that section and must have a meaning and an effect. In the past, Judges of the Arbitration Court had consistently construed the provision as giving them power by means of an award to define the hours of employment of kiln-burners, and in deciding that they possessed this authority their Honours were of opinion that they correctly interpreted the law.

KENNEDY, J., delivered a separate judgment concurring.

Solicitors for union: **Ongley, O'Donovan. and Arndt,** Wellington.

Solicitors for employers: **Izard, Weston, Stevenson and Castle,** Wellington.

Myers, C.J.
Herdman, J.
Blair, J.
Smith, J.
Kennedy, J.

March 17, 18; April 4, 1930.
Wellington.

ESPAGNE v. HART.

Landlord and Tenant—Structural Defects—Liability of Landlord—Damage to Property of Tenant Owing to Structural Defects in Roof Under Control of Landlord—Roof Constructed by Builder Under Joint Contract With Both Landlord and Tenant—Design and Construction of Roof as Specified Defective—Landlord Not Liable—Landlord Not Liable for Damage Caused by Work of Independent Contractor Instructed by Him to Repair Defects.

Appeal from the decision of Ostler, J., in an action by the lessees of certain shop premises, the respondents on the appeal, claiming damages from their landlord in respect of injury caused to goods in the shop occupied by them as a result of water passing through the roof of the shop. The lease under which the respondents occupied the shop described the property demised as the "ground floor of a building containing two rooms hereinafter referred to as the 'said shop.'" A separate and distinct part of the structure was occupied by another tenant, a Miss Stewart, and the roof of the building covered entirely that part occupied by Miss Stewart and the shop of the respondents. The lease contained *inter alia* a covenant (clause 3) that "the lessees will from time to time and at all times during the said term well and substantially repair, cleanse, maintain, amend and keep the said shop and ceilings and the plastering, painting, paper and the drainage, sewers, water closets, water pipes, water taps, electric light fittings and other pipes and verandah spouting and all appurtenances whatsoever with all necessary reparation." When the lease under which the respondents occupied their shop was being arranged, it was agreed that certain additions and alterations should be made, some on the demised premises and some on the part retained by the landlord, the total cost to be £600. The respondents were to contribute a portion of the cost. These additions were effected by a contractor named Mills who prepared specifications which were in due course signed by both parties. They provided for a box-gutter not less than 6 inches wide which was to have the necessary fall and was to be secure and water-tight. The work was performed; but shortly after the lease had commenced water found its way into the roof of the premises occupied by the respondents. In October, 1926, and in 1927 the

escape of water was very serious and the shop premises were flooded and the respondents' stock damaged. The flooding was due to the fact that the gutter provided was not sufficient to carry off the water from the roof. Complaints were made to the appellants, and they were given notice requiring them to remedy the defects, and they in consequence instructed a builder, Pulley, to repair the gutter and spouting. The leakage still continued after these repairs had been effected and the respondents subsequently commenced proceedings for the damage to their goods which they alleged was caused by the defective construction of the box-gutter on the roof. Mr. Justice Ostler gave judgment for the respondents for damages against the appellants, and the appeal was from that decision.

W. J. Treadwell and Parry for appellants.

North for respondents.

MYERS, C.J., said that the subject of the demise was described in the lease as being "all those shop premises on the land above described and being the ground floor of the building on the aforesaid lands containing two rooms and hereinafter called 'the said shop.'" There was nothing in the lease which in His Honour's opinion enlarged the subject of the demise; and His Honour agreed with the learned Judge in the Court below that the two rooms which formed the shop premises were all that was demised, that the roof was not included, and that the appellants retained control of it. His Honour agreed also that there was nothing in clause (3) of the lease that imposed upon the lessees any obligation in connection with the roof. Stress was laid by Mr. Treadwell upon the words "drainage" and "water pipes," but His Honour thought that those words referred only to drainage and water pipes upon the demised premises and had nothing to do with the roof. It was also clear, in His Honour's opinion, that the lessors had a legal right to build above that portion of the premises which consisted only of the one floor, so long as access to any upper storey was given over other portions of the property of the lessors not included in the premises demised to the respondents. It might have been difficult or even impracticable in the particular circumstances of the case for the lessors so to build any upper storey, but that seemed to His Honour to be quite immaterial and in no way to affect the legal rights of the parties. His Honour also agreed that (subject however to any special contract between the parties negativing such liability) the authorities such as **Hargroves Aronson and Co. v. Hartopp,** (1905) 1 K.B. 472, and (more particularly) **Cockburn v. Smith,** (1924) 2 K.B. 119, showed that the lessor, where portion of a building was let as in the present case, was under a liability, at any rate after notice, if he neglected to take reasonable care to remedy defects in the roof and guttering. His Honour was prepared further to assume for the purpose of the present case—though His Honour expressly refrained from expressing an opinion on the point—that that was the position even if the defect which caused the damage was a structural defect. But His Honour did not agree with the learned Judge in his view of the effect of the contract made between the appellants and the respondents in regard to the construction of the building. Whether the liability of the lessor in cases of the present kind arose from a contractual relationship, or from a duty imposed by law, or, as was thought in some of the cases, from a modification of the doctrine of **Rylands v. Fletcher,** L.R. 3 H.L. 330, His Honour saw no reason why the liability might not be negatived by contract between the parties or perhaps by some special circumstances in the case. If the building had been undertaken by the appellant-lessors entirely on their own account and according to their own plans and specifications, and the damage complained of had arisen through a structural defect, then it might be that the lessors would be liable in the event of failure, after notice, to remedy the defect. Similarly they might still be liable notwithstanding that the plans and specifications had been agreed upon between the lessors and the lessees, if they had themselves undertaken the construction, and the damage complained of had arisen through faulty construction caused by the negligence of the builder. But in point of fact what happened was that the plans and specifications of the building (including of course the roof) were not only agreed to by the respondent-lessees but were actually obtained and procured solely by them, and they were to pay a sum equal to about two-thirds of the cost of construction. Not only that, but they were actually parties to the contract with the builder whereby the builder agreed to erect not merely for the lessors, but for the lessors and the lessees, a building in accordance with that plan and those specifications. The parties jointly instructed the builder and jointly entered into the contract with him. In the result, so far as the whole work was concerned (including the roof) the lessees obtained just exactly what they bargained for. If the builder was negligent the lessees as well as the lessors, as it seemed to His Honour, had a cause of action against him. But His Honour failed to see how, in view of the fact that the lessees obtained (subject only to possible negligence by the builder with whom they contracted) just exactly the building they bargained for, they could successfully throw upon the lessors the responsibility for damage caused by a defect in the design or construction of the roof. That aspect of the case, however, did not end even there. In October, 1924, all the parties, that was to say, the appellants, the respondents and the builder, submitted certain disputes to arbitration by an agreement which recited that the owner (Espagne) and the lessees had agreed to make certain alterations to the shop premises and had contracted with the builders to make the alterations set out in the specifications and that "the owner and the lessees contend that the builder has not properly carried out the works specified in the said specifications." The agreement set out "the only matters in difference between the parties," which did not include any matter referable to the cause of the damage in question, but His Honour did not think that that affected the position. His Honour could not think that the position of the respondents in the circumstances in regard to a claim against the appellants for damage caused by a structural defect was any different from that it would have been if they had contracted alone with the builder, in which case His Honour apprehended that it could hardly be seriously contended that they could recover. They had the plans and specifications prepared; they procured the tender from the builder; they joined in the contract with the builder as employers jointly with the respondents; and they accepted the work as done by the builder. What duty or liability could there be upon the appellants in such circumstances to reconstruct the roof if the design or the construction turned out to be faulty or defective? In His Honour's opinion, none.

The learned Judge said that there could be no doubt that the damage done to the respondent's goods was caused by the defective structure of the box-guttering on the roof, though it was true that later in his judgment he said that the damage was caused partly through the defective construction of the box-gutter and partly through the gutter being blocked to some extent by the pipe laid into it some time afterwards by Mr. Pacey, who, he said, was acting at the time as the appellants' agent. Supposing that the damage was due partly to one cause and partly to the other it was impossible from the evidence to estimate the damage due to each cause. In any event it was to be borne in mind that what Pacey did was done under the instructions of the appellants, not, if His Honour was right in his view, because they were legally liable to remedy the defect in the roof, but simply because they were desirous of meeting as far as possible the complaint made by the respondents. They sent Pacey to do the work and there was no suggestion in the evidence that Pacey was not a reliable and competent person to do it: **Blake v. Woolf,** (1898) 2 Q.B. 426. As His Honour viewed the case the appellants were not liable, at all events up to the point of their receiving notice that damage was being caused by reason of the work that Pacey had done. And His Honour thought that on their attention being called to the damage that was caused by Pacey's work, they could avoid further liability by restoring the condition to precisely what it was immediately prior to Pacey's work being commenced. If the condition could not be so restored, then it might be that there would be an obligation on the part of the appellants to effect such an improvement or reconstruction of the roof as to avoid further damage. Furthermore, although His Honour thought that there was no liability on the appellants in the circumstances of the case by reason of a structural defect, they would of course be liable for damage done through their neglect, after notice, to remedy a defect arising from other causes such as stoppage in the guttering or corrosion of the pipes. It followed from what His Honour said that, though His Honour agreed with the greater portion of the judgment of the learned Judge in the Court below, he thought that in the final result the judgment was erroneous and that the appeal should be allowed.

HERDMAN, J., dissented.

BLAIR, SMITH and KENNEDY, JJ., delivered separate judgments concurring in the allowing of the appeal.

Solicitors for appellants: **Welsh, McCarthy, Beechey and Houston,** Hawera.

Solicitors for respondents: **Halliwell, Thomson, Horner and North,** Hawera.

Myers, C.J.
Herdman, J.
Blair, J.
Smith, J.
Kennedy, J.

March 25; April 4, 1930.
Wellington.

NEW ZEALAND FEDERATED SEAMEN'S UNION v. SANDFORD LTD.

Industrial Conciliation and Arbitration—Award—Validity—Jurisdiction of Arbitration Court—"Industrial Matter"—Provision for Preference of Financial Members of Union Over Non-Financial Members Invalid—Provision Empowering Union Executive to Deal with Members Wilfully Misconducting Themselves Invalid—Provision Prescribing Entrance Fee in Excess of Maximum Entrance Fee Permitted by Statute Invalid—Industrial Conciliation and Arbitration Act, 1925, Ss. 2, 105, 143.

Case stated under S. 105 of the Industrial Conciliation and Arbitration Act, 1925, for the opinion of the Court of Appeal. The question submitted was, whether it was within the jurisdiction of the Court of Arbitration to include in its award the following provisions: "24 (a) Employers shall, in the engagement or subsequent employment of seamen, give preference to those members of the Federated Seamen's Union of New Zealand who are not more than one month in arrear with their contributions to the said union:

(b) Provided that any such unfinancial member shall again become eligible for employment on payment of his arrears without any fine in addition:

(c) Should there not be a sufficient number of such members available when required, then and in such case the employers may engage or employ other men conditionally that they shall become and remain members of the said union during the currency of their employment. The entrance fee and subscription to become payable within one week of joining the ship, when it shall be paid to the delegate on board or the secretary of any branch of the union.

(4) Members of the union presenting themselves for employment shall be not more than one month in arrears with their contributions.

(e) Membership of the union shall be open to any man of good character.

(f) The union undertakes that the maximum entrance fee and subscription shall not exceed 12s. and 4s. per month respectively, during the currency of this award.

(g) Any member or members wilfully missing their passage, wilfully misconducting themselves on board the ship or wilfully impeding the voyage of the ship shall be liable to be dealt with in such manner as the union executive may decide, provided that such men are not otherwise punished."

"25 (g) In this award reference to "man" or "men" means any financial member of the Federated Seamen's Union of New Zealand employed on vessels belonging to employers who are parties to this award.

Ongley for Industrial Union.
Stevenson for respondent.

MYERS, C.J., said that so far as subclause (g) of clause 24 was concerned Mr. Ongley properly admitted that its subject-matter was not an "industrial matter" within the meaning of that term as defined by S. 2 of the Industrial Conciliation and Arbitration Act, 1925, and that he could not justify its inclusion in the award. It was clear also, His Honour thought, that subclause (f) of clause 24 could not be justified, at least in part, because the entrance fee was in excess of the maximum entrance fee permitted by S. 143 (1) of the Act. The other subclauses, except subclause (e) of clause 24, as to which no exception could be taken, in His Honour's opinion stood or fell together. His Honour regarded the matter as concluded by the decisions in **Magner v. Gohns,** (1916) N.Z.L.R. 529, and **Butt v. Frazer,** (1929) N.Z.L.R. 636. The Arbitration Court in **Weenik v. McCormick,** (1927) G.L.R. 533, nearly two years before **Butt v. Fraser** was decided, held that it was bound by the decision in **Magner v. Gohns** (*cit. sup.*) to restrict any preference of employment that it might grant to a preference in favour of members of an industrial union of workers over non-members; and it held that there was no power to grant preference of employment to the members of one union over the members of another union. If **Weenik v. McCormick** (*cit. sup.*) was correctly decided, as in His Honour's opinion it was, it followed that the Court of Arbitration could not give a preference to members of a union over other members of the same union. That was precisely what the clauses in question purported to do. The relationship between different members of a union, or between the members of the union and the union itself, did not, His Honour thought, come within the scope of "industrial matters" as defined in the statute. The vice created by an assumption to the contrary ran through subclauses (a), (b), (c) and (d) of clause 24 and subclause (g) of clause 25. Furthermore His Honour thought that subclause (c) of clause 24 was covered by the decision in **Butt v. Frazer and Ors.** (*cit. sup.*) and that it was beyond the jurisdiction of the Court of Arbitration. Mr. Ongley referred to the Queensland case **In re the Mount Morgan Gold Mining Co. Ltd. and Australian Workers Union,** (1917) Q.W.N. 21, where it was held that the Court had jurisdiction to make an award on lines very similar to those contained in the clauses in controversy in the present case. He also referred to the Cold Storage and Ice Making Award set out in the Queensland Industrial Gazette of 24th January, 1929. In Queensland, however, the definition of "industrial matters" expressly included "any matter, whether industrial or not, which in the opinion of the Court has been, is, or may be a cause, or contributory cause, of a strike or lock-out." In the **Mount Morgan case** a strike had actually occurred. The decision of the High Court of Australia in **Waterside Workers Federation v. Gilchrist, Watt and Sanderson,** 34 C.L.R. 482, was also referred to during the argument, but of that case also it was not necessary to say more than that it was decided upon the construction of enactments materially different in language from that of the New Zealand Act.

HERDMAN, J., concurred.

BLAIR and SMITH, JJ., delivered separate judgments concurring that subclause (e) of clause 24 was the only clause in question which was within the jurisdiction of the Court of Arbitration.

KENNEDY, J., concurred.

Solicitors for union: **Ongley, O'Donovan and Arndt,** Wellington.
Solicitors for employers: **Izard, Weston, Stevenson and Castle,** Wellington.

Supreme Court.

Myers, C.J.

February 25; March 20, 1930.
Wellington.

McCALLUM v. HILL.

Animals—Negligence—Droving Operations—Bullock Running-down Pedestrian on Highway—Negligence Not Proved.

Appeal on law and fact from a judgment of the Magistrate's Court at Wellington, whereby damages were awarded to the respondent in respect of injuries sustained by him, on 23rd August, 1929, while walking along the Ngahauranga—Johnsonville road. The injuries were caused by a Hereford bullock, one of a mob of eight that had arrived at Ngahauranga by rail from the Wairarapa district at some time during the previous night. The bullocks were untrucked by the appellant's drover, Robinson, who was an experienced and competent man, shortly before the time of the accident and were run into a holding pen. Robinson then went along the highway to see whether the Gorge Road, up which he intended to drive the bullocks, was clear of workmen or children. Seeing that it was, he went back to the holding-pen, opened the gate, and put his dogs in behind the cattle to drive them out upon the highway. A Hereford bullock, described by Robinson as being a "scarey" one, rushed out of the gate and made up the Gorge Road. Robinson whistled his leading dog to head and stop the bullock. The dog ran after the bullock and endeavoured to stop it but failed to do so, and the bullock charged up the road unchecked. The plaintiff, who lived in a house near by, came out of his gate, apparently just before the Hereford bullock rounded a bend in the road near the gateway. He made an effort to avoid it but failed, and he fell or was knocked down. The bullock did not appear to have charged him to gore him, but to have run over him as he appeared in its track. The Magistrate came to the conclusion that there had been a failure to take reasonable

precautions in the control of the bullocks, and that the mischief resulting was the natural consequence of such negligence, and gave judgment for the plaintiff. The defendant appealed.

Gray, K.C. and P. W. Jackson for appellant.

Hay for respondent.

MYERS, C.J., said that if thefact were that the bullock had shown itself to be wild before it was allowed to go through the gate, the respondent clearly enough, he thought, would have been entitled to damages. His Honour said that (apart from the Irish case to which he would later refer) because according to the drover himself, if a bullock, even though one only of a very small mob, was known to be wild, two men were employed to attend to the operations. In the present case only one man was employed, Robinson himself. It did not appear, however, that the bullock had shown itself to be wild before it was allowed to go through the gate, and the learned Magistrate had not so found. All that he said was that the bullock was described by Robinson as being a "scarey" one; and on examination of the notes of evidence His Honour found that such expression meant merely that when the bullock rushed out of the gate and across the road—but apparently not before then—it appeared to Robinson to be what drovers call a "scarey" bullock. Such being the facts, the Magistrate correctly said that the question was whether negligence on the part of the appellant had been established. If the injury to the respondent was caused by the negligent way in which Robinson handled the bullocks, then, quite irrespective of any question of *scienter*, the appellant would be liable: **Lysnar v. Binnie,** 24 N.Z.L.R. 241; **Paul v. Rowe,** 24 N.Z.L.R. 641. On a careful consideration of the facts, and of the authorities that were cited during the argument of the appeal, His Honour came to the conclusion that the Magistrate's judgment could not be supported. His Honour could find no such evidence of negligence as was required before the appellant could be held liable. First of all it would appear that the practice adopted in the present case was the same as had been generally adopted for many years under the same or similar conditions. That of course was not necessarily in itself sufficient to negative negligence but it was a fact to which the authorities in His Honour's opinion showed considerable weight should be attached. His Honour referred to **Smith v. Wallace,** 35 Sc.L.R. 583; **Harper v. Great North of Scotland Ry. Co.,** 13 R. 1139; **Paterson v. Fleming,** 23 N.Z.L.R. 676, 701, and **Tillett v. Ward,** 10 Q.B.D. 17, 18, as illustrating the importance attached to such evidence. In the present case, then, there was first of all the fact that cattle were being handled in the manner which had been customary for years under the same conditions, and they were being handled by a competent drover and three dogs. No affirmative evidence of negligence was called on behalf of the respondent, and no suggestion was made by any of his witnesses as to what additional precautions could or should have been taken, unless it were in the evidence of a time-keeper who said: "The bullocks have to be driven; but they could have a man in front with a stock-whip and dogs." The witness was not an expert in the handling of stock, and it was not suggested that such a course was ever adopted in similar conditions. His evidence on that point appeared to have been in no way relied upon by the Magistrate. The respondent himself, who had frequently seen cattle driven in that neighbourhood, said that as a rule only one man was placed in charge of a small mob. Another of the respondent's witnesses who had seen the particular bullock mob, including the bullock that did the damage, said that they were not vicious and that the method of droving was the usual method. And then there was evidence called for the appellant to the effect that more than one drover was never employed to handle a small mob of say eight cattle, and there was also evidence, which was uncontradicted, that an extra man could have done no more or better than the dog. Not only was the drover himself a competent man, but it was not suggested that the dogs were other than good and experienced cattle dogs. The Magistrate seemed to have drawn an inference adverse to the appellant because it was the practice of the appellant and also of the drover, when releasing cattle from the station yard to be driven up the Gorge Road, to go first along the road a little way to obtain a view up the Gorge Road before the cattle were released from the yard, in order to see as far as possible that the road was clear of workmen. His Honour did not think that it was justifiable, because the drover took this reasonable precaution, to say that there was negligence because it appeared in the light of after events that something additional might perhaps have been done which, if done, might possibly have prevented the accident. His Honour could deal only with the case as presented, and all he could say was that on the case as presented there was in his opinion no affirmative evidence of negligence, nor any evidence from which he thought an inference of negligence could reasonably be drawn. Of all the cases that His Honour had examined that which most clearly resembled the present case in its facts was **Howard v. Bergin O'Connor and Co.,** (1925) 2 Ir.R. 110. There, bullocks had been transported by the railway, and some of them were allowed to go out of the railway yards into the public highway, where one of them knocked down and injured the plaintiff. The plaintiff ultimately succeeded in her action, but there was affirmative evidence of negligence on the part of the defendant's servants in that the cattle were unloaded at the passenger platform, instead of at the cattle unloading bank, without proper precautions at the actual place of unloading, and the bullocks, or some of them, which had "got wild on the platform," instead of being kept till they had quietened down, were allowed to escape through an open gate into the highway, which gate could easily, and should, have been closed by the drovers. It seemed to His Honour on a close examination of the judgments in that case that, if the facts had merely been those which were proved in the present case, the result would have been otherwise than it was.

The case was undoubtedly a hard one, but the judgment appealed from was erroneous and must be reversed.

Appeal allowed.

Solicitors for appellant: **Levi and Jackson,** Wellington.

Solicitors for respondent: **Mazengarb, Hay and Macalister,** Wellington.

Myers, C.J. April 4, 1930.
Wellington.

IN RE CINEMA ART FILMS LTD.

Company — Debentures — Registration — Company Incorporated and Registered in New South Wales Carrying on Business in Australia and New Zealand—Greater Portion of Assets in Australia—Debenture Duly Registered in New South Wales But Not in New Zealand—Application for Extension of Time for Registration in New Zealand—Entry of Debentureholder into Possession—Meeting of Shareholders of Company Called to Consider Winding-up—Largest Unsecured Creditors in Australia—Extension of Time Granted on Terms Protecting Unsecured Creditors—Form of Order—Companies Act, 1908, S. 130.

Motion for an order under Section 130 of the Companies Act, 1908, extending the time for registration of a debenture issued by the Cinema Art Films Ltd., in favour of the Inter-State Investments Co. Ltd. The debenture, which was dated 3rd October, 1929, was given to secure the sum of £11,000 and further advances. The company was incorporated and registered in New South Wales, but carried on business in other States of Australia as well as in New Zealand. The assets of the company for the greater part were in Australia, though there were assets of substantial value in New Zealand. The debenture was duly registered in New South Wales but was not registered in New Zealand.

An affidavit filed in support of the application showed that the debentureholder entered into possession of the company's assets on 13th March, 1930, and that a meeting of shareholders of the company was held at its registered office in Sydney on 29th March, 1930, for the purpose of considering the winding-up of the company, which meeting was adjourned to 5th April. Counsel assured the Court, however, that to the best of their information and belief it was practically certain that a winding-up resolution would not be passed. All the largest creditors of the company were in Australia.

Johnston and **Fitzherbert** in support of motion.

MYERS, C.J., said that through accident or inadvertence within the meaning of S. 130 (7) of the Companies Act, 1908, the debenture had not been registered in New Zealand. The relevant authorities were collected and discussed by Reed, J., in **In re Dalgety and Co. Ltd.,** (1928) N.Z.L.R. 731, but the circumstances in the present case were exceptional and His Honour was not prepared to make an order in the terms in which the order was made in that case. Reed, J., there said that the order which he then prescribed would be adopted by him in future in all cases where he was satisfied that there was no necessity for any specific protection to be given to unsecured creditors. His Honour thought the present case was one of the class excepted by Reed, J., in his judgment in which special provision should be inserted in the order for the protection of

unsecured creditors. As His Honour understood the position, the company had but a limited number of creditors but it owed those creditors considerable amounts. All the creditors, His Honour was informed by counsel, at all events all the largest creditors, as were resident in Australia; and in the circumstances His Honour did not think that it was practicable to adopt the course suggested by Buckley, J., in **In re Cardiff Workmen's Cottage Co. Ltd.**, (1906) 2 Ch. 627, 630, of giving notice to the unsecured creditors of substantial amount so as to give them the opportunity of being heard. In His Honour's opinion the position of the unsecured creditors could best be protected partly by including in the order an undertaking by the debentureholder and its counsel somewhat on the lines of the undertaking laid down in the form of order in **In re Byers,** 24 N.Z.L.R. 903, and partly by including a proviso somewhat on the lines of that suggested by Buckley, J., in **In re Cardiff Workmen's Cottage Co. Ltd.** (*cit. sup.*) at p. 629. The undertaking to be included in the order would be an undertaking by the debentureholder by its counsel: "(1) not to raise any objection to the jurisdiction of this Honourable Court or any Judge thereof to set aside vary or discharge this order upon any motion which may hereafter be made, whether by any person or persons corporation or corporations claiming under any right or interest which may have accrued or come into being, or by any creditor or creditors of the company, or by any liquidator of the company, or by any other person or persons corporation or corporations claiming to be prejudicially affected by this order; and, (2) that the debentureholder will not further rely upon or seek to enforce this order if upon such motion this Honourable Court or a Judge thereof should be of opinion that this order should not in the circumstances have been made." The substantial portion of the order would then proceed in the ordinary form, with a proviso as follows: "Provided always that the security conferred by the debenture for whose registration the time is extended shall not, as against any creditor of the company who shall have become a creditor after the date when the debenture ought to have been registered and before the time when it shall be actually registered, or against any liquidator of the company in so far as concerns the claims of any such creditor, be of any greater validity than if this order had not been made, (the intent of this order being that so long as the claims of such creditors remain unsatisfied by the company the debentureholder shall have no greater priority as against such creditors in respect of the company's New Zealand assets than if this order had not been made and the debenture had remained unregistered), and so that it shall be competent for any person or persons corporation or corporations whether claiming under or in respect of any right or interest accruing to or arising in any such person or persons corporation or corporations or claiming as or being a creditor or creditors of the company or claiming as the liquidator of the company or otherwise for any reason whatsoever claiming to be prejudicially effected by this order to move before this Honourable Court or a Judge thereof to set aside vary or discharge this order and so that it shall be a condition of this order inseparable therefrom that the debentureholder shall not raise any question as to, or make any objections to, the jurisdiction of this Honourable Court or any Judge thereof to set aside, vary, or discharge this order and will not further rely upon or seek to enforce etc." (following the terms of the undertaking as above).

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

Reed, J. March 6; April 4, 1930.
New Plymouth.

GEARY v. MELROSE CO-OPERATIVE DAIRY CO. LTD.

Company—Co-operative Dairy Company—Alteration of Articles—Articles Conferring on Non-supplying Shareholders Right to Interest on Amount Paid up on Shares—Alteration of Articles Depriving Shareholders of Right to Interest—Alteration not *bona fide* for Benefit of Company as a Whole as Trading Entity—Acquiescence—Delay in Commencing Proceedings Not Amounting to Laches—Acquiescence No Defence to Claim to Restrain Future Illegal Proceedings—Companies Act, 1908, S. 122.

Action brought by plaintiff on his own behalf and on that of a number of non-supplying shareholders (known as "dry shareholders") to determine their right to interest upon the amount paid up on their shares in the defendant company. The company was incorporated on 12th September, 1912, and article 22A of its original articles provided: "Subject to the rights of the holders of any shares entitled to any priority preference or privilege the net profits of the company shall be divisible as follows: First in a payment to members at the rate of five pounds per centum on the amount paid up on each ordinary share and the balance of the net profits shall be paid to members in such proportions as the company shall decide." Table A of the Companies Act, 1908, was, subject to certain specified exclusions and modifications, adopted. When the company was first incorporated all the shareholders were suppliers and this continued for some years. During that period no payment of interest was made, the shareholders being all on an equal footing and sharing in the distribution of profits and in this form receiving interest on their capital but not *eo nomine*. In time some ceased to be suppliers and the company bought their shares. This method of dealing with the shares of dry shareholders ceased in November, 1923, and in July, 1924, owing to the demands of dry shareholders, it was resolved to commence paying interest. In August, 1925, the Chairman of Directors, one Williams, moved that article 22A be deleted, but this motion was defeated. Interest was paid until August, 1928, when a resolution proposed by Williams was carried repealing article 22A and substituting the following: "The shareholders of the company may be paid interest upon their shares at such a rate not exceeding 5 per cent. as the directors may declare. Subject to the right of the holders of any shares entitled to priority, preference or privilege, and to the payment of interest as aforesaid the net profits of the company shall be divisible between the members of the company in such proportions as the company shall declare." Acting upon this resolution the company paid no interest in the succeeding year but divided the profits among the suppliers and these proceedings were brought to determine the rights of the dry shareholders. The share capital was held as follows: dry shareholders, £1,547, supplier shareholders about £1,900. To pay interest to dry shareholders only would cost the company £77 7s. 0d. per annum or ·13d. per lb. of butterfat, and to pay all the shareholders at the same rate £177 per annum. The amount distributed annually among the supplying shareholders was approximately £11,000 per annum. The company owed, principally to its bankers, an overdraft of about £4,000, but its liabilities apart from shares amounted only to £1,180, and at its present rate of progress the company would be free from external debt in about six years. Its financial position was, therefore, admittedly good.

North for plaintiff.
Beechey for defendant.

REED, J., said that S. 122 of the Companies Act, 1908, gave a company power by special resolution, subject to certain limitations, to alter or add to its articles, and as to any alterations or additions so made it expressly provided that they should be deemed to be regulations of the company and of the same validity as if originally contained in the articles of association, and might in like manner be altered or modified by any subsequent special resolutions. Although nothing could be wider than the terms of that section a limit had been placed upon it by judicial decisions. Thus a majority might be restrained who were endeavouring, directly or indirectly, to appropriate to themselves money, property, or advantages which belonged to the company or in which other shareholders were entitled to participate: **Menier v. Hooper's Telegraph Works,** L.R. 9 Ch. 350. But even if the effect of altering the articles was to benefit the majority at the expense of the minority that did not invalidate the alteration if made *bona fide* and in the interests of the company as a whole. Lord Sterndale, M.R., in **Sidebottom v. Kershaw, Leese and Co.,** (1920) 1 Ch. 154, 162, cited with approval the following passage in Buckley's Companies Acts, 10th Edn., 26: "Possibly the limitation on the power of altering the articles may turn out to be that the alteration must not be such as to sacrifice the interests of the minority to those of a majority without any reasonable prospect of advantage to the company as a whole." If a majority of shareholders carried a resolution to alter the articles, not for the benefit of the interests of the company at large, but entirely for their own benefit and in their own interests, they had not acted *bona fide* and that was fatal to the validity of the alteration. But the question as to whether they had acted *bona fide* or not was not a distinct question but was involved in the general question which was put by Eve, J., in the same case as follows: "Was the resolution adopted, or was the alteration made for the benefit of the company or for the benefit of some section of the company, without reference to the benefit of the company as a whole?" The manner in which a Court should test the validity of an alteration in the articles was considered by the Court of Appeal in **Shuttleworth v. Cox Brothers and Co.,** (1927) 2 K.B. 9. His Honour quoted from the judgments of Bankes, L.J. (at p. 18) and of Scrutton, L.J., (at p. 23) and said that

although in the course of the argument a large number of cases were cited it was unnecessary to refer to them as the law, for the time being at all events, appeared to be settled by that case.

The question arising then was one of fact, namely, whether, when the majority shareholders carried the alteration, whereby they in effect deprived the dry shareholders of their right to 5 per cent. interest on their capital in the company, and appropriated the money representing same to their own use, they did it *bona fide* for the benefit of the company or not? In considering that question His Honour adopted the view of the learned authors of **Palmer's Company Law,** 13th Edn., 45 (n.) as to the meaning that should be attached to the words "the benefit of the company." They said: "The true view would appear to be that the benefit must be a benefit to the company as a trading entity irrespective of who are the shareholders."

His Honour reviewed the facts of the case and said that the result of the passing of the alteration was that £77 7s. 0d. which otherwise would go to the dry shareholders was divided amongst the producing shareholders, and the dry shareholders received nothing for the use of the capital subscribed by them. The majority reaped that benefit at the expense of the minority. Regarding the company as a trading entity, irrespective of who the shareholders were, the suggestion that £77 put into the pockets of the majority at the expense of the minority was for the benefit of the company as a whole as a trading entity was so extravagant that on its face no reasonable man could accept it, and was so oppressive that it at once raised a strong suspicion of *mala fides*.

The company gave reasons why it was in its interests as a whole, and it became necessary to consider them. First it was said that one of the supplier shareholders, Looney, who was also a director, threatened to transfer his patronage to a rival dairy company unless the company ceased to pay interest upon the capital and that that shareholder was a large supplier and that his withdrawal would materially injure the company. The minutes, however, showed that Mr. Looney's complaints were of a different nature altogether and that the company had met them by changing its manager and making certain arrangements with its bankers. Mr. Looney was called but failed to support any such threat, but stated that he had complained to the directors about payment of interest to dry shareholders. His opinion that if interest were paid shareholders would give up dairying and take to sheepfarming, drawing interest from the factory, was not warranted by the previous experience of the company, for although interest was paid from 1924 to 1928 there was no evidence of any supplier withdrawing during that period on the ground that interest was being paid. The more important reason urged in support of the allegation that the alteration was made for the benefit of the company as a whole might be stated thus: dairy farmers looked to the pay-out for butter-fat and they would be attracted to the company that paid most. If interest were paid it would be deducted from the amount available and the pay-out, although really unaffected, would on the face of it not compare favourably with the pay-out of other factories, and dairy farmers would be likely to transfer their patronage. The answer to that was first that in the last six years, which included the period during which interest was paid, one supplier only transferred his patronage to another factory and there was no evidence as to why he did so. Secondly to pay the dry shareholders the £77 per annum that would be required to pay 5 per cent. interest on their capital would affect the pay-out by .13 of a penny per pound of butter-fat. His Honour agreed with the opinion of certain witnesses that such a sum would not affect the company at all in the matter of success or failure. It might be observed that whilst the company was paying interest it was being paid to all shareholders, suppliers as well as dry, which meant a payment of £177 per annum, and yet the deduction of that sum from the pay-out on butter-fat, more than twice as much as was required to pay the dry shareholders only, had no ill effect on the success of the company. His Honour was forced to the conclusion, therefore, that the alteration in the articles was not made *bona fide*; it was not made in the interests of the company as a whole but solely to benefit the majority of the shareholders at the expense of the minority.

It would be observed that the right to interest was not absolutely negatived, discretionary power being granted to the directors to declare the payment of interest at a rate not exceeding 5 per cent. The fact that by the articles no dry shareholder might be a director, and that in a better year (1928-1929) than the preceding one no interest was declared payable, showed that the amendment in that form was a subterfuge. It would have been more candid to have provided in plain language that no interest should be paid to dry shareholders. It was not irrelevant to a consideration of the causes that have led to the passing of the amended article to note that it was not denied that a feud had existed for some time between the families of the chairman of directors (Williams) on the one hand and that of the plaintiff on the other, and that Williams was the most active in pushing the alteration. Further, it was admitted by the secretary of the company that discussions had taken place at directors' meetings as to the advisability of the company going into liquidation in order to get rid of the dry shareholders.

The company had alternatively alleged as a defence that the plaintiff had by his conduct acquiesced in the alteration of the articles of association, or alternatively, that the plaintiff had stood by and allowed the company to act on the articles as amended and was estopped from claiming relief in respect of such amendment. The fact was that the plaintiff protested vigorously against the amendment and voted against it. The defendant company based such defence upon the fact that the writ was not issued until September, 1929, whilst the confirming resolution amending the articles was passed in August, 1928. There was no evidence that the plaintiff at any time abandoned the position taken up by him and His Honour did not think that in the circumstances of the present case the delay in the issue of the writ amounted to laches. Moreover the plaintiff was not seeking to set aside the distribution of profits for the year 1928-1929 based on the alteration in the articles but sought to restrain future illegal proceedings by the company. Acquiescence, even if, from the delay in commencing proceedings, such could be inferred, was not, in such circumstances, a good defence: **Mosely v. Koffyfontein Mines Ltd.** (1911) 1 Ch. 73.

In view of the conclusions at which His Honour had arrived it was unnecessary to consider an alternative submission by the plaintiff that even upon the amended article the dry shareholders were entitled to participate in the "net profits of the company." That contention was based upon the words "the net profits of the company shall be divisible between the members of the company in such proportions as the company shall declare." It was argued that the dry shareholders were members (S. 21 of the Companies Act, 1908) and that it would be *ultra vires* of the company to "declare," in accordance with that article, that any particular section of the members should receive no share of the profits. There was considerable weight in that submission, but, as His Honour had said, it was unnecessary to come to any definite conclusion.

Amended article declared void.

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

Solicitors for defendant: **Welsh, McCarthy, Beechey and Houston,** Hawera.

Reed, J. February 28; March 26th, 1930. New Plymouth.

WOOD v. FREYNE.

Negligence—Collision—Liability of Father for Negligent Driving of Daughter—Daughter Using Father's Car with his Knowledge for her Own Purposes—Mere Fact that Guest of Father Being Driven in Car Not Sufficient to Constitute Daughter Agent of Father—Onus of Proof of Agency—Quaere Whether Any Presumption of Agency Arising from Proof of Ownership of Car Where Car Owned by Father Driven by a Member of His Family.

Appeals on law and fact from the judgment of Mr. Tate, S.M., awarding damages to the two respondents against the appellant and his daughter in respect of a motor collision. By consent the actions were tried, and the appeal heard, together. One car was driven by the respondent T. B. Freyne, whose father, the respondent A. Freyne, was a passenger and injured in the collision, and the other by the appellant's daughter, Ruby, who was aged 18, and who had held a driving license for two years. The appellant owned the car that was driven by his daughter but was not an occupant at the time of the collision. The appellant's daughter did not appeal.

Billing for appellant.

O'Dea for respondent.

REED, J., said that the main question to be decided was whether the appellant was responsible for the negligence of his daughter. That depended upon whether, in the circumstances of the case, she could be said to be his servant or agent. The learned Magistrate on the authority of **Timaru Borough v. Squire,** (1919) N.Z.L.R. 151, had held that she was his agent

or servant and that consequently the father was liable. The present was not a case where the law attached liability to the parent on the ground of his own negligence in affording or allowing his child an opportunity of doing mischief. There was no negligence imputable to a parent for allowing to drive his car a daughter of 18 years of age who possessed a license. If the appellant was to be held liable in the present case it must be upon the ground that his daughter was at the time of the accident acting as his agent or servant. The case of **Timaru Borough v. Squire,** (1919) N.Z.L.R. 151, was an authority for the following propositions of law: (1) in order to make a father liable for the negligence of his daughter "it is not necessary to prove any contract of hiring and service between them, the terms 'servant' and 'agent' being used in the authorities as pretty well synonymous," (2) that proof of the ownership of a motor car being in the father was sufficient *prima facie* evidence that the negligent driving of the daughter which caused the collision was imputable to the father without proving affirmatively that she was his servant, and (3) that in such circumstances the onus of proof was on the father to "make out clearly that his daughter was not acting as his agent when the collision took place." That decision appeared to go further than that of any previous case with the exception perhaps of **Leary v. Osborne,** 20 N.Z.L.R. 416, where, if correctly reported, Stout, C.J., held a father liable for the negligence of his stepdaughter the only evidence being (1) that he was the owner of the gig that she was driving; (2) "it was her custom to drive her mother out, and she was doing so with his knowledge and consent." The judgment did not appear to be a considered one and it was on appeal from a Magistrate, there being, therefore, no appeal from the judgment of the Supreme Court except by consent. It was clear upon the authorities that "mere knowledge and consent" were not sufficient to establish the relationship of master and servant or principal and agent. His Honour referred to the statement of this principle in **Salmond on Torts,** 6th edn. 110. The authorities cited by Sim, J., in **Timaru Borough v. Squire** (*cit. sup.*) in support of his ruling that the owner of a motor car was liable for the negligence of his daughter upon proof of ownership, unless he was able to "make out clearly that his daughter was not acting as his agent when the collision took place, were all cases of strangers in blood in charge of the vehicle or animal concerned. It was proper that in such circumstances the law should infer the relationship of either master and servant or principal and agent and throw upon the owner the onus of proving the contrary, but nowadays when motor cars were in such general use and, in a large number of cases were treated as family cars and driven by various members of the family, it appeared to His Honour to be against common experience that the children of the family were engaged upon their father's business whilst in charge of a car. If, therefore, the usual thing to find was that when a youth was driving his parent's car he was on his own frolic the law should not presume to the contrary—it should not presume that which by common experience was known to be contrary to fact. If it was desirable that parents should be held responsible for the negligence of their children when in charge of their parent's cars it was the business of the legislature to say so and the Courts should not be required to enter into a microscopical examination of the evidence to see whether it was possible to pick out something from which it might be inferred that the child was on his father's business when the negligence occurred. In **Timaru Borough v. Squire** (*cit. sup.*) the father was held liable for the negligence of his daughter whilst in charge of his car, upon the ground that at the time of the collision she was acting as his agent or servant. That finding was based on the following: (1) the father was the owner of the car; (2) the daughter was driving a friend, who was going to stay with her, to her father's house when the collision took place; (3) the father was unaware that any friend of his daughter was coming on the day of the collision to the house as a guest; (4) it was consistent with the proved facts that the father had given his daughter general authority to invite occasionally an old school friend to stay with her as a guest in her father's house, and to use his motor car for the purpose of bringing such a guest to the house; (5) the business on which the daughter was engaged concerned the father for she was creating the relation of host and guest between him and her friend—a relationship which would impose upon him certain legal responsibilities. The learned Judge held: "In the absence of any evidence to the contrary, that ought to be treated as the respondent's business, and the presumption of agency, therefore, has not been rebutted." He further held that probably the Magistrate "was right in holding that the appellant had not proved .... affirmatively" that the daughter was her father's agent at the time of the collision, but that the appellant was entitled to the benefit of the rule as to the onus; "and when it had been proved that the car belonged to the respondent the onus lay on him of proving that his daughter was not his agent at the time of the collision." He held that that onus had not been discharged. For the reasons that His Honour had already stated he thought that such ruling required further consideration, but it was unnecessary for him to definitely express an opinion for he held that the appellant in the present case had discharged the onus.

His Honour reviewed at length the evidence the effect of which may be summarised as follows: The appellant, in evidence, described his car as a family car and admitted having taken out licenses to drive it for his wife, his daughter, Ruby, and his son, John. On Saturday, 30th June, 1928, the appellant's daughter, Ruby, with the appellant's son, John, and two persons named Coombes left from the appellant's house at New Plymouth to visit a show being held at Hawera. They picked up *en route* by previous arrangement a Mrs. Fisher and her young child. The party, with a Mrs. Reilly as an addition, were returning from Hawera to New Plymouth on the following day, when the collision occurred. All the members of the party were connections: one of the two Coombes was a guest of the appellant at his house at New Plymouth and the evidence showed that possibly the other was also. There was no evidence to show that the appellant was consulted as to the trip, but he knew about it. Even assuming that the onus was on the appellant of proving that his daughter was not engaged on his business His Honour thought the evidence conclusively proved that she was on her own pleasure only and in no way acting as her father's agent or servant. The only possible ground for suggesting otherwise was that in the party were the two Coombes, one at least of whom might be regarded as a guest, but to hold that when a young girl took her cousin, a youth of her own age, out for a drive she was thereby acting as her father's servant because that youth happened to be a guest in her father's house was not in His Honour's view warranted by the decision in **Timaru Borough v. Squire** (*cit. sup.*). The appeals must be allowed.

As the amount involved was substantial, amounting to £295 5s. 3d. and there was an important question of law involved, leave would be granted to appeal to the Court of Appeal. In the event of leave being availed of and the Court of Appeal reversing His Honour's decision it was necessary to express an opinion upon the question of negligence. His Honour thought that there was evidence from which the Magistrate was justified in finding that the real cause of the collision was the negligence of Ruby Wood. If that had been the only point involved His Honour should have dismissed the appeal.

Solicitors for appellant: **Weston and Billing,** New Plymouth.
Solicitors for respondent: **O'Dea and Bayley,** Hawera.

Reed, J. February 21; March 24, 1930.
Wanganui.

IN RE HALL: EX PARTE OFFICIAL ASSIGNEE.

Bankruptcy—Assignment—Assignment of Moneys to Become Due Under Entire Contract for Work—Contract Completed at Date of Bankruptcy With Exception of Certain Minor Requisitions by Engineer—Assignment Valid as Against Official Assignee—Assignment Not an Instrument Requiring Registration Under Chattels Transfer Act as an Instrument Comprising Book Debts—Jurisdiction of Court to Determine Validity of Assignment on Motion—Bankruptcy Act, 1908, S. 9 (c)—Chattels Transfer Act, 1924, Ss. 18, 31.

Motion under S. 9 (c) of the Bankruptcy Act, 1908, for a declaration that an assignment by the bankrupt to C. N. Williamson & Co. Ltd. of moneys payable to the bankrupt by one Nicholls was of no force and effect against the Official Assignee. The bankrupt was adjudicated on 26th September, 1929. The assignment was in the form of an order addressed to Nicholls and signed by the bankrupt requesting Nicholls to pay to C. N. Williamson & Co. Ltd. the sum of £71 15s. 0d. being the amount to become due by Nicholls to him for the installation of lighting and power to his garage as quoted, and was expressed to be an absolute assignment of the said sum of £71 15s. 0d. to C. N. Williamson & Co. Ltd. Notice of the assignment was duly given to Nicholls. The grounds upon which it was alleged that the assignment was of no force as against the Official Assignee were: (1) that the contract referred to was an entire contract, and that such contract was not completed by the bankrupt prior to his being adjudicated bankrupt: (2) that such assignment was null and void as against the Official Assignee by virtue of S. 18 of the Chattels Transfer Act, 1924.

The bankrupt was an electrician and had on or about 22nd July, 1929, contracted with Nicholls for the installation of electric lighting and power, including the necessary meters, for his garage, the contract price being £57 10s. After the bankrupt had commenced the work certain extras were ordered bringing the total amount coming due to the bankrupt upon completion to the sum of £71 15s. 0d. The bankrupt whilst engaged upon the work was sued by Williamson & Co. Ltd. for £46 4s. 9d., the summons being for hearing at Auckland on 15th August, 1929. Prior to the issue of the summons the bankrupt's credit with Williamson & Co. Ltd., who were dealers in electrical appliances, had been stopped. On 13th August the bankrupt interviewed that firm and in consideration of the assignment or order on Nicholls the summons was adjourned *sine die* and further credit was allowed to him. The contract was between Nicholls and the bankrupt and, although, as it appeared, one Masters and the contractor for the building were each finding part of the money, it was Nicholls who was responsible to the bankrupt for the contract price, together with the cost of the extras. On 2nd September the work had been completed and Nicholls took over and connected up and used and had continued to use the installation. The meters had been obtained from the electrical department of the local Borough Council and installed by its workmen. The switches and switchboard had also been supplied and installed and on 2nd September the electrical engineer of the Borough Council gave permission for the installation to be used. The switches were of a type "extensively used" and were of the "slow make and break" type. For technical reasons, owing to the installation being in a garage and therefore subject to benzine fumes, the engineer instructed that the switches should be replaced by a "quick make and break" type and also required the "switchboard to be cut as it was not of the required thickness" according to Government regulations. The approximate cost of such alterations would be 10s. He passed the work on 2nd September subject to those small matters being put right. They were not finally attended to until after the date of the adjudication. It was claimed that the bankrupt had not at the date of adjudication completed the work to be done by him under the contract as the necessary switches had not been supplied and the switchboard was not completely boxed in and that accordingly no monies were due under the contract at the date of adjudication.

Maclean for Official Assignee.
Rice for C. N. Williamson & Co. Ltd.

REED, J., said that a preliminary point had been taken on behalf of Williamson & Co. Ltd. that the Court had no jurisdiction on the motion before the Court to determine the questions involved and **Ex parte O.A. of Pearson,** 13 N.Z.L.R. 338, was cited as supporting that contention. In that case Connolly, J., held that an application for the opinion advice or direction of the Court under S. 67 of the Act of 1892 (S. 65 of the Act of 1908) was not, in circumstances similar to the present, a question respecting the management of the estate, and the application was refused. Nevertheless Cooper, J., in **In re Thomas,** 29 N.Z.L.R. 510, dealt with a similar application under that section. However the motion at present before the Court was not an application under that section but was a motion for an order under Section 9 (c). His Honour thought the Court had jurisdiction under that section to make an order determining the rights of the parties. It was done in the cases of **In re Irvine,** (1919) N.Z.L.R. 351, and **O.A. of Bredow v. Newton King Ltd.,** (1926) N.Z.L.R. 198. Mr. Rice referred to **In re Morrison,** 25 N.Z.L.R. 513, but all the Court of Appeal there held was that when the Official Assignee sold goods the property of a bankrupt to any person for payment in the future or for immediate payment he could not recover the purchase money by a proceeding in bankruptcy, but must enforce it by an ordinary action in the Supreme Court or Magistrate's Court.

It was further contended that on the proved facts the money in question was actually in the hands of the Official Assignee and was, therefore, not a claim for "property from third parties" within Section 9 (c) (ii). Upon the evidence before him, His Honour found as a fact that the money was not in the hands of the Official Assignee. It was in the hands of Masters in his private capacity as being the person ultimately liable for the payment of the moneys due by Nicholls under the contract but not in his hands in his capacity as Official Assignee although he held that office. His Honour thought the preliminary point failed.

The assignment in the present case was an assignment of moneys which were to become due to the bankrupt at a future date—that was upon the execution of the contract. If the contract was not performed before his adjudication no debt would arise upon which the assignment could operate and the benefits of the contract would be an asset in his estate: **O.A. of Bredow v. Newton King Ltd.,** (1926) N.Z.L.R. 198. The question, therefore, was whether before the 16th September the contract price had become a debt due and payable to the bankrupt. His Honour thought that on 2nd September it had become a debt recoverable by action at the suit of the bankrupt. His Honour referred to **Dakin v. Lee,** (1916) 1 K.B. 556, and said that the bankrupt need not have carried out the requirements of the electrical engineer and could at any time after Nicholls took possession on 2nd September have recovered by action the amount of the contract price and extras less such sum as might have been awarded for any deficiency. It was, therefore, on 2nd September a debt upon which the assignment operated.

It was further contended that the assignment was null and void against the Official Assignee in bankruptcy by virtue of S. 18 of the Chattels Transfer Act, 1924. S. 31, however, provided that book or other debts should be deemed to be chattels and any instrument comprising book or other debts was made subject to the provisions of S. 18. As to whether the assignment was an instrument under that section depended upon whether the money which on 2nd September became payable to the bankrupt was, at the date of the execution of the instrument, a debt. His Honour was satisfied that it was not, there being no money owing by Nicholls to the bankrupt at that date; it did not become a debt until 2nd September, 1929.

Motion dismissed.

Solicitors for C. N. Williamson & Co. Ltd.: **Endean, Holloway and Hubard,** Auckland.
Solicitors for Official Assignee: **Maclean and Kincaid,** Taihape.

Adams, J. March 28; April 14, 1930.
Christchurch.

W. A. McLAREN & CO. LTD. v. NEW ZEALAND INSURANCE CO. LTD.

Insurance—Motor Vehicle Insurance—Motor Omnibus Insured in Joint Names of Owner and Hirer—Policy Excluding Liability of Insurers for Damage Occurring While Vehicle Driven in Damaged or Unsafe Condition—Vehicle Destroyed by Fire While Being Driven in Damaged and Unsafe Condition—Owner as well as Hirer Bound by Provision even if Policy a Separate Insurance of Interest of Each Insured.

Action to recover £400 under a policy of insurance. The plaintiff was a company carrying on business in Christchurch as engineers and agents for motor-vehicles. In October, 1928, the plaintiff hired a motor-omnibus to one McDuff on the terms of the usual hire-purchase agreement, and made a proposal to the defendant company to insure the omnibus in the joint names of the plaintiff as owner and McDuff as hirer. The defendant accepted the proposal and issued a policy in accordance therewith dated 18th October, 1928, and in a common form. The policy contained the following proviso: "Provided always and it is hereby expressly agreed and declared that no liability shall attach to the company under this policy in respect of any loss, damage, or liability occurring while any motor-vehicle in connection with which indemnity is granted under this policy is being driven in a damaged or unsafe condition." On 21st July, 1929, the motor omnibus was destroyed by fire and became a total loss. At the time of the fire the omnibus was being driven in a damaged and unsafe condition, in that the flexible tube attached to the exhaust under the bonnet was broken so as to allow the flame from the exhaust to escape, and the band had been removed from the generator, and the Court took the view that one or both of those serious defects was the cause of the fire which destroyed the vehicle. The evidence showed that these defects had been in existence at least for several weeks prior to the fire to the knowledge of the hirer McDuff and of the person who was driving the vehicle when the fire occurred.

Donnelly and Brassington for plaintiff.
Thomas for defendant.

ADAMS, J., said that the facts were not disputed and in truth were beyond dispute. But counsel for the plaintiff contended that in the circumstances the proviso should be construed liberally, and as it was common knowledge that the vehicle would be in the sole possession of McDuff, the hirer, and that the plaintiff would thus have no means of knowledge as to its condition the policy should be read as a separate insurance of the interests of each insured and that the plaintiff

was entitled to sue on it without regard to the proviso. In other words, for the purposes of the present action, the policy was to be read as a separate insurance of the plaintiff's risk and for that purpose the proviso was to be ruled out as against him. His Honour agreed that it was incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions and stipulations on which the insurance was offered, and that in a case where there was any ambiguity those documents were to be construed *contra proferentes*. But in the present case there was no ambiguity, and there could be no objection to the insertion of stipulations such as the proviso at present under discussion if the intending assured had full and fair notice of them and consented to them. Those propositions were stated by Farwell, L.J., in **In re Bradley and Essex and Suffolk Accident Indemnity Assn.,** (1912) 1 K.B. 415, at pp. 430, 441, and were well settled. But in the present case the proposal was the joint proposal of the plaintiff and McDuff and was signed by the plaintiff. Moreover, the proviso was printed on the back of the proposal for all parties to read and understand. The policy was in accord with that proposal, and there was no doubt that the amount of premium payable was fixed at a lower rate than would have been demanded if the proviso had been deleted. Counsel referred to a passage in the judgment of Viscount Cave in **P. Samuel and Co. v. Dumas,** (1924) A.C. 431, 445, but in the present case by the express terms of the contract the insurance was suspended while the vehicle was being driven in a damaged and unsafe condition. That was the contract, and, whether the plaintiff could sever and bring a separate action or not, its right to recover on the policy was equally limited by the terms of that contract. Having effected the insurance on those terms it was idle for the plaintiff to ask the Court to strike out a material term in the contract to which it had agreed and for which it had doubtless received consideration by reduction of premiums. The Court could not make a new contract for the parties. With reference to the argument *ab inconvenienti* that the literal reading of the proviso in question might lead to hardship, His Honour could only say, as was said by Lord Russell of Killowen in **The Sulphite Pulp Co. v. Faber,** 1 Com. Cas. 146, 152, that he was not prepared to spell out a contract that the parties had not made.

Judgment for defendant.

Solicitors for plaintiff: **Wilding and Acland,** Christchurch.
Solicitor for defendant: **C. S. Thomas,** Christchurch.

Adams, J. February 25; March 22, 1930. Greymouth.

McHENRY v. CONLON.

Mining — Jurisdiction — Wardens Court — Partnership — Partnership of Ten Persons Carrying on Coal-mining Operations — Wardens Court No Jurisdiction to Dissolve Partnership Formed to Carry on Coal-mining Operations But Not a Mining Partnership — Matter Not One Arising in Respect of Leases, Licenses, and Coal-mining Operations under Coal-mines Act, 1925 — No Power to Increase Number of Members of Partnership Without Consent of All Partners — Coal-mines Act, 1925 — Companies Act, 1908, S. 5 — Mining Act, 1926, S. 336.

Motion for a writ prohibiting the Warden's Court and the Warden of the Westland Mining District from exercising jurisdiction in an action in the Warden's Court at Reefton. The facts as admitted were that ten persons including the present plaintiffs and the defendant, Dr. Conlon, had for some time prior to January, 1930, carried on coal-mining operations within the Westland Mining District, all the partners except Dr. Conlon being working members. On 7th December, 1929, the partners owning a majority of the shares or interests passed a resolution to admit James Williams as a partner, and on 4th January, 1930, a similar resolution was passed to admit Thomas Hubert Lee as a partner. On 7th January Dr. Conlon gave notice to determine the partnership as from 8th January, and on that date commenced proceedings in the Warden's Court for dissolution of the partnership and consequential remedies. On 23rd January Dr. Conlon gave notice that at the sitting of the Warden's Court at Reefton on 28th January he would amend the statement of claim by adding a clause for a declaration that Williams and Lee were members of the partnership and to join them as defendants. The action and motion came on for hearing before the Warden on 28th January when the present plaintiffs contended that the Warden's Court had no jurisdiction to hear and determine the questions in the action on the grounds: (1) that the partnership was not a mining partnership under Part VIII of the Mining Act, 1926, (2) that the action was not an action or proceeding concerning a matter in respect whereof jurisdiction was conferred on the Warden's Court by S. 336 of the Act, (3) that no action could be maintained in the Warden's Court in respect of an illegal partnership at the suit of a member of such partnership. The Warden reserved his decision and on 14th February, after stating his opinion that the Warden's Court had, under Subsection (i) read with Subsection (n) of Section 336 of the Mining Act, 1926, jurisdiction in respect of matters relating to partnerships carrying on coal-mining operations, and that, as he held Williams and Lee to be members of the partnership, Subsection (3) of Section 5 of the Companies Act, 1908, with Section 359 of the Mining Act, 1926, gave the Warden's Court power to wind up the partnership, ordered that Williams and Lee be added as defendants and pronounced a decree for dissolution of the partnership and for accounts.

Hannan for plaintiffs.
Patterson for defendants.

ADAMS, J., said that the jurisdiction of the Warden's Court was defined in S. 336. Within the orbit thus defined the jurisdiction was exclusive and the jurisdiction of the Supreme Court was to that extent ousted. Decisions within those limits could be questioned only on appeal under S. 336, but the power and duty of the Supreme Court to keep the Warden's Court within its jurisdiction remained in full effect. In the present case the claim to jurisdiction could be supported only if it came within the express provisions of S. 336. The partnership was clearly not a mining partnership within Part VIII of the Mining Act and that was properly admitted by counsel for the defendant Dr. Conlon. The difference between an ordinary partnership such as the present one and a mining partnership was fundamental—**Stewart v. Nelson,** 15 N.Z.L.R. 637. A partnership formed to carry on coal-mining operations under the Coal-mines Act differed fundamentally from a mining partnership and they did not "correspond" to each other. If, however, it were held that such partnerships did correspond to each other that would not help the defendant; by the express terms of Subsection (n), the "matter" in respect of which the action was brought must arise in respect of a lease, license, or in respect of coal-mining operations under the Coal-mines Act. But the "matter" of the present action was not in respect of a lease, license or coal-mining operations under the Coal-mines Act. It was concerned solely with two questions—the admission of two new partners as members of an ordinary partnership and the winding up of that partnership, and those were the only "matters" on which the Warden's Court was asked to adjudicate. His Honour referred at length to the decision of the Court of Appeal in **Westport Coal Co. v. Champion,** 26 N.Z.L.R. 590. where Subsection (n) was considered by the Court. The meaning of that decision plainly was that the words "under the Coal-mines Act, 1925" in Subsection (n) of S. 336 of the Mining Act 1926, qualified the preceding words in the subsection, and therefore that only such matters as were dealt with in the Coal-mines Act were relegated to the Warden's Court by Subsection (n). There being nothing in the Coal-mines Act relating to partnerships formed for the purpose of carrying on coal-mining operations, the Warden's Court had no jurisdiction in relation to such partnerships. On that ground the plaintiff was entitled to the writ claimed.

His Honour next considered the question of illegality. The partnership consisted of ten persons. The addition of one or more partners would, therefore bring the number to more than the maximum permitted by S. 5 of the Companies Act, 1908, and the partnership would thereupon become an illegal association. No doubt the Warden assumed that he was dealing with a mining partnership and that partners owning a majority of the shares or interests could at their pleasure, and without the concurrence of the minority, increase the number of partners for the time being. But it was a fundamental principle of partnership law that no person might be introduced as a partner without the consent of all existing partners—**Lindley on Partnership,** 9th edn., 448—and that was expressly enacted in S. 27 (g) of the Partnership Act, 1908. Section 329 of the Mining Act enabled a partner in a mining partnership to sell or assign his interest, but did not authorise a majority to add to the number of partners. It followed that the resolutions of the majority purporting to admit Williams and Lee as partners were void and effected no change in the partnership. There was, therefore, no breach of the provisions of Section 5 of the Companies Act, 1908.

Writ of prohibition issued.

Solicitors for plaintiffs: **Hannan and Seddon,** Greymouth.
Solicitor for defendants: **I. Patterson,** Reefton.

Ostler, J. March 8; 27, 1930.
Masterton.

TINKHAM v. JESSEP.

Sale of Goods—Ewes Sold as "In Lamb"—Impossible to Determine by Inspection Whether Ewes in Lamb or Not—Sale by Description—Meaning of "In Lamb"—Observations as to Quantum of Damages.

Appeal in law and fact from a decision of the Stipendiary Magistrate at Masterton. On 2nd August, 1929, the appellants purchased from the respondent 547 ewes at the price of £1 2s. 6d. per head. It was claimed that the ewes at the time of the sale were described as being "in lamb," but that only 212 of them were in lamb. The appellants claimed damages from respondent for breach of warranty. The facts as found by the learned Magistrate were that the sheep were first offered to the appellants by one Corksie, the agent of the respondent, who described them as "ewes running with Romney rams" and also as "ewes in lamb." Later the appellants saw the respondent himself, who did not describe the ewes as "in lamb," but as "running with rams." At the time of the sale the ewes were in poor condition and "tucked up" through lack of food, so that the appellants could not have ascertained by inspection whether they were in lamb or not, and they were therefore compelled to rely on the description. The ewes were the balance of a line of 2,300 which had travelled down from Wairoa in Hawke's Bay to the Wairarapa. Various lots had been sold from the line to other buyers, who in selecting their sheep would have rejected any that appeared to be not in lamb. The appellants were not informed of this fact, but they were told where the sheep had come from. The Magistrate further found that the expression "ewes in lamb" did not influence the appellants at the time the sale was made, and at the time they acted as though they were purchasing ewes "running with rams"; that they expected only a low percentage of lambs and paid a low price for the sheep accordingly. On those findings of fact the learned Magistrate decided that although the ewes were described at the time of the sale by respondent's agent as "in lamb" the respondent himself before the sale had subsequently described the ewes only as "running with rams," and as that description did not imply a warranty that they were "in lamb," the appellant had no case. He gave judgment accordingly for the respondent.

Biss for appellant.
Laing for respondent.

OSTLER, J., said that it had been found as a fact that the respondent's agent described the ewes, when offering them to the appellants, as being in lamb. It was clear from the evidence that the respondent seemed to admit that he himself in describing the ewes to the appellants used the expression in lamb. His Honour thought that it was clear from the evidemce of the respondent himself that the ewes were sold under the description of "ewes in lamb." It had been found as a fact that it was impossible to find by inspection whether the ewes were in lamb or not. In His Honour's opinion, therefore, the sheep having been sold by description, there was an implied condition under S. 16 of the Sale of Goods Act, 1908, that they should answer to that description. His Honour thought, moreover, that the appellants were entitled under the circumstances to rely on that description, especially as the respondent himself admitted that they were probably right in saying that the sheep were described by him as "ewes in lamb." It was in that respect that His Honour differed from the learned Magistrate. In His Honour's opinion the judgment was erroneous first in the finding of fact that the respondent did not describe them as "ewes in lamb," and secondly in the finding of the fact that the expression "ewes in lamb" did not influence the appellants in inducing them to purchase. It might well be that the appellants realised that owing to the poor condition of the sheep there would be a low percentage of lambs and it might be owing to that circumstance that they offered a low price, but those considerations affected only the amount of damages which they would be entitled to recover. It did not affect their right of action.

On the question of law as to the legal meaning of the description "ewes in lamb," in His Honour's opinion the Magistrate's judgment was correct. The description did not of course mean that every ewe was in lamb, as might well be the case where a line of cows were sold under the description of being in calf, but it did mean that at the date of the sale that at least 80 per cent. of the ewes were "in lamb." His Honour thought that the principle of the decision in **Jackson v. Townsend,** 33 N.Z.L.R. 242, applied. His Honour agreed also with the Magistrate that it did not matter whether the respondent intended to give any guarantee or not. A description was to be understood in the sense in which it was reasonably understood by the person to whom it was made. What the describer professed to have meant was entirely immaterial. If a seller of sheep described them as "in lamb" an intending purchaser was entitled to take that description as meaning that at least 80 per cent. of those sheep were in lamb at the time the description was given. That description, in the circumstances of the present case, was a condition of the sale. If the condition was broken the appellants had the right to treat the condition as a warranty and to sue for damages for breach of that warranty. Having done so they were entitled to damages.

As to the amount of the damages, the learned Magistrate had found that it was likely that a larger percentage of lambs was dropped than the percentage which was actually docked. The matter of course only affected the quantum of damages. He had also found that a low price was given for the ewes because the appellants expected a low percentage of lambs. If that was so the expectation must have been based on the poor condition of the ewes, for it was admitted that the question whether they were in lamb or not could not be determined by inspection. The appellants were entitled to rely on the description that some 80 per cent. were in lamb at the time of the sale. If he had proved that that was not so he was entitled to damages. With regard to the damages, that was a matter which must be settled by the Magistrate on the evidence. If the price given by the appellants was no greater than the value at the time of empty ewes of that class then they had suffered no damage. If, however, as would seem to be the case from the evidence, the reduction in price was entirely on account of the condition of the sheep, then there would be damages to assess. As the matter would be determined by the Magistrate, His Honour did not wish to say anything further which might possibly affect his discretion in the matter.

Appeal allowed.

Solicitors for appellants: **Gawith, Biss and Wilson,** Masterton.
Solicitor for respondent: **J. MacFarlane Laing,** Masterton.

Ostler, J. March 8; 31, 1930.
Masterton.

IN RE CAVANAGH (No. 2).

Administration—Executor—Commission—Death of One of Two Co-Executors—Application by Surviving Executor for Commission—One Sum Only Allowable—No Power in Court to Allow Portion of Commission to Representatives of Deceased Executor—Allowance Narrowed if Shown that Deceased Executor Participated in Work for which Commission Sought—Administration Act, 1908, S. 20.

Motion to increase amount of commission recommended to be paid to trustees on passing their accounts in the report of the Registrar. The testator, J. Cavanagh, died on 19th January, 1911, leaving a will under which he appointed J. Wolland and E. J. Smith, both sons-in-law, executors and trustees of his estate. By his will he devised his estate to his trustees upon trust to pay the nett income to his wife and an unmarried daughter in equal shares, and upon the death of his wife upon trust to set aside £3,000 and to stand possessed of the investments representing the same upon trust to pay the income thereof to the said daughter during her life and upon trust for such person or persons as she should appoint and in default of appointment on trust for such persons as would have taken the same had it been the absolute property of the daughter at the time of her death. The trustees were directed to stand possessed of all the residuary estate in trust for the two sons of the testator. The widow had died, and the £3,000 had been set aside and invested for the daughter, and there was a residue of some £739 to be divided between the two sons. E. J. Smith died in 1926. The surviving trustee J. Wolland had carried on the trust and he had petitioned for an allowance of commission under S. 20 of the Administration Act, 1908, upon the passing of his accounts. The Registrar's report recommended that £225 be allowed to the executors for their pains and trouble, that sum to cover all future allowances for commission on the

collection of interest and for the control of the investment of the £3,000. He recommended, however, if it be held that commission could not be granted to both executors, but only to the surviving executor, Wolland, that the sum of £112 10s. 0d. be allowed to him for his pains and trouble. Wolland was not satisfied with that report and moved the Court to increase the amount.

Page for Wolland.
Robinson for deceased executor.
Smith for residuary beneficiaries.

OSTLER, J., said that it had been laid down in several cases that the Court had no power to apportion the commission between several executors but had power only to grant commission to the executors as a body on the passing of their accounts: see **In re William Adams,** 7 G.L.R. 660; **In re Edmondson,** 26 N.Z.L.R. 1404; **In re Holmes,** 15 V.L.R. 734. It followed from these decisions that where one of two executors had died before the accounts were passed and the surviving executor thereafter applied for commission on the passing of accounts only one sum could be allowed and the Court had no power to allow a portion of that sum to the representatives of the deceased executor. The Registrar had found that the deceased executor had for a period of fifteen years out of the nineteen years during which the trust had been in existence mainly controlled the management of the estate. Affidavits had been filed in an endeavour to contradict that finding of fact, but His Honour was not satisfied that they did so. After reading the whole of the papers His Honour was prepared to agree with the finding of the Registrar in that respect. In **In re Brown's Will,** 1 V.L.R. 41, it was decided that where one of several executors applied for commission for his pains and trouble the Court would narrow the allowance if it were shown that a deceased executor had taken part in the labour for which compensation was sought. That ruling seemed to His Honour entirely reasonable and he was prepared to follow it. His Honour thought, however, considering that Mr. Wolland would have to carry on the trust in the future for an indefinite time, that something more should be allowed him to cover past and future trouble than the Registrar had allowed him. On consideration His Honour was prepared to increase the amount allowed him to £175. That amount could only come out of the residuary estate.

Solicitor for Wolland: **T. M. Page,** Eketahuna.
Solicitors for deceased executor: **Robinson, Cunningham, and Beckingsale,** Masterton.
Solicitors for residuary beneficiaries: **Smith and McSherry,** Pahiatua.

Ostler, J. March 24; 26, 1930. Auckland.

IN RE BELL.

Will—Construction—Interest—Bequest of Mortgage—Legatee Entitled to Arrears of Interest Owing at Testator's Death—Bequest Subject to Payment by Legatee of Sum of Money to Trustees—Condition Concurrent and Not Precedent—Interest Payable by Legatee on Sum Only From Date of Trustees Communicating Willingness to Transfer Mortgage—Interest on Sum Not Payable so long as Improper Conditions of Transfer Insisted Upon by Trustees.

Originating summons to determine certain questions arising under the will of Alexander Bell deceased who died on 24th July, 1928. By the second codicil to his will the testator in lieu of a provision in his will for his daughter Janet Taylor, bequeathed to her a "mortgage for twenty-five thousand pounds held by me from my son-in-law J. W. Taylor over a farm in Ohaupo Road, Waikato, and formerly owned by one Cornfoot such bequest to be subject to the payment by the said Janet Taylor of the sum of five thousand pounds to my trustees which said five thousand pounds shall form part of my residuary estate." The mortgage referred to was a memorandum of mortgage dated 16th December, 1927, under which interest at 7 per cent., reducible to 5 per cent. so long as the property continued to be owned by J. W. Taylor, was to run from 21st November, 1927. No interest had been paid by the mortgagor down to the date of the testator's death, and at the time of his death there was a sum of about £1,000 due for interest. The mortgagor, J. W. Taylor, was the husband of the plaintiff. The trustees of the estate claimed this interest and were prepared to transfer the mortgage only on condition that they should have the right to recover such interest from the mortgagor. The questions arising for determination were: firstly, whether the plaintiff was entitled to the arrears of interest on the mortgage which accrued during the testator's lifetime, and secondly, whether the plaintiff must pay any and if so what interest on the sum of £5,000 which had to be paid by her to the trustees as a condition of the bequest.

Johnstone for plaintiff.
McVeagh and Macarthur, for defendant.

OSTLER, J., said that in his opinion there could be no doubt whatever that what the testator intended to bequeath to the plaintiff was the specific mortgage, and not merely the sum of £25,000. She was to take the mortgage debt evidenced by the memorandum of mortgage. If the mortgage turned out valueless she would have no claim whatever to be paid cash in lieu of the mortgage. That being so the maxim "*accessorium non ducit sed sequitur suum principale*" applied. A long line of cases had established that the bequest of a mortgage or a bond would carry with it arrears of interest which had accrued during the testator's lifetime: see **Roberts v. Kuffin,** 2 Atk. 112; **Hawley v. Cutts,** 1 Freem. 23; **Harcourt v. Morgan,** 2 Keen, 274; **Kent v. Tapley,** 11 Jur. 940; **Gibbon v. Gibbon,** 22 L.J. (C.P.) 135; and **In re Faris,** (1911) 1 I.R. 165. In His Honour's opinion the principle of those cases applied. Therefore the plaintiff was entitled to the arrears of interest on the mortgage which accrued during the testator's lifetime.

As to the second question it was claimed on behalf of the defendants that the plaintiff should pay interest on the £5,000 from 7th March, 1929, that being the date upon which the trustees intimated to her that they were then in a position to transfer the mortgage to her. Had the trustees not added another condition which they had no right to add His Honour thought that their contention that interest should run as from that date would have been correct. The condition of the bequest was a concurrent condition. If the trustees had intimated that they were ready to hand over the mortgage upon being paid the £5,000, then if the plaintiff had not paid the £5,000 she would have been in the position of getting double interest on that sum. But when the trustees stated that they were in a position to transfer the mortgage they refused to do so except on the condition that they should reserve the right to recover from the mortgagor all the interest owing to the testator under the mortgage down to the date of his death. They had no right to make that condition because such interest had become the property of the plaintiff. Therefore down to the present day they had not been ready and willing to hand over the mortgage except upon a condition they had no right to impose. The paying of the £5,000 being a condition concurrent and not a condition precedent the plaintiff was under no liability to pay such sum until informed that the trustees were ready to hand over the mortgage without the imposition of any unlawful conditions. Down to the present date the plaintiff had not been so informed. Therefore in His Honour's opinion she was not down to the present liable to pay any interest on the £5,000.

Solicitors for plaintiff: **Alexander, Bennett and Sutherland,** Auckland.
Solicitors for defendant: **Reyburn, McArthur and Boyes,** Auckland.

Blair, J. November 14, 15, December 12, 13, 14, 15, 16, 1929; March 29, 1930.

FEATHERSTON COUNTY COUNCIL v. PUBLIC TRUSTEE AND GUARDIAN TRUST AND EXECUTORS CO. LTD.

Contract—Construction—Covenant to "Reconstruct" Bridge if Required—Covenant to "Rebuild" Bridge to Plans and Specifications to be Prepared by County Engineer—Span of Existing Bridge Too Small to Allow Escape of Flood Waters—Bridge of Three Times Existing Span Required for Such Purpose—Covenantor Bound Only to Erect Bridge of Same Span and Materials as Existing Bridge.

Originating summons for a declaratory judgment as to the extent of the obligations of the defendants in respect of the erection of a new bridge constructed on a road known as Hume's Road. The extent of their obligations depended on the construction of a bond executed in favour of the plaintiffs by G. Hume,

since deceased. The road on which the bridge was constructed was across swampy land subject to floods, and the road operated as an artificial embankment across such lands, stopping the flood waters which invaded the area. It was necessary therefore to make provision in the embankment for the escape of flood waters, and accordingly some culverts and a bridge were provided, the bridge being constructed at the lowest portion of the road at a place where there was a more or less defined stream. The bridge was a monolith composed of reinforced concrete decking having supporting beams longitudinally across it and the decking was supported at each end by concrete pillars two feet thick with footings four feet wide. No attempt was made to put the footings into solid ground. The bridge was eighteen feet wide with a sixteen feet span. It was clearly established that the water channel provided by the bridge was by no means sufficient to permit the free escape of flood water. In consequence the flood water accumulated and overflowed the road causing damage to such an extent that it became necessary to remedy the position. It was proved that for this purpose an opening approximately three times the area of the present opening of the bridge would be required, and that the bridge would accordingly need to be approximately three times its present span. It appeared that the County had accepted dedication of the road only on condition that G. Hume agreed to its requirements as to the formation and maintenance of roads and as to the construction and maintenance of bridges thereon, and these requirements were embodied in a bond signed by him. The bond recited the facts and the agreement on Hume's part to construct and complete the works required by the Council enumerated in the schedule to the bond, "and to indemnify the Council against the costs of maintaining repairing and reconstructing the said road or any part thereof for a period of five years from the 30th April, 1922." Then followed an express covenant by Hume and his brother to keep and maintain the road for the period mentioned and to "do and perform all things which the Council may from time to time require to be done in connection with the maintaining and repairing of the said roads and bridges and culverts thereon and the reconstruction of any part thereof which in the opinion of the Council requires to be reconstructed." The schedule to the bond commenced as follows: "All bridges now erected shall be loaded in the presence of the engineer for the County at the owner's expense with a sixteen ton traction engine, and shall sustain such load without subsidence, otherwise the same must be rebuilt to plans and specifications to be prepared by the County Engineer." Then followed reference to lowering the level of all pipe culverts so as effectively to drain all borrow pits. The remainder of the work specified in the schedule comprised certain roading, levelling, filling, and metalling, and had no bearing on the questions in the present case. The question arising was whether Hume's estate was liable under this bond to pay for the additional length of bridge required to permit the free escape of flood waters, and as to the nature of the bridge which such estate could be required to build under the bond.

Cooke and Biss for plaintiff.

Gray, K.C. and Evans for defendants.

BLAIR, J., said that upon the County's part it was contended that the span of the bridge was insufficient to provide a sufficient escape for flood waters, and the County claimed that once that fact, and the fact that the bridge had failed in the specified test, was established, then Hume's estate was bound under the bond to provide or pay for a bridge of sufficient span properly to let away flood waters. His Honour had found that the span was insufficient, and admittedly the bridge had failed without being subjected to the specified test. Nevertheless, in His Honour's view, the County could not under the bond call upon Hume's estate to increase the span of the bridge, however desirable it might be that that should be done. The span of a bridge generally depended upon the width of the place to be crossed. In the present case the width of the place to be crossed did not depend on natural features, but was an artificial opening left in a raised roadway constructed across a swamp. The designing engineer made the opening in the embankment he designed too small. The bridge's span he made sufficient only for the opening as designed by him. When the County obtained the bond from Hume's Estate it made no stipulation in it as to the possibility of the opening in the embankment being too small. It provided only for the possibility of the structure being too weak to stand a specified loading test. If the bridge as built had survived the loading test then Hume's Estate could not have been called upon to do or pay for anything more to it, not withstanding that its span was clearly insufficient to provide the opening required. The trouble was due, not to the frailty of the bridge, but to the fact that the embankment had not a large enough gap in it to let water through. To correct that would require the removal of part of the embankment so as to widen the gap, and the building across such gap of a bridge. The gap being larger the span must be larger. But all the County stipulated for was a specified strength of a structure of known span, and if, as happened to be the case, the structure was wanting in the specified strength then Hume's estate was under the bond liable to rebuild the bridge to plans and specifications to be prepared by the County Engineer. But His Honour could not interpret the bond as entitling the County to call upon Hume's estate to cure not only want of strength but another trouble entirely unconnected with strength, the necessity for which had since become apparent. The rebuilding contemplated by the bond was to His Honour's mind clearly limited to the question of strength, and the word "rebuilt" in the context in which it appeared must mean a bridge of no larger span than the bridge which on failure of the stability test had to be rebuilt. His Honour's view upon that phase of the case was strengthened by the subsequent reference in the schedule to the bond to the necessity of lowering culverts so as to provide better drainage to borrow pits. His Honour accordingly held that the bondsmen were not liable to be called upon to erect or to pay for the cost of the erection of a bridge of wider span than was sufficient for the opening in the roadway as at present constructed.

The next question arising for consideration concerned the specifications for the bridge to be substituted for the present structure which had admittedly failed. The answer to that question depended entirely on the wording of the bond. It provided that if the bridge would not sustain the prescribed loading without subsidence "the same must be rebuilt to plans and specifications to be prepared by the county engineer." Upon a consideration of the whole of the evidence and of the terms of the bond His Honour held that the new bridge must be of the same material as the old, namely reinforced concrete. The bridge called for by the bond was then a ferro-concrete bridge as specified by the county engineer, but of the same span as the present bridge.

Solicitors for plaintiff: **Chapman, Tripp, Cooke and Watson,** Wellington, agents for **Gawith, Biss and Wilson,** Martinborough.

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

Kennedy, J. February 12; March 31, 1930. Dunedin.

IN RE WRIGHT.

Will—Construction—Absolute Gift—Failure of Engrafted Trusts—Absolute Gift Taking Effect—Trust for Daughter on Her Attaining Twenty-one—Subsequent Provision that Share of Daughter Not to Vest Absolutely But to be Held Upon Trust to Pay Income to Daughter for Life With Gift Over to Certain Children—No Provision for Event of Daughter Dying Without Leaving Children Attaining Vested Interest—Corpus of Daughter's Share Part of Her Estate in Such Event—Shares of Each Daughter in Residue to be Held Upon "Trusts and Provisions Hereinbefore Contained in Favour of Her and Her Children"—Earlier Trusts of Certain Daughters' Benefits Containing Ultimate Limitations in Default of Issue to Persons Other Than Their Children—Such Ultimate Limitations Not Engrafted on Shares in Residue.

Originating summons for determination of certain questions arising under the will of J. T. Wright, deceased. The testator gave his real and personal property to trustees to sell and convert, and after payment of debts and legacies and making certain provisions for a grandson and to meet certain annuities, to hold certain named sums upon trust for certain daughters. He directed that the sum of £9,000 should be held upon trust in equal shares for the children of his late son John Wright, namely for the grandson J. D. Wright on his attaining twenty-five and for such of his grand-daughters as attained twenty-one or married under that age. His will then continued as follows:: "8. Provided nevertheless and I declare that the share in the trust premises which I have hereinbefore given to each daughter of mine shall not vest absolutely in such daughter

but shall be retained and invested by my trustees and held by my trustees upon the following trusts namely the income thereof shall be paid to such daughter during her life without power of anticipation or alienation and from and after her death in trust for all the children or any the child of such daughter who being male shall attain the age of twenty-one years or being female shall attain that age or marry under that age and if more than one equally as tenants in common.

"3. I declare that the share in the trust premises to which each daughter of the said John Wright shall become entitled shall be held by my trustees upon the trusts and subject to the provisions in favour of her and her children corresponding with the trusts and provisions hereinbefore contained in favour of my said daughters and their children."

Following clauses 8 and 9 were provisions for the destination in certain events of the share of each named daughter and of each daughter of the testator's son John Wright in the specific sums. Clause 15 of the will, after directing the trustees to hold one-seventh part of the residue of the said trust fund in trust for each of certain named sons and daughters and the remaining one-seventh part in trust for such of the children of his late son John Wright as should be living at the time the youngest of such children should attain twenty-one such children if more than one taking in equal shares," further directed "that the shares in the residue of my said trust fund of each of my said daughters and each of the daughters of my late son John Wright shall be held by my trustees upon the trusts and subject to the provisions in favour of her and her children corresponding with the trusts and provisions hereinbefore contained in favour of my said daughters and grand-daughters." Phyllis Mary Wright who was a daughter of the testator's son John Wright had attained twenty-one and the first question arising was as to the destination of the corpus of her share in the sum of £9,000 should she die without leaving any child or children who attained a vested interest therein. The second question was as to the destination of Phyllis Mary Wright's one-third share in one-seventh of the residue should she die without leaving any child or children who should attain a vested interest therein. E. L. M. Wright and M. F. G. Buckland, two of the daughters named each died without issue, and a similar question arose in each case as to the destination of the corpus of a one-seventh share in the residue.

Brent for plaintiffs.
Paterson for F. R. Wright and others.
Haggitt for executor of will of M. F. G. Buckland.
Callan for children of J. Wright.
Sinclair for children of J. R. Wright and P. L. Wright.

KENNEDY, J., said that Phyllis Mary Wright was in the first place given her share absolutely and later there was the declaration that her share did not vest absolutely but was held subject to the trusts declared. That conclusion that the will did in the first place confer an absolute interest was supported by **In re Hamilton Gilmer, deceased,** (1922) N.Z.L.R. 411; and **In re Marshall, Graham v. Marshall,** (1928) Ch. 661, where the provision of the wills considered were, so far as material, almost identical with those in the present case. In **In re Payne, Taylor v. Payne,** (1927) 2 Ch. 1, Astbury, J., held that, where the language used was "to appropriate one of such shares to each of my sons now living" coupled with a declaration that the shares were not to vest absolutely, there was at no stage an absolute gift. The language, however, as Eve, J., pointed out **in In re Marshall deceased** (*cit. sup.*) was different from the language of the will considered in that case. The trusts declared did not exhaust the whole interest. They made no provision for the contingency of Phyllis Mary Wright dying without leaving a child or children who attained a vested interest and consequently, in accordance with the principle sometimes called the rule in **Lassence v. Tierney,** 1 Mac & G. 551, and recognised by the House of Lords in **Hancock v. Watson,** (1902) A.C. 14, and frequently applied in New Zealand—see **In re Hamilton Gilmer deceased,** (1922) N.Z.L.R. 411, and **In re Antrobus, Henderson v. Shaw,** (1928) N.Z.L.R. 384—Phyllis Mary Wright's share in the £9,000 would form part of her transmissible estate That principle applied where the property was devised and bequeathed in trust as well as where property was devised and bequeathed directly: **In re Harrison, Hunter v. Bush,** (1918) 2 Ch. 59 and **In re Hamilton Gilmer deceased,** (1922) N.Z.L.R. 411.

As to the second question, each such share in the residue was according to clause 15, to be held upon the trusts and provisions "corresponding" with certain trusts and provisions thereinbefore contained. The trusts and provisions to apply to the share of each named residuary legatee were the trusts and provisions in favour of her and her children which applied to her share in the specific sum already by the will bequeathed to her. The words, "upon the trusts and subject to the provisions in favour of her and her children," in His Honour's opinion, sufficiently indicated that the share would be held upon trust to pay the income for life to the child or grandchild named, with a gift of the corpus thereafter to such of her children as, being male, attained twenty-one, or, being female, attained that age or married under that age. There was no provisions in the will thereinbefore contained which provided for the destination of the share of Phyllis Mary Wright in the £9,000 should she die without leaving a child or children who should attain a vested interest therein and consequently, as the gift of residue was absolute in the first place, her share therein would on death form, in the circumstances set out in the second question, part of her transmissible estate. It appeared in clause 15 that trusts and provisions in favour of a daughter and her children were later described as trusts and provisions in favour of the daughter and as if a provision giving income to a daughter for life with corpus thereafter to children did not in the testator's view alter the character of the provision and prevent such a provision being a provision in favour of the daughter.

The third and fourth questions expressly raised the question whether clause 15 applied not only to clauses 8 and 9 but also the provisions thereinbefore contained providing for the destination of the share of the named daughters should they die, without leaving children who attained a vested interest. If either M. I. Guthrie or E. L. M. Wright died without leaving a child or children who attained vested interest in the named sum her respective share was directed to be held in trust for her next of kin as if she had died a spinster and intestate and as if such share had formed part of her estate: see Clause 10. If no child of the said M. F. G. Buckland lived to attain a vested interest in the said sum of £3,000, after her death the share in the sum of £3,000 bequeathed to her was to be held in trust in equal shares for such of the children of F. R. Wright and P. L. Wright living at the testator's death who attained the age of twenty-one years, or being female attained that age or married under that age. The words "in favour of her and her children" and "in favour of my said daughter and grand-daughters," indicated, it was submitted, all those trusts and provisions which dealt with the destination of the share, which was in the first place given absolutely to the daughter, including those provisions for remainder over in case there were no children of the daughter who attained a vested interest. In the proper sense of the words a provision of a will was, His Honour stated, "in favour of" a person, if it conferred bounty upon him, and those words did not aptly describe a provision that others should, in certain events, take a share in the first place given to the named person. Such a provision was in favour of someone else. Earlier in the will the testator, in clause 9, had used similar words and, in that clause, it was clear that the provisions "in favour of" a daughter and her children described provisions conferring bounty upon a daughter and her children. The testator had not used the words "concerning" or "with respect to" the share bequeathed or some such like colourless words, nor had he used the words "with the like remainder over in default of certain issue," or such like words. His Honour did not think that, as submitted, the words "in favour of" could be treated as destitute of the implication of bounty, and as sufficiently colourless to apply provisions usually applied by the inclusion of such words as "with the like remainder over." His Honour had not overlooked the provisions of clause 25 of the will, but he did not think that the reference to the share in the residuary trust fund of the children of the testator's sons F. R. Wright and P. L. Wright was sufficient to indicate that the words "trusts and provisions in favour of her and her children" were really equivalent to the words "trusts and provisions concerning the share in the first place given absolutely to her."

The answer to each question accordingly was: "It forms part of her transmissible estate."

Solicitors for plaintiffs: **Statham, Brent and Anderson,** Dunedin.

Solicitors for F. R. Wright and others: **Lang and Paterson,** Dunedin.

Solicitors for executor of will of M. F. Buckland: **Ramsay, Barrowclough and Haggitt,** Dunedin.

Solicitor for Public Trustee: **Public Trust Office Solicitor,** Wellington.

Solicitors for children of J. Wright: **Callan and Gallaway,** Dunedin.

Solicitors for children of J. R. Wright and P. L. Wright: **Solomon, Gascoigne, Sinclair and Solomon,** Dunedin.

Third Annual Legal Conference.

HELD AT AUCKLAND, 22nd, 23rd and 24th April, 1930.

FULL REPORT OF PROCEEDINGS AND PAPERS.

The Third Annual Legal Conference was held at Auckland in the Auckland University College Hall, on Tuesday, Wednesday, and Thursday, the 22nd, 23rd and 24th April. A full report of the proceedings and papers read is published below.

The Committee constituted by the Council of the Auckland District Law Society to take charge of all arrangements with regard to the Conference consisted of: Chairman, Mr. R. P. Towle (President, Auckland District Law Society); Conference Secretaries, Professor R. M. Algie and Mr. A. M. Goulding; Committee, Messrs. J. Alexander, E. L. Bartleet, E. C. Blomfield, A. St. C. Brown, W. H. Cocker, G. P. Finlay, Miss G. M. Hemus, Messrs. J. M. Hogben, T. M. Holmden, J. B. Johnston, A. H. Johnstone, L. P. Leary, F. G. Massey, Miss E. Melville, Messrs. L. K. Munro, R. McVeagh, J. H. Reyburn, H. P. Richmond, H. M. Rogerson, J. Stanton, and F. L. G. West.

The following list of members attending the Conference is taken from the signed Roll Book, but it is quite possible that some practitioners attended the Conference without so recording their names.

Auckland District Law Society.

Algie, R. M.
Armstead, J.
Bartleet, E. L.
Bawden, J. P.
Baxter, T. N.
Beattie, W. A.
Berman, A.
Billington, A. J.
Brewer, H. J.
Brown, A. St. Clair
Brown, E. B.
Choules, R. L.
Clark, Walker G.
Cocker, W. H.
Cooper, A. N.
Cox, F. J.
Cox, J. W.
Crimp, N. E.
Cutten, E. C. (S.M.)
Dickson, J. F. W.
Dignan, A. A.
Eddowes, G. A.
Finlay, G. P.
Gatenby, W. J.
Goldstine, I.
Goodall, S. I.
Gould, A. M.
Goulding, A. M.
Grant, R. M.
Halliwell, H.
Hanna, H.
Hanna, S. J.
Hemus, Miss G. M.
Hesketh, H. R.
Hogben, J.
Holmden, T. N.
Hubble, V. N.
Hunt, R. P.
Johnston, J. B.
Johnstone, A. H.
Kaiman, J.
Keegan, C. T.
Kensington, W. H. G.
Kerr, V. W.
Kirkpatrick, W.
Lovegrove, C. J.
Manning, J. W.
Massey, F. G.
Mason, Spencer R.
McArthur, M. G.
McElroy, R. G.
McCown, T.
McInnes, D. H.
McKenzie, F. E.
Melville, Miss Ellen
Milliken, A.
Moody, A.
Mueller, F. H.
Munro, L. K.
Neumegen, E. E.
Neumegen, Eric
Neumegen, W. M.
O'Donnell, A. T.
Oliphant, T. A. H.
Patterson, W. J. C.
Peak, A.
Pudney, R. W.
Purdie, D. C.
Rennie, J. C.
Reyburn, J. H.
Richmond, H. P.
Robb, M.
Rogerson, H. M.
Rudd, F. L.
Singer, R. A.
Steadman, H. A.
Stevenson, J. M.
Stilwell, W. F.
Sullivan, J. J.
Terry, J. J.
Thomas, N. R. W.
Towle, R. P.
Tunks, C. J.
Ward, R. F.
Webster, T. C.
West, F. L. G.
Wilson, A. L. E.

Canterbury District Law Society.

Milliken, T.
Weston, G. T.

Gisborne District Law Society.

Nugent, J. S., Jr.
Pearson, Bernard J.

Hamilton District Law Society.

Bell, Garnet G.
Broadfoot, W. J.
Brown, A. R.
Corbett, H. G.
Davys, J. D.
Dingle, L.
Ferguson, H. J.
Gilchrist, George
Henry, F. C.
Johns, W. F.
King, W. J.
Kingsford, F.
Low, K. W.
Mackersey, G. M.
Morton, H. T.
McMullin, H. J.
Norris, H. G. M.
Oliphant, J.
Seymour, D.
Strang, J. F.
Swarbrick, F. A.
Swarbrick, H. R.
Tudhope, W.

Hawkes Bay District Law Society.

Commin, E. L.
Dorrington, P. W.
Duff, Cecil
Gifford, E. T.
Holderness, H.
Jones, F. Hamilton
Kelly, F. P.
Kent, D. B.
Mackie, I. W. N.
Molony, J. J.

Marlborough District Law Society.

Churchward, W. T.
McCallum, R.

Nelson District Law Society.

Rout, W. Vernon

Otago District Law Society.

Callan, J. B.
MacGregor, Hon. J.
Sidey, Sir Thomas K.
White, C. J. L.

Southland District Law Society.

Hall-Jones, F. G.
Stout, W. A.

Taranaki District Law Society.

Billing, H. H.
Caplen, H. D.
Coleman, A.
Crump, T. B.
Fookes, A. C.
Fookes, Thos. C.
Horner, F. W.
Houston, J.
Hughes, L. C.
Hughes, R. Clinton
Macallan, G.
Middleton, W.
North, A. K.
Prichard, I.
Roy, I. W. B.
Sheat, J. H.
Spence, G. M.
Taylor, L. A.
Thomson, P.
Weston, C. H.
White, C.
Young, E. H.

Wanganui District Law Society.

Barton, A. A.
Barton, M. C.
Christensen, F. J.
Currie, G. W.
Thompson, L. J.
Tustin, E. B.
Wilson, A. B.

Wellington District Law Society.

Anderson, H. E.
Anyon, F. B.
Bell, Sir F. H. D., G.C.M.G., K.C.
Boys, R. H.
Bunny, E. P.
Burridge, R. R.
Card, J. W.
Clere, F. T.
Cousins, A. M.
Cunningham, W. H.
Currie, A. E.
Fair, A., K.C.
Free, A. W.
Gray, A., K.C.
Herd, J. R.
James, H. J. V.
Johnston, H. F., K.C.
Leicester, W. E.
Levi, P.
Logan, D. K.
Luckie, M.
Luke, A. J.
McEldowney, W. J.
Meek, A. R.
Meltzer, J.
O'Leary, H. F.
Perry, D.
Perry, W.
Smith, E. S.
Todd, A. G.
Treadwell, C. H.
Tringham, C. W.
Wiren, S. A.
Wylie, A. A.

FIRST DAY.

Tuesday, April 22nd, 1930.

MR. R. P. TOWLE (President of the Auckland District Law Society): It gives me great pleasure, on behalf of the Auckland District Law Society, to welcome you here to-day. We hope your stay with us will be a profitable and pleasant one. The pleasant part to a certain extent depends upon whether the climate is favourable, but if the Auckland climate behaves as usual everything will be all right.

I have to apologise for the absence through illness of Sir Robert Stout, who expresses great regret at his inability to attend. He says in his letter that he will be glad to have conveyed to the Conference his wishes for the success of its labours. I have also to apologise for the absence of Mr. W. J. Hunter, of Christchurch, who was the first Conference secretary.

It gives me great pleasure to welcome to this Conference His Honour the Chief Justice. Of course, although Sir Michael Myers was well-known previously to you, this is the first occasion he has come to Auckland since he took up his present office. I also welcome Sir Thomas Sidey, the Attorney-General. He has come here at no small personal inconvenience. We appreciate greatly the way Sir Thomas has taken the interests of the profession to heart in every way.

ADDRESS OF WELCOME.

HIS WORSHIP THE MAYOR OF AUCKLAND (MR. GEORGE BAILDON) then delivered the following address of welcome:

Ladies and gentlemen, on behalf of the citizens of Auckland, it is my privilege and my very great pleasure to extend to you all a very hearty welcome, and to express to you the sincere hope that your stay with us and your deliberations at your Conference will be both pleasant and beneficial.

It is impossible to estimate very accurately the value of Conferences such as this. It is certain they can do no harm. (Laughter). It is our firm belief that they can do very real good. Many of you are known to one another only through the medium of correspondence; the more fortunate ones amongst you receive a well-deserved but somewhat distant homage from your brethren by reason of your frequent appearances in the cold and uninspiring columns of the arguments in your law reports. But at a Conference such as this the barriers erected by distance can be broken down; that which was previously a mere name becomes a personality; understandings are arrived at; views and opinions are mutually exchanged and friendships formed, and perhaps many a difficulty which will arise in the future will prove easier of solution because of some such understanding and some such friendship. (Applause). It is good for us to remember that in our negotiations with one another the time allowed to us on this earth is very short, and that we shall not travel this road a second time. Let us try, therefore, while we are here, to do what we can towards making that road smooth and a pleasant one for all. (Applause).

I am glad to notice from your programme that the lighter side of a lawyer's life has not been entirely neglected. As the representatives of a profession, known popularly as "the Devil's own," it is your undoubted right to be merry. (Laughter). I think I have read somewhere that one cheerful sinner is worth a couple of gloomy saints. (Laughter).

It is equally pleasing to notice from your list of visitors that every province is represented, and that there are with us to-day practitioners from the four corners of the Dominion—from the farthest North, from Poverty Bay, from Westland, and even from the most southern of our cities, Invercargill. To all of you, our city holds out its hand in the friendliest of welcomes.

As citizens we are perhaps only indirectly interested in the deliberative side of your Conference. To us, the law is a serious business, and those who practise it are, from our point of view at least, to be avoided as long as it is possible to do so. That we or our estates may ultimately be offered up as a part of the sacrifice to the administration of justice is perhaps inevitable, and to that fate we move forward with stolid fortitude. (Laughter). Already, perhaps, some of us have learned that a glorious victory in a legal battle is only a little less costly than a disastrous defeat. (Laughter). But in spite of all these hard thoughts we are genuinely glad to have you with us and we trust most sincerely that you will find that our northern city is equal to your hopes and that our hospitality is far in advance of your expectations. We, on our part, are honoured in the fact that we can number amongst the visitors such distinguished guests as the Chief Justice, the Hon. Sir Michael Myers, and the Attorney-General, Sir Thomas Sidey. We congratulate you upon having for your President Mr. Alexander Gray, who holds with distinction the high office of a King's Counsel. We are glad to notice that two other members of your profession have recently been admitted to this high rank. We refer to Mr. Harold Johnston, who is now with us, and to Mr. A. C. Hanlon, of Dunedin. It is very pleasing to notice also that your Conference is receiving the sympathetic interest of their Honours the Judges. While we thus single out a few of your number for mention by name let it be understood that we do so merely to emphasise the fact that our welcome is to one and all. It is our desire to give you of our best and it is our earnest hope that your Conference will be as successful as you yourselves would wish it.

Mr. President, ladies and gentlemen, we are glad to have you all with us and wish you the happiest of holidays. We hope that in the conduct of everyday business you will find ample room for those ideals that have won respect for your profession, and we hope that the time will never come when lawyers will fail to

recognise that they, as well as the Judges, are officers in that essential function of state and corporate life, the administration of justice.

MR. A. GRAY, K.C. (Wellington): Mr. President, Sir Michael Myers, Mr. Mayor, ladies and gentlemen, I have been asked, on behalf of the visitors to express the appreciation we all feel of the welcome of His Worship the Mayor. We also appreciate fully the cordial statements expressed by him, and we will all enter upon the duties of the Conference with spirit and be encouraged by the Mayor's helpful and thoughtful remarks. Auckland city is noted for its hospitality and I am sure all will enjoy their visit to the full. I shall content myself now by thanking the Mayor for his kind remarks.

MR. A. GRAY, K.C., was then voted to the chair. He expressed thanks to the Conference Committee for having paid him the compliment of asking him to preside at the sittings. He did so with very great pleasure. He felt certain this Conference would be as successful as the others had been. Continuing, Mr. Gray said: I desire to inform you that His Excellency the Governor-General, to whom it had been suggested when first he arrived in New Zealand that he might attend and open the Conference, was unable to do so and has had to decline the invitation. He has been good enough, however, to send me a letter conveying a message to the Conference, which I shall read. It is as follows:

"It was with feelings of the keenest regret that, owing to the pressure of other engagements, I was obliged to forego the pleasure of complying with the kind and attractive suggestion that I should open the Third Annual Legal Conference at Auckland.

"Apart from other considerations, the fact that I am a member of the same honourable profession as yourselves would have rendered the task particularly congenial to me had it been possible for me to undertake it.

"Will you be good enough to convey to those present at the Conference my cordial greetings and my earnest good wishes for the success of the Conference, the continued welfare of the legal fraternity in New Zealand and the maintenance of the high traditions of the profession of which we are justly proud?"

"(Signed) BLEDISLOE,
"Governor-General."

MR. R. P. TOWLE (Auckland): While we regret the absence of His Excellency we very much appreciate his kindly letter. I move the following resolution:

"The members of the legal profession assembled at their third Conference in Auckland gratefully acknowledge the receipt of His Excellency the Governor-Genernal's message and their appreciation of his interest in the work of the Conference and in the welfare of the profession. They desire also to express their gratification that a member of the English Bar has been selected to fill the responsible position of Governor-General of this Dominion."

MR. A. H. JOHNSTONE (Auckland) seconded.

THE CHAIRMAN: It is hardly necessary formally to put the resolution but I ask the Conference to pass it with acclamation.

The resolution was then carried, with applause.

INAUGURAL ADDRESS.

His Honour the Chief Justice, Sir Michael Myers, K.C.M.G.

Sir Michael Myers then addressed the Conference:

It is not my intention to deliver anything in the way of a set speech. It is better that I should say what I have to say in the form of more or less desultory remarks on questions which I think are of importance to the legal profession generally and to the public. There are two or three questions particularly to which I desire to refer as I proceed in those observations.

Firstly, I wonder whether I might make a few personal observations which seem to me to be not out of place at a gathering of this kind. With all of you I regret for many reasons that His Excellency the Governor-General has been unable to attend here today, first, because he would be making this speech and not I. I would have liked to see him taking a place here and opening this Conference because also he is the first practising barrister, so far as I know, to hold the position of Governor-General of this Dominion. I should like to say also how pleased we are to see amongst us Sir Francis Bell (applause),—my first principal after I left school, my partner for twenty-two years, and my friend for thirty-eight.

SIR FRANCIS BELL: Thank you.

During the whole of that period Sir Francis Bell has been the doyen of the New Zealand Bar. (Applause). And no man in the history of the profession in the Dominion has taken a greater interest in the welfare of the profession and its members. Then we have here Mr. Hughes who is, I believe, the Nestor of the solicitors' side of the profession in New Zealand. This is the third Conference he has attended and I hope he will be able to attend many more. Then there is the Hon. John MacGregor who is perhaps the oldest practising lawyer in Dunedin. It is inspiring to see gentlemen of such long-standing in the profession and who have held honourable positions coming here, giving up their time, and doing what they can to help the profession along. I cannot, while on the subject of personal observations, refrain from adding a word of tribute to the Attorney-General, Sir Thomas Sidey, with whom during the last twelve months I have had a good deal to do in connection with matters relating to the administration of justice and the profession of the law. He has at heart the welfare of the profession. He is always accessible to the representatives of the New Zealand Law Society and always anxious to do what he can for the benefit of the legal profession, as he has shown by the interest he took in connection with the Solicitors' Fidelity Guarantee Bill, which has now become a part of the law of this Dominion. I cannot conclude my personal observations without a word of reference to Mr. Gray. There have been only three Presidents of the New Zealand Law Society as it is now constituted—Sir Francis Bell, Sir Charles Skerrett, and Mr. Gray. None of those gentlemen has spared himself in doing everything possible for the profession in New Zealand. I do not think members of the profession know—I was going to say appreciate, for they cannot sufficiently appreciate without knowing—the amount of work and time the President of the New Zealand Law Society devotes to the business of the profession in this country. I want to refer also to Mr. C. H. Treadwell, vice-president of the Society, and also treasurer of the Council of Law Reporting which he has pulled out of the mire and placed on a very firm foundation. Lastly, I should like to thank you for

your welcome and for the opportunity you have given me of coming here, and of saying and showing that we who leave the Bar and become Judges do not lose our interest in and sympathy with those who were our brother practitioners.

In one slight respect I have been able, during the last twelve months, to introduce an innovation, bringing the profession into somewhat closer touch with the Judges. It was always very difficult, as some of you who have been on the Council of the New Zealand Law Society know, to get things done in the past. There was a great deal of correspondence between the Society and its branches and the Judges and between the various departments of the State. It took sometimes months before anything could be done. The innovation is this: As there is always a gathering of Judges in Wellington during the sittings of the Appeal Court, and the Council of the New Zealand Law Society always holds its meetings during the sittings of the Court of Appeal, we have arranged that any matters to be represented can be represented there and then at a conference, at which the law officers of the Crown are also present. Decisions have been come to at these conferences promptly, and indeed immediately.

I want now to say a word in regard to the continuation of your annual Conferences. As you know this is the third. I well remember when the people of Christchurch suggested an annual Conference should be held. There were many pessimists, particularly in Wellington, and many doubters. I was one of the doubters; but nowadays I never doubt. (Laughter). Be that as it may, the two last Conferences should be sufficient to convince not only the doubters but also the pessimists of the value of these annual Conferences. Consider the Fidelity Guarantee Bill alone. No doubt that would have been passed sooner or later, but its passage was expedited because of the discussion at these annual Conferences. That very much expedited its passage. Very many matters have been discussed, matters affecting not only the interests of lawyers but of the public as well. The social side too is not to be ignored. One of the main things that pleases me is to see that members of the profession do not, at these Conferences, bring up matters that affect only their own interests. It is a new side to the profession, as far as the public is concerned, to see that, although they may not be altogether altruists, lawyers have an eye to matters that affect the public interest. That is all to the good. I notice on your agenda paper proposals that the Conference will be held every alternate year, instead of every year. I hope that remit will not be carried, at least not until you have given Dunedin an opportunity of entertaining you all. (Laughter). The annual Conference should not be abandoned in favour of a biennial Conference, without very careful consideration.

I said the lawyers had not dealt simply with matters affecting themselves. That brings me to the consideration of one point that has not come before the Conference. It has been raised in England and it must have been discussed among some of you in New Zealand. It relates rather to the barristers' side than to the solicitors' side of the profession. In England the work of the Bar has decreased enormously and members of the profession have been searching to learn the reason why. They have come back to this, that it is all due to two or three leaders of the Bar who have too much work to do and have charged very heavy fees. Let us suppose that A is one of those leaders. You have X also a leader, but not quite on the same plane. A solicitor's clerk comes to X's chambers, A having been retained on the other side, and says he wants X to take a brief. He asks what is the fee. X's clerk then goes to A's chambers and inquires what A's fee is. The clerk says 1,000 guineas. X's clerk at once says that X must have the same. So there you have these two leaders getting 1,000 guineas. The second counsel gets two-thirds and so it goes on and the goose that lays the golden eggs is killed. One counsel in New Zealand in the last few years, I believe, has had the reputation of doing something to improve the standard of counsel's fees. Of course it is not true. (Laughter). Anyhow, I hope the word of warning will not be misunderstood. There is always a way out of the difficulty. There is a way out in England. If a leader is briefed who is entitled to heavy fees because of his special ability, then fix the brief fee at an ordinary rate and give him an additional fee, known as a special fee. There can then be no question of a relation between the fee of the leader and that of the second counsel. There would be a relation as regards the ordinary fee, but not as regards the special fee.

There are two particular matters about which I want to speak. There is, at the present time, not in New Zealand, but in certain other parts of the British Dominions, an obvious desire—one might almost say a determination—to get rid of the Privy Council as the ultimate appellate tribunal. I do not believe this is a live question in New Zealand. I do not believe anybody in New Zealand wants to get rid of the Privy Council. I hope it will forever remain, and remain as it is. It is, I consider, the finest tribunal in the world, the greatest of all tribunals. You receive from it not only the judgment of the finest minds in the Empire but you receive the greatest courtesy, and you know there is a freedom from that unconscious local bias which, sometimes, try how he will, the man in a small country cannot avoid. In 1926 I had the privilege, because a privilege it is, of appearing before no fewer than, in all, thirteen of their Lordships. I believe there were only three before whom I had not the opportunity of appearing. One of those three was Lord Birkenhead, then at the India Office; another was Lord Buckmaster, who held a position in the city; and the third was Lord Sumner, since retired. I do not know whether it would interest you to know the names of those before whom I appeared. They are as follows: Viscount Cave, Viscount Haldane, Viscount Finlay, Viscount Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, Lord Wrenbury, Lord Carson, Lord Blanesburgh, Lord Merrivale, Lord Darling, Sir John Wallis. Gentlemen, that is a great list of names. I hope that when the paper in Mr. Callan's name is read you will have a discussion on this matter, and I hope Sir Francis Bell will give you the benefit of his views, because he has had as much experience in the way of personal appearance as I have had in the Privy Council and has instructed counsel in many other cases and knows more of the tribunal than I do. I hope, and I feel sure he will express the hope, that the Privy Council will remain intact as the ultimate appellate tribunal. You hear many suggestions in regard to the Privy Council and I remember one mentioned to me by one of their Lordships whom I was privileged to meet. He told me that Sir John Simon had expressed the view that the position should be altered and the Judicial Committee become an ambulatory tribunal going around the British Dominions. That, I consider, would be a retrograde step, for many reasons,

and I was able so to convince the learned Lord who told me of Sir John Simon's suggestion. Personally, I can think of no greater conception than that of appeal, because that is what it is, to the fountain head of justice, to the King himself. It is one of the last remaining tangible links between Great Britain and the overseas Dominions and I hope it will so remain; and, may I suggest, if you agree with that view, that a resolution be passed, because that will strengthen the hands of the delegates to the next Prime Ministers' conference. I don't presume to dictate to you any more than I ever dictate to a jury, but may I say—it is a matter for you? (Laughter).

The next matter to which I shall refer arises from a passage I saw in the last report of the N.Z. Law Society. The report is of a confidential nature, to which however I feel Mr. Gray will not mind my referring. Of 51 applications last year for admission as barristers from applicants who were already admitted to practise as solicitors, no fewer than 37 were based on five years' practice as a solicitor. Ladies and gentlemen, 74 per cent. in one year, and I suppose it may be regarded as typical of what has been going on, were prepared to enter the Bar by the back door. It is not creditable to them and it is not creditable to the profession. In 1882 the first Act was passed by the legislature to reduce the status of our profession. The profession of the barrister and of the solicitor are really distinct professions. Although we may practise them together it does not in the least follow that the qualities required are the same in the one as they are in the other. We know they are not. Perhaps many a young man goes into Court and takes cases when he should remain in his office and instruct counsel. It is not a good thing for the Bar, the solicitor, or the public. It is your business, I suggest, to make the public and the legislature realise that. In 1882 the first attack was made. In 1898 the back door to the Bar was opened. Any solicitor in practice for five years was entitled to come along and say he wanted to be admitted as a barrister, and he was entitled to be admitted accordingly. I want to remind you of what has happened in other professions. Every profession has had its status improved—accountants, dentists, architects—every profession; the only one which has had its status lowered is the profession of the law, and I ask you how much longer are you going to allow that to continue? Has it occurred to you that you may have in the future men being appointed as King's Counsel who have not had the ability, or who have been too indolent, to pass the necessary examination to qualify them for admission to the profession of a barrister? That certainly will not happen immediately, because so long as I am Chief Justice there will be no King's Counsel who has not come to the Bar through the front door. (Applause). I suggest, Mr. Attorney-General, the subject on which I have just been addressing this meeting is one you might well take into consideration, at all events, if the profession is prepared to support it. So much for that.

Then I notice you have on your agenda paper a paper on "Nisi Prius." I suppose something will be said about jury rules. I want to say this. I do not know that my view is shared by some of my colleagues, and I speak only for myself. I have personally a great deal of confidence in juries. I think if a jury is properly handled (laughter)—that observation is not for the press—the jury system is not anything like as bad as some people would make out. Indeed, in one case where the jury came to a different conclusion from that at which I had arrived, I was satisfied on subsequent consideration that the jury was right, and I was wrong.

SIR FRANCIS BELL: In how many cases would you find that?

Well, even in that case I might have considered the matter further and come to a different conclusion. At any rate the jury system is not anything like as bad as it is made out to be. There are many cases in which I prefer to have the assistance of a jury. In many cases where you can have a jury many of you do not have it and you throw the whole of the responsibility on the Judges. What is the use of asking for a revision of the rules when you can get what you want under the existing rules and don't take it? I do not suppose we shall have heard the last word on this matter, even when your deliberations finish.

In one of your remits I see a suggestion that there should be a right of appeal in workers' compensation cases. I hope that will not be pressed, and, if pressed, will not be passed. I am satisfied that, as a matter of policy, it is wrong. You will be accused of endeavouring to increase litigation and, after all, I doubt very much whether the right of appeal is required in those cases. The law is pretty well settled and the Court of Arbitration has done very good work. But this is the difficulty that might arise. The Court of Arbitration, you might find, is over-worked, and you might find some other arrangement may have to be made. If necessary, although the Judges of the Supreme Court are not looking for these cases, they will be quite prepared to take them. They are not desirous of doing so, but if the choice is between their doing the work and the setting up of a new court, with its attendant expense, the work could be done by the Judges of the Supreme Court. I daresay some arrangement may be made which would avoid any alteration to the existing system. An alteration would only be justified by the fact that there was too great a pressure of work on the Court of Arbitration. If the cases were taken by the Supreme Court you have the advantage that it is nearly always sitting in the cities and that it sits regularly in the circuit towns, and there would be no loss of time. Delay would be saved and that would be an advantage. I do not suggest the change, but merely make these remarks because I see the remit here. I repeat that, to my mind, an alteration in the existing system would only be justified if the Court of Arbitration is overworked.

I am afraid I have already taken up too much of your time by what, I said, would be desultory observations. If it is for me to open the Conference, then I would say, "It is opened, go on with your work." (Applause).

MR. F. L. G. WEST (Auckland): It gives me very much pleasure to move a vote of thanks to His Honour the Chief Justice for his interesting and instructive remarks. The form he has chosen could not have been better chosen, because we have been able to have His Honour's views on subjects we could not have had otherwise. I notice by his remarks that the right to doubt is limited to the Bar. We hope His Honour will retain always his sympathy with and interest in our profession. To-morrow, at Government House, in Wellington, the formal insignia of the honour bestowed on His Honour will be conferred, and to-morrow, I am sure, he will have with him the good wishes of the whole profession in New Zealand. (Applause).

MR. J. STANTON (Auckland) in seconding the vote of thanks, expressed appreciation of Sir Michael Myers' action in coming to Auckland at great inconvenience and delivering his interesting and informative remarks.

THE CHAIRMAN: Before putting the motion, I wish to say I am in entire agreement with His Honour's remarks as to the presence here of some of the old members of the profession. Reference might be made also to a gentleman who is not actively engaged in practice, Mr. Francis Harrison, secretary for many years of the Wellington District Law Society, and the N.Z. Law Society. Another gentleman here who is well-known is Mr. Heathcote Williams from Hastings.

The vote of thanks was carried with acclamation.

THE ATTORNEY-GENERAL'S ADDRESS.

THE HON. SIR THOMAS K. SIDEY, Attorney General, then addressed the Conference.

Mr. President, the Hon. Sir Michael Myers, the Right Hon. Sir Francis Bell, Ladies and Gentlemen,—I have not come prepared to make any formal speech. I want to thank you most sincerely for your kind reception and I also wish to thank Mr. Towle for his kind reference to myself and for his having arranged that I should have the opportunity of speaking to you to-day. I have also to thank the Honourable Sir Michael Myers for what he has said and I should like to return the compliment paid to me by him. My official duties have brought me into touch with the Hon. the Chief Justice who has already, in connection with matters submitted for his consideration, rendered very valuable service. In referring to those who have assisted me I should like to mention Mr. Gray. He has placed his long experience and his valuable advice at all times at my disposal. In Mr. Gray I have not only a wise counsellor but a very valued friend.

May I explain that when I first made arrangements which would have prevented my being with you to-day I was not aware that another fixture was to be made for me which would have had the effect of preventing my attending your Conference even at a later stage. I am glad to have been able to re-arrange matters so as to enable me to attend this morning because I feel it is important, if I am to be of assistance to you and you to me, that I should get into touch with you so that I may have your support in matters which I may bring before the House and in which you are concerned.

The last Session was the first Session of a new Parliament. The first Session is never regarded as a working Session and still less is it so when it is also the first of a new Government. However, a very fair record of achievement was placed to the credit of the new Government and amongst the Bills passed was the one dealing with the Solicitors' Guarantee Fund. That was a notable piece of legislation of importance both to the legal profession and to the public. In urging the Government to take up that measure and also in advocating it in Parliament it was very helpful that I was in a position to say that it had the support of a representative Conference of the legal profession as well as the support of every District Law Society in the country. At this Conference I hope to get your support for the main legislative proposal which so far as the profession is concerned I intend to submit to Parliament this Session. At the last legal Conference the question of legal education was discussed and a Committee was appointed to consider the matter. No convener was appointed and I therefore convened the Committee. A meeting was held on January 31st last. When the Committee was set up it was intended that it would report to the Council of the New Zealand Law Society. The Committee passed the following resolution:

> "That the Law Practitioners Act, 1908, be amended so as to place the whole control of Legal Education in the hands of the New Zealand University; the Academic Board to make to the Senate no recommendation affecting courses of study without having first got a recommendation to that effect from a body to be set up and called 'The Council of Legal Education' and being representative of the Law Societies, the Judiciary and the teaching staffs of the University Colleges."

A copy of the resolution was forwarded to the Council of the New Zealand Law Society and although I have not yet heard from the Council on the subject I assumed that the resolution would be supported by it and have had legislation prepared accordingly.

I should like here to say with reference to the proposed legislation for next Session, an outline of which I shall give you this morning, that it has not yet been submitted to Cabinet for approval. I am not, therefore, in a position to say that the Government has agreed to adopt the legislation I am proposing. I am not, however, anticipating any difficulty in that respect as regards my legal education proposals, especially if I receive the united support of the legal profession. The Law Draftsman, in order to give effect to the legal education proposals, has had to amend two existing statutes—the Law Practitioners Act and the New Zealand University Act. The Law Practitioners Amendment Bill provides that the examinations for the legal profession shall be prescribed and conducted by the University and it repeals all parts of the principal Act inconsistent with that provision but without affecting the power of the Court to admit candidates qualified for admission at the commencement of the Act. The position under the New Zealand University Act at present is that the Senate cannot make or alter curricula without first considering the recommendations of the Academic Board in the matter. The amendment proposed in the University Act provides that so far as legal education is concerned the Academic Board shall not make any recommendation to the Senate without first considering the recommendations of a body to be called the Council of Legal Education. It is proposed that the Council of Legal Education shall consist of:

(a) Two Judges (one of whom may be the Chief Justice) to be appointed upon the recommendation of the Chief Justice:

(b) Two persons to be appointed upon the recommendation of the Council of the New Zealand Law Society, and

(c) Two teachers of law of the University to be appointed upon the recommendation of the Senate,

the members to be appointed for terms of three years. If they are well chosen, and there is no reason to suppose they will not be, a body of six should be large enough. That is briefly what is proposed so far as legal education is concerned.

It does not perhaps appear to involve very much because at the present time the University conducts all the examinations both for solicitors and barristers.

There is, however, more involved than appears on the surface because at the present time there are two bodies who are entitled to prescribe for and carry out examinations in law, the one being the University and the other the Judges. The powers of the University are in effect restricted by the restrictions imposed upon the powers of the Judges who, for example, have no right to prescribe experience in an office as a qualifying test. The proposal, therefore, is a far-reaching one in that it avoids duplication. It is to be remembered that the University for the purposes of its Degrees in Law must conduct examinations in that subject and it is undesirable that there should be another body with a similar function. The University Commission which reported upon this subject some years ago recommended the setting up of a Council of Legal Education but contemplated that that body should have similar powers to those now conferred upon the Judges. My proposal is intended to eliminate the duplication of examining bodies and thus to bring the profession of law into line with what has taken place in medicine, dentistry and other professions.

When amending the Law Practitioners Act I am taking the opportunity of placing in the Bill such remits passed at your two last Conferences as are relevant to that measure. The first one is that relating to the number of members of District Law Societies: it is proposed to increase the number from nine to eleven. Another amendment relates to the removal of a solicitor's name from the Roll on his own application. The Court is given power on the application of a barrister or solicitor and on such terms as it thinks fit to order the removal of his name from the Roll of Barristers and the Roll of Solicitors or from either of them. The third amendment relates to the prevention of solicitors under twenty-five years of age from practising on their own account. It seemed to me that the House would be unlikely to accept such a proposal if it applied in all circumstances to every adult. I therefore propose to insert the provision in this connection in a qualified form which I hope may be acceptable to the legal profession. My proposal is that no solicitor admitted after the commencement of the Act is to practise while under twenty-five years of age, either on his own account or as a member of a firm of which no partner is over twenty-five, without the consent of the District Law Society, unless he obtains the authority of the Court which the Court may grant in its discretion on the application of any solicitor aggrieved by the withholding or refusal of the Law Society's consent.

There are one or two other matters affecting the legal profession that I propose to bring before the House next Session. I am proposing an amendment of the Judicature Act setting up a Rules Committee for the purposes of the principal Act, to consist of the Chief Justice and four other Judges, the Solicitor-General, and three practising barristers or solicitors to be nominated by the Council of the New Zealand Society and approved by the Chief Justice. It is proposed that the members other than the Chief Justice and the Solicitor-General shall be appointed by the Chief Justice for terms not exceeding three years. The Bill provides that the Governor-General in Council, with the concurrence of the Chief Justice and any four or more of the other members of the Rules Committee may make rules of practice altering, revoking or adding to the Code of Civil Procedure. At present this power may be exercised by the Governor-General in Council with the concurrence of any two or more of the Judges, and there are several other Acts which provide that rules may be made by the Supreme Court or the Judges or by the Governor-General in Council with the concurrence of the Judges or some of them. It is proposed to provide in the Bill that in all these cases, rules shall in future be made in accordance with the provisions of the Bill as mentioned above. It is not proposed, however, to interfere with the power of the Judges under Section 52 of the Judicature Act to make district rules as to the times and places for holding sittings of the Court and the order of disposing of business.

I propose an amendment to the provisions of the Administration Act relating to the distribution of intestate estates. The amendment will, speaking generally, be on the lines of recent Imperial legislation but the proposal will be considered of giving the Supreme Court the same power to modify a distribution under the Act as it has to modify the will of a testator under the Family Protection Act.

Another Bill which is in course of preparation and should be ready soon after Parliament assembles is a new Companies Bill. While, speaking generally, the Bill will be on the lines of the Imperial Act, 1929, an Advisory Committee representing the professions of law and accountancy, and also representing the business community, has been set up by the Government to consult with the Law Draftsman and to advise the Government as to such modifications of the English law as may be needed to suit local conditions. As far as possible I think it desirable to follow the English provisions that we may get the benefit of English decisions.

Regarding the remits to come before this Conference, I shall watch carefully the discussions that take place. I should like to make a brief reference to one or two of the remits. As to the first one regarding appeals by way of rehearing: In considering that remit I trust the Conference will not lose sight of the fact that the Magistrates' Court is usually regarded as the poor man's court. The change proposed will be in favour of the wealthy litigant who will have two chances to one as against the poor man. Regarding the next remit which deals with the subject of contributory negligence, I may say that before I saw your Agenda Paper I had already had this matter under consideration. The Hon. Mr. MacGregor a year or two ago introduced into the Legislative Council a measure on these lines. I shall be glad to have the views of the Conference on this question and I have already taken steps to ascertain how the law is working in Canada where I understand it has been in force for some years. As to the remit regarding statements of witnesses taken down by the police in cases of accidents, I understand the Department over which I have control has an objection to these notes being used for a purpose other than that for which they are primarily obtained. The object of the notes is primarily the detection and prevention of crime. If it were known by those making such statements that they might be made use of in litigation by private individuals there might not be the same readiness to give communications to the police. The officers of my Department are inclined to look with disfavour on the proposal contained in this remit. The only other remit to which I shall refer is that relating to compensation cases in the second remit, and not the first, that deals with this question. This has come under my notice owing to the fact that the Court of Arbitration has been unable to visit as frequently during the year as the law prescribes the various centres for the

purposes of hearing industrial disputes. The reason why it has been unable to do so is, it is alleged, because of the greatly increased number of compensation cases. The proposal contained in your remit is being considered from that point of view and the Government has learned with much satisfaction that the Judges of the Supreme Court are willing, if desired, to undertake the work of dealing with compensation cases.

I have now indicated a number of legislative proposals that I intend to bring down next Session. As far as the legal profession is concerned I regard the legal education proposals as the most important. I have been considering the point to which the Hon. the Chief Justice has directed attention, namely, the provision under which a solicitor with five years' practice is entitled to qualify as a barrister. You have not passed at any of your Conferences a remit condemning that proposal. I agree that it is a blot in our legal education. In this country with all our educational facilities, including free places in our secondary schools and bursaries and scholarships giving practically free education in our University, there is no reason why anyone desiring to qualify as a barrister should not pass the necessary examinations. If a change were made it would of course only apply to future entrants to the profession. The proposal, however, may be contentious and I am unwilling to jeopardise my main proposals for legal education by the insertion of contentious clauses. Once legislation is secured dealing with legal education on the lines that I propose, any amendments regarding the five years' qualification would most appropriately come from the Council of Legal Education or the Senate of the New Zealand University, when bringing down new proposals as the result of the new legislation. In the following Session I trust I may be able to bring down a consolidation of the Law Practitioners Act when several amendments of that Act in directions other than those proposed for this year may be taken into account. When the Law Practitioners Act is consolidated it is suggested that provisions relating to the New Zealand Law Society and the District Law Societies should be placed in an Act by themselves. I regard the Bill of this year dealing with legal education as one which may stand side by side with the Act which was put through last Session. It will be a complement to it. Speaking figuratively, may I say that the object of last year's proposals was to remove the effects of the contamination of the stream, while the object of this year's proposals is to purify the stream at its source. (Applause). I trust I will have the undivided support of the legal profession in getting this Bill through Parliament and I believe it will be a land mark in legal education in this country.

MR. C. H. TREADWELL (Wellington) proposed a vote of thanks to the Hon. Sir Thomas Sidey for his address. He said: The office-bearers of the New Zealand Law Society are brought very much into touch with the Attorney-General. It was through him they reached the Government. In those circumstances, in company with Mr. Gray, I have found that the present Attorney-General is a man of ideas—a gentleman who discusses and is prepared to consider anything put forward in the interests of the profession by the Council of the New Zealand Law Society. Sir Thomas Sidey has put before the Conference a number of proposals to improve the position of the profession.

MR. J. B. JOHNSTON (Auckland) seconded. He said: It has been very interesting to listen to the Attorney-General's address, particularly his remarks regarding new legislation. It would not be fitting at this stage to comment on the proposed legislation, but at least we can assure Sir Thomas Sidey that he will have all the Law Societies behind him in the introduction of an up-to-date Companies Act. The other matters will have the most careful consideration, and he will have behind him the whole backing of the legal profession in any movement for improving the status of the profession and facilitating the process of justice.

THE CHAIRMAN: I add to Mr. Treadwell's remarks my appreciation of the help the Hon. Sir Thomas Sidey has already given and of his earnest desire to give further help. The profession has in the past been very fortunate in having a number of distinguished Attorneys-General, notably Sir Robert Stout, the late Sir John Findlay, and Sir Francis Bell, who had done wonderful service, and the Hon. Sir Thomas Sidey has shown that he is quite desirous of following in their footsteps.

The vote of thanks was carried by acclamation.

CIRCUMSTANTIAL EVIDENCE.

(Mr. H. F. Johnston, K.C.)

MR. H. F. JOHNSTON, K.C., then read the following paper on "Circumstantial Evidence."

Circumstantial evidence in criminal trials which arouse public interest is so often sufficient in public estimation to hang a man before he is convicted, and after he is hung sufficiently inconclusive to raise in the public mind a doubt as to the justice of the verdict, that if enquiry into the reason of the first public reaction to pronounce accused guilty and the subsequent reaction in favour of acquittal subjects inferences on the direct evidence establishing evidentiary facts to more searching tests, it is worth while, and in an age when the general absorption of detective novels and the subjection of all classes to mystery and trial films produces a type of mind too ingenious in chain building to be left to its own devices unchallenged, it is as well, that lawyers should furnish themselves from the authorities with an answer to the criticism against the place we give to the method circumstantial in our system of jurisprudence, and with means to test in each case its strength and weakness.

At the present moment it appears that in the columns of the English *Law Journal* there is being conducted such an enquiry into the evidence in the Podmore trial and the result, it is reported, may end in the reprieve of the condemned man. Whether that is so or not, it will be interesting to learn when the reports arrive on what ground the verdict is questioned—lack of motive, unjustifiable inference from established facts, insufficient proof of evidentiary facts, an hypothesis consistent not only with guilt, or discovery of fresh evidence. To whatever weakness in the evidence, direct or circumstantial, the *Law Journal* directs its attack we may be sure its charge will not be against the general validity of circumstantial evidence, though the evidence in that trial will be found to be almost entirely circumstantial, but we may at the same time be sure, in the light of experience, that the greater and less instructed part of the law world will, in view of the great preponderance of circumstantial evidence present, interpret the attack as one against the reliability of circumstantial evidence in general as a means of proof. In the event of a verdict, whether of

acquittal or conviction, not in accord with the general sense of the community and leading to a belief that there has been a miscarriage of justice it is, I think, of advantage that qualified men in the profession should conduct or take part in the enquiry, but I think it is very much to the public detriment that the lay public should be allowed without question and without challenge to rest their criticisms, however valuable, in language which improperly implies that an integral part of our judicial rules to ascertain the truth is in character so prone to lead to fallacious conclusions that it should in general be mistrusted. The effect of allowing such a false implication to continue must in the end diminish confidence in verdicts based on circumstantial evidence and lead to a demand for more direct evidence of the *factum probandum*. This means in effect a swing to the continental system and method, as opposed to the English, that is to say, to satisfy a public demand for direct evidence resort must be had to continental methods to extort a confession. It is due to misapprehension in the French mind—especially curious in a people who pride themselves on their devotion to logic—of the nature of circumstantial evidence that a distinguished French jurist was able to say: "In France unless a criminal commits his crime in a public square or makes a confession, he need not fear conviction." If it is made clear to the layman that such is the alternative to the circumstantial method he will be very ready to abandon hastily conceived conceptions as to the nature of circumstantial evidence and carefully reconsider its true character and probative value, all the more readily because, as pointed out previously, paradoxically he first adopts it and then rejects it. The paradox is explicable, I think, because whereas the adoption is real, and follows the natural syllogistic process he adopts in reaching conclusions in the matters affecting his own business, the reflection is not of the syllogistic characteristic of circumstantial evidence but of the direct evidence in proof of the evidentiary facts.

My purpose is to suggest that, generally speaking, where the syllogistic method of circumstantial evidence is attacked by the layman, examination will show that under cover of a general attack the attack really is only justifiable so far as it relates to a particular flaw in the chain of evidence and is not in fact to the method in general, and that generally his criticism is aroused by his disbelief in the direct evidence called to prove the evidentiary facts. If this is so, it is I admit, difficult to account for the disparaging terms sometimes applied to circumstantial evidence as a class, especially since a series of slogans, such as: "Circumstances never lie"—"All men are liars"—"An ounce of fact is worth a pound of theory"—"Truth is stranger than fiction," are constantly on the lips of the lay, which, while true enough in the limited sense given them by their authors, bear no relation at all to truth as generally used, nevertheless seem to infer by their adoption a lay inclination to believe in circumstantial rather than in direct evidence.

Argument as to the relative probative value of direct and circumstantial evidence does not, I think, lead to any useful results. In principle it can, I think, be admitted that direct evidence is the more cogent. "From an abstract point of view," says Professor Gulson, in his *Philosophy of Proof*, "there ought not to be two opinions. Given the same quantity of evidence in either case, and circumstantial must of necessity be less cogent than direct evidence, in exact proportion as the inference inseparable from the former mode of proof is uncertain, and since an inference must always involve more or less of uncertainty, it follows that circumstantial evidence must, theoretically speaking be less trustworthy." In practice, however, we can show by example that circumstantial evidence does yield proof as satisfactory as direct. Paley argues that circumstantial evidence is, upon the whole, superior to direct, but Professor Gulson points out that this is merely because in the method circumstantial the quantity of evidence is much greater than in the method direct. This is the characteristic feature of the circumstantial method. The principal fact to which some direct evidence may be given is but one solitary fact, whereas the number of circumstances which surround it and may become evidentiary facts is unlimited. The particular result must depend in each case on the quantity of evidence procurable. If there be no direct evidence forthcoming, it is obvious that any circumstantial evidence that can be obtained is the best.

To lawyers, however, I think it is quite clear that they feel no need of any fixed scale to gauge either the credit of a witness or the force of an inference. To measure with any precision either the veracity of the one or the probability of the other is wholly impracticable. We know that in very few cases is there complete reliance on the one or the other class of evidence, that direct evidence may unite or coincide with circumstantial and that the two combined may furnish proof which either alone would fail to supply and that, conversely, each operates as a test of the reliability of the other. We do know, however, that the circumstance that correspondence or resemblance between two known or ascertained facts, that is to say coincidence, is itself a fact of a somewhat complex character which in so far as it raises an inference of the existence of an ulterior fact may be regarded as an evidentiary fact and should be taken into account by the layman when he is engaged in the process of weaving the networks of facts cast around an accused person, not only when he abandons that task for the more fascinating one of making gaps in the net-work woven by the prosecution. We know further that an accidental or chance coincidence does not warrant any inference as to an ulterior fact, but that, singularly enough, such a coincidence described in popular language as an odd or curious coincidence is often the means of turning the the lay mind, which fails to distinguish it from those coincidences which are referable to a common cause and legitimately imply ulterior facts, to its conclusions. The strength gained to inference when there is coincidence between two independent evidentiary facts is stated by Mr. Best in the formula: "Where a number of independent circumstances point to the same conclusion the probability of the justness of that conclusion is not merely the sum of the simple probabilities of those circumstances but the multiplied or compound ratio of them," and due appreciation of this measure is not obtained without instruction and example.

If ill-directed criticism calls in question the place of circumstantial evidence in our system it can properly be answered by increased understanding of its method, and an advance in understanding can only come from the judgments of those who have given it its place and maintained it there. In the judgments or summings up in criminal trials there is displayed a depth of wisdom and understanding of human character not equalled in any other class of reports. They form an admirable

field from which to gather categorical question and answer.

"Accused's flight after the commission of the crime," says Lex, writing to the daily press, "to my mind conclusively proves his guilt. The jury must have overlooked this pregnant fact." "Flight," on the other hand, says Baron B., "is not referable to the hypothesis of guilt only. Many not guilty, from various motives, take steps to prevent themselves being involved in the circumstances and publicity attending a criminal trial." "The motive," says another, "was too weak to suggest a crime of such magnitude. "Motives," says Lord Justice A., "are manifold and their strength or impelling power varies as vary the temperaments, constitution and habits of individuals."

A tall man wearing brown trousers was observed near the scene of the crime on the night when the crime was committed, therefore, the accused, who is tall, has brown trousers and lives in the vicinity, was the man. "Yes," says authority, "but there are other tall men, other brown trousers, and the vicinity is not taboo to strangers."

Innumerable instances relating to every class of trial and every class of crime—inferences as to identification of the quick and the dead, murder by shooting, murder by poisoning, murder by drowning, and all forms and shapes of crime and criminal method—which raise substantially in every similar case the same class of *ex post facto* question, where sound reasoning and great knowledge have been applied to the pros and cons of the question raised by Lex and others, can be garnered from the reports.

If questions affecting the validity of any class of evidence are to be discussed by the public, it seems to me our duty to diffuse the knowledge and opinions contained in the reports. As an antidote to the tendency to be over ingenious in building up a structure of circumstantial evidence—a tendency perhaps now-a-days more general owing, as I have said, to detective novels and films—I think the remarks of Baron Alderson in *Regina v. Hodges*, 2 Lewin 227, should be not only retained in the mind of the practising barrister but displayed in the forefront of any relevant discussion. The trial was one where the evidence was almost entirely circumstantial. The learned Baron said: "It was necessary to warn the jury against the danger of being misled by a train of circumstantial evidence. The mind was apt to take a pleasure in adapting circumstances to one another and even to straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of an individual, the more likely was it, in considering such matters, to over-reach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." If, at the time the learned Baron issued this warning, it was necessary, it is to-day doubly necessary, I think, to keep it constantly in mind, because, now-a-days everyone is prepared to do a cross-word puzzle or find the murderer.

The case of *Rex v. Thornton*, where the accused was acquitted, was a case of strong circumstantial evidence rebutted by equally strong circumstantial evidence establishing an *alibi*. The circumstantial evidence in support of guilt was as dramatic and as strong in kind as anyone can well imagine. The *alibi* established depended upon the testimony of witnesses who swore to seeing the accused at the time at which the crime was committed. The various time-pieces to which the witnesses referred and which differed much from each other were carefully compared on the day after the occurrence and reduced to a common standard, so that there could be no doubt as to the real times, as spoken to by them. Nevertheless, although, as Wills says, it was not within the bounds of possibility that the prisoner could have committed the crime imputed to him, public indignation was so strongly excited that his acquittal, although it afforded a fine example of the calm and unimpassioned administration of justice, occasioned great public dissatisfaction. As you all know, the brother of the deceased was not satisfied because the proceedings which he instituted by way of wager of battle are necessarily in our minds as the last instance of that relic of ancient procedure.

In the case of *Regina v. Pook*, as in Thornton's case, popular feeling ran very high against the accused, largely in consequence of sensational anticipations of the evidence in the newspapers. In that case the deceased, a girl of seventeen, had been servant in the house of the prisoner's father at Greenwich, where the prisoner also lived. On the 11th April she went to stay with friends. On Tuesday, 25th April, she was in High Street, Deptford, at 6.40 p.m. At 4.15 a.m. next day she was found in a dying state in Kidbrooke Lane, with her head beaten in. On the 27th April a hammer covered with blood and hair was found near the scene of the murder, in the direction of the prisoner's home. A metal whistle was found about fifteen yards from the scene of the murder, and it was proved that the prisoner was in the habit of using a similar whistle. The post-mortem examination showed that the girl was pregnant. Several persons swore that a young man in a dark coat and light trousers bought a hammer similar to the one produced at a shop kept by a man named Thomas, on Monday, 24th April, at about 7.45 p.m., and two of them deposed that this man was the prisoner. Two witnesses swore that on the evening of Tuesday, 25th April, they saw the prisoner in Kidbrooke Lane in company with a girl, one of them at about 6.40 p.m., the other at about 8.45 p.m. Two other witnesses saw him running into Greenwich at about 9 p.m. A few minutes later he entered a shop at Greenwich in a very hot and muddy condition, and brushed his clothes there. The shirt and trousers worn by the prisoner on that day had some spots of blood on them. Some time between the 23rd and the 30th of April he had shaved off his moustache, and had told some girls that he was going to London on the Tuesday evening, whereas his defence was that he had gone to Lewisham. It may be remarked that this evidence, if unanswered, contains all the elements necessary for a complete circumstantial proof; the *corpus delicti*, motive, possession of the means of crime, other inculpatory facts such as the whistle, spots of blood on his clothes, identification near the scene on the night in question, and his running home; there was also evidence of falsehoods told as to his intended movements upon the night in question, with a suggested attempt at disguise.

The evidence for the defence was equally complete. Prisoner was subject to fits, and was constantly watched by his family, and they saw no signs of any intimacy which would supply the motive suggested for the murder. On the evening of Monday the 24th, prisoner was with his brother the whole evening and did not go to Thomas's shop. Thomas's books only showed the sale of one

hammer that day or near it, and the purchaser was called. The prisoner had never had a pair of light trousers in his life, and was shown to have had his whistle after the murder. His whole family saw him at home on Tuesday evening till about 7.20, and again soon after 9. Several independent witnesses saw him on Lewisham Bridge from about 8.0 till 8.30. According to the defence he had gone there to meet his sweetheart, who had failed to come, and after waiting about forty minutes, he had run back to Greenwich, arriving there by nine o'clock. The blood on his clothes was reasonably accounted for; one witness had noticed it on his shirt on the day preceding the murder. He had shaved his moustache four days after the murder and it had not sufficiently changed his appearance to effect any disguise. Having had some flirtation with one of the girls called, he naturally would not say he was going to Lewisham after another young woman. The prisoner was acquitted.

Anyone reading the facts of either of the two cases will find no great difficulty in understanding the public resentment aroused by the acquitals in these cases. They are excellent illustrations of the length to which circumstantial evidence has to go before it will establish a verdict of guilty and how that of the prosecution can be countered by that for the defence. In both cases public resentment seems to have been directed at the circumstantial evidence for the defendant proving sufficient to negative the circumstantial evidence of the prosecution, and was probably influenced by preference for the testimony of the prosecution's witnesses. In Podmore's case criticism is against guilty on circumstantial evidence. I have not time to set out the facts. They are worth studying. As to circumstantial evidence, Lord Chief Justice Hewart, reminding the jury that that was a case of circumstantial evidence, said that that kind of evidence was sometimes spoken of in language of apology as if it were some minor or less compelling kind of evidence, and proceeded: "Is that so? Circumstantial evidence, that is to say, the evidence of cumulative surrounding circumstances all pointing in one direction, circumstantial evidence is contrasted with direct evidence, that is to say, the evidence of an eye-witness. But you know, one cannot forget, an eye-witness may sometimes be mistaken, there may be the interference of grudge or spite. Circumstantial evidence is free from those blemishes. Circumstantial evidence consists in this: That when you look at all the surrounding circumstances you find such a series of undesigned, unexpected coincidences that as a reasonable person you find that your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all."

I think the layman should understand how carefully juries are instructed by the presiding Judge when circumstantial evidence is relied on; a good example is provided by Lord Chief Justice Abbott who in such a case told the jury: "Regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or of contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion and care must be taken not to draw the conclusion hastily; but in matters that regard conduct of men the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men conversant with the affairs and business of life, and who know that where reasonable doubt is entertained, it is their duty to acquit, and not of one or more lawyers whose habits may be suspected of leading them to the indulgence of too much subtlety and refinement."

I have dealt with circumstantial evidence in criminal cases only. It is none the less important in civil cases. There is no difference in the rules relating to its admissibility in civil or criminal cases unless it is growing up to-day by reason of the increasing number of civil cases in which the judge is judge both of fact and law. As to whether the doctrine of similar facts, as established in criminal cases, applies in civil cases, there seems to be some reasonable doubt, but it is just as well, in civil cases as in criminal cases, that we should resist the prevailing tendency to admit that the rules of evidence, which exist only because we believe them the best means for discovering truth and essential for private and social security, should be modified or relaxed according to the enormity of the crime or the weightiness of the consequences which attach to conviction.

Lord Chancellor Nottingham, on the trial of Lord Cornwallis, said the fouler the crime is the clearer and plainer ought the proof to be. The more flagrant the crime is, said Mr. Baron Legge, in *Rex v. Blandy*, the more clearly and satisfactorily you will expect that it will be made out to you. Mr. Justice Holroyd, in *Rex v. Holson*, is reported to have said the greater the crime the stronger is the proof required for the purpose of conviction. These dicta are opposed to the principles of reason, and inconsistent with the established rules of law. No legal doctrine is more firmly settled than that there is no difference between the rules of evidence in civil and criminal cases, but if, under any circumstances, they may be relaxed according to notions of supposed expediency, they cease to be in any correct and intelligible sense rules for the discovery of truth, and the most valued rights of civilised men become the sport of chance.

Lord Macaulay has thus denounced the doctrine under review: "The rules of evidence no more depend on the magnitude of the interests at stake than the rules of arithmetic. We might as well say that we have a greater chance of throwing a size when we are playing for a penny than when we are playing for a thousand pounds, as that a form of trial which is sufficient for the purpose of justice, in a matter affecting liberty and property is insufficient in a matter affecting life. Nay, if a mode of proceeding be too lax for capital cases, it is, *a priori*, too lax for all other; for, in capital cases, the principles of human nature will always afford considerable security. No judge is so cruel as he who indemnifies himself for scrupulosity in cases of blood by licence in affairs of smaller importance. The difference in tale on the one side far more than makes up for difference in weight on the other."

THE CHAIRMAN expressed thanks to Mr. Johnston and said that the paper was open for discussion.

As there were no speakers the Chairman said that the usual courtesy vote of thanks to readers of papers would be given at the conclusion of the Conference.

REMIT.

Appeals from Magistrates' Courts.

"That the existing provisions of the Magistrates' Courts Act, 1928, in reference to appeals on point of law and matter of fact, or matter of fact alone, are unsatisfactory, and that the Act should be amended so that all such appeals should be by way of re-hearing alone."—(OTAGO).

MR. C. J. L. WHITE (Dunedin): We have found in Dunedin that the provisions of the Act in connection with appeals from the Magistrates' Court leave something to be desired and we think that legislation should be introduced to remedy what we consider to be a defect in our system. If this remit is adopted it will place the law in respect of appeals from the Magistrates' Court on the same footing as appeals in Justices of the Peace matters and Wardens' Court matters. The chief features are that the Magistrate takes merely rough notes of evidence on points that appear to him of importance. We all find on reading through the notes that many very important points have been missed out altogether. Perhaps, in the cross-examination of a witness, one is leading up to certain points. If a complete note of the cross-examination were taken, with the introductory points set out and the concluding answers, sometimes those microscopic points might become of considerable importance. In a Magistrate's notes they are usually lost. On the appeal the appellant is bound by those notes and he suffers in that respect. It is most difficult to demonstrate an error from the Magistrate's notes of evidence. We suggest that the appellate Court should have the unfettered right to consider the whole case from beginning to end. The Hon. Sir Thomas Sidey said by way of a warning that he wished us to remember that the Magistrate's Court was really a poor man's court. My answer to the Attorney-General is first of all that very extended jurisdiction has been given to the Magistrate, and it has now been extended up to £300. A Magistrate also exercises jurisdiction in destitute persons' cases. In those cases he is much more in the position of a man adjudicating in a poor man's Court than a man adjudicating on claims up to £300. Yet the appellant in a destitute person's case has the very right we are asking for. Surely that is an answer to the Attorney-General's criticism. If the legislature considers questions under the Destitute Persons Act can be dealt with in this way, questions of civil jurisdiction should also be dealt with in this way. The question of expense is one of great difficulty. In every case an appeal means expense for both parties. The only considerable expense if the remit is adopted would be that of obtaining witnesses to give evidence a second time. But it would only be in an odd case that hardship might arise, and in many cases a great number of those witnesses in the lower Court could be dispensed with. It would be the testimony of two or three important witnesses, perhaps, that would be required. In odd cases it might entail considerable hardship to poor persons in bringing witnesses from a distance, but one must not rule out a proposition of this sort merely on the question of expense. One must consider the public interest as a whole. That one or two persons might be affected is no argument against the remit. Therefore, I formally move the Otago remit.

MR. W. A. STOUT (Invercargill) seconded the remit.

MR. L. A. TAYLOR (Hawera): I speak with full appreciation of the fact that at my side sits a respected Magistrate. Half the arguments of the mover of the remit could have been dispensed with if it had been suggested that the Magistrates take more complete notes. There have been many appeals against Magistrates' decisions because cases have not been properly got up before a Magistrate. There is some good ground for the comment of the Attorney-General that we should not open the door to more litigation.

MR. R. A. SINGER (Auckland): I agree with the previous speaker. The answer to Mr. White is that, if there are to be appeals from the Magistrates in the same way as in destitute persons' cases, why should there not be appeals from the Supreme Court Judges to the Court of Appeal with a rehearing. We have all suffered from the incorrectness or the insufficiency of notes. I name no names. (Laughter). I remember a case of a Judge, now no longer in New Zealand, who produced the notes taken by a very incompetent associate. He said they were the Court notes. The same applies to Magistrates, except in a few cases. If Magistrates are requested by Sir Thomas Sidey, or whoever succeeds him, (laughter) to be particularly careful to take proper and accurate notes the whole difficulty will resolve itself.

MR. A. K. NORTH (Hawera): There are really two types of Magistrates—those who take exhaustive notes and those who pay attention to how the witnesses give their evidence. I feel possibly some good could come out of the remit. Either there should be an appeal by way of re-hearing, where the amount is £50 or over, or else, where the amount is over £50, there should be someone taking down the evidence on a typewriter. A Magistrate cannot pay attention to how a witness is giving his evidence and at the same time take exhaustive notes. I recently saw a witness receive a nod from someone in the back of the Court, while he was giving his evidence. The Magistrate did not notice it because he was taking exhaustive notes in case of an appeal to the Supreme Court.

MR. A. H. JOHNSTONE (Auckland): This remit would possibly have a good deal more force were the mover able to point to any substantial cases of injustice which have arisen from the present law. In certain cases Judges do sometimes hear more evidence when they are taking appeals. There is one reason why the evidence taken in the first place should be relied upon afterwards, and that is that it is likely to be approximately the truth. The objection to a rehearing is that there is a tendency to perjury. Litigants might bolster up their stories consciously or unconsciously. That is an objection not referred to by the mover and we should bear it in mind before passing the remit.

MR. C. J. L. WHITE (Dunedin): The demeanour of a witness is of very great importance for the consideration of the Court. The appellate Court would have the advantage of seeing the demeanour of witnesses and being better able to ascertain whether they were telling the truth. Regarding Mr. Singer's point, we have the advantage of the fuller notes taken in the Supreme Court, for what they are worth. As to Mr. Johnstone's first point, we all know that there

have been many cases; and, as regards the possibility of perjury, the fact that evidence has already been taken might be regarded as an additional test of veracity.

The remit was put and lost.

REMIT.

Apportionment of Damages in Running-down Cases.

"That legislation is necessary to bring the law relating to collisions on land into unison with that relating to collisions at sea, so that when both parties are negligent the damages may be apportioned."—(AUCKLAND)

MR. W. J. GATENBY (Auckland): Commonsense alone dictates that the change proposed in the remit should be made. The Admiralty rule is a very ancient one. There is no better means of making the masters of vessels careful to avoid collisions than to keep the liability of paying half the damages constantly before their eyes. Now that traffic on land has increased so enormously the time has arrived for such a rule on land. The reason why the rule has not been adopted before is that there were formerly so few vehicles on land and collisions were infrequent. Also the consequences were less serious. But modern conditions have changed that. I recall the case of a collision between a "Baby" Austin and a Hudson "Six" which shot out of a side road and bowled it over. The Court ordered the owner of the small car to pay the whole of the costs; they have not yet been paid, as the insurance was not forthcoming. It seems to me the time has arrived when the law should be brought into line with the development of traffic on the land. It is not in keeping with the principles of British justice that one party should bear the whole costs, where two are at fault.

MR. J. H. REYBURN (Auckland): The Admiralty principle is a nearer approximation to justice than the common law. A man has to make good a fair proportion of the loss he has brought on the other and has to meet a fair proportion of the loss brought on himself. A man may cause great loss to another and may have escaped damage himself as shown in the case cited by Mr. Gatenby. It is for us to consider the promotion of legislation more in keeping with ideal justice.

MR. W. E. LEICESTER (Wellington): I desire to support this remit strongly. At the present time the position here and abroad has led to confusion and injustice. Once, it was comparatively simple. The defendant was liable for his negligence to the plaintiff unless the latter could be shown to have caused or contributed to the accident by his own negligence; but the principles of the "*Donkey case*," enunciated fully in *Radley's case*, allowed the plaintiff to succeed in such circumstances if he could show that the defendant, by the exercise of due care, could have avoided the contributory negligence. In the view of the late Sir John Salmond, the true test is that, where the collision is caused by joint negligence, the defendant is liable if he had a later opportunity than the plaintiff of avoiding the accident. "Whose negligence is the last?" is the question to be considered. Then *Loach's case* added to the difficulties of deciding the liability by laying down that the last opportunity which the defendant should have had he actually did have, if it was or should have been in his power to have averted the collision. For example, a defendant driving with defective brakes might be liable for the whole collision, whatever the plaintiff did. These confusing conceptions, increased by such further catch-words as "proximate," "real" or "effective" causes, were commented upon by Lord Justice O'Connor in the *Law Quarterly* for 1922, when he drew attention to a case of Lord Birkenhead's where *Loach's case* was shown to be inapplicable in circumstances surrounding the collision of two vehicles through a series of negligent acts impossible to separate. Obviously, the present position presses unfairly against the defendant. The plaintiff comes to Court claiming damages, and says to the Court, "I can succeed if the defendant is negligent, and even if I myself am negligent I can still succeed if the defendant has not extricated *me* from the consequences of *my own* negligence." On the other hand the defendant can only say of the plaintiff that he caused the accident or negligently failed to extricate *himself* from it. I mention these considerations in order to show that the rule of apportioning the loss cannot lead to any greater complexity, while it will act more fairly. That has been found to be the position in Canada in those states where the rule proposed by the remit has operated for some time. The difficulty of making the apportionment, falling, as it may do, to judge and jury, judge or magistrate alone, should not be greater than that of assessing damages for personal injury or loss of various kinds. The result would approximate to a truer justice than obtains at present. To illustrate my contention, I refer to a case that came before the Full Court of Victoria. A passenger was injured through the joint negligence of two colliding vehicles. He elected, as he was entitled to do, according to the doctrine of *The Bernina*, to sue the driver of the vehicle in which he was not being conveyed. The defendant so sued, and against whom judgment was given, joined in the driver of the car conveying the plaintiff as a third party. It was held by the Full Court that the old common law doctrine of *Merryweather v. Nixon*, that there is no contribution between wrong-doers, does not apply to negligence cases. In any event, as the accident was not caused "in furtherance of any common design," it is doubtful whether the drivers were joint tort-feasors. But—and here is the rub—the Court was unable to find any authority to the effect that there was contribution in such a case as had arisen, and, therefore, refused to assist the defendant who, although only partially responsible for the accident, had to bear the whole of the plaintiff's loss—a position not without its comforting features where the plaintiff is driving with reckless friends. The maritime law, of course, apportions the loss in the degree in which the colliding vessels are at fault and, if this cannot be ascertained, then, equally, where both have been negligent. No less an authority than Lord Lindley said, in *The Bernina*, that he was at a loss to understand why such a rule should not be employed on land, and the best argument for it is that it is unjust that, where, at the suit of some party concerned, either party to a collision has a liability imposed upon him by law that, through a chance election, one only should have to pay the piper while the other escapes altogether.

MR. H. F. O'LEARY (Wellington): These are the days of heavy verdicts and heavy judgments for damages. I do not differentiate between the assessments of juries, judges and magistrates. I have seen as extravagant assessments of damages from a judge alone as ever I have seen from a jury. I support the remit because

I know the Admiralty rule is being adopted by juries, without their knowing it, in the assessment of damages. I was recently interested in a case where a motor-cyclist was seriously injured in an accident. The case did not, owing to his injuries, come up for hearing for two years. The damages assessed in his favour were moderate, as the jury did not like to find him guilty of negligence, because he would then get nothing, but they took his negligence into account in assessing the amount. (Laughter). A judge cannot do that, but once he comes to a conclusion as to the real cause of an accident the fault must be all on one or all on the other. I cannot help feeling that, in cases one is trying to settle, one would get a little more reason in one's efforts to effect a settlement if the Admiralty rule were adopted.

THE HON. JOHN MACGREGOR (Dunedin): Last session I introduced a bill into the Legislative Council with a view to making the change now suggested. It was passed there but fell dead. As to the necessity for the change I have not the least doubt.

SIR FRANCIS BELL, K.C. (Wellington): Mr. MacGregor has not told the whole story. The law is actually in force in one state of Canada.

THE HON. JOHN MACGREGOR: In Ontario.

SIR FRANCIS BELL, K.C.: It was a Bill of one clause that was introduced, copied from the Canadian Act. This law in Canada, it was shown, had given great satisfaction. The Conference should know that, because, however wise it may be to initiate legislation of a new kind, it is wiser to proceed on lines that have been proved satisfactory elsewhere. Unless something of this kind is accepted it will be impossible for justice to be done under the present rule of law, as ascertained by recent decisions in England. No judge is able to tell the jury what they ought to find; he is not able to tell them on what they should proceed in considering their verdict. The Lord Chief Justice was told by the Court of Appeal in one case that he had directed the jury wrongly when he asked them to find who was the real cause of the accident. He should have said that, although the defendant had broken every rule of the road and had been proceeding at an outrageous speed, yet because the other car did not dodge him it was the other car that was responsible. That is the law as I understand it now. Nobody can say that is satisfactory. The vehicle that really caused the collision is able to recover damages from the other fellow, because he didn't get out of the way. I think the Lord Chief Justice said in the most recent case that he did not know how the jury would arrive at their verdict from what he had told them of the law. It is not illogical to say that a rule applied with satisfaction for a century to collisions at sea should be applicable now to collisions on land, when we have, practically for the first time in our experience, a series of collisions of two cars, each on its right side of the road and proceeding even at a snail's pace!

MR. E. C. CUTTEN, S.M.: If the law is altered it will save Magistrates, at any rate, a fearful lot of mental worry.

The remit was put and carried unanimously.

SECOND DAY.

Wednesday, 23rd April, 1929.

The Conference resumed at 9.30 a.m. on Wednesday, 23rd April.

THE CHAIRMAN introduced Sir George Fowlds, Chairman of the Auckland University College Council, and expressed the appreciation of the Conference of the kindness of the College Council in allowing its beautiful hall to be used for the meetings of the Conference.

SIR GEORGE FOWLDS: I am a little awed in facing such a gathering of legal talent from all parts, and I am more awed at the possibility of any results of our consultation. I hope it will be purely formal and in no sense professional. (Laughter). I intended to be here yesterday morning to bid you welcome but was delayed in getting back from the country. I am glad to have this opportunity to say welcome, not only to this building, but to the City of Auckland. I have a keen sense of the desirability of a close association between the legal profession and the University. I have been assiduously paying close attention to the local branch of the Law Society in Auckland for several years past, without any material results coming from that flirtation; but I still live in hopes of a closer relationship in carrying on the work of the College and in preparing the coming generation for their life's work. I am quite sure the University can render very valuable service in the education of the coming generation of professional men. I am rather proud of the work already done here in the Auckland College. We have gone somewhat out of our way, and some of the faculties have the impression that we are inclined to spend money rather freely on the law side. I have no doubt we are rendering good service in that direction, and we hope our local friends will give financial help later on. I hope your Conference will be enjoyable and beneficial in its results.

MR. R. P. TOWLE (Auckland) proposed a hearty vote of thanks to Sir George Fowlds for his attendance and for the action of the University Council in giving the Conference permission to use the hall. As far as the local Council of the Law Society was concerned, it might be true that Sir George had been in touch with it for some time past without receiving any material results. He had, however, had the sympathetic interests of the legal profession in the city and that would surely be maintained.

Motion carried by acclamation.

MR. J. B. CALLAN (Dunedin) then read the following paper on "Appeal to the Privy Council."

THE APPEAL TO THE PRIVY COUNCIL.

(Mr. J. B. Callan, B.A., LL.B.)

The appellate jurisdiction of the Privy Council is now vested in its modern offshoot, the Judicial Committee. The members of the Committee are lawyers of immense experience and the highest eminence. It has sometimes been hinted that as there is no age limit, they retain office too long. I know nothing of this, but it is a criticism, which even if it have any substance, affords merely a reason for reform, and none for abolition. The most arresting characteristic of the work of the Committee is its amazing variety. The Committee hears appeals from the self-governing Dominions, including the Irish Free State, and from India and the

various Crown Colonies. It is called upon to interpret the Common Law, statute law inherited from England, statutes copied from modern English statutes and independent legislative experiments of self-governing Dominions. In Canadian appeals, their Lordships often have to deal with French law. In appeals from South Africa and Ceylon they meet Roman-Dutch law. In Indian appeals they may have to deal with customary law of which the origins are still more remote. In an appeal from the Straits Settlements, they defined the customary marriage and divorce laws of Chinese. In one of the cases in which it became necessary to consider the land tenure system of a native tribe, their Lordships, by the mouth of Viscount Haldane, said: "In interpreting the native title to land, not only in Southern Nigeria, but in other parts of the British Empire, much caution is necessary. There is a tendency, operating at times unconsciously, to render that title conceptually in terms that are appropriate only to systems that have grown up under English law. But this tendency has to be held in check closely." (1921 A.C. 402.)

I believe that these words faithfully express a particular application of a general attitude habitually adopted by the Committee. If we are to have any Court of Appeal beyond our own shores, we surely do wisely to go to a court whose daily work trains it to search for the individual basis, origin and genius of the particular legal system it is for the moment engaged in interpreting.

It would not be honest to say this without adding that at one period, the Judicial Committee appears to have failed more than once to appreciate the true basis, origin and genius of our New Zealand land tenure, particularly with reference to Native lands. Finally, in *Wallis and Others v. Solicitor-General*, (1903 A.C. 173), misconceptions on these subjects led their Lordships so far astray that they imagined our Court of Appeal to have been guilty of subservience to the Executive Government. The judgment of their Lordships undoubtedly conveys such an impression. It was an unpleasant occurrence, but when it is looked at from the distance of twenty-seven years, it is easy to see that it may have done good. It may have cured their Lordships of a dangerous tendency. The Court of Appeal whose judgment was attacked had consisted of Williams, Denniston, Conolly and Cooper, JJ. To New Zealanders the most obvious feature of the accusation was its absurdity, but the honour and reputation of the Court beyond New Zealand had to be considered. Carefully prepared written protests were made by Sir Robert Stout, and by Mr. Justice Williams and Mr. Justice Edwards, as they then were. The protests were read in our Court of Appeal and were widely published. They are masterpieces. Those of Sir Robert Stout and Sir Joshua Williams are full of close, careful and convincing reasoning, and all three protests are admirable in the restrained dignity of their language. No member of the New Zealand Bar could read them to-day without pride and satisfaction. Since then, I do not think there has been any instance in which New Zealanders have had cause to complain that their Lordships failed to understand the idiosyncrasies of our law. I have mentioned this phase of our connection with the Privy Council because it seemed to me that it would be a mistake to ignore it. The occurrence was a public event and is part of public history. It was hinted at last year by the English *Law Journal*. Moreover I have not set myself the impossible task of proving that the Judicial Committee is a perfect tribunal. The sufficient answer to that would be that it is a human tribunal. All that I am concerned to show is that we are much better off with it than we would be without it. An appellate court that failed to understand our local peculiarities would be a tribunal to which we would not wish to be subject. But the very enormity of the offence the Judicial Committee committed twenty-seven years ago, as a direct consequence of such a failure, is our best assurance that it will not so fail again. Finally, I should remark that not even the necessities of the moment blinded our Judges to the immense advantages of retaining a central court of appeal for the Empire. Sir Robert Stout in his protest said: "A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and a noble ideal." And on the same occasion, Sir Joshua Williams said: "That the decisions of this Court should continue to be subject to review by a higher court is of the greatest importance. The knowledge that a decision can be reviewed is good alike for Judges and for litigants."

I turn now to another aspect of the subject. The Judicial Committee of the Privy Council does not possess a uniform degree of control over the Courts of all the countries from which it may hear appeals. In New Zealand an appeal lies as of right from any final judgment of our Court of Appeal where the matter in dispute amounts to five hundred pounds in value. This provision forms part of an Order-in-Council of 1910, which recites that it is expedient to equalise and render uniform the conditions under which His Majesty's subjects in the British Dominions beyond the seas shall have a right of appeal to His Majesty in Council. But some of His Majesty's subjects beyond the seas have no such right of appeal. While the prerogative to grant special *leave* to appeal remains, the *right* of appeal does not exist in the Irish Free State nor in South Africa. In Australia, so far as questions of Constitutional interpretation are concerned, there is no right of appeal. There have lately been indications that even such position as the Judicial Committee now possesses is threatened. The topic has been discussed at Imperial Conferences. It will probably be discussed again at the Imperial Conference this year. When I was in London last year, members of the English Bar asked me what was the attitude of this Dominion to the Privy Council. They expressed surprise and anxiety as to what they described as the "paucity" of New Zealand appeals. The English *Law Journal* of 14th September, 1929, spoke of New Zealand appeals as having been "infrequent and rare," and welcomed with obvious relief an announcement then recently made by our Prime Minister, that this Dominion had no intention of altering the present position, but would retain the right of appeal to the Judicial Committee. I found that the London barristers who asked anxious questions as to our attitude, and who, in their uneasiness, were disposed to draw unfavourable inferences from what seemed to them our indisposition to use the Privy Council, had very inaccurate ideas as to our population and our wealth. The then recent group of New Zealand appeals brought before the Committee in the space of a few short months of 1926, in which distinguished New Zealand counsel had earned still further distinction, had not passed unnoticed. But my London acquaintance, while admitting that the gentlemen concerned had rendered

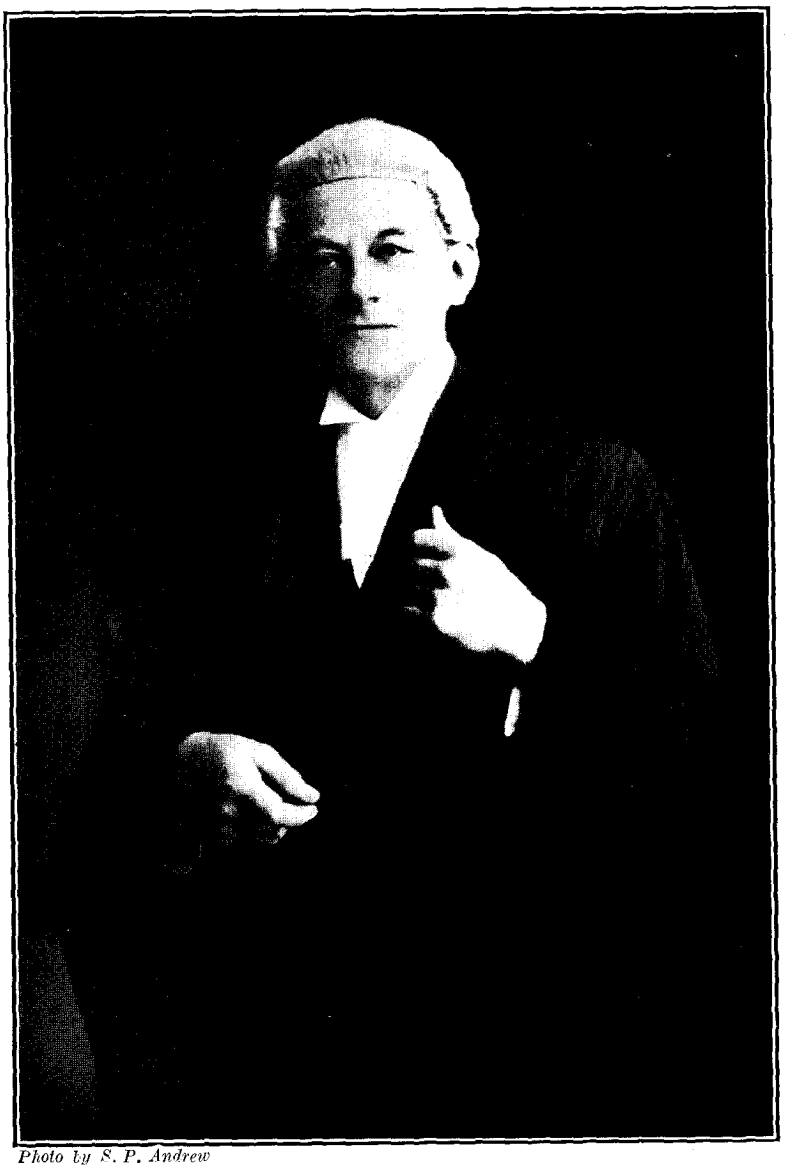
remarkable service in reminding Londoners of the existence of this Dominion, were disposed to complain that this sort of thing was not normal. I told them that out here the occasion had been regarded as phenomenal. I discovered the fact to be that these leading London barristers thought of our Islands as containing far more people, far more money, and far more business than they do. Perhaps they were deceived by our size on the map ; no doubt they had many other matters to occupy their attention ; but I was forced to reassure them as to our attachment to the Privy Council by diminishing the notions they entertained as to our importance.

A few weeks later, I was in Dublin. There I had some conversations on the subject with a leading Irish barrister, and with a member of the Bar who had spent many years in practice in South Africa. These gentlemen spoke as if well informed as to the state of professional opinion in their respective countries. And, to put it bluntly, I collected the impression that neither the Irish Free State nor South Africa had much use for the Privy Council. I said to these gentlemen, as I had said in London, that I thought New Zealand valued the connection, and would be loath to cut itself off from intellectual heirship to a common interpretation and a common development of the Common Law of England. The South African answered that in South Africa they were not concerned with English Common Law, but rather with Roman-Dutch law. He also stated that they had the greatest confidence in their own Judges of Appeal, to whom they pay a salary of £5,000 a year. He said this ensured the services of the best men. He added that to make sure of getting value, the Constitution forbad oral judgments in their own final Court, and required individual, considered, written judgments in every case. This is, of course, contrary to the Privy Council practice. The Judicial Committee does not deliver a judgment or judgments. It tenders advice to the Sovereign. From this purely historical cause, and in what appears to be a purely accidental way, it has come about that it speaks always with one voice and delivers only one piece of reasoned advice. Whatever may have been the doubts and dissensions before that published statement was evolved is never known. Their Lordships are prohibited from publishing these mysteries. Though the practice has come about by historical accident, and is not followed in the House of Lords, there is a great deal to be said for the view that it is a suitable practice for a Court of final appeal. It has been said, very expressively, I forget by whom, that "the Privy Council does not sprinkle like a garden hose, but hits like the hammer of Thor."

In the case of the Irish Free State, it should be remembered that the Privy Council is under the disadvantage of being a new and a strange thing. Possibly, it would be more accurate to say that it is at the unfounded, but none the less real, disadvantage of being an old thing under a new name. Before the establishment of the Irish Free State, the Courts of Ireland were subject to the House of Lords, as the Courts of Northern Ireland still are. The Courts of Southern Ireland are no longer subject to the House of Lords. They are freed from that jurisdiction. But they have, by reason of Dominion status, become subject to the Privy Council, though the jurisdiction of the Privy Council over the Courts of Southern Ireland is markedly less than that formerly enjoyed by the House of Lords. To any one turning over the pages of that volume of Law Reports called "Appeal Cases," in which one volume are reported the decisions of the House of Lords and of the Privy Council, it may appear that the House of Lords and the Privy Council are, in their judicial capacities, the same thing. The men who do the work are substantially the same men. The same names appear again and again in the pages, whether one is reading a decision of the Judicial Committee or of the House of Lords. Except that distinguished Judges from the Dominions may serve on the Judicial Committee, the men are in truth identical. And it would be still more difficult to establish that the law is interpreted differently in the two places than to establish that the men are different. But the names of the two bodies are different, and the name Privy Council for Great Britain is a new and a strange name in Ireland, which had its own separate Privy Council since 1801, though Scotland lost hers in 1707.

On the 12th April, there appeared in our papers an obscure cablegram that the jurisdiction of the Privy Council in Irish appeals had been challenged by a respondent. His contention had been rejected. What precisely he had contended it was not possible to make out from the cable. But the Lord Chancellor was reported as having said that the words "Majesty-in-Council," used in the Free State Constitution, could not mean anything other than the Privy Council. What the respondent had attempted to make of them did not appear, and I wondered whether he had attempted to argue that they meant His Majesty's Privy Council for Ireland. However, a report by mail was published last Saturday, 19th April. From this it appears that counsel for the respondent admitted the existence of the royal prerogative to grant special leave to appeal. He could not well avoid doing this, as the prerogative is expressly mentioned in Article 66 of the Constitution of the Irish Free State. But he claimed that it was not by the advice of the Privy Council for Great Britain, that His Majesty should exercise the prerogative. He claimed that as to matters arising in the Irish Free State, His Majesty should be guided by the Free State Executive. This was grounded two ways, alternatively. First, it was said: "Ireland is a Kingdom, as witness His Majesty's title: 'King of Great Britain *and* Ireland and of the Dominions beyond the Seas'—and let the constitutional monarch exercise his prerogative by the advice of his Ministers in his kingdom of Ireland. Let us have *all* the King in Ireland, and not merely a part of him." The other argument was that since the Imperial Conference had recognised the separate capacities of the Dominions for treaty-making, it was inconsistent with the status of any Dominion for the royal prerogative to be exercised there except by the advice of the responsible Ministers in that Dominion. We know from the cable that neither argument was accepted. The acceptance of the first argument would have severed the Free State from the Judicial Committee. The acceptance of the second argument would have severed *all* the Dominions from the Committee, and, incidentally, from the one remaining bond that in any way helps to co-ordinate their jurisprudence.

Some of you may be disposed to dismiss the whole question of the Irish attitude to the Privy Council by saying that it is unreasonable and the product merely of political prejudice. But that does not get rid of the Irish attitude. That merely ignores it. If there are reasons for the Irish attitude apart from prejudice, I have not grasped them. But I suggest



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THE HON. SIR MICHAEL MYERS, K.C.M.G.
Chief Justice of New Zealand.

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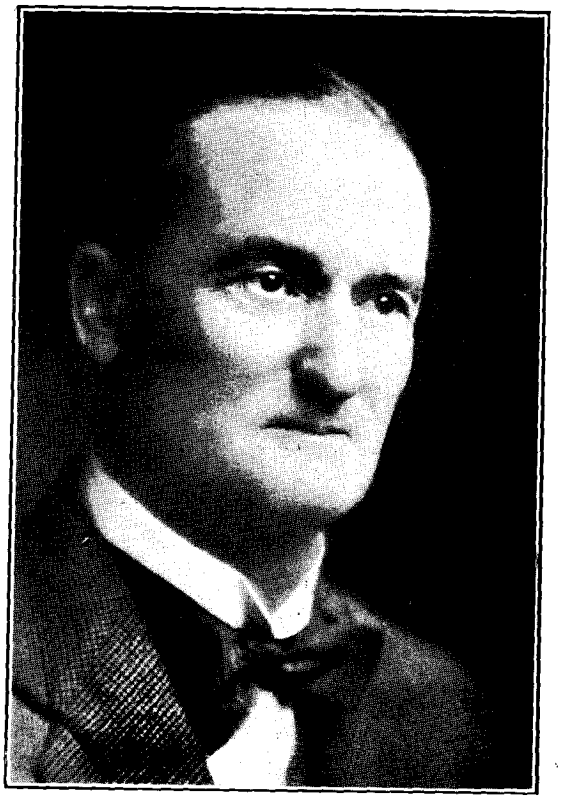
President of the New Zealand Law Society.
Chairman of the Conference.

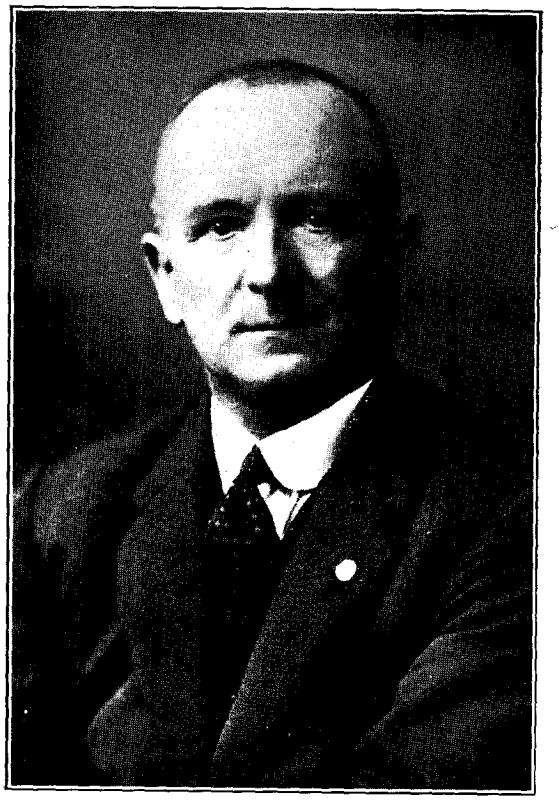
MR. R. P. TOWLE.
President of the Auckland District Law Society.
Chairman of the Conference Committee



MR. H. F. JOHNSTON, K.C.

"Circumstantial Evidence."

MR. J. B. CALLAN.
"Appeal to the Privy Council."



MR. C. H. WESTON.
"Nisi Prius."

PROFESSOR R. M. ALGIE.
Joint Conference Secretary.
"The Position of Mortgagees with respect to Fire Insurance."

MR. A. M. GOULDING.
Joint Conference Secretary.

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GROUP PHOTOGRAPHED AT THE THIRD ANNUAL LEGAL CONFERENCE.

that the proper attitude of all Englishmen towards Irish prejudice, is repentant patience. There has grown up in England, more so than in this country, a realisation that in the long quarrel of centuries between England and Ireland, the overwhelming proportion of the blame lies on England. It is no longer felt to be a sufficient explanation to say that the Irish are "incorrigible," or "hopelessly unreasonable." The truth, of course, is that the Irish and the English are just about as different as any two peoples well can be. Personally, I thank God for the difference, as for all other manifestations of the divinely ordained differences of nature. And the prejudice of the Irishman simply means that he is still feeling a little sore after a very prolonged attempt by his stronger neighbour to hammer him into a shape and mould quite other than that in which he was cast.

I am afraid I have digressed from my main topic. I mentioned my conversations with members of the Bar in London and in Dublin as confirming an impression that naturally arises from reading the public news. The destruction or diminution of the appellate jurisdiction of the Privy Council appears to be in the air. It is generally understood that the British Government would not seek to force the jurisdiction on any self-governing Dominion contrary to the will of the Dominion. It is also fairly clear that in at least some of the Dominions there is, shall we say, an absence of enthusiasm for remaining subject to the jurisdiction. One or more may be actively impatient to shake off the jurisdiction altogether. Our own very useful publication, the *New Zealand Law Journal* thought the topic sufficiently alive to warrant a leading article on it on the 3rd September last. The *Journal* supported the retention of the Privy Council and quoted Sir Robert Stout as having said: "I do not think there is a single Dominion or Colony that if asked to abolish the appeal to the Privy Council would agree to the suggestion." The *Journal*, while expressing its belief that Sir Robert's published statement correctly represented informed opinion in this Dominion, guardedly added that it had not reliable information as to the trend of thought in the other overseas Dominions. I suggest that the *Journal's* doubt is justified, that there is danger of the position of the Privy Council being weakened or destroyed, and that the danger should be combated, not ignored. I do not believe that you favour the abolition of appeals to the Privy Council. But some discussion of the matter here may make clearer to ourselves what we owe to the Judicial Committee, and what we would lose if we lost our connection with it. In this matter the decision of each Dominion affects the others. Each Dominion is, or ought to be, the best judge of its own interests. But every change that weakens the position of the Privy Council and reduces its jurisdiction, is a blow for those Dominions that value the connection and desire to retain it. The weakening of the ties that bind together widely severed peoples that lean on each other for support is involved. The question of example and imitation is involved. One Dominion, in a moment of careless and ignorant indifference, may be led to undervalue and abandon what another has thought fit deliberately to throw away. Finally, practical questions of expense and convenience may be involved. To put an extreme case, however ardently we in New Zealand might be attached to the Judicial Committee, we could hardly expect it to continue its existence for us alone. I have already mentioned that the paucity of New Zealand appeals has been the subject of remark in England.

I submit that for following reasons we in New Zealand should maintain the connection: First, there is the argument thus succinctly expressed in the public statement made last year by Sir Robert Stout: "We should do what we can to strengthen the Empire and keep it together, and not to weaken it." To appreciate adequately all that is implied in this statement demands more time than I have to-day, nor is this aspect of the question the peculiar affair of the legal profession. But I suggest these few queries as a basis of reflection: Are we satisfied that the world is yet a safe place? Do we know that there is to be no more war? In an unsafe world, can this small, isolated, thinly populated country stand alone? If not, in what group does it stand? What are the ties that bind this group? Are we as important to the centre as the centre is to us? If the ties are slight and intangible, what are the probable ultimate consequences of every gesture of severence that we may make? These queries touch matters of national policy; I pass to other considerations peculiarly within the appreciation of the legal profession.

Much of the law under which all civilised communities live is made by Judges. This is a hard saying. Those who believe that the people really make all the laws under which they live will deny it. Those who believe there should be no law save that to which the people voluntarily submit themselves will say: "Let us have no more judge-made law." But such an ambition cannot be realised. In a real democracy no law can long prevail which is contrary to the active wishes of a substantial majority. No greater measure of popular control than this can be expected. Meanwhile community life must be carried on by imperfect human beings, who, because they are imperfect, continually involve themselves in disputes, which they will not or cannot settle. The ingenuity of man as an evader of law has always been greater than his foresight as a law maker. The interests of the evader are more vitally affected than those of the law maker. He gives more time and attention to his business, and he works under conditions more favourable to results. Moreover, since conditions of life are always changing, new situations not precisely foreseen are always arising. For these reasons it continually happens that citizens bring before the courts disputes on which there is no clear definite rule. The democracy, through its Parliament, has either not spoken at all, or has spoken ambiguously. Yet the dispute must be settled, and the Court must settle it. In the result, the Judges make law; and that law, once made, stands until unmade by higher authority. Of course, Judges do not purport to make law, but only to interpret. But in its practical effect such interpretation is new and Judge-made law. It gives the citizens new rules of conduct which are new, because previously unknown. And it is Judge-made by this very sure test, that it is made by one particular Judge or group of Judges in cases as to which Judges may well differ, often in cases as to which they have very patently differed. Law is a living thing, and therefore, like all living things, subject to change and development. What shape this inevitable development will take depends in part on the individuals who are charged with administering the law—the Judges. This aspect of the work of a Judge is controlled by any court of appeal to which he is subject. Change the court of appeal, and you must change the development. Whether for better or for worse, I do not consider. If several communities, whose law has a common basis, have a common court of

appeal, all will develop their common heritage on uniform lines. But sever the tie that binds them together, abolish their common final court of appeal, and they will develop on different lines. It must be so. Development of some kind cannot be avoided, and since this development arises from the constant solution of difficult problems on which trained minds will differ, it follows that unless there be some active means of preserving unity of conception and interpretation, the solutions of daily problems will differ, and the severed systems will grow apart. This inevitable process may easily be illustrated. When the United States of America commenced their independent career, they inherited the whole body of then existing English law. Since then their Legislatures and their Courts have been busy. The reported decisions fill many volumes. A large proportion of these decisions are decisions on the Common Law, and some of them decide questions that have not yet been decided in England, Australia, or New Zealand. Yet we make little use of American reports, and this is primarily because they are of very little use. In addition to the confusion created by a multitude of independent legislatures, the inevitable differences in development and interpretation have made their appearance. Once this happens. the estrangement proceeds at an aggravated rate. A Judge or a practitioner who has once detected an instance in American jurisprudence of a development of the Common Law that is at variance with the English development, forthwith loses confidence in the whole mass of American decisions. It becomes branded as an alien growth. It occurs to me that this illustration will carry more weight if I allow the Americans to speak for themselves, and to declare their own attitude towards those developments of the common heritage that have taken place in England since the American Revolution. I quote, from the *American and English Encyclopedia of Law*, which, you will remember, is an American, not an English work. In the article on the Common Law, volume 6, pp. 279 and 280, I find the following passages:

> "Decisions of the English courts on the common law rendered since the American Revolution, though entitled to respect, and at times to be regarded as persuasive are not authoritative and will be disregarded should the exigency arise."

I think you will agree with me that when a Judge says that a decision is entitled to respect, he is generally preparing the way for an announcement that the exigency has arisen for disregarding it. The second quotation is as follows:

> "If the English courts vary from a former interpretation of a statute common to both countries, no obligation is thereby thrown upon the American courts to fluctuate with them."

The third quotation is a little longer, but I ask you to bear with it, because it is the *ipsissima verba* of an American Judge:

> "The common law grew with society, not ahead of it. As society became more complex and new demands were made upon the law by reason of new circumstances, the courts originally in England out of the storehouse of reason and commonsense, declared the common law. But since courts have had an existence in America, they have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding the current English decisions, especially upon questions involving new conditions."

Here I leave the United States, but before I leave the subject of divergent development, let me cite one more example, this time from French law. The Civil Code of Quebec is founded upon the Code Napoleon. A certain article of the Quebec Code is to all intents identical with a particular article of the French Code. Yet in the interpretation and development of this identical material, the French Courts have followed one train of reasoning, the Canadian Courts another and conflicting line. In the result, the Privy Council was asked to compel the Canadian Judges to abandon their own development and to accept the interpretation evolved by the French Judges. The Privy Council refused to do so, and supported the claim of the Canadian Courts to pursue their independent development. Obviously, the Courts of a Dominion that are engaged in administering a system of law founded on the Code Napoleon, have no such duty to follow the French Courts as lies on the Courts of this Dominion to respect the English decisions on the law that is common to England and New Zealand. But what becomes of this duty and how is it enforceable if our Courts cease to be subject to any English Court? I cite this then as another instance of the inevitability of divergence in development, unless there exists some active means to prevent divergence arising. For this Canadian example, and for a great deal more of the material I have used, I am indebted to that brilliant series of lectures on the Privy Council delivered in 1927 by Professor J. H. Morgan, K.C., and published in the *Solicitor's Journal* of that year.

Now, to draw the moral: Do you think I am going too far when I suggest, as I very seriously do suggest, that if we were to elect to have our final court of appeal in New Zealand, we would be running a great risk? The risk, as I see it, is this—that in a few generations, the work of English Judges and text-writers might become for us a mass of useless and foreign lumber. At present, from time to time, our Court of Appeal is reversed. These reversals check the current of legal thought in this country from drifting out of the main current of the development that is always taking place in England. If for the last ninety years, we had had no connection with any appellate tribunal in England, there would by now be a number of matters in which the case law of New Zealand differed from the case law of England. Do we desire such a position? I am prepared to concede that the completely independent efforts of New Zealand Judges might accomplish as near an approximation to abstract justice as the efforts of English Judges. But all human efforts to attain ideal justice are mere approximations. And there is a practical, attainable aim of far more importance than the pursuit of abstract justice. It is of great importance to the community that the citizen should be able to find out, without recourse to the Courts, what he may or may not do, and what is his redress, if any, in such-and-such events. To be able to do this in a large number of cases is attainable, so long as we preserve a common jurisprudence with huge and busy populations. At present, the disputes of English litigants, the researches of the English Bar, the decisions of English Judges and the dissertations of English text-writers settle many of our daily problems for us. That is why English reports and English text-books are found upon our shelves. Do we wish to risk all this never-ending product of highly skilled work becoming increasingly alien and useless to New Zealanders? One can easily see that it might be a good thing, commercially, for us, or rather, for our successors. But it would be a bad thing for the nation, and a very bad thing for us, professionally. Under present conditions, our daily work brings us into close and continuous touch with the best efforts of the best intellects

in England that are or have been dedicated to law. We owe the great lawyers of England much more than daily help in the solution of our daily problems. By the constant study of their work we unconsciously form our habits of mind, or methods of approaching our problems, and our modes of expression. From them, we derive a proper conception of the high and useful place our profession has in the scheme of society, and a proper realisation of the serious duties we have accepted. As a profession, we must suffer if severed from our fellowship with English workers in the law, and such a severance would be the ultimate result of severance from any court of appeal manned by English Judges.

You will gather that I invite you to consider ultimate results and the interests of an unborn generation. If the decisions of our Courts ceased to be subject to review in England, I do not suggest that we would, in a moment, lose the habit of looking to England for guidance in our problems. But that result would come, and would come more quickly than is at first realised. After all, though we improve our minds by reading the English law reports, we do not read them with that object. We read them in order to ascertain the law. When we began to find that New Zealand Judges declared the law to be otherwise than we thought we had ascertained it to be in England, then we would begin to neglect the English law reports. If you answer that there is no warrant for thinking that New Zealand Judges would declare the law to be other than English Judges declared it to be, I reply that every time a Judge is reversed on law, it follows that he has declared the law to be other than the appellate tribunal declares it to be. Also, the mischief could be done although our Judge had not, in truth, varied from the English interpretation. It would be done if we *thought* they had so varied. This is the sort of thing that might happen. We would cite English cases to our Court, only to find them distinguished where, we thought, no distinction existed. Then we would say: "What is the use of citing English cases to these men? They don't understand them. They will persist in going off on a line of their own invention. If only we hadn't lost the Privy Council, we would teach them!" I reply further that there is no ground for thinking that the Americans commenced their independent career with a firm determination to make up new Common Law out of their heads, or that the Quebec Judges have approached their problems in a mood of contemptuous defiance of French legal development. Yet, in each case, the separated systems are drifting apart.

It is in the light of future probabilities that our connection with the Privy Council should be judged; and that applies not only to ultimate consequences, but also to present inconveniences. As I had occasion to remind the London gentlemen who criticised the "paucity" of New Zealand appeals, we are a long way from London. We cannot often send Dominion counsel there; and our professional habits are such, that we feel an uneasiness about briefing a gentleman unless we can look in on him now and then for a conference. It is our pleasant way of trying to ensure that our particular case keeps high up in any roster of his duties that he arranges for himself. But the marvels of modern locomotion are such that we may look forward hopefully to the day when New Zealand counsel will fly to the Privy Council. Then we may arrive there as speedily, as comfortably and as frequently as Canadian counsel now do. And if Christopher Columbus could have been vouchsafed a vision of the circumstances under which Canadian counsel now journey to London, even a man of his imagination might have been startled.

The article in the *New Zealand Law Journal* stressed the importance of preserving a common interpretation of the law merchant throughout the Empire. I have not developed this argument. I cannot, in this paper, cover all the ground; and I thought it better to develop other points, to which the Journal had not directed attention. But the great cogency of the *Journal's* argument is obvious. It would be a bad day for the commercial interests of any Dominion, when business men elsewhere in the Empire felt they could no longer rely on their transactions receiving, in its Courts, the interpretations they would receive elsewhere.

I am in danger of exceeding my time limit. I offer one more thought. I have quoted that great and good man, the late Sir Joshua Williams, as saying: "That the decisions of this court should continue to be subject to review by a higher court is of the utmost importance. The knowledge that a decision can be reviewed is good alike for Judges and for litigants." This was said in the Court of Appeal, and of the Court of Appeal. What precisely Sir Joshua had in his mind, we do not know. But he may well have remembered that we New Zealanders live in small communities, in which litigants, witnesses, counsel and Judges tend at times to know each other inconveniently well; in which disputes are apt to arise in which all of us take sides, and in which heated feelings altogether disproportionate to the occasion may be generated. In such circumstances a court at a serene and Olympian distance is an invaluable safeguard. The Privy Council once erred in our affairs from lack of local knowledge But there is a variety of local knowledge that hinders, and does not help a tribunal There are occasions when complete aloofness is the one characteristic pre-eminently required in a tribunal, if it is to command unquestioning confidence. At present we New Zealanders have the right of recourse to such a tribunal. We would be singularly unfortunate if we lost that right. And if we lost the right because of a failure to value it, we should neither receive sympathy nor deserve it.

THE CHAIRMAN expressed the thanks of the Conference to Mr. Callan for his able paper.

RT. HON. SIR FRANCIS BELL, P.C., G.C.M.G., K.C.: I join most sincerely, Mr. Chairman, in what you have said, expressing the thanks of the gathering to Mr. Callan who has expressed so carefully and elaborately the reasons that induce many of us to hope that the appeal to the Privy Council will not be abolished by the Imperial Government or by the Parliament of New Zealand. As a fact there is no right of appeal in the complete sense. It is a right of appeal limited to £500; That right of appeal is only a special grant super-imposed on the right to petition His Majesty in Council in all cases whatever the sum at issue. Even the right of appeal has to be supplemented by a petition to His Majesty in Council. The process is not by merely lodging the papers on appeal. There must be lodged also a petition to His Majesty. That emphasises the fact that we possess the privilege of asking His Majesty by petition to refer to his Privy Council. The matter in which the Privy Council advises His Majesty is as to the right or wrong done by the Court below. The right in every consideration of the subject

is limited to the right to petition His Majesty in Council in any matter, and, of course, the limit of £500 is no limit at all to the right to so petition, though the Privy Council would be very loath to recommend the process of appeal unless the subject-matter were at least of a value of £500. That was how the matter was presented to the body which, at the last Imperial Conference, sat to consider this question, and I think you know that I was present there as the principal law officer of the Crown in New Zealand. I took a part in that conference, being privileged to speak, as I am not now, on behalf of the Government of New Zealand, with the then Prime Minister of New Zealand sitting beside me. Every Dominion had its law officer dealing with this question sitting beside its Prime Minister and speaking with the authority of the government of his Dominion. It was not the Imperial Conference that sat to consider this matter. It was a very special conference. The body that sat to deal with these matters was not alone a gathering of Prime Ministers and law officers of the Empire. The Lord Chancellor, Lord Cave, took a very important part. So did the present Lord Hailsham. So did Lord Birkenhead. I want to refer to that because Lord Birkenhead took a very different view from Mr. Callan, but he took the Irish view and very emphatically too. The real question is the Colonial Laws Validity Act, commonly known as the Repugnancy Act. If that remains in force then some Imperial tribunal must determine the validity of a colonial law. We, in this Dominion, have in our constitution the repugnancy clause, prohibiting legislation in contravention of the law of England, as expounded by the Colonial Laws Validity Act—legislation contravening any Imperial Act expressly relating to the Dominions. It is not, since the Colonial Laws Validity Act was passed, beyond the power of any Dominion to pass laws contravening the laws of England, for we can pass laws contravening Magna Charta itself; but we cannot contravene Imperial statutes which expressly apply to the Empire—and there are several such, for instance, the Shipping and Seamen Act. That is not a very good example, because it applies only in parts, but I will not waste your time by giving examples. The first attack of the Dominions, excluding New Zealand and Newfoundland, and I think, excluding Canada, was on the Colonial Laws Validity Act. The powers of the legislatures of the Dominions is limited under the repugnancy clause, as we, the New Zealand government of that day, thought, properly limited; but it was obviously not in accordance with the somewhat vague statement issued by the Prime Ministers. I did not sign that declaration of independence; I was not a Prime Minister. With the questions arising out of the discussion of the Colonial Laws Validity Act there was the further question of appeal to His Majesty in Council. If the Colonial Laws Validity Act remains it cannot be for the courts of the Dominions alone to determine ultimately whether the legislation of the Dominions contravenes an Imperial statute. Then came what was a minor question: the preservation of the right of appeal to His Majesty—to claim the right of review by His Majesty in Council. Mr. Callan has explained how singularly Ireland differs from the other Dominions. The very recent discussions in the *Times* and in the *Law Journal* also deal with the situation in Ireland. There never was a right of appeal to His Majesty from Ireland. The appeal was to the House of Lords. When Ireland severed her connection with Great Britain and was given the status of a Dominion it did not follow that there was a right of appeal as a natural course. It was open to Ireland to argue that the King in Council did not exist in Ireland, except as the King in Council of Ireland. It was open to argue too, with a great deal of force, that what was meant was His Majesty in consultation with his Council in Ireland. Ireland, because there never was a right of appeal as there has always been from the possessions abroad, is in a different position. Ireland so argued, and following on that there arose in some other Dominions the same claim, that what was meant by appeal to His Majesty was His Majesty in Council in the Dominion. New Zealand did not agree with that and I do not think Canada agreed. Australia wanted extra-territorial jurisdiction and claimed it. If there is extra-territorial jurisdiction surely then there is, there must be, an ultimate jurisdiction to determine when the extra-territorial jurisdiction comes into conflict with other parts of the Empire. So when Australia resolved to support final determination in Australia, nevertheless it sought extra-territorial jurisdiction, as Canada does, with the result that some tribunal must follow to determine the conflict. Ireland suggested the League of Nations. (Laughter). That was the position as it existed two years ago. I think the profession in New Zealand will understand how a question of so much importance to us and to the Empire arises, for, if the Imperial Parliament is induced to repeal the Colonial Laws Validity Act, then difficulties will arise in the Empire that are incalculable; but, with the repeal of that Act, there might properly follow the repeal of the right to petition His Majesty in Council, because, if all restrictions were removed, then obviously it is in the power of any Dominion to declare that its citizens shall lose the great privilege that citizens of the Empire have had since time immemorial. That conference did not arrive at any conclusion, but determined that such questions must be left to experts. So a committee of experts was appointed. It recently sat and came to the conclusion that, on the whole, it was better to let the Colonial Laws Validity Act go. Why, I do not know. I agree entirely with Mr. Callan and what His Honour the Chief Justice said regarding New Zealand. The repeal of the Act would not affect us seriously unless we altered our constitution, by the repeal of the repugnancy clause. We have adopted the law merchant in such a large degree from England,—for instance, the Sale of Goods Act and the Marine Insurance Act—we have adopted so much of the law merchant that it is of the utmost importance that we in New Zealand should not forego the advantage of the exposition of the law merchant by the greatest lawyers of the Empire. It is so great a privilege that I have been unable to understand why any Dominion wants to abandon it. If we enact that the law of New Zealand shall finally be determined by the judges of New Zealand, and without any power of revision by an Imperial tribunal, we thereby prevent—give up—the present power of seeing that the law merchant, for instance, is the same here, at one end of a contract, as it is in England at the other end of the contract. That is only one illustration of what the effect would be. By some Dominions, led, very naturally, by southern Ireland, it is thought to be a limitation instead of a privilege. If it is a privilege it is absurd to want to abandon it. If we regard it as a limitation of a great constitutional right I can understand the agitation to abolish it by legislation. It can never be abolished except by Imperial legislation. It is the right of the Crown. It can only be abandoned by legislation of the parliament under which the Crown first granted

it. It is true that, by a resolution of the Imperial Conference the Imperial Parliament might be induced to repeal the Colonial Laws Validity Act and rescind the right of appeal to His Majesty. If the Imperial Parliament does rescind the right which we regard as a privilege, the first thing we should do is to re-confer on the citizens of New Zealand the privilege they have always had, and which they ought always to have. It is not politics. The question was forced on my mind when I was responsible and took part in the Conference with the other Dominions on the Colonial Laws Validity Act.

THE CHAIRMAN: We have gentlemen here with personal experience of the Privy Council and would be pleased to hear what they have to say.

MR. J. J. SULLIVAN (Auckland): I must first congratulate Mr. Callan and Sir Francis Bell on raising this subject to a high and intellectual plane. In effect it strikes at the foundation of the unity of the British Empire. The question of the Irish Free State has been ably dealt with, but I wish to say, in passing, that the impression has been left that there is some peculiar reason why the Irish Free State does not wish to take advantage of petition to the King in Council. The Irish are inherently, it is sometimes stated, disloyal. I want to object to that. The most loyal people to the Empire, throughout the ages, have been the Irish. We have only to refer to the times of Charles, and again to James II, who was chased out of England and found protection among the people of Ireland. When all the tumult was going on in Ireland between 1916 and 1921 the Irish people tried to petition the King in Council but were prevented by the old gang who then were in charge of Dublin Castle.

There have been several things done in the past by the Privy Council relating to New Zealand and they might possibly be referred to in the hope that they will not be repeated again. The Privy Council has shown complete ignorance of our local laws and local customs, as instanced as recently as 1901. There is the famous case that led to a protest by the New Zealand Judges. Mr. Justice Williams said that the Privy Council had all the characteristics of an alien tribunal. In his protest he said that that Court, by its imputations, and by its long delayed judgments, had displayed the qualities of an alien tribunal. Sir Robert Stout illustrated three or four cases in which the Privy Council were sadly at a loss to explain the law and gave wrong decisions, and showed their want of knowledge of the law of New Zealand.

We must to-day consider the practical side of the matter of appeal. Take, for instance, an obscure employee obtaining a verdict from a wealthy employer for more than £500. In the appeal the rich man would win every time. We have to consider that. Imagine a bush-feller in the back country, with a verdict in his favour, competing with a wealthy man who carried an appeal to the Privy Council. How could he live until the proceedings were disposed of in London? In a country where the professions are not amalgamated as here there is additional expense. Of course, in 1925, a poor persons' department of the Privy Council was instituted, and a man could thereby get Home, but what about the case of a pauper respondent in an appeal to the Privy Council? There was a case of a waterside worker being killed in Lyttelton. His wife received a verdict in her favour, and an appeal was taken to the Privy Council. How was she going to instruct a solicitor in London to instruct counsel? Then there is the political side. Should we not consider that we might make the unsuccessful person intensely disloyal, to think that he has taken an appeal to a place where he loses merely through lack of resources. Therefore, I consider, as Sir John Simon suggested, that the Privy Council should go round and visit each of the Dominions. In Australia the High Court goes on tour and hears appeals in the various States. In these days of fast transit, New Zealand is not so very far away from London. Would it not be in accordance with the spirit of British justice to make justice accessible to the subject by bringing justice from London to the litigant who cannot go to London to get justice there? In the past there has been evidence of a want of knowledge of our law. A New Zealand Judge considered that judges from the various Dominions of the Empire should be associated with the Judicial Committee of the Privy Council. We have Sir Robert Stout who holds such a position, but he does not leave New Zealand. I believe some eminent jurist from New Zealand should sit in London to instruct those eminent law Lords. An eminent New Zealand judge should be associated not only in name, but in fact, with the highest judicial body in the Empire. I am satisfied, if I may use the language of a very eminent Englishman—not an Irishman this time—that Mr. Callan has lighted a candle here to-day that will bear good fruit. (Laughter).

MR. J. M. HOGBEN (Auckland): It is with some diffidence that I rise to speak on this difficult subject, and I do so only because I continue to be a student of international and legal matters. I am not an Irishman, but I have, of course, a great respect for the Irish. My mother-in-law is Irish. (Laughter). But, after all, the Irish views on this matter are only extreme manifestations of views that have become more or less general throughout various parts of the Empire. At the last Imperial Conference the position of the Dominions was defined and the resolution that defined it described them as autonomous states. It was said then and subsequently that this was a mere definition of the existing position, and was no attempt to set up a new constitution for the Empire, but, while that was said then and has been repeated since, at the same time the whole trend of thought among constitutional lawyers and among statesmen in different parts of the Empire has been towards recognition of the separate state existent in each of the separate Dominions. Canada first asserted independence as a state, and was the first to pass individual customs laws. That was followed at close intervals by similar laws passed by others of the Colonies. It was the first to assert the right to be represented at international conferences. In recent years the views of statesmen have been that the effect is to give true autonomy to the self-governing dominions. The result must be that there must be a weakening of the one bond remaining to unite the Empire. There is only one link to unite the Empire and that is the personal allegiance to the King. That is the only true link and, with that, we say the Privy Council is a link, but as Sir Francis Bell has pointed out, that right of appeal is only one example of the allegiance we owe to the King. There is, with that allegiance, the right to petition His Majesty. The present trend of thought, as expressed not only in Ireland and in South Africa, but as expressed in the Canadian Parliament by the Prime Minister of Canada, Mr. McKenzie King, is towards complete autonomy of the Dominions. We do not seek it, but we must realise that we are almost alone

in that respect. The views that were expressed in the House of Commons were that the Dominions were entitled to autonomy. So long as there remains the personal allegiance in any Dominion there will remain the desire to retain the appeal to the Privy Council. As soon as the Empire becomes disintegrated, as soon as any part seeks complete autonomy in all matters, then there will arise the desire to abandon the right of appeal to the Privy Council. That stage has, perhaps, been approached in the other Dominions. We appreciate the views put before us but we must realise that we are becoming somewhat isolated in the position we have taken up. The ideal of personal sovereignty has long disappeared throughout the world except in the Empire. As regards territorial sovereignty there may follow a disintegration as regards the right of appeal to the Privy Council. In New Zealand we still need and desire dependence on the Crown and on the Imperial government. I trust the day is far distant when that need will have disappeared in the Dominion and in other parts of the Empire. The outlook is being changed. While we do not desire any departure from the present practice of having our laws moulded by the leading jurists of the Empire—as we hope, of the world—at the same time there is perhaps a tendency, which we should profit by, to lead away from that ideal. (Applause).

MR. A. M. GOULDING (Auckland): I feel that this meeting is so overwhelmingly in favour of retaining the right of appeal that I propose to move this resolution:

"**That this the Third Annual Conference, representative of the whole of the profession for New Zealand, resolves that the retention of the final right of appeal to His Majesty in Council is in the best interests of the Dominion of New Zealand and of the administration of justice therein.**"

MR. H. F. O'LEARY (Wellington): I second the motion. I think Mr. Callan in his paper has reached the highest level reached at any of these Conferences. The discussion which has followed has continued at the same high level attained by the reader of the paper. I do not claim a sturdy Highlander as my forbear, but I feel that our affection for the land of our fathers is not incompatible with our affection for the Empire and the Privy Council. It is a privilege to second the motion.

MR. J. B. CALLAN, invited by the Chairman to reply, said that he thought nothing had been left unsaid regarding either the Privy Council or Ireland. (Laughter).

The motion was put and carried unanimously.

REMITS.

"**That in future the legal Conference be held every alternate year instead of annually as at present.**" (CANTERBURY).

"**That the Council of the New Zealand Law Society be requested to convene an annual legal Conference of all members of the New Zealand Society at or about Easter, or some other suitable time, and at such place as the Council may from time to time appoint, in order to discuss and deal with matters of interest or importance to the legal profession; and that such Conference be convened as a meeting of the Society, under Section 78 of the Law Practitioners Act, 1908.**" (TARANAKI).

At the suggestion of MR. G. T. WESTON (Christchurch), the second remit was taken first.

MR. A. COLEMAN (Stratford) in moving the adoption of the second remit, said: I feel handicapped in moving a matter of such domestic concern after the Conference has been regaled by a subject of such wide Imperial interest as has been discussed. A situation of bathos has been created by the juxtaposition of these two matters. (Laughter). I shall have to try and live that down. The object of the remit is to have a Conference constituted as a formal gathering of the New Zealand Law Society, instead of being an irresponsible gathering, as it has been, of the legal fraternity. The New Zealand Law Society has status and funds. The Conference has not. This remit arose through some remarks made by Mr. Seymour, of Hamilton, at the last Conference, and from a motion moved by Mr. A. F. Wright, of Christchurch. Mr. Seymour said:

> "I would like to draw the attention of the Conference to the fact that we are sitting here as a body which has no organic relationship to the New Zealand Law Society. It is a curious fact that this Conference, devoting much time and attention to important business, is nevertheless not yet a body which has a legal existence, and I suggest that that would seem to be one of the most urgent matters to be attended to—that is the reconstitution of the New Zealand Law Society with a view to giving this Conference 'a place on the map.'"

Mr. Wright's motion read as follows:

> "That in view of—(a) the many important matters engaging attention at this and the last Legal Conference requiring redress; (b) the ever increasing inroads being made into the legitimate business of the profession; (c) the necessity of meeting unfair competition, whether of State departments or of private concerns; and (d) the great amount of additional work which Conferences of this nature cast upon the New Zealand Law Society; it be a recommendation from this Conference to the New Zealand Law Society that an executive officer, who should be a lawyer, be appointed to assist the New Zealand Law Society to carry into practical operation the various matters dealt with at these Conferences, and also matters affecting the profession generally; such officer to devote the whole of his time to questions affecting the profession, and not to engage in private practice, and to be paid such a salary as would enable the Law Society to secure the services of a lawyer of executive ability and of standing in the profession."

Speaking to the motion, Mr. F. L. G. West, of Auckland said:

> "This Conference being a floating entity which meets only once each year and then ceases to exist, some sort of a standing committee will require to be formed at some date or other, and the most appropriate body to act as that standing Conference committee are the delegates to the Council of the New Zealand Law Society."

If due effect is to be given to the decisions and resolutions arrived at by this Conference they should be such as to insure that they are carried into effect. It is most desirable that that should be done, and resolutions not carried into effect following previous Conferences, and there are many such, should be put in the most prominent position on the programme of the next Conference. There were many resolutions passed by the Canterbury and Wellington Conferences. I think a great many of those are ineffective or abortive, because they have been lost sight of. This is not a meeting of the New Zealand Law Society. It is simply a gathering of the profession. The agenda is prepared by the District Law Society in whose district the Conference is held. There is no connection between one agenda and another. If this were a meeting of the New Zealand Society somebody would be responsible to see that matters previously discussed were brought up again, and the same applies to resolutions. We have no power to see that those resolutions were carried out. We have no funds to pay expenses. That state of affairs was realised by Messrs. West,

Seymour, and Wright. Without going through the appointment of a standing committee the difficulty could be got over by making this annual gathering a meeting of the New Zealand Law Society. The Society has not met as a whole, but legislative authority is given for it to meet and carry on its functions. The resolution is purely a machinery one. There is every reason why the Society should meet in the form I have proposed. There are strong objections to meeting as we are doing. The Council of the New Zealand Law Society can suggest that meetings be held wherever it is thought best. The only thing that Taranaki insists on, as far as it is able, is that the meetings be convened as meetings of the Society, not merely as gatherings of the members of the profession.

Regarding the Canterbury remit, I would be very loath to deprive Dunedin of the opportunity of showing its hospitality next year. I think we should have an annual gathering for many years, as there are many domestic matters that can only be settled at these Conferences. I do not think interest has waned on the part of members. I do not think it will wane. There is too much yet to be done to justify a postponement to every alternate year. The remit I am moving is designed so that legislative effect can be given to our resolutions. The New Zealand Law Society, when its Council meets under the Acts which govern it and grant its constitution, has, broadly speaking, no powers. That will have to be remedied. Although that is the case, it must be obvious that we should put our house in order at this stage, so that, when we have a new Law Practitioners Act on the statute book, preserving the interests of the legal profession and giving the profession power to conserve its own interests, we shall be holding our meetings as a regular body. The Council will be required, as far as possible, to carry into effect the resolutions we pass. There is no duty on it to do that now. No doubt it does it, but it is not truly answerable if it fails.

I should like permission to digress for a moment to draw attention to the provisions of the two Acts of 1908 and 1913, as affecting legal practitioners. The 1908 Act provides that the Society in general shall perform certain functions.

> S. 69.—The Society shall have perpetual succession, and be capable in law of acquiring any lands or any estate therein of what nature or kind soever, the yearly value of which shall not exceed in the whole at any one time the sum of five hundred pounds, computing the same at the rack-rent which might have been obtained for the same at the time of acquisition thereof.
>
> S. 70.—The Society may also from time to time sell, convey, demise, exchange, and dispose of or mortgage any of the lands wherein it has any estate or interest or which it so acquires as aforesaid, but so that no sale, mortgage, incumbrance, or other disposition thereof shall be made except with the concurrence of a general meeting to be held in manner hereinafter mentioned.

The humour of it is that the Society is formed for carrying out no real objects. The 1913 Act gives additional powers to provide and maintain a Judge's library, and to subsidise the funds for law reporting.

> Section 2 of this later Act says: The New Zealand Law Society shall, in addition to its existing powers and functions, have the powers and functions following, that is to say:—
>
> (a) To provide and maintain a law library at Wellington for the use of the Judges of the Supreme Court and of the Court of Appeal.
>
> (b) To subsidise the funds of the New Zealand Council of Law Reporting in connection with the preparation and publication of reports of legal decisions.
>
> (c) To investigate charges of professional misconduct against any practitioner.
>
> (d) To institute prosecutions against practitioners or other persons for the breach of any statute, rules or regulations relating to the practice of the law.
>
> (e) To oppose any application made for admission as a barrister or solicitor, or any other application made under Part I of the principal Act.
>
> (f) To appoint any barrister to appear before any Court in any of the foregoing matters, and any barrister so appearing shall have audience accordingly on behalf of the said Society.

There are no provisions, either in the Act or in the rules, for extending our interests. What we want is a provision in the new Act somewhat on the lines of the provision in the Society of Accountants Act, which provides that one of the objects is to promote the interests of the accountants in New Zealand. That is going a little beyond the remit, but it is designed to anticipate an amendment or instalment of reform to be passed at the coming session. The remit is designed so that, when those amendments are law, we will in annual conference have power to legislate and put into operation from time to time the powers those amendments to the Act will confer on us. At present we have no such power and the Taranaki remit is designed to get over that.

MR. G. M. SPENCE (New Plymouth): I wish to compliment the committee which arranged this Conference on the excellent programme. The standard set is to deal with matters of great importance to the profession and more particularly to the public. In looking through the agenda, however—I say this in the kindest spirit—I fail to see one remit which deals with any matter of domestic interest to the profession except the one now under discussion. I feel this Conference was designed to discuss such matters, to protect the interests of the profession, and to advance the affairs of members generally, with due regard to the public interest. Every other society and institution in New Zealand meets for the purpose of looking after its own interests and I think some scope should be provided to allow us to discuss matters that vitally affect our profession.

The position as regards this remit is that at the present time we do not meet as a corporate body. We are simply a gathering of lawyers from different parts of New Zealand, who come to discuss matters, but without the ability to see that resolutions passed are carried into effect. It is a most unfair tax on the members of the District Law Society which is good enough to invite the Conference to be held in their centre that they have to face the whole expense. The profession is deriving benefit from these Conferences, and the profession, as a whole, should pay. I suggest that we should have such important matters to discuss as the co-ordination of the Law Societies, the protection which is afforded by the Guarantee Fund, methods of meeting unfair competition from outside, and other matters pertaining to the protection and interests of the profession. As a matter of fact we could usefully discuss the true scope and objects of a Conference like this. I suggest this is the appropriate place to consider what suitable means could be adopted by the profession as a whole for making known and bringing before the public the value of such matters as the Guarantee Fund. At the last meeting of the Council of the New Zealand Law Society two very important matters came up for consideration,. I understood that an opportunity would be given here for discussion of those

matters—in the first place, the desirability of making known to the public the advantages of the Guarantee Fund, and, in the second place, the appointment of an executive officer on the lines indicated at the last Conference. The funds of the Society are for certain particular purposes. The amount that can be obtained from members of the profession is limited. That brings us to the point that certain further amendments of the Law Practitioners Act are necessary. It is open to us to consider not only the points raised by the Hon. Sir Thomas Sidey, but to consider also other directions in which the Act might be amended. All this, I think, comes around the remit and it is in support of what has been said. Power should be taken to authorise the New Zealand Society to obtain revenue to pay the salary of an organiser, as suggested at the last Conference, and to advise the public of the importance of the Guarantee Fund. That would be, in effect, putting into operation the resolutions of these Conferences. There is also the question of empowering the New Zealand Law Society to set up a statutory committee. The extraordinary position we have in this country is that, if a solicitor defaults he is prosecuted in the Magistrate's Court, then he appears in the Supreme Court, where a rule *nisi* is granted, and he finally goes to the Court of Appeal. On each occasion there is scope for unnecessary publicity, which could quite easily be removed, as in England, because it has a damaging effect on the profession as a whole. Regarding legal education, we have had a lead on that from the Attorney-General. It is a great pity that this Conference will possibly not have an opportunity of discussing the Attorney-General's views regarding legal education, and the powers of the New Zealand University, and to what extent those powers should be controlled by the New Zealand Law Society. Further, there is the question whether all members of the profession should not compulsorily be members of the New Zealand Law Society.

I am putting these suggestions to you to show that we should at Conferences like this, be able to discuss matters affecting the profession internally, and if there is going to be an amendment to the Law Practitioners Act we should have the opportunity, at an annual Conference, of making suggestions, while the Bill is before the House, to provide additional machinery for getting the best results from the amendment of that Act. I cordially agree with everything said in support of the remit. The Conference performs a very useful purpose, but it could be made much more useful if it were constituted as a meeting of the New Zealand Law Society.

Regarding the other remit, it seems that we have not reached the stage when we ought to try to weaken our Conference by holding it only once every two years. There will be great advantages in continuing to hold these Conferences annually. Other professions hold annual Conferences; and are not we in a position where we find it necessary to discuss vital matters? Conditions are such as to make it more important in the future than in the past to hold regular annual Conferences. If this Conference did no more than to deal with the business on the agenda paper it would be performing a useful and important function; but, leaving out altogether the question of public interest, the profession itself requires that we should meet annually to consider domestic matters. I am satisfied, if the Council of the New Zealand Law Society places matters on the agenda paper which are of domestic interest, they will be supported throughout the Dominion. Interest will increase. Members will feel that they are helping themselves as well as the profession, and guarding the public interest.

MR. M. M. F. LUCKIE (Wellington): I am entirely in accord with the principles outlined by the mover and seconder of the remit. It is obviously necessary from time to time to improve the legislation which, for a good long time, we have been afraid to touch. We have heard from the Attorney-General the most encouraging remarks that we have heard from any Attorney-General for many years past. I have been connected with a municipal body for many years and we have been holding annual Conferences. We have found it necessary to incorporate those Conferences with a view to securing official recognition of every resolution passed; and, in particular, reference ought to be made to the fact that we do not let any resolution passed drop out because legislative effect is not given to it. It comes up and is passed every year and is kept before the public. We have obtained the passage of a great number of provisions suggested at the Conferences. With the sympathetic consideration of the head of the profession, as we have, we ought to do much more by adopting that scheme and seeing that resolutions are brought forward from the previous years as a matter of form and passed every year. And we should set up a permanent executive committee, as is done by the Municipal Association, for bringing before the Government the proposals which the municipal conference considers should be included in legislation. If that were adopted the Council of the Law Society, meeting in Wellington, should father a large number of these remits, which should come before the annual Conferences. They would then go with very much greater weight to the government of the day. If this is constituted into an annual meeting of the New Zealand Law Society it will carry much more weight as an executive body than at present. It would be a great blunder just now to adopt the suggestion of biennial Conferences coming from Canterbury which instituted this Conference. It would be an admission of failure which this meeting and the attendance here does not warrant. I have much pleasure in supporting the resolution.

MR. G. T. WESTON (Christchurch): Perhaps I ought to bring forward what I have to say on the Canterbury remit now. I am not the father, but only the adoptive father of that remit. I do not propose, however, to get rid of the adoptive tie. I appreciate that in bringing this remit forward I am guilty of a breach of good manners to Auckland, in view of the hospitality and excellent methods of those who have arranged this Conference. I owe the Auckland Law Society an apology, and I make it now. We thought in Canterbury that the time had come when we should consider whether the Conferences should be held annually or biennially. We thought the expense involved justified a suggestion that they be held every two years. There is the expense on the entertaining society and then there is the expense on the visiting members. Both are excessive, and it is for you to say whether the results justify the expense. I am not sure which course is better, but we were tempted to adopt the biennial Conference by the Medical Conference recently held in Christchurch which decided that their purposes would be served by meeting once every two years. The second objection is that we do not want the members of the profession to take the

Conferences as a matter of course. As long as they regard this as the Mecca to which they must proceed annually or very frequently, very good, but once they get the idea that the meetings are not necessary, the time may come when we will have to widen the intervals or abolish the Conference. If Mr. Coleman's resolution is carried, that will dispose of the Canterbury remit at the same time. If it is not carried, I take it the second will be put.

MR. C. J. LOVEGROVE (Auckland): In answer to the Canterbury suggestion, our medical brethren have put their house in order, but our profession is and has been for a number of years fighting for its very existence. I favour the annual Conference under the jurisdiction of the New Zealand Law Society. It is most important for the future success of our profession.

MR. J. B. CALLAN (Dunedin): Whether, broadly, the Canterbury remit is sound or not I have an open mind. I am not convinced of the necessity for a Conference every year, but I am strongly opposed to the Canterbury remit because the Conference is now three-quarters of the way round New Zealand and has yet to come to Dunedin. (Laughter). It would be a horrible blow to the Dunedin people if this change were made just on the eve of the time when we would have the pleasure of entertaining you. We took it for granted, when the Conference had been to Christchurch, Wellington and Auckland, that it would be ready to come to Dunedin. We have been getting ready in a preliminary way to entertain you. I would go back utterly disgraced if I allowed you not to come. Therefore, suspend your judgment whether the Conference should be annual or biennial until you have been among us.

MR. T. MILLIKEN (Canterbury): The mover of the remit did not speak for the bulk of the Canterbury people. The majority are keen on the Conference. There is too much work to be done to allow it to develop into a biennial Conference. The matters referred to by Mr. Spence should be dealt with, and I regret they are not down on the agenda. I wish to disabuse your minds of the idea that the Canterbury people are in favour of discontinuing this Conference in any way at all. We have difficulties down there that you have not—the land-brokers particularly. We feel that strongly.

MR. R. H. BOYS (Wellington): Could the President direct us as to the opinion of the Council of the New Zealand Law Society? It is a matter that affects the meetings of the Council. It would assist the Conference if we could have a guide.

THE CHAIRMAN: The Council of the New Zealand Law Society has desired to encourage these Conferences. In the beginning the idea came from Canterbury and the Council carried a resolution unanimously in favour of a Conference to be held every year, and the first Conference was called to be held in Christchurch.

The New Zealand Law Society is a peculiar body. Its constitution provides that every member of a District Law Society is also a member of the New Zealand Society, but under the Law Practitioners Act of 1908, amended in 1913, the sole management and control of the Society and of its income and property is vested in the Council and fixed by the Act and Rules. I do not think a general meeting of the Society—apart from the Council—has been held since the Rules were passed in April, 1916. I would like to tell you the objects of the Society as they are defined by the Act and Rules. Rule 2 reads as follows:

> Rule 2.—"The objects of the Society are: To promote good feeling and encourage proper conduct amonst the members of the legal profession; to suppress illegal, dishonourable, or improper practices; to preserve and maintain the integrity of the legal profession; to consider and suggest amendments of the law; to afford means of reference for the amicable settlement of professional differences; to settle points of difference; to provide and maintain a Law Library at Wellington for the use of the Judges of the Supreme Court and Court of Appeal; to subsidise the funds of the New Zealand Council of Law Reporting in connection with the preparation and publication of reports of legal decisions; and generally to watch over the interests of the legal profession."

In my experience the Council of the New Zealand Law Society endeavours to act up to the objects defined in that Rule. Also, it has some statutory powers of investigating complaints and taking proceedings against offending practitioners, and of opposing applications for admission to the profession.

If it be thought that the objects of a Conference like this can be better attained and carried out by a general meeting of the Society, by all means let that be done. We are in effect meeting as members of the New Zealand Law Society, all being members of the District Law Societies. The practice has been for the Council of the District where the Conference is to be held, with the assistance of other gentlemen willing to act, to prepare a programme on the business and entertainment sides, and to send out, in advance of the day, invitations to every District Society for contributions from members who wish to read papers, or for the other District Societies to suggest remits. It is open to every member of the profession in New Zealand to suggest that there shall be brought forward some particular subject in which he or his Council is interested. All the matters mentioned by Mr. Spence would have been very useful subjects for discussion, no doubt, but it is too late now to enter upon a general discussion of them. The Auckland Council has done very well. It invited remits for discussion, and papers to be read, and if any gentleman wished to bring forward any particular matter for discussion it was open to him to do so. The practice in the case of the Christchurch and Wellington Conferences was that all resolutions carried were passed on to the Council of the New Zealand Law Society to be dealt with; and in every instance the Council, after consideration of them, sent on the resolutions to the Attorney-General, and discussed them with him, and effect was given to such of them as he considered desirable and capable of being carried out. Sir Thomas Sidey proposes to bring down legislation to give effect to some of the other resolutions. It is desirable that anything that stands over from a previous Conference shall be brought up at the next Conference. That can be attended to in the future when programmes are being prepared.

Regarding the suggestion from Christchurch, that there should be an executive officer to carry into effect the resolutions of the Conference and to act as a manager of the business arising from the Conferences, that has been considered by the Council of the New Zealand Law Society but we have not the means to adopt the proposal. Our revenue is very small. Under an amending Act one guinea is added to the fee previously prescribed to be paid for the annual practising certificate and we are required to contribute eleven shillings

of that sum to the Council of Law Reporting. It would be impossible, with that limited revenue, to get a lawyer of standing who could give the whole of his time to the work.

As to getting increased powers for the New Zealand Law Society to deal with the matters mentioned by Mr. Spence, the Attorney-General is willing to help, but he says he must go slowly. He hopes next year to bring down a comprehensive amended and consolidated Act, and in that respect he will do all he can to assist us. Some time ago, after a discussion with him, the Council of the Society requested the District Societies to send in suggestions of amendments to the Law Practitioners Act, but none were received. We hope members of the Conference will now consider what amendments should be made, so that they can be submitted in good time to the New Zealand Council and the Attorney-General.

MR. G. M. SPENCE (New Plymouth): I wish to explain that remits were sent forward. Matters relating to advertising, amendments to the Act, etc., were matters that could profitably have been discussed at this Conference. The Auckland committee apparently thought otherwise. The suggestions were made, but the agenda is already fairly lengthy and no doubt the Auckland committee thought it could not find space on it for the remits.

MR. H. F. O'LEARY (Wellington): I oppose both the remits. After hearing Mr. Callan, Mr. Weston on behalf of the Canterbury Society should withdraw the first remit. The time will come when this matter will have to be discussed, but Dunedin should first get its Conference in sequence. Regarding the second remit, I was disappointed not to hear whether the Chairman thought it practicable or feasible for a gathering like this to be constituted as a meeting of the Society. I do not think it feasible, practicable or desirable. Are we, present here to-day, a representative gathering of practitioners in New Zealand? We are under two hundred in number. The number from the South Island is nine. If this resolution is carried into effect it will really be a representative view of the North Island, and a meeting at Dunedin would be a meeting of the South Island. Unless you have a gathering at Wellington you have no possible chance of getting a gathering that is representative of the whole of the Dominion. Let the gathering carry its resolutions, which are placed before the Council of the New Zealand Society and leave it to the Council to carry the remits into effect. The Council has not been remiss. Why is it necessary to constitute this as a gathering of the Society? The time may come when, on vital matters, the two islands will have very different views, but we should leave very well alone. These Conferences have been a success and resolutions have been carried into effect by making representations to the Attorney-General. It would be improper to make the proposed change without a representation from all parts of the Dominion. We cannot get a truly representative gathering and therefore we should leave it as at present.

MR. J. MELTZER (Wellington): I entirely agree with the remarks of the previous speaker, particularly regarding the Canterbury remit. In view of the remarks of Mr. Callan it would be discourteous to our southern friends to deprive them of their anticipations of entertaining us next year.

MR. E. M. MACKERSEY (Te Kuiti): I am very much interested in the remarks made by the mover and seconder of the Taranaki remit. I think it will be generally agreed that the profession is entering upon a critical time. In Canterbury they are feeling the effects of the land-brokers. There is another institution that, by unprofessional conduct, is attacking the profession from one end of the Dominion to the other. I feel that matters and resolutions dealt with by this Conference will have more weight if they come from a properly constituted meeting of the Society. We have just put on the statute-book the Solicitors' Fidelity Guarantee Fund Act. We, in the country, feel great appreciation of the work done by the Council in getting that bill through, but we all know it is in the nature of an experiment. I think New Zealand is the first part of the Empire to put such a measure on the statute-book. We are certain to discover that that Act will require some amendments. It would be a retrograde step if we did not meet in conference for two years. Matters will come up in the next twelve months affecting the Solicitors' Fidelity Guarantee Fund Act and they can be dealt with more effectively by a properly constituted body.

MR. L. A. TAYLOR (Hawera): The lack of thorough representation at this meeting may be due to the fact that we are more or less powerless to see that anything we want done is carried into effect. As Mr. O'Leary has laid down the gage I take it up. There is in the country districts a pronounced feeling that the Council is not representative of the practitioners as a whole and we in the country districts are fighting for some wider representation and some better say in the Councils of the profession. Perhaps the resolution is not sufficiently well thought out, and in order to obtain a fully representative gathering each of the Law Societies should be asked to nominate representatives to the Conference. Others who attend should have the right to take part in the Conference but not to vote. I ask you not to throw out the remit that has been sent on from Taranaki. It is the first step towards a broader government of our affairs. The profession is not in as bad a way as has been stated, but we should make some move to get out of the rut into which we have fallen.

MR. H. P. RICHMOND (Auckland): We who have had many years of service on the District and New Zealand Councils know that the Societies do their utmost to represent fully the whole of the profession, and if there are some practitioners in the country who feel they are not fully represented surely it is their own fault. They can elect men to the Council and can assure that their views are fully representative. In a Conference of this kind there is a liability that there should be a catch vote. We have very little opportunity for consideration. We have no individual duty to consider the various remits. Those who are members of the District Societies have a duty cast on them. They give the remits their individual consideration. I know nothing more dangerous than to trust the vote of a large and democratic assembly. A Conference of this kind is immensely valuable if it puts before the public the view that we are considering other matters than costs. Let us leave aside the question whether or not the province of our profession is being unduly invaded. We have the exceedingly able paper of Mr. Callan, and where we have that high standard we are on better ground than in dealing with domestic affairs only. The New Zealand Law Society

is dealing with numerous questions affecting the interests of the profession. In regard to both remits I strongly support what Mr. O'Leary has said, that we should not make any resolution. One becomes converted to the idea of Conferences when one has papers such as we have had, and it is certainly not the time to cut down the Conference when we are yet to have the wisdom and sagacity of Dunedin to control our next meeting. I hope both the remits will be thrown out.

MR. W. T. CHURCHWARD (Blenheim): I desire to support Mr. O'Leary's argument. The question has been considered by the Marlborough District Society unofficially. We considered the Conference should continue in its present form and, further, that the real government should be done by the New Zealand Council and Society as at the present time, for the reasons given by Mr. O'Leary, and for the further reason that the New Zealand Council is comprised of representatives from every District Law Society in New Zealand. If a matter of importance is referred to the District Societies it is carefully considered—at least, by ours (laughter)—and it is sent on to a representative in Wellington or someone is sent from the District Society. I think for the present that is a good arrangement. Mr. Richmond has pointed out a defect, that we come here not fully prepared to argue a remit—that we have not considered it with proper care. We come here more in a holiday spirit. The principal advantages of these Conferences are in their social aspect. (Hear, hear.). I admit the proposer and seconder have made out a very good case, but I am opposed to the remit.

Whether the Conference should be an annual one or not brings up the question of a continuity of policy. The principal arguments are that we have a great deal to do to put our house in order. We have an Attorney-General with the interests of the profession at heart. Following the Conference at Dunedin, I suggest the country Societies combine and arrange a Conference, say, at the Tongariro Chateau. (Applause and laughter). By that time we should have the opportunity of returning this hospitality. Then we may consider whether the Conference should continue to be an annual one or not.

MR. I. J. GOLDSTINE (Auckland): I must challenge the statement made by Mr. Richmond that he knows of nothing more dangerous than a vote taken at a democratic gathering like this. In my opinion, and from the little I have gathered during my few years in the profession and in public life, I know of nothing safer and more beneficial than a vote taken at a democratic gathering. At a Conference like this members of the profession from all parts are gathered together to express their views and we are able to vote sensibly on any question brought before the meeting. As to the remit that Conferences should be held biennially, I should be very disappointed as a younger member of the profession to see any change, as I feel a lot has still to be done and there is much to be learned from these Conferences. We look forward here to obtaining a better understanding of the affairs of the profession.

MR. A. M. GOULDING (Auckland): As one of the joint secretaries I might have spoken feelingly in regard to organising and directing a Conference of this kind. There is a danger, if the Taranaki remit is carried, that the New Zealand Society might feel itself placed in an awkward position. I feel also that it would be wrong to rob Dunedin of the privilege of having a Conference next year. It would be better, under the circumstances, if we deferred consideration of both remits until the next annual Conference and possibly to a still later Conference, supported by the country practitioners. I move the following amendment:

"That consideration of both the remits from Canterbury and Taranaki be posponed until the next Conference."

MR. A. ST. CLAIR BROWN (Auckland) seconded the amendment.

MISS E. MELVILLE (Auckland): What Mr. Goulding has said anticipated what I was just going to say. We know by experience the hospitality of Dunedin. Having gone the rounds of the four chief cities no one should complain if the question were then discussed, whether the subsequent Conferences should be biennial. The question whether the Conferences should permanently meet in Wellington might then be considered. I have quite an open mind on that. If it were possibly more of a business Conference no one could have any complaint if we all had a turn. Certainly I appreciate the social side and by that I do not refer to drinking tea. (Laughter). We can have social life without drinking tea, or anything else. It seems to me that modern conditions demand modern treatment, and all of us who practised before the war know that conditions now are very different from what they were then. Therefore, they must be reviewed and domestic consideration is necessary. The question was raised whether we should speak for the whole profession. We have passed a resolution arising out of Mr. Callan's paper and we said we spoke on behalf of the legal profession of the Dominion. Even if we do not get a numerical representation from all parts we probably think much along the same lines, whatever part we come from. On a serious question of public importance there would be a possibility of misunderstanding or doubt, but none of these considerations seems to outweigh the desirability of postponing a decision until after the next Conference. Therefore, I support the amendment.

MR. R. A. SINGER (Auckland): It seems that this debate is going to occupy the whole morning, so I might as well speak on the question before the meeting. One of the advantages of this Conference is that we are all able to get up to-day and discuss matters, and we cannot do that in Wellington before the Council of the Society. This is my first experience of a legal Conference and I agree with all the practitioners here, that the Conference is of great importance to the profession. We all appreciate the value of the addresses delivered by His Honour the Chief Justice, the Attorney-General, Sir Francis Bell and others. Also we have had the value of remits brought before the profession in general and the opportunity of putting ideas in the minds of the District Councils (laughter)—not that they have no ideas, but they cannot have the ideas we have. We have also here the ideas of other men's minds. In our practice the unfortunate position is that we have problems brought before us and the solutions are the work of only one mind, or of very few minds. Here there is the work of many minds. (Laughter). The Conference should be annual. If we are to hold the Conference it should, if necessary, have some legislative status, so that we should perhaps be in the position of not only advising the New Zealand Council but even

perhaps directing it. This gathering could be made representative. The remits, if they are not digested before the discussion—well, that is the fault of those who have not a proper digestion. (Laughter). If we are to find a remedy it is undoubtedly proper that these matters should be considered before the members of the profession, or the congregation, or whatever you call it. (Laughter.)

MR. J. F. W. DICKSON (Auckland): There has been no attack intended on the New Zealand Council. It has been asked in what way the Council has been remiss. There has been no suggestion of that, except possibly, that the remits have not had, perhaps, the attention they should have had. I suggest the mover and seconder of the motion might get over the difficulty by making the remits recommendations to the New Zealand Council. Mr. Richmond mentioned that he thought domestic matters should not be discussed at these Conferences. I am opposed to that suggestion. The profession has been going down the hill. Competition is getting keener. The Public Trustee is hitting country practitioners badly. The more remits are brought down and discussed the more it will be in the interests of the profession. Therefore, I have much pleasure in suggesting, in order that the remit might not be thought to be an attack on the New Zealand Law Society, that these matters be held over for subsequent consideration.

MR. W. E. LEICESTER (Wellington): I do not consider that we should use such expressions as "the profession is in a rut," or "going down the hill," and I challenge those statements.

MR. A. COLEMAN (Stratford) in his reply said: I assure Mr. Dickson there was no suggestion of remissness on the part of the Law Society. I was pointing out the deficiencies of the present system. Replying to Mr. O'Leary, that the meeting is not representative, I ask, if that be the case, who or what would be representative? We meet to pass resolutions, and to dispose of or discuss remits. If we are not representative, why should the Council of the New Zealand Law Society take any more notice of our deliberations than if we were a meeting of the Society? As to the point that members have insufficient time or notice to discuss the remits, we in Taranaki received our copies of the agenda in ample time to give full consideration. It is for us to take the keenest interest in the welfare of the profession. His Honour the Chief Justice said the law was the only profession whose status had been lowered. If it is necessary for other professions to agitate to advance their interests, then it is also necessary in our case. I would say the medical profession has probably put its house in order, but we have everything to do to put our own house in order. There is machinery in the Act for the Society to meet annually, and I urge that the remit as drafted be carried to-day.

THE CHAIRMAN: I am quite sure no reflection was intended to be cast upon the Council of the New Zealand Law Society. (Hear, hear.) I certainly did not regard the remit in that way. As to what happens to Conference resolutions, the report is contained in the records of the Council and in circulars sent to the District Societies.

The amendment moved by Mr. Goulding and seconded by Mr. Brown was carried, and the Conference then adjourned for the day.

THIRD DAY.

Thursday, 24th April, 1930.

The Conference resumed at 9 a.m. on Thursday, 5th April.

REMIT.

Statements of Witnesses in Running Down Cases.

"That this Conference recommend to the proper quarter that the statements of witnesses taken by the police in investigating 'running down' and accident cases be available to the parties concerned or their counsel in any proceedings or enquiries based thereon." (WELLINGTON).

MR. W. E. LEICESTER (Wellington): On the opening day of the Conference the Attorney-General singled out this humble and inoffensive remit for his special displeasure. He did not sprinkle it with the hose of doubt, but hit it on the head hard with the hammer of disdain. The officers of his department did not approve, he said, of this particular remit. But as the officers, in the main, are the police, the fact that they do not approve may be one of the strongest arguments in favour of the remit. The position is different from what it was, and we must adapt ourselves to the changes. At one time one ran considerable risk on the highway of losing money, but nowadays one runs a great risk of losing a leg. Those of us who have visited Auckland and have managed to avoid disaster from the local taxi-driver are still of the same opinion. The prevalence of motor accidents has been a matter of national concern. Every Monday there is in the Press a crop of accident reports. The tone of editorials has done nothing to check that cheerful fatalist the week-end motorist. It is a matter for argument whether the Third Party Risks Act has not greatly lowered the standard of care adopted by the motorist towards people who are unfortunate enough to be thrown up against him. The evil on the part of the motorist is two-fold. In the first place he inflicts loss on the injured person for which monetary compensation is not always ample; and in the second place he inflicts on the insurers a heavy burden and also on the motor community as a whole, because of the acts of the less careful members. Thirdly, he has provided the legal profession with a staple form of litigation.

The present remit is framed to deal with that litigation. Viscount Haldane stated in a report contained in the last issue of the *New Zealand Law Journal*— "About comparatively few law cases is it really possible to say with certainty in the early stages how they will turn out." Those words are peculiarly appropriate to litigation in accident cases. Statements are taken by the police at the time of the accident or soon afterwards. The matter does not come up for hearing until, perhaps, a considerable time later, through no fault of the solicitor engaged. Efforts may have been made towards a settlement; witnesses have had to be interviewed. If personal injury is incurred months may elapse before the medical practitioner concerned commits himself to any sort of a prognosis as to the client's condition. Recollections of witnesses have been dulled by time and are often very different from their statements made to the police at the time of the accident. But the statements made to the police are not available to counsel. Some Judges have insisted upon them being made available on occasion, and their production has been ordered. But a cautious counsel is not going to insist on the production of state-

ments the contents of which he has had no opportunity to review, as they might be dangerous to his case. The present position presses more harshly on the unfortunate man concerned with the litigation. A man driving by himself in a thoroughfare is perhaps unfortunate enough to knock down a pedestrian running for a tram car. It is suggested to him that the unconscious victim be taken immediately to the hospital. The police come on the scene afterwards, and take a number of statements, some containing matter unfavourable to the motorist. The motorist returns but the crowd has dispersed. Although the police will give the names of the witnesses interviewed, the motorist is not relieved of his disadvantage. Counsel for him is in a dangerous position if he approaches the witnesses with a view to getting a different account, that is, if the witnesses have been briefed and told they are Crown witnesses. If the injured man dies the motorist is in a very unfortunate position indeed. He is deprived of the opportunity of getting witnesses, and as the accused person he is not entitled to know at once what the case is against him, especially when it depends not on provable facts, but on the impulse and judgment of the moment of people who, from their judgment on the moment, form their version of the accident. Why do the police refuse these statements? Their reasons for hoarding these precious possessions are three: (1) that they are State or departmental documents; (2) that if the statements were made available to counsel or to the parties in civil litigation they would be unobtainable—the people who have been interviewed as witnesses would not give statements, because their confidence would be lost; (3) the Commissioner of Police says that the police would be continually called upon in Court to produce these statements. Regarding (1), primarily the police take the statements with a view to seeing whether there is any ground for a criminal prosecution, but often the police do not prosecute and the parties are left to obtain a civil remedy. Often the police action is deferred and the civil action is taken first. Also, the police may deal with a minor matter not of great concern in the civil proceedings. I say the only reason why statements should not be produced is that their production is contrary to public policy, but it may be more detrimental to the public to conceal their production, and therefore conceal the true facts of the case, bringing hardship on the parties. In regard to (2) this is very improbable. It is based less on reason than on precedent to say that the statements would not be available. Stephen says: "It is essential to the welfare of the state and the administration of justice that communications made to the police should not be divulged, for otherwise, either because of the possibility of arousing the animosity of one of the parties concerned, or from dislike of being mixed up in inquiries into breaches of the law, few would be willing to assume the responsibility of making statements at all." But the position is very different where statements are taken in regard to accident cases. The person giving a statement to the police should not be concerned whether the statement is privileged or not. The motive is not to establish a crime or a tort but to help somebody later to establish a civil remedy. Regarding (3), the Commissioner's objection is based upon a mistaken idea of the functions of the police. They should be ready and willing to assist in the administration of justice either between individuals and the state or between individuals themselves, where it falls within their province to be able to do so. The value of the statements is perfectly obvious to the injured person. It is better for him to obtain a civil judgment than a criminal conviction. The necessity of the police having to produce these statements would not make any serious inroads on the work of the police. Therefore, I desire to move this remit, which is highly desirable at the present time and will be more so in the future, both to the profession and to the public.

So long as the police maintain their present attitude we shall have concealment of the true facts. Witnesses rely after a time on reflections, instead of on observations, and counsel have to advise clients on insufficient material. If it is said that the time of the Court is being taken up with the number of these cases, I submit that many of the cases will be settled by negotiation and a great deal of the time of the Court will be saved. Where evidence is at all evenly balanced the statements might provide the turning point in a case. First impressions are often better than deductions drawn later. They are better than a plan produced to the witness in the witness box.

MR. W. PERRY (Wellington): I second the remit. I want to urge that in these cases it is essential that the best evidence be made available. As far as the statements made by persons to the police at the time of the accident are concerned, if once they come before the Court any privilege attaching to them is destroyed and we may find this position: A bystander witnesses a motor accident; he is interrogated by the police and he gives his version. He says that A was in a state of intoxication when he ran into B. If such a statement is to be tendered in evidence, that bystander might find himself involved, at the suit of an irate teetotaller, in an action for libel, because the teetotaller may feel that he has some ground for an action. It is important that the best evidence when available be placed before the Court, and it may be desirable that these statements be made available in any proceedings issuing from the accident. We have to guard against any possible abuse. The Conference might consider that the ends of justice will be met if the Police Department were to allow the constable first on the scene, as it generally does, to give evidence and produce his plans, and if the Police Department is also asked to provide counsel with the names of the witnesses who made statements at the time of the accident.

THE CHAIRMAN: In view of the fact that we have a large amount of business to get through I think it proper that a time-limit should be imposed. Each speaker other than the mover and the seconder of a remit, will be allowed three minutes. I hope that will not be an undue check. Taken over the whole of the members attending I think that will be generous.

MR. D. SEYMOUR (Hamilton): I am much in accord with the bulk of the statements made by the mover of the remit, but I consider the principles involved are of a wider application than the subject-matter. If it is desirable to obtain a change in the law in this matter it is surely applicable to all similar matters. I am a little unconvinced by Mr. Leicester's treatment of this particular difficulty. I feel we are embarking on a very dangerous principle and one that should be tested by application to the statements made to the police in general. Mr. Perry's suggestion that the names might be made available to counsel seems much more practicable. While I desire strongly the means of placing the best evidence before the Court the suggestion in the resolution may land us in difficulties. I think

this Conference is at a disadvantage in dealing with suggested amendments to the law in this way, and I suggest it might be desirable to refer such remits to experts at the commencement of the Conference to bring down a report.

MR. A. FAIR, K.C., Solicitor-General (Wellington): I wish to add support to the comments of Mr. Seymour. Members of the Conference who have had communications with the police will agree that, as far as possible, the police endeavour to assist; but the reason why they decline to make these statements available is that the first duty of the police is the detection and prevention of crime. It is considered probable that, if statements were made available, the police will not be able to get information volunteered with the same freedom, and will not get the same full information as to possible crimes, as they would if the statements were made under the seal of confidence. I refer not only to statements regarding the actual facts. In many cases witnesses volunteer information as to the previous record of persons concerned in accidents, and regarding the reputation of the persons concerned. That is properly placed at the disposal of the police. If a man knows it will become public knowledge that he has made these statements the police will be hampered in the detection of crime. That is a factor that should be weighed. It should appeal to the Conference. All the objections are met if the police supply to any parties concerned the names of witnesses from whom statements have been taken. The solicitor can go along while the facts are still fresh in the mind of the witnesses and obtain statements. I do not think the police are intended to act as parties in civil offences. As far as the evidence of police officers is concerned I think they may be called in accidents they have seen, or in cases where they have taken measurements. I think the remit should be rejected in its present wide terms and referred to the New Zealand Council to see if anything more suitable can be prepared.

MR. F. G. HALL-JONES (Invercargill): The difficulties might be largely surmounted if the police were instructed to hand witnesses copies of the statements, and then, if the names of witnesses were supplied, it would be possible to get an exact record of what the witnesses had said.

MR. J. M. HOGBEN (Auckland): I move the following amendment:

"That the words 'statements of witnesses taken' be deleted and that the words 'names of witnesses interviewed' be inserted."

I venture to suggest that at the present time the position is not unsatisfactory. Counsel engaged in these cases, unless they have fallen out with the police, are readily supplied with the names and addresses of witnesses, but it would put it on a better footing if the police were approached by the Society to have that done in all cases. Therefore, I move the amendment.

MR. R. A. SINGER (Auckland) seconded the amendment.

MR. H. P. RICHMOND (Auckland): The amendment is perhaps a little unfair to the present attitude of the police. The police in recent times have raised no objection to giving the names of witnesses. The amendment might somewhat misrepresent the position as it now is. The suggestion of Mr. Hall-Jones is a reasonable one, that the parties to and witnesses of an accident might be allowed to retain a copy of any statements made so that, if later they are interviewed, the facts as they were when fresh in their minds would be available. That would be as much as we are entitled to.

MR. A. K. NORTH (Hawera): Regarding Mr. Richmond's observation, it may be all right in the city of Auckland where the heads of the Police Department are available to refer to, but in provincial and country towns the police have not all that good sense the police in Auckland have and they need some instruction from their head office as to what they may give to solicitors who approach them. We should not allow any feeling of being unfair to the Police Department to affect our ruling here to-day. Some recommendation should go to the Council so that the Police Department might be constrained to give some instruction to the police officers all over the country. A number of the police officers in the country towns is only too willing to give information but there is the fear of the head office. You generally find they are in a tremble as to what they should give us and if we finally persuade them to give something it is under a bond of secrecy and is difficult to make any use of. I suggest that Mr. Leicester's remit be carried and I hope something will be evolved out of it to enable litigants to get a fairer spin than they are getting now. In the Hawera district the police prosecutions are postponed until after the jury cases. The result is that a lot of valuable information is not available to counsel, and the police in a number of cases seem even to resent any approach to the witnesses to be called ultimately for the prosecution. The whole problem is wrapped up in this matter, because there seems to be some doubt as to how far counsel may go in approaching witnesses for the prosecution.

MR. A. ST. C. BROWN (Auckland): If copies of the statements are supplied to witnesses they will be able to provide the solution themselves.

MR. A. COLEMAN (Stratford): A remit was moved at a previous Conference and it might be helpful to know what its fate was at the hands of the authorities. I have always found the police very helpful to counsel in their preliminary inquiries and in that respect my experience has been similar to that of Mr. Richmond. Also I have had the experience of Mr. North in the smaller country towns. There is just one curious point that though undoubtedly we have the right to call police officers to testify in matters of civil wrong, there has been a curious reluctance in all parts of Taranaki on the part of constables to testify as to what parties in the action have said. We are met with a blank refusal to say what either of the parties have said and appeals to the Magistrates to order the necessary evidence to be forthcoming have been met with a refusal. It is very difficult to get the police officers to give evidence as to what was said. It is well worth while for the Council to make inquiries in Wellington to see whether there is any rule. I favour the suggestion made by Mr. Hall-Jones.

THE CHAIRMAN: The resolution passed at the last Conference had nothing to do with taking statements of witnesses. It was as follows:

> "That this Conference recommends that the Minister of Justice should take steps for the investigation of the whole question of taking statements by the police from persons suspected of crime with a view to ascertaining an appropriate remedy against possible abuse; and that in every case where such a statement is taken, a copy thereof should be supplied to the person making the same."

The resolution was conveyed to the Attorney-General and a conference was arranged with the police, and he replied that the police were unwilling for the change. We have returned to the matter. Sir Thomas Sidey said that the Commissioner of Police was entirely opposed to giving effect to what we wished.

MR. A. H. JOHNSTONE (Auckland): I suggest the matter is clearly one for negotiation. No result would be obtained by passing either the motion or the amendment, but, instead, a motion should be passed that the whole question of statements in cases of accident be referred to the New Zealand Council for negotiation with the Commissioner of Police to see what can be done. The matter has been well ventilated and members of the Council know what is wanted. In that way some working arrangement may be arrived at. I suggest the mover and seconder of the amendment withdraw it.

MR. W. E. LEICESTER (Wellington): If any result could be arrived at from such negotiation I would be only too pleased to withdraw the remit. There is no attack on the police. I have received the greatest assistance from them. The injustice has been remarked upon both in the Supreme Court and in the Magistrate's Court. His Honour the Chief Justice stated that in matters of concern to the profession something could possibly be done by the Judges in conferences with the law officers of the Crown, and if that could be done at the next conference that might pave the way to a solution, but I do not agree with Mr. Richmond that the practice is the same throughout the Dominion.

The amendment moved by Mr. Hogben, was put and lost.

MR. A. H. JOHNSTONE (Auckland) moved the following amendment:

"That the question arising out of the remit be referred to the Council of the New Zealand Law Society to take whatever action may be thought proper."

MR. G. M. SPENCE (New Plymouth) seconded.

The amendment was put and carried.

Mr. C. H. WESTON then read the following paper on "Nisi Prius":

NISI PRIUS.

(Mr. C. H. Weston, LL.B.)

Constitutional lawyers tell us that when His Majesty's Judges in New Zealand go on circuit or "do the smalls," as the late Mr. Justice Alpers described it, they are following the steps of William the Conqueror and his two sons who themselves presided in their Courts at Westminster, Gloucester, and Winchester. The Conqueror's system was extended by later Kings giving commissions to their Judges to hold Courts in the various counties at regular periods during the year. Actions in the Courts of King's Bench, Common Pleas and Exchequer originated at Westminster but naturally the parties and their witnesses preferred the actual trials to take place before the Judges in Eyre or "*in itinere*" and so the writs commanded that the jurors should come to Westminster "*nisi prius*"—unless before the day named, the Justices assigned to take Assizes should come into the County in which the cause of action arose. The term *nisi prius* now is loosely applied to all trials of matters of fact and is contrasted with "*in banco.*"

At the English Bar "banco" work leads to more lucrative rewards, and the fortunate barristers who are briefed in that class of litigation, are said to regard the strugglers in "nisi prius" cases with some condescension; but it is the suit dealing with human nature, its frailties and misfortunes, that attracts the interest of the man in the street; and an advocate in big practice, like an actor, captivates the hearts and imagination of that great audience, the public.

The subject of this paper was suggested by "Mr. Serjeant Ballantine's Experiences." Among the foremost English advocates who practised in the middle eighties, he was one of the last of the Serjeants and indeed, as Honorary Treasurer of the Inn, wound up its affairs. He never attained judicial office, possibly because he was not in Lord Campbell's favour, and it is a tribute to his innate sense of justice that his criticism of that Lord Chancellor was fair although merciless. When a man sets out to write his memoirs he cannot hide himself from his readers: Ballantine was evidently a very charming man who after a life of struggle, associating with the seamy side of human nature and subjected to great disappointment, emerged unscathed and still retaining his natural kindliness of disposition. Referring to the works of Thackeray who was a fellow member of the Garrick Club he says: "They present an unpleasant, and I do not think entirely correct, view of human nature. I believe it is better than he paints it. Thackeray appears almost to divide it into knaves and fools. My experience—and much of it has been gained amongst what would be deemed the outcasts of society—is that in every class there is much that is good and estimable." He was essentially a man of the world who liked his kind, and in return men and women, without any distinction, were drawn to him. Some indication may be gained from the fact that King Edward VII, then Prince of Wales, singled him out and showed his friendship by many acts of recognition. The Prince also was a member of the Garrick Club, and in 1875 upon Ballantine's return from India, where he defended the Gaekwar (Guicowar) of Baroda, he invited the Prince and some of the members of the Indian Civil Service to dine there. Nature endowed Serjeant Ballantine with the gifts that make for success at *nisi prius*—a keen sense of humour, a pleasant happy manner, concise expression and an instinct of sporting fairness. Underlying, were tact, judgment and discretion and a meticulous respect for the traditions of the Bar. The period in which he lived presents some astonishing features to us: in many respects it was a coarse and cruel age: the conditions prevailing in the streets of London both by day and by night were almost unbelievable and yet the honour of the Bench and Bar of England is no more precious or carefully guarded to-day than it was then.

During a long career Ballantine was briefed in almost all the famous trials of the time. His experiences enable us to look back nearly one hundred years and to contrast the trials at *nisi prius* then and to-day, to observe the Judges as they were, to watch our own brethren at work, to criticise the way in which the cases were conducted. It would have been rather startling to us to see how in his time society treated the Court as a theatre. At the trial of Courvoisier for the murder of Lord William Russell in June, 1840 (I quote Ballantine's description): "The occasion might, from the

appearance the Old Bailey presented, have been thought one of the most festive character. The Court was crowded with ladies dressed up to the eyes, and furnished with lorgnettes, fans, and bouquets; the sherriffs and undersherriffs, excited and perspiring, were rushing here and there, offering them what they deemed to be delicate attentions. A royal duke honoured the exhibition with his presence, and, upon the occasion of a witness giving a particular answer to a question from counsel, showed his approval by an ejaculation of 'Hear, hear.' Sir Nicholas Tindal, the presiding judge, was so hemmed in by the extensive draperies of the surrounding ladies that he had scarcely room to move, and looked disgusted at the indecency of the spectacle." Speaking of the Tichborne case, Ballantine says: "The interest in the case was also enhanced by the enormous amount expended in the conduct of the defence, and the proceedings before Lord Chief Justice Bovill might have been more properly described as 'morning performances' than sober legal inquiries. . . . . Occasionally he accepted advice from a bevy of ladies who clustered around him, and who took a great interest in the proceedings. This certainly was not upon law, but in French and geography, in which it was early shown that he had not been thoroughly grounded." A ludicrous incident of a similar kind occurred in an election petition tried before the dour Mr. Justice Blackburn: "Mr. Justice Blackburn had taken his seat and composed himself for the performance of his duties, when a lady, having arrived late, had to pass him to get to her party. Now his lordship's legs being no unimportant portion of his body, her flounces became seriously entangled in her attempted passage, and for the moment the Judge was lost sight of by the audience in front, whilst the lady presented the appearance of sitting upon his knee. The Judge's voice was heard in no musical tones, and when relieved from the embarrassment he declared, in emphatic language, 'that he never had been in such a position before'; and this," says Serjeant Ballantine, "I am disposed to believe."

Otherwise, on the surface, a century appears to have made little difference. The judges, counsel, litigants, and witnesses played the same parts in very much the same way. However there have been changes. That keen weapon of the advocate, cross-examination, subsists, of equal danger unfortunately to truthful and untruthful witnesses. We still stand the witness in a box in strange surroundings and give him over to the mercy of keen intellects who have spent most of their lives putting questions to unfortunate people in similar circumstances and we expect him to give a true and correct account of what he has seen and heard. The witness who is there with the intention of lying deserves no consideration and in the interest of justice truth should be dragged from him. The danger is with the truthful witness. Serjeant Ballantine shared the experience of many *nisi prius* advocates who on occasions tie up their briefs with an uneasy feeling that truthful witnessess have not been able to convey to the Court what is really in their mind. Embarrassment exhibited under a searching cross-examination is not to be relied on as a proof of falsehood: the novelty of the situation or constitutional nervousness may frequently occasion it. In the manner of cross-examination there has been a much-needed improvement. As Marjoribanks says: "Erskine himself repeatedly did things in his conduct of a case for which a modern counsel would be summoned before the Benchers of his Inn and perhaps disbarred. In the eighties Sir Charles Russell had been widely and vigorously attacked for the licence with which he had conducted a certain cross-examination, and from that time began a gentler and more restrained use of this powerful weapon." The Old Bailey style has disappeared and in its place has come what is just as deadly a method, clothed with courtesy and patience. A striking instance of the latter is Sir Rufus Isaacs' cross-examination of Frederick Henry Seddon who was hanged for poisoning Miss Eliza Barrow. The cross-examination lasted for a whole day and is thus described by the author of "The Life of Sir Edward Marshall Hall": "For the rest of the sixth day, and for the greater part of the seventh day, Seddon stood in the box under the patient, relentless, but increasingly intense light of the Attorney-General's enquiries, all the more deadly because of the unfailing courtesy of that beautiful voice. At a dinner of his community that celebrated his return from India, I heard an admirable compliment paid to Lord Reading. Sir Herbert Samuel had compared him to Rufus Curtius, a great proconsul of the Emperor Tiberius. 'I am glad,' said Lord Merrivale in a later speech, 'that even in those days there was a Rufus—courteous.' And courteous he certainly was to the wretched man Seddon, even in his fiercest questions. He always addressed the prisoner as 'Mr. Seddon.' Seddon had a very quick and agile mind: at first his clever parries and retorts were very effective. He had an explanation and a reason for everything. But gradually his very cleverness and his inhuman coolness began to disgust the jury. His performance in the witness box makes a strange contrast to that of Robert Wood. Wood, innocent, made a bad futile witness, and did not seem to understand the points made against him. Seddon, guilty, made an excellent witness, and missed nothing. Yet Wood, by his very incompetence in the box, made an impression of innocence on the jury: Seddon, with all his surprising competence, by his skilful quips and retorts, gave all his hearers a secret conviction of his guilt. Only towards the end did he break out and lose his composure. When he was asked as to the counting of the gold on the day of Miss Barrow's death, he showed his first sign of anger."

Serjeant Ballantine was a master of the art although it is not ungracious to say, with envy, in this far away Dominion, that he had the advantage of observing and working with great advocates continuously from the day he was presented with a glass of wine and a speech by the Treasurer at the Bench table of the Inner Temple. He was an eager pupil. And what a galaxy of masters: Serjeant Sullivan, Sir Wm. Follett, Sir Henry Hawkins, Sir Fitzroy Kelly, Mr. Serjeant Copley (afterwards Lord Lyndhurst), Sir Alexander Cockburn and many others. He did not look for startling effects but aimed to elicit facts that would support the theory he intended to put forward. Sometimes by good fortune dramatic results followed. One of his greatest triumphs was as a young man before the House of Lords. A Bill had been introduced to annul the marriage of a young lady Miss Esther Field, contracted with a man named Samuel Brown, upon the grounds of coercion and fraud on his part, accompanied by the allegation that the marriage had not been consummated. The lady was possessed of a large fortune—£1,200 per annum in land and £40,000 in money. She was barely 18 years old whilst Brown was 52, of humble origin and no apparent means. There was a formidable array of counsel in support of the Bill—Sir Fitzroy Kelly, Mr. Rolt, Sir

John Bayley, Mr. Walford and Mr. Austin. Ballantine was alone in opposition. Sir Fitzroy Kelly opened the case with a considerable amount of colouring which was maintained by Miss Field under the examination of Mr. Rolt. Ballantine cross-examined her, other witnesses were called, and after Mr. Rolt had addressed the House the case was adjourned until the following Friday. At the end of the first day Lord Lyndhurst came up to the Bar of the House where Ballantine was standing and complimented him on the way he had conducted the case, concluding by asking him whether he intended to call witnesses and upon Ballantine replying that it depended upon the result of a consultation remarked with a significant smile: "I do not think you will." Upon resuming on the Friday the Earl of Devon said that he was free to admit he had come down to the House with a strong bias in favour of the Bill for annulling the marriage but the evidence he had heard and the able cross-examination of the learned counsel against the Bill had created a contrary opinion in his mind: the Bill was rejected.

Sir William Follett asked the fewest questions of any counsel Ballantine knew and as Ballantine said, he had heard many cross-examinations from others, listened to with rapture by admiring clients, each question of which had been destruction to their cases. As an example of restraint he could refer to his own defence of a young woman at Chelmsford charged with poisoning her husband, the motive suggested being to obtain money from a burial fund and to enable her to marry a young man, with whom she was already on terms of improper intimacy. Mr. Baron Parke afterwards Lord Wensleydale, presided. A minute quantity of arsenic was discovered in the body which the defence accounted for by the suggestion that poison had been used carelessly for the destruction of rats. The famous Mr. Taylor, Professor of Chemistry and an experienced witness, had proved the presence of arsenic and to the great disappointment of the solicitor for the accused, who desired a severe cross-examination, Ballantine did not ask him a single question. Mr. Baron Parke in a summing up not unfavourable to the prisoner dwelt pointedly upon the small quantity of arsenic found in the body and the jury acquitted the prisoner. Dr. Taylor was sitting on the Bench near the Judge and when the Judge after his summing up and before the verdict, remarked that he was surprised at the small amount of arsenic found, he, Dr. Taylor, said that had he been asked he would have pointed out that as a matter of fact, a very large quantity had been taken. The Professor had learnt never to volunteer evidence and the counsel for the prosecution had omitted to put the necessary question. Mr. Baron Parke, having gained the information by accidental means, did not feel warranted in recalling the jury and further directing them. Some years after, at the Central Court, Ballantine was engaged in an unimportant trial, in which the prosecutrix was a comely middle-aged woman. She was his fortunate client. She had married her former lover and they were keeping a public house in the East End of London under other names and with highly respectable characters.

Ballantine led for Orton, the claimant in the Tichborne trial, and considered that if Sir Henry Hawkins had been asked by the advisers to the family to cross-examine him, instead of a barrister who coming from the Chancery Division, it is true with a great reputation, had probably had little experience of cross-examination under such unusual circumstances, the monster trial, with its gigantic bill of costs, would have perished at its birth in the Court of Chancery.

It was Lord Justice Lush who said that a clear and careful opening wins more cases than anything else and one would be rash to venture to disagree with him. Ballantine, who spoke of him as "his dear old friend," said his career exhibited a course of unwearied industry and unswerving integrity from its earliest youth. He could not properly be described as a powerful advocate but he was singularly lucid and always a perfect master of the facts. No doubt one of the secrets of lucidity at *nisi prius* lies in adhering to the rule of chronological order; to follow the flow of events in opening the case, in examination in chief and in cross-examination. Many a complicated set of facts becomes an attractive story when presented in its natural sequence of occurrence.

It may be that the future will see a modified departure from our rigid system of eliciting the evidence of witnesses by question and answer: the method is a simple instrument fashioned for simple cases: on pure questions of fact perhaps none better. But when in compensation and other similar cases expert witnesses are engaged who, while perhaps biassed in favour of their side, cannot stray much beyond the bounds of their own opinions, the system is inadequate to arrive at what they really wish to convey. If the matters in issue could be informally discussed at a kind of round table conference under the chairmanship of the presiding judge, with counsel and all expert witnesses present and entitled to speak without restraint and to question each other, and if then each witness' opinion be reduced to writing and signed by him, a much more satisfactory conclusion might be reached.

Ballantine was courageous in his decisions as to calling or not calling witnesses against the wishes of the solicitor instructing him or of his client. He held the opinion that the fee on his brief paid for his judgment on such questions and he adhered to his decisions even to the point of returning his brief if his advice were not accepted. In our time the difficulty more often occurs in criminal cases in deciding whether to allow the accused to give evidence or not and the practice of a modern advocate, Sir Edward Marshall Hall, may be cited. He left the decision in the end to the prisoner himself and always took a signed memorandum from him: "I wish to give evidence," or "I do not wish to give evidence" as the case might be. The circumstances under which Seddon went into the box are interesting: "The other duel in the trial—and it was a real duel—was that fought between the Attorney-General and the male prisoner. Seddon was an exceedingly vain man, with a great belief in his own abilities. When he heard that the Attorney-General himself, the great Sir Rufus Isaacs, was coming down to prosecute him, far from being alarmed, he was delighted, and from that moment made up his mind that he would cross swords with him. Marshall Hall from the date of his first interview with Seddon had been strongly opposed to calling him as a witness. 'If the evidence does not convict this man,' he said, 'his conceit will.' He told Mr. Saint, the solicitor instructing him, that he must on no account prevent Seddon from going into the witness box, but that he must warn him in the clearest way of the dangers. Just before the case for the prosecution had closed, he himself went over to the dock, and gave Seddon a final warning. But the prisoner was determined. He

had heard Rufus Isaacs' masterly opening, and thought that he, Seddon, could easily defeat him. He was, in fact, longing for the fray. So, after Marshall Hall had called two witnesses to prove that Seddon was in the habit of keeping large sums of gold in his house, Seddon went into the box on the afternoon of the fifth day of the trial." And from the box to his doom.

Serjeant Ballantine did not live to see the inauguration of a Court of Criminal Appeal which he had earnestly advocated in and out of season. Sir James Fitzjames Stephen and his fellow commissioners had been engaged in preparing their criminal code, but Ballantine despaired of it ever becoming law.

I do not suppose he could visualise women on English juries, and in New Zealand we have witnessed the partial abolition of the trial by jury in civil actions ; a reform, if it may be so described, followed by considerable protest from the profession but, whether from the absence of a centralised Bar or because it is impossible to say definitely if it is better or worse, now acquiesced in.

In England, evidence is taken down verbatim in shorthand : in New Zealand we are awaiting a system of television which will record evidence in typewritten form as it is spoken by the witnesses and from the accounts in certain technical journals we may not have long to wait.

His long experience with juries led Mr. Serjeant Ballantine to the conclusion that they distrust the evidence of experts upon handwriting and that in consequence handwriting is a dangerous element upon which to rest a case, and I am inclined to think that evidence as to oral or written statements made by accused persons is regarded by juries in very much the same way.

Mr. Serjeant Ballantine agreed that it is of the essence of advocacy that counsel should under no circumstances convey his own belief to the jury or use expressions calculated to do so, and quoted the two rather glaring instances of Lord Campbell (Sir John Campbell as he was then) in his defence of Lord Melbourne to an action by Mr. Norton for criminal conversation stating to the jury that his client solemnly and upon his honour declared his innocence, and that of Mr. Phillipps in his defence of Courvoisier. The latter's expressions were more unjustifiable because, at the time he made use of them, he had received from his client what was tantamount to a confession of his guilt : his only excuse was that he had composed his speech before that information reached him.

A remarkable case of mistaken identity is related by Serjeant Ballantine. He defended a man at the Lewes Assizes, again before Mr. Baron Parke, for the murder of an old lady in a house on the outskirts of Hastings. " The prosecution undertook to prove that the prisoner was at a village between Tunbridge and Hastings called Robertsbridge on the night before the murder. This proof was obviously superfluous as the evidence of the turnpike man was undisputed and brought the prisoner conclusively upon the spot of the murder. But this endeavour gave rise to the most dramatic scene I ever witnessed in a Court of justice. The postman of Robertsbridge swore positively to having met him, and, noticing that he was looking tired, invited him to come to a public-house and take a glass of ale ; that he did so, and remained for some half-hour talking to him and three other persons, who corroborated this statement. None of them had the slightest doubt of his identity. Nor were they shaken by cross-examination. They not only recognised his person, but having heard him speak before the magistrate, stated that they remembered the tone of his voice. At my request a person was placed in the dock beside him. The postman was desired to look at the two then standing together. He trembled, turned ghastly pale, and I thought he would have fainted. The excitement in court was intense, and a pin might have been heard to drop. The likeness between the two men was marvellous ; the postman looked and looked again ; at last he gasped out, ' I do not know which is the man.' And, in fact, he had been mistaken ; it was incontrovertibly shown that the man I produced was the person whom the postman had met. He had come down by the same train as the prisoner, and was on the way to Hastings at the time he was met at Robertsbridge. He had not appeared at the preliminary proceedings, not wishing, for family reasons, that his journey to and from London should be known."

Lord Russell of Killowen once said that he did not think counsel really influenced the result of a case to any great extent. Palmer, the prisoner, for one, did not share that view. Sir Alexander Cockburn conducted his prosecution in a most masterly fashion and after Sir Alexander's address to the jury a conviction was recorded without much hesitation. When the verdict was returned Palmer, who was a racing man, wrote on a slip of paper which he handed to his attorney : " The riding did it."

To ring down the curtain, I choose in Ballantine's own words, one who was a celebrity of the Old Bailey. " Rarely met with upon festive occasions, he was, nevertheless, accustomed to present himself after dinner, on the last day of the Sessions. He was a decently dressed, quiet looking man. Upon his appearance, he was presented with a glass of wine and this he drank to the health of his patrons and expressed with becoming modesty, his gratitude for past favours and his hopes for favours to come. He was Mr. Calcraft, the hangman."

MR. R. A. SINGER (Auckland) : The very delightful address just given reminds me of a story that is a very old one. It is a story of a man I knew many years ago. He was a very brilliant and delightful Irishman, a very eminent advocate, particularly at the Old Bailey, and was much in demand by the better class of criminal. On one occasion his clerk was approached with a question as to what the fee would be in a certain case. The clerk said he would not allow his governor to take the case under 25 guineas. The inquirers shook their heads and went off. A quarter of an hour later they came back with the money. The clerk asked what had happened. They said they had a bit of luck in the Strand. (Laughter).

Mr. Weston referred to notes of evidence of cases in Court. I would like to bring that up again. Notes of evidence do not matter much with Magistrates, but they are of much more importance in the Supreme Court. But the notes of evidence of modern judges are not taken by the modern judges. The difficulty is a great one. Counsel have all their time taken up in dealing with witnesses. This very important task of taking notes is usually given to a young gentleman, who has little experience in taking notes, and doesn't like it. (Laughter). When the question is asked, what was the evidence on a particular point, the Judge

says: "Let me look at my notes." He takes his associate's notes and says that so and so was the evidence. Nine times out of ten it wasn't. In important cases experienced note-takers of some kind or other, if not an official shorthand writer, should be employed by the proper Department, and I throw out that as a suggestion to the Conference, as an increasingly important matter, particularly as we are coming into our own and there are a great many accident cases. (Laughter).

MR. J. J. SULLIVAN (Auckland): Firstly let me congratulate Mr. Weston on the very able paper he has read, covering ground of great interest. Mr. Weston said, in effect, that the main trials he referred to were trials by jury. One or two observations particularly relating to Charles Phillips should not go without being corrected. Mr. Weston said that Phillips in addressing the jury had made a statement that was unpardonable. The facts are that Phillips was engaged for the defence in an important murder trial. The Italian accused called Phillips to the dock and said he was putting up a great defence, as he (the accused) was guilty all the time. This case has been quoted in Australia and is very important. It is relevant to the profession in New Zealand. Phillips sought an interview with the Judge. This was granted. Phillips informed the Judge of what the accused had said. The Judge instructed him to continue the case as if the accused were not guilty and not to involve anyone else. It is of interest for us as showing that it is right for counsel to defend persons known to be guilty. Addressing the jury Phillips said: "Only God knows, apart from the accused, who committed the murder." The London *Times* said Phillips had no right to involve the Supreme Being in the matter in view of what he knew. It was a sanctimonious age and Phillips, from being a leader at the Old Bailey, saw his briefs fall off and became a poor man. Phillips was appointed Judge of the Insolvency Court by Lord Brougham and gave us one of the most charming books ever published—"Curran and his Contemporaries." He dedicated that book to Lord Brougham. When Richard Dennis Meagher, in Sydney, was struck off the roll for defending an accused he knew was guilty, the Phillips matter was mentioned. That case is incorporated in *Re Lundon* in New Zealand. That shows how decisions are linked in with one another. Of course, I suppose, reasons can be given. But it is very difficult to follow the reasoning there.

Arising out of Mr. Weston's paper is the question of the importance of trials by jury. They are a priceless thing in England. They have made England what she is. The system was brought here by the early colonists and operated until 1924. In New Zealand we had the "New Despotism" in that year when the right of trial by jury in civil cases was taken away, in part, by Order in Council. Under that Order it was decided in a night —nobody had any notification of it—behind closed doors, that rules 254–258 of our Civil code were to be abrogated. It is perfectly true this enormous power is given to the Supreme Court Judges, and, if they can take away trial by jury, as they have done in matters affecting contracts, or mixed questions of contract and tort, they can also take away trial by jury in pure tort itself. Once trial by jury is taken away in one particular case it may be taken away in other cases. We may find it taken away in civil cases altogether. The working man has suffered by this, inasmuch as he cannot have a trial by jury in negligence cases as his contract of employment precludes it, although there is a tort in the very fact that a man has met with injury through negligence. We are told that common juries will be sympathetic to the workers. In this age of universal education, surely it is an indictment against our system of education when we are afraid to trust the common people. When the right of trial by jury was taken away, the Law Societies were entirely inarticulate. There was no protest. The matter was never brought up at any meetings of the Law Society; but by the Councils, who are in many cases re-elected year by year, the matter was discussed and nearly all the Councils that discussed it gave it as their opinion that they did not believe in trial by jury in these cases. This brings suspicion on the legal profession. The legal profession was never at its best as it is to-day in New Zealand. I suggest the profession give a lead to the people. It knows well what is in the best interests of the public and should suggest to the people what is in their interest, and that is trial by jury. An eminent Judge—Lord Russell of Killowen—has stated that, if the people knew as much about His Majesty's Judges as he did, they would not be so keen to abolish trial by jury. I am looking forward to the time when the Bar of New Zealand will protest against the removal of this great privilege which took place in a night.

The discussion then closed.

PROFESSOR R. M. ALGIE then read the following paper on "Some Points Respecting the Position of Mortgagees with Regard to Fire Insurance":

SOME POINTS RESPECTING THE POSITION OF MORTGAGEES WITH REGARD TO FIRE INSURANCE.

(Professor R. M. Algie, LL.M.)

It may be accepted as axiomatic that a mortgagee has an insurable interest in respect of the particular sum that is due or is to become due to him under the mortgage. It is also clear that where a mortgagee has an interest in the subject-matter insured he may, if he chooses, insure not only for his own interest but also for the benefit of other persons who are interested as well as himself. When he effects the necessary cover, his primary intention of course is to protect the security and thereby to make certain of the repayment to him in due course of the amount advanced. What we are here to consider is the extent to which his expectations in this direction are likely to be fulfilled.

A mortgage is after all nothing more than a loan of money upon security, and a mortgagee therefore has the double protection that is afforded by the existence of the security and also of the personal covenant. If a building which forms part of the security is destroyed by fire, the loss naturally falls upon the mortgagor; his liability under the personal covenant remains unaffected; and the position is therefore exactly the same in this respect as if the security had depreciated from some other cause.

The mortgagee has, as is well known, no inherent authority to charge the mortgagor or the mortgaged property with any premiums he may have to pay to protect his own interests. Such authority must be found in the agreement between the parties, or in the provisions of statute law. Elaborate statutory provisions in this connection are set out in the Fourth Schedule to our Property Law Act, 1908.

As regards the amount which a mortgagee may recover under his policy, the position depends primarily upon his intentions when effecting the insurance. He could, if he so desired, take out a policy which would cover his own interest and also that of the mortgagor; in such a case he would hold as trustee any surplus over and above his own interest. But when he intends to cover only his own interest as mortgagee, the amount recoverable would in general be limited to the amount of the debt due to him.

His intentions in this matter would have to be established as matters of fact and not of law. An interesting case on this point is that of *Somerville v. Australian Mercantile Union Insurance Co.*, 6 N.Z.L.R. 108. A policy was effected by a mortgagor in the name of the mortgagee. Under the provisions of the mortgage, the mortgagor covenanted to insure and to keep insured in the name of the mortgagee to the full insurable value, and in case of neglect, the mortgagee was empowered to insure and to add to the security any premiums that might be paid by him. The application for the policy was signed by the mortgagor, but, above his signature, was inserted the name of S. as the person in whose name the policy was to be, and describing him as mortgagee. All premiums were in fact paid by the mortgagor. In such circumstances the Court would have to decide whether the policy was intended to insure the property or merely the debt. Prendergast, C.J., came to the conclusion in the present case that the policy covered the interest of both mortgagor and mortgagee, and that the mortgagee could claim the full amount of the loss, even in excess of the amount of his mortgage. He held, too, that in such a case as the one he was considering, the description of the assured as "mortgagee" would not, by itself, limit the insurance to the extent of his beneficial interest. Where the policy is in the name of the mortgagee, but is paid for by the mortgagor, the obvious inference is that the mortgagor and mortgagee intend that the surplus, after satisfying the mortgage, is to belong to the mortgagor.

May on Insurance at p. 650 expresses the opinion that if the terms of the policy are that the insurance company is to make good to the assured all loss to the property, that fact would give to the mortgagee the right to recover the full amount of the loss. There is therefore ample authority for the proposition that the mere description of the assured as mortgagee is not enough to convert a policy on a house into an insurance of a mortgage debt only: *Hare and Wallace's American Leading Cases*, Vol. III, p. 829; *Bank of New South Wales v. Royal Insurance Co.*, N.Z.L.R. 2 S.C. 337; *Holmes and Bell v. National Fire and Marine Insurance Co.*, N.Z.L.R. 5 S.C. 360. In the last mentioned case Mr. Justice Richmond said: "It is settled law that the interest of both mortgagee and mortgagor can be covered by one and the same policy if it be so agreed between them." It is not necessary that it should be so provided in the policy, nor is it to be in any way inferred that the mortgagor could sue on the policy if it were in the name of the mortgagee only. If the policy is to cover the interests of mortgagor and mortgagee, it must be established that the insurance has been treated as fulfilling the provisions of the mortgage deed in respect of insurance; and when that has been done, the insurance company might find it very difficult to refuse payment on the ground that either the mortgagor or the mortgagee was a stranger to the contract.

Then there arises the question as to the position of several mortgagees who have effected policies to cover the amounts respectively lent by them. In this connection we need not concern ourselves with the point as to whether or not such policies were taken out pursuant to provisions in the mortgages themselves. It is in the first place quite clear that, if the value of the property insured is more than sufficient to pay all the debts, no serious question under this head can arise. The New Zealand case of *Crawford v. Stevenson*, 7 N.Z.L.R. 199, is closely in point here. In that case, A acquired certain chattels and also a lease from B, part of the purchase money being secured by a mortgage which contained a covenant by A to effect an insurance in the name of B. The policy was duly taken out by A for the full insurable value in the name of B. Later A gave a second mortgage to C and entered into a similar covenant with him with respect to insurance. In this instance no second policy was obtained but B verbally agreed with C to hold the policy for all parties. A fire occurred, and, in an action brought to determine the rights of the parties, it was held that B would be accountable to C for the balance of the insurance moneys after satisfying his secured debt and interest. Prendergast, C.J., was of opinion that B would be so accountable even if there had been no express agreement between the parties: he gave as his reason for this view the fact that the premiums had been paid by A, and he supported his conclusions by reference to *May on Insurance*, par. 449. What, however, is to happen if the value of the property is insufficient to satisfy even the first mortgage? What becomes of the subsequent policies? Bunyon in his work on *Fire Insurance*, 7th Edn., at p. 378, suggests that the best method in practice for avoiding this difficulty would be that each mortgagee should have a separate security in the form of a policy, which in the event of a fire would give his mortgage the effect of a first charge. Support for this suggestion is to be found in *Macgillivray on Insurance*, at pp. 682 and 683, where the learned author discusses the effect of the decision in *Westminster Fire Co. v. Glasgow Provident Investment Society*, 13 A.C. 699.

One of the many special and complex questions which arise as between mortgagor and mortgagee has reference to the rights if any which each may have in any fire insurance policy effected by the other. Lord St. Leonards in *Garden v. Ingram*, 23 L.J. Ch. 478, seemed to think that a mortgagee must have an interest in the policy effected by the mortgagor especially if the policy in question had been taken out in pursuance of a covenant to do so by the mortgagor. But it is very important to observe that in this case the policy of insurance was already in existence at the time of the execution of the mortgage to the mortgagee. In the later case of *Lees v. Whiteley*, L.R. 2 Eq. 143, the defendants mortgaged certain chattels to the plaintiffs under a deed containing a covenant to insure; but it contained no provision for the application of the policy moneys towards the liquidation of the mortgage debt in the event of the destruction of the chattels by fire. Unfortunately, the chattels were destroyed by fire, and, more unfortunately still, the defendants became bankrupt. The Vice-Chancellor, Sir R. T. Kindersley, felt that having regard to the case of *Garden v. Ingram*, and to the claims of natural justice, the plaintiff ought to have the policy moneys applied towards the payment of the debt due to him. Moreover, what else could be the reason for the insertion

of the covenant to insure? But notwithstanding these weighty considerations, the Vice-Chancellor felt himself bound to hold that the plaintiff had no claim to the policy moneys as against the defendants. As there was, in this case, no existing policy at the date of the execution of the mortgage, and as there was no covenant to apply the policy moneys towards the restoration or replacement of the chattels, it was impossible to hold that the benefit of the policy passed to the mortgagee because, at the date of the mortgage, no policy in fact existed. The learned Judge held further that the language of the mortgage did not justify him in holding that there was any implied contract to the effect that the policy moneys should be so applied. There was in this case a further complication in that, at the date of the commencement of the defendants' bankruptcy, the policy was in the possession, order and disposition of the bankrupt; but that fact hardly needs consideration in this place. The case of *Lees v. Whitely* is given a measure of support in the judgment of Cotton, L.J., in *Raynor v. Preston*, 18 Ch.D. 8. It may therefore be taken as well settled that, apart from statute and from any special contract on the point, neither a mortgagor nor a mortgagee would have any interest in any fire policy effected by the other with his own moneys and for his own benefit. This view of the matter was clearly expressed in *Sinnott v. Bowden*, (1912) 2 Ch. 414.

It must not be overlooked, however, that where an insurance company had not actually paid over the insurance moneys, certain persons have, by virtue of the Fires Prevention Act, 1774 (England), a right to require that policy moneys should be applied towards reinstatement. A doubt had been expressed in *Westminster Fire Office v. Glasgow Provident Investment Society*, 13 App. Cas. 699, as to whether this Act applied as between mortgagor and mortgagee. But in *Sinnott v. Bowden*, Parker, J., held that a mortgagee had, under the above-mentioned Act, a right to have policy moneys in such a case applied towards reinstatement. It is common knowledge that the relevant provisions of the Act in question are in force in New Zealand, and, in consequence, the decision in *Sinnott v. Bowden* is of importance in this country. See *Cleland v. South British Insurance Co.*, 9 N.Z.L.R. 177. If the insurance company refused to comply with the mortgagee's request for reinstatement, it seems quite clear that the proper remedy would be found in an application for the prerogative writ of mandamus: *Searle v. South British Insurance Co.*, (1916) N.Z.L.R. 137; *Simpson v. Scottish Union Insurance Co.*, 1 H. & M., 618.

There arises also for consideration the important question of subrogation. The principles upon which this doctrine is founded and the general conditions upon which it is applied are too well known to need detailed elaboration here. It will suffice if one or two points are noted and their implications examined. In America, the decisions are not at all uniform as regards the right of an insurance company to be subrogated to the special rights of a mortgagee after payment by the company of the claims of the mortgagee under his policy. Normally, of course, the special rights of a mortgagee are his rights to the security and to payment of his debt. If the company pays the amount due under the policy, is it thereby subrogated to these particular rights? In England, in view of the decision in *Castellain v. Preston*, L.R. 11 Q.B.D. 380, it may be safely assumed that such a right of subrogation would be recognised by the Courts, subject to the exceptions hereinafter set forth. On this point reference may be made to the judgment of Mellish, L.J., in *North British and Mercantile v. London Liverpool and Globe*, L.R. 5 Ch.D. 569, and to *Westminster Fire Company v. Glasgow Provident*, (1887), 14 R. 947, 966.

Macgillivray in his work on *Insurance*, at p. 745, says:—

"Whether or not there is a right of subrogation in the case of a mortgagee's insurance depends partly on the terms of the mortgage and partly on the terms of the insurance policy. There is no subrogation

(1) Where the mortgagee is merely payee of the insurance money payable upon the interest of the mortgagor and is not separately insured in respect of his own interest.

(2) Where the mortgagee is insured but the insurers have also agreed to indemnify the mortgagor as well as the mortgagee and such agreement is enforceable by the mortgagor.

(3) Where the mortgagee has contracted to insure the mortgagor or to give him the benefit of his insurance by applying the insurance money in reduction of the mortgage debt."

The first two of these three propositions do not appear to call for any special comment. The third one has a special interest for us in view of the existence of the implied covenants contained in the Fourth Schedule to the Property Law Act, 1908. When a policy is granted to a mortgagee in his own name, it becomes important to discover whether the intention was to cover his own interest only or both his own and the mortgagor's interests. If the intention was to cover the interest of the mortgagee only, the right of subrogation would in general arise; but the mortgagee might be bound, as between the mortgagor and himself, to insure for the benefit of the mortgagor or to apply the insurance moneys in discharge of the debt. In this case there is no claim by the mortgagee against the mortgagor to which the insurance company could be subrogated. When there is in the mortgage a covenant by the mortgagor to insure, and when, failing such insurance, there is a power enabling the mortgagee to insure and to add to the mortgage debt all premiums so paid, and where the mortgagee acts in pursuance of this power, the insurance is generally regarded as having been made for the benefit of both mortgagor and mortgagee, and the mortgagee would in this instance be bound to apply the insurance moneys in reduction of the debt. Under such circumstances, it would appear that no right of subrogation would arise. But it should be noted that a power to insure vested in a mortgagee does not involve the consequence that he must insure for the benefit of both: he could, if he so desired, effect an insurance of his own interest only and his policy could in that event contain a proviso to the effect that if and when the insurers paid the amount due they should be subrogated to the rights of the mortgagee under the mortgage.

Finally there is the very difficult question which concerns the position of a mortgagee who holds a policy issued to the mortgagor and who finds to his dismay that the policy can be held to be void because of misrepresentation at the time when it was applied for or because of the breach of some condition in the policy itself. Various attempts have been made to find a way out of this difficulty. In the United States of

America the practice was to insert in an insurance policy a mortgage clause by virtue of which the loss if any was made payable to a mortgagee of the insured property in accordance with his interest as it might appear at the time of such loss. The important question which arose in these cases was whether a condition of forfeiture in the policy itself applied as against, and to the prejudice of, the mortgagee. American Courts have shown a tendency to regard the interests of mortgagor and of mortgagee as distinct subjects of insurance, and to interpret where possible the mortgage clause as a new and independent contract which placed the mortgagee beyond the control or effect of any act or neglect of the mortgagor: *Westminster Co. v. Coverdale*, 48 Kan. 446. In most of the cases, however, there was in the policy itself a clause to the effect that the interest of the mortgagee should not be prejudiced by any act or neglect on the part of the mortgagor. But in the policy which formed the basis of the claim in *Oakland Home Insurance Co. v. Bank of Commerce*, 58 Am.S.R. 663, there was no such clause, and the Court, in holding that the interest of the mortgagee was nevertheless safe as against the acts of the mortgagor, may be regarded as having carried this principle to its extreme limit. In point of fact it may well be doubted whether the decision was really a sound one, and we may cite by way of contrast another American case, namely, *Hanover Insurance Company v. Bohn*, 58 Am.S.R. 719.

Assuming, however, that we should feel inclined to place complete reliance upon the insertion of a mortgage clause in the policy, how would the matter stand then? Obviously, much depends upon the nature of the mortgage clause, but, having regard to the general form of clause used, and to the interpretation that has been put upon such clauses, the position cannot be regarded as satisfactory.

The Canadian Courts have more than once been called upon to decide whether, under the common form of mortgage clause, the mortgagees have any right to maintain an action in their own names. In *Liverpool, London and Globe Co. v. Agricultural Savings Co.*, 1 British Ruling Cases, 593, the Court held strongly to the view that no such right of action existed for the mortgagees having regard to the wording of the clause then under consideration. In another case reported in (1901) 3 Ontario Law Reports, at p. 141, the Court held that the mortgage clause was so worded as to constitute a direct contract between the mortgagees and the company. The decisions upon this point in the United States Courts do not appear to agree either as to the reason for the rule or as to its extent. The English law reports do not supply any very clear authorities on this point. Enough has been said to show, however, that the right of the mortgagee to sue in his own name under a mortgage clause rests upon slender authority and may in some instances turn out to be non-existent. Possibly, however, the point is merely of academic interest in New Zealand: it may well be that the mortgagee would base his right to sue upon the provisions of Section 44 of the Property Law Act, 1908, which enacts that: "Any person may take an immediate benefit under a deed although not named as a party thereto."

But there are far greater difficulties in the path of the mortgagee than those we have hitherto considered. Suppose that a mortgagor, when effecting a policy to which the mortgagee may later look for protection, is guilty of some fraud, concealment, or misrepresentation of such a character as to invalidate the policy as between the company and himself. When a loss occurs, how does the matter stand then? The answer must be that, if the policy fails as between the company and the mortgagor, it is valueless from the point of view of the mortgagee also. But, it may be argued, the clause should be so worded as to avoid this danger. No doubt this is a sound suggestion, but it is usually easy to be wise after the event. In the Canadian case referred to (*London Liverpool and Globe v. Agricultural Savings Co.*) the mortgage clause provided *inter alia* that the insurance policy should not be invalidated by any act or neglect on the part of the mortgagor; but the Court decided that this clause had reference to acts of the mortgagor subsequent to the effecting of the insurance and did not apply to his acts or defaults connected with his application for the insurance or to his statements or omissions therein. A similar view was taken in the case of *Omnium Securities Co. v. The Canada Fire Co.* (1882) 1 Ontario Reports 494. There are numerous decisions in the American reports in which the opposite view was upheld but the Canadian cases are the more likely to be followed by our Courts if the question should ever arise in this form.

Enough has been said to establish the proposition that risk of forfeiture of the policy is very great and that the position of the mortgagee may be precarious. It would hardly serve any very useful purpose if we were to consider in detail the large number of cases in which policies have been held void because of some fraud, concealment or mis-statement of fact which was operative at the time of the signing of the proposal. But since the fate of the mortgagee is so intimately bound up with the validity or otherwise of the mortgagor's policy it may be of some assistance if a passing reference at least is made to some of the recent cases in New Zealand. In *Harding v. Victoria Insurance Co.*, (1924) N.Z.L.R. 267, a policy issued to an owner of premises was held void because he had described the premises insured as being occupied by a tenant for the purposes of a dwelling when in point of fact they were occupied by a person whom the owner alleged to be a trespasser. In the cases of *Willocks v. New Zealand Insurance Co.*, (1926) N.Z.L.R. 805, and *Arundel v. National Insurance Co.*, (1925) N.Z.L.R. 924, the policies were held valid but their fate hung in the balance. Reference may also be made to *Marinovich v. Australian Provincial Association*, (1929) G.L.R. 215. Again, there is a serious danger that the policy may be invalidated by some breach by the assured of some condition set forth in the policy. The consequences which might follow are exemplified by the case of *James v. Standard Insurance Co.*, (1929) N.Z.L.R. 187. It will be seen, therefore, that a mortgagee's position under present conditions may turn out to be a most unfortunate one. When lending his money he may accept an assignment of a policy which, later on, may turn out to be valueless by reason of some flaw affecting the application on which it was issued. On the other hand, he may be relying upon a policy which the mortgagor has taken out pursuant to the covenants of the mortgage, and which may turn out to be equally useless because of some material, but innocent, mis-statement made by the mortgagor in his proposal form. Finally, whether he relies upon an assigned policy or upon one issued to the mortgagor under his contract with the mortgagee, he may still find that his protection in this respect has disappeared because of the fact that the mortgagor has allowed the premises to be unoccupied, or has varied the nature of the occupancy, or has done some other act which oper-

ates as a breach of condition and which vitiates the policy. Nor can it be said that the position is to any very great extent improved by the existence of the implied covenants and powers contained in the Fourth Schedule to the Property Law Act, 1908. The whole position calls urgently for investigation and for the provision, either by legislation or by improvement in the common form of policy, of some means whereby the position of the mortgagee might be rendered a little less risky and a great deal more certain. This has already been done to some extent in South Africa, and this Dominion might well follow suit. So far the results have not been entirely satisfactory and it is small wonder that Bunyon in his work on *Fire Insurance* at p. 374, finds it necessary to exclaim in a passage somewhat relevant to our present topic :

> " On these subjects, the collective wisdom of the sages of the Law and of the Legislature does not appear to have been very successful, whether the interests of the public or of the insurance offices are considered."

MR. J. B. JOHNSTON (Auckland): The paper is of a very practical interest to the profession. It has been long felt that some redress in this regard is necessary—that mortgagees have not had the protection not only which they should have had but which they believed they had. A good many of the lending public would be astounded if they knew the risks they are taking in regard to their loans. The Council of the Auckland District Law Society has recognised that and has been endeavouring to get the insurance companies to agree to the insertion of clauses in their policies which would give the protection so necessary. A subcommittee was appointed by the Council to meet representatives of the Underwriters' Association. At the first approach we met with an absolutely closed door. They said it was not proper or sound insurance to make the changes we suggested. We have persisted and have met those representatives again, and we have hopes that the door will not be absolutely closed in the future. Already we see a little light through it. If the other Law Societies would work in the same direction it would be a great advantage. We may even extend the clauses in the Canadian policies, somewhat enlarged in the South African policies. If we can get the Underwriters' Association to agree to something in that direction it would be a great thing for the lending public.

MR. H. P. RICHMOND (Auckland): When I handed a few scattered notes to Professor Algie, which he has kindly acknowledged, I also handed him a copy of the South African Act and a draft bill that was prepared in my office. After all, the insurance companies themselves have some rights in these matters. We are a little apt to attach a lot of blame to vested interests. The insurance companies are in this difficulty: if there is a policy issued under which a mortgagee believes himself to be protected it may be that there is a serious default by the mortgagor, which entitles the insurance company to refuse to pay out on the policy. If the company is then asked to consider the position of the mortgagee and to pay him, the company finds itself faced with the position that, having paid to the mortgagee, it cannot stand in the mortgagee's shoes by way of subrogation and recover from the mortgagor. Legislative provision should be made by which, having paid the mortgagee, the company could take proceedings to recover from the mortgagor. Take a simple instance. An insurance company insures a particular owner and the undesirable person thinks there is an opportunity of raising money if the house is burned down. The company can hardly be blamed for recognising that the owner of the property is a suspicious character and saying that it has strong reasons to believe it is a case of arson, and it can hardly be blamed for resting upon default. That is one of the simple matters where legislative enactment might clear the way of a great deal of difficulty.

MR. J. STANTON (Auckland): I hope this discussion will not be entirely confined to Auckland, regarding the question of subrogation. The suggestion has been made that the companies should include provisions for the protection of the mortgagees—that the policies should not be invalidated by the default of mortgagors. There is no reason why such provision should not be made in the policies. There can be nothing to prevent a provision that, in the event of a policy being avoided, the mortgagee shall be entitled to recover on condition that he will transfer to the company the right to recover from the mortgagor, in consequence of having paid to the mortgagee that to which he would not otherwise be entitled. It seems there would be no difficulty in dealing with that. The suggestion of Mr. J. B. Johnston, that the Law Societies should negotiate with the insurance companies, is a useful one and the problem has now become urgent. In many cases the companies have made payments to mortgagees simply to maintain valuable connections. Fires might possibly become numerous. Companies might find mortgagors taking out policies, which the clerks fill in. Particulars which later become material are not asked for by the clerks. The mortgagee may not possibly be aware that there is an absolutely fatal defect in any action which he or the mortgagor might choose to bring against the company. I suggest that some motion be passed—I would prefer that the matter be referred to the New Zealand Council for the purpose of co-ordinated and continued action on the part of the profession throughout New Zealand—to arrange a suitable agreement with the insurance companies operating in New Zealand. That would be the most suitable course for taking united action. I move the following motion :

> **" That this Conference is of opinion that action should be taken with a view to securing better protection for mortgagees under insurance policies, and requests the Council of the New Zealand Law Society to negotiate with the insurance companies for the purpose of endeavouring to arrange suitable provisions for that purpose."**

MR. M. M. F. LUCKIE (Wellington) seconded the motion.

MR. C. H. TREADWELL (Wellington): I noticed the Chairman nod to me because he possibly recognised I have had some experience in matters of insurance that does not fall to the general practitioner. Some years ago I discussed with Sir John Salmond the book referred to by Professor Algie. My experience leads me to the conclusion that that volume is without any general statements of principle, and has been got together as little more than a collection of cases on insurance. I have personally acted for quite a large number of insurers of various classes. My belief is that no arrangement can be come to by the New Zealand Council, or by any other heterogeneous body of that nature, for the purpose of securing the benefit of fire insurance policies for mortgagees. As I shall show in a moment, in my opinion such an arrangement

would be of very little value. Policies of fire insurance are issued on the applications of mortgagors or mortgagees or other persons interested in the property intended to be affected by the insurance. We brought with us into the law and practice of insurance in this country, along with the mass of English law that came to us under the English Acts Act of 1854, an English statute that was devised in Great Britain originally for the purpose of controlling the felonious operations of persons who might be holders of insurance policies. About forty years ago I was engaged in a case in which the late Mr. Gully represented the South British Insurance Company. Mr. Justice Edwards was on the Bench, and I spent my energies in obtaining from Mr. Justice Edwards a decision against the insurance company, that, under the general terms of this Statute, they were liable to re-build. I have many times used this weapon for the purpose of effecting settlements in cases in which difficulties have arisen, with reference to conflicting claims under insurance policies. The English statute was re-enacted in Victoria and is used there to prevent insurance companies evading their liability by compelling rebuilding. Under the statute a notice can be given by a person claiming an interest in the property burnt and the insurance company is bound to rebuild under the provisions of that Act. Forty years ago that section of the English Act was declared to be in force in New Zealand and many times it has been used for the purpose of compelling settlements of claims. That that does afford an almost complete remedy to persons claiming under an insurance policy, who are not insured, but may claim an interest in the property, is very clear to my mind in cases where the interest is in a house or other building insured. There is a question that has not been tested in New Zealand, as to whether, under one section of the Property Law Act, an action can be brought by the person not insured by name. I intend, when I get the opportunity, to bring that question before the Court. Dealing with the suggestion as to a general arrangement, many years ago I effected, as a condition of accepting insurance policies of different companies, an arrangement with a large number of companies by which the interests of mortgagee clients were covered and protected under the terms of the policy. I think that is where a remedy could be found for the risk which Professor Algie seeks to show is run by the mortgagee from day to day. Many large holders of mortgages have secured, by arrangement with different insurers, the protection afforded by the policy issued to them in any event, and that is where the remedy I have suggested will be found—not by any such scheme as could possibly be effected by the New Zealand Law Society. I recognise that, within the limits of a few minutes, it is quite impossible to deal with the questions suggested by Professor Algie in his paper, and for that reason I am not putting what I might say on the matter in the logical way that I would if I were making a speech. I offer you the thoughts that I have had in my mind.

The motion was put and carried.

REMIT.

Liability of Husband for Torts of Wife.

"That legislation should be passed abolishing the liability of a husband for his wife's torts."—(AUCKLAND).

MR. F. L. G. WEST (Auckland): I am not the originator of this remit. It has caused some uneasiness and some hesitation as to who should propose it, for fear of some suggestion of a personal motive behind the motion. It is one that is important in the cause of clear and consistent principles of law. There was such a high probability of discord in another place if this motion were moved by a married man that I felt it my duty to come to the assistance of my very learned and yet married friends. The present position is the result of the legal fiction of the unity of man and wife. This gave rise to the rule of procedure that a wife, during marriage, could not sue or be sued alone; and, further, all her personal property passed to the husband on marriage. The husband, therefore, was joined merely, as it was said, "for conformity." Only one defence was allowed, and only one judgment was given. Once judgment against the husband was given, however, he became personally liable thereon. That was the position until the passing of the Married Women's Property Act in England, in 1882. The relevant provision is the same in our New Zealand statute. In 1925 the question came up for consideration, after the matter had been strongly commented upon in the Court of Appeal in England, and the House of Lords decided by a three to two majority that the liability of a husband for the torts of his wife still continued. Immediately following that decision Lord Cave introduced a Bill, which got no further. The same statute law exists in Australia and came before the High Court for review, I think in 1909, when it was held that a husband was not liable for his wife's torts. It is strange that the question has not arisen more frequently. One would like to think that this is due to cautious action on the part of wives, but it is probably due to another legal fiction. There is no branch of the law in which legal fictions occur so frequently. I would not be over-stating the case if I said they occur no less frequently than actual fictions in the same relation. It has probably been a simple matter in most cases to prove the actual existence between the husband and wife of the relation of master and servant and thereby avoid the necessity of invoking the procedural liability. And, of course, the husband's liability was limited to what are termed naked torts. Lord Sumner's remarks on this point are as follows: "After judgment the husband, although he had only been joined for conformity, could be sold up, under a *fieri facias*, or sent to prison under a *capias*. Before judgment, subject always to proof of the plaintiff's case, he could escape this inexorable doom only by parting with his spouse, his money or his life. A judicial separation, or a divorce, or an adjudication in bankruptcy was a bar to judgment against him. *Quoad ultra* his only resource was to depart this life without delay." I submit that is a doom which no one should be compelled by rule of procedure alone to meet. One last reason why the time is ripe for the change is that, at the present time, the property of the wife does not pass to the husband on marriage. Formerly, he took everything and, if the wife committed tortious acts, he would have to pay out. Nowadays, the wife keeps everything, I understand, but the husband is still liable. Perhaps one should suggest he should not

have to seek protection against the tortious acts, but, if I may coin the word, the "extortious" methods, of his wife. The question is one that should be dealt with by legislation and I move accordingly.

MR. A. H. JOHNSTONE (Auckland): I second the remit for the reasons stated by Mr. West. The present rule is an anachronism. While it may be perfectly just in some cases, the husband may be very unjustly treated in others. That is the reason why a sweeping change was made as soon as women were emancipated as long ago as 1884. I hope that, within a reasonable time, the change may find its way into the statute-book of this country.

MISS E. MELVILLE (Auckland): I may be regarded as being as unbiassed as the two previous speakers. This legislation would, I believe, be quite acceptable to most women. It has been discussed by thoughtful women and they have had some influence in commencing the movement. But there is an aspect that is worthy of consideration. Both speakers have referred to the Married Women's Property Act. The large body of women are without separate property. In these days women go into business and a great many drive motor cars—and that shows the danger to the community. (Laughter). The percentage of careless women drivers, however, is less than that of men. Still there are occasional instances and it might occur that, if an action for damages against the woman were successful, she would have no separate property to satisfy the damages, because of another archaic condition—that a woman may be a worker in the home without payment. If the husband is absolved from responsibility the damaged person may have no remedy. If justice is done in one quarter injustice may be done in another quarter by depriving the injured person of a remedy. The person who works without any remuneration has no means to satisfy a claim. Some provision should be made so that married women without separate estates should receive some remuneration for their work and then there would be a very logical solution of the whole difficulty.

MR. A. E. CURRIE (Wellington): The position of a man having a claim in tort is not often a happy one. This remit would make it harder still. A claim against a married woman is more difficult than against a married man. The fact is that in the common law of identity of man and wife they are something like partners. The man with a claim in tort should be able to satisfy it against the husband of a married woman. That would be more just and more in the public interest than that many married women should evade having to make good claims in tort, owing to the fact that they are married and proceedings can only be taken against their separate properties. This is a matter that might very well be considered from the point of view of the plaintiff who cannot recover. When it is a plain tort I suggest that the old common law rule will be found to be based on very sound principles of public interest and the House of Lords, in being reluctant to extend the vague words of the Married Women's Property Act to cover her, was also basing its decision on sound principles of public interest, which might very well be left as they are.

MR. R. A. SINGER (Auckland): I suggest it might be discussed at the next Conference: "What about making a married woman responsible for the torts of her husband?"

MR. P. THOMSON (Hawera): Mr. Singer has forestalled me. I agree with what Miss Melville has said, that the Auckland Council, in bringing forward the remit, has had in view the position of the husband, rather than that of the other party. It would be much fairer if the wife were made responsible for her husband's torts, possibly, than that the husbands should not be responsible for their wives' torts.

MR. GATENBY (Auckland): This remit should be worded: "Legislation should be passed abolishing inequalities in the law, as applying to husbands and wives." Married women should be under no disability at all. They should lose no power or status because they are married. There should be no difference in that respect between married and single women. Marriage should not place on women any disability whatever.

THE CHAIRMAN: When the question of the abolition of capital punishment was raised recently, particularly as to whether women should be hanged, a large and influential body of women insisted on having equal right. They insisted that if women were sentenced to death they ought to be hanged. If the remit were carried in its present form it would be welcomed by married men. A client came to me many years ago, who was not living with his wife. They were simply living apart. He had received an awful shock. He had been handed a writ in an action in which £501 damages were claimed against himself and his wife for slander by the wife. I told him that he was legally liable for his wife's torts. He said: "What an infernal law."

The remit was carried.

REMIT.

Determination of Workers' Compensation Claims.

"That the Workers' Compensation Act, 1922, be amended to provide—

(1) That claims to recover compensation should be heard and determined in the Supreme Court and the Magistrate's Court (if within the ordinary limit of jurisdiction of the latter Court), and not in the Court of Arbitration.

(2) (In the alternative) that in dealing with claims to recover compensation there shall be a right of appeal (on questions of law only) from the decisions of the Court of Arbitration to the Court of Appeal." (WELLINGTON).

MR. H. E. ANDERSON (Wellington): I am fathering this remit for Wellington. The first reason for the change is the delay in the hearing of compensation cases and the other is that there is no right of appeal from the Court of first instance. If the Conference does not agree to the first we suggest the alternative that there shall be a right of appeal. As regards the delay in hearings this has been very pronounced recently. For eight months no Compensation Court sat in Wellington. A delay like that creates an impossible position. It means that insurance companies, who are the chief sufferers, are paying out to injured men compensation without any knowledge of what their liability is. Further, there is a class of compensation case dealing with neurasthenics in which the men do not recover until after the cases have been heard. Most of us know of cases where the worry involved in the case has kept a neurasthenic in that state. There are other cases, of course, where that is used as an excuse for malingering. Another reason is the question

of witnesses. Evidence may become dulled in the course of time, as we have heard in a previous debate this morning. Witnesses become scattered about, and they forget the statements they made in the first instance. When acting for a defendant the case, I think, is worse than when one is acting for the plaintiff. We suggest some change in the law. If the first suggestion is accepted you will have cases dealt with fairly quickly and you will have the right of appeal as a matter of course. The Workers' Compensation Act is a departure from the principles of British Law, in that, as a matter of principle, from the earliest days, a Court of first instance has not been a Court of final decision. That is the position under the Workers' Compensation Act. The principle has been departed from for the purposes of social service, and the question is whether the change is an improvement or otherwise. It is no reflection upon the Judge of first instance to say that his judgments should be revised, but it is rather a help; it improves the method of dealing and giving out of justice in our Courts and, for that reason, I think, if the Workers' Compensation Act is amended in order to give the right of appeal on questions of law, it would assist the Court of Arbitration in dealing with these matters. In England the County Court is only a court of first instance. Many of the cases go to the House of Lords. That, I think, is very significant as a reason why this should be done. Like Mr. Leicester's remit, this remit has received some comments from His Honour the Chief Justice and from the Attorney-General. Both of those speakers seemed to be against any amendment of the Act. I had an opportunity of discussing this matter with the Workers' Compensation Committee in Wellington. I was told that the only evidence so far adduced upon it was to the effect that the Arbitration Court should not be altered in respect of claims for compensation and that, if any change be suggested, the proposals should be put before the Committee. In Canada the Court of Arbitration is the Court of first instance and final decision. The United States and New South Wales both follow the same procedure. The British procedure seems to stand out alone. If anything is going to be done with these remits I think some suggestion should come from this Conference to be placed before the Committee that starts its sittings in Wellington again on May 8th. Recommendations from that Committee are going to be placed before the Government in bringing down the law. The principles of our Court practice and the methods of dealing in our law courts have been done away with by the Workers' Compensation Act and we wish to change that. I move that an attempt be made to obtain an amendment to the Workers' Compensation Act in accordance with the remit.

MR. P. LEVI (Wellington): I second the remit. The Workers' Compensation Act originated in England, and throughout the British Dominions the Acts are copies or variations of the English statute. In England the primary tribunal is the County Court. From it there are appeals on questions of law, first to the Court of Appeal and then to the House of Lords. There are a number of cases heard by the Lords on these points, especially as to the exact meaning of various words. Notwithstanding what His Honour the Chief Justice has said, the law is not quite as settled or clear as it might be. In one case the Lords seemed to have laid down a principle quite disregarded in many subsequent decisions, especially in New Zealand. The first part of the remit was not intended to reflect on the Arbitration Court or on its learned Judge. That Court is really not a very suitable tribunal to deal with these questions. There seems to be an understanding that these cases should be practically dealt with by the Judge alone and the assessors have not much to do with them. Yet the two assessors have the power of over-ruling the Judge. As the Court is constituted, it is not a suitable tribunal. The main difficulty, however, arises from the fact that the original tribunal is a wandering tribunal. The people interested in these cases have to wait too long for a hearing. It is not a matter for the insurance companies. They are not so much concerned. It is really for the injured persons or their dependants. The generosity of the insurance companies, or the employers, in many cases keeps the parties going until they can come to Court. There really is no reason why these cases should not all be heard by Magistrates. If the County Court Judges in England can hear them there is no reason why our Magistrates should not. As far as appeals are concerned one feels very doubtful about expressing an opinion. The appeal question is always a difficult one when one party is poor and the other wealthy. In these cases the plaintiff, always, is the person of moderate means. Probably the advantage of having the matter disposed of once and for all will over-rule any other defect.

MR. H. E. ANDERSON (Wellington): The Committee dealing with the matter is proposing that a Compensation Court be set up to deal with compensation cases only.

MR. J. J. SULLIVAN (Auckland): This is the most important remit before the Conference and it would be interesting to know who has asked for this change, that the Supreme Court should be substituted for the Arbitration Court in claims under the Workers' Compensation Act. The mover of the remit has stressed the delay that has taken place last year in Wellington. That is easily explainable as Mr. Justice Frazer was sent to Australia by the Government to make inquiries into the working of the Act there. Later Mr. Justice Blair was engaged temporarily. The change of Judges and the absence of Mr. Justice Frazer in Australia justly explained the delay, which is not likely to occur again. Mr. Levi, in seconding the remit, said he had an open mind on the second part of the remit. He says he is not convinced. When you find the seconder of that view, I think you may take it that you should not carry the second portion of the remit. A great body of workers and a large number of insurance companies are affected by this remit. They did not ask for it but it was brought forward by the legal profession. It will mean certainly more fees in the pockets of the profession and this taunt will be levelled against us. The profession is unfortunately unpopular because of its inactivity in matters that affect the great mass of the people. Any matter, therefore, that it takes an interest in is always regarded with a good deal of suspicion. That is unfortunate. In this particular remit the profession is asking that the matters be dealt with in the Supreme Court and not in the Arbitration Court under the Workers' Compensation Act. At present sessions are held four times a year in the Supreme Court and also in the Arbitration Court. If you carry this remit, the position will be that the compensation cases when listed will come after criminal cases and jury cases and amongst the fixtures generally in the Judge alone cases. The Court of Appeal sits three

times a year in Wellington. The Judges will be away from Auckland sometimes for a fortnight. How will the Workers' Compensation cases fare in their absence? It has been suggested that the delay means loss to the insurance companies as they have to pay the workers while they are waiting for the cases. This in practice is not the case. There are two other reasons why the Arbitration Court should be retained. At present the Arbitration Court is virtually a Judge and jury and if it were now abolished it would be the second outrage perpetrated against the workers, as trial by jury has already been taken away in the Supreme Court by an Order in Council in negligence cases. And the final point is that in the Arbitration Court evidence may be accepted which is strictly not legal evidence, such as doctors' certificates. No reason has been advanced by the proposer—and the seconder is doubtful—why the Arbitration Court should be abolished and the Supreme Court substituted for hearing cases under the Workers' Compensation Act.

MR. H. F. O'LEARY (Wellington): I am not convinced that the remit should be passed in its present form. There is no question that the delay in dealing with workers' compensation cases has been a scandal during the last twelve months, and I do not think the reason given by Mr. Sullivan is the true one. Unless the Court is differently constituted the delay will go on and the scandal will continue. It is suggested that the compensation cases should be dealt with by a Magistrate or Judge. The average Magistrate is profoundly ignorant of the Workers' Compensation Act, and will take a good deal of educating before he is competent to deal with these compensation cases. They are not simple. Some of the Judges of the Supreme Court are entirely ignorant of the Workers' Compensation Act also. I remember being concerned in a case where workers sued their employers at common law. They failed but they had the right to have their workers' compensation assessed by the Supreme Court. The Judge said: "Surely you don't ask me to assess the compensation. I know nothing about the Workers' Compensation Act." I took that to be an admission of ignorance of the Act. In more than one case it has been left to the counsel concerned to assess the compensation between themselves and to get judgment entered. In Australia they have in some of the States, separated compensation claims from the other work of the Arbitration Court. That may be the real solution for New Zealand. I would be sorry to see the President of the Arbitration Court cease to deal with compensation cases. He is a specialist. He has a very wide knowledge of the medical side of most of the cases, which is of great assistance. We should content ourselves with urging upon the Government the necessity of taking steps to ensure that workers' compensation cases will be disposed of, with reasonable promptitude. I move the following amendment:

> "**That the Government be urged to take the necessary steps to ensure that workers' compensation cases be dealt with with greater expedition.**"

MR. C. H. TREADWELL (Wellington): I second the amendment. I have no hesitation in saying that the Compensation Court performs its functions admirably. The Judge is admirably qualified. The assessors are, after a little tutoring, efficient in the administration of the Act. I agree with Mr. Sullivan. Since the Act was passed in 1900 I have practised before every Judge of the Court of Arbitration and I hope you will not think I am presumptuous when I say that my opinion on this question is worthy of some consideration.

MR. G. M. SPENCE (Taranaki): I happened to be talking to Mr. S. G. Smith, chairman of the committee at present sitting, and he made the comment that the New Zealand Law Society was not in any way represented, nor had it discussed with him the questions involved. There were no legal members on the committee and his opinion was that the committee was at a disadvantage for that reason. He mentioned the matter, I think, knowing that I was coming to this Conference. I suggest that steps might be taken to put the views of the legal profession before the committee.

The amendment was put and carried.

PRESENTATION TO CONFERENCE SECRETARIES.

THE CHAIRMAN: I have a very pleasant duty to perform. I have been requested by the visitors to the Conference to hand to the very capable joint secretaries, Professor Algie and Mr. Goulding, small tokens of our appreciation of their work in connection with the Conference and of their efforts to bring about the happy results that have followed. They have been indefatigable and it is a pleasant matter to be able to give some tangible proof of our appreciation. The work of the two previous secretaries, Mr. Hunter, in Christchurch, and Mr. Leicester, in Wellington, showed that the organisation was enormous and the work continuous throughout the whole of the Conference.

(The Chairman then presented an entree dish to each of the Conference Secretaries).

PROFESSOR R. M. ALGIE (Auckland) in replying said: I express sincere appreciation of this tangible proof. Mr. Goulding wants to know whether you expect us to continue our joint efforts and set up together; but I expect there would be some objections to that from another quarter. I trust our efforts have been worthy of the appreciation you have expressed.

MR. A. M. GOULDING (Auckland): My own work as joint secretary, or secretary joint, has been the lesser of the two joints. During the conduct of the secretaryship Professor Algie has devoted an enormous amount of time to the writing of the delightful paper he read this morning. If the larger burden has fallen on me in the way of collecting subscriptions among the different brethren it is a matter of pleasure to me to say that I am completely converted as to my view of the value of the Conferences. It seemed doubtful whether the Conferences would continue as annual functions but when I heard Mr. Callan volunteer his hospitality I felt that next year I must get down to Dunedin. I appreciate now the work that Mr. Leicester put into the Conference in Wellington. He worked alone as secretary. I wish to thank him for sending us a complete file of what was done in Wellington. That was most useful. I do not know whether he experienced one of the difficulties that confronted us—the difficulty of language. The English language is not always adequate to cover some of the work of the secretary. My brother Algie—not my learned brother, because we know one another very well (laughter)—and I had a great difficulty. In preparing the little questionnaire which we circulated among visiting practitioners and our

own practitioners a debate of more than an hour occurred at the general committee meeting at which the members of the ladies' committee were present, as to whether members should attend the function, accompanied by a " wife " or a " lady friend." That is where the English language was not adequate. Mr. Brown suggested that we substitute the word " woman," but that was not suitable. (Laughter). Finally, we used the words " wife or daughter." That is one of the little things which illustrate the difficulties we had to face. I throw out to Mr. Callan and his committee my sympathy in the task they will undertake next year. I am sure that, next year, if any of us are fortunate enough to go to Dunedin, we shall have as hospitable a reception as any of our visitors have had in Auckland.

VOTES OF THANKS.

MR. E. H. WILLIAMS (Hastings): This Conference has had the privilege of listening to very able papers that have been placed before it. I beg to move a very hearty vote of thanks to the gentlemen who read the papers. Without detracting from any one paper I thought the paper on " Appeal to the Privy Council " was one of the finest ever delivered in New Zealand. We not only had an exhaustive paper from Mr. Callan, but we also had the privilege of listening to the best constitutional lawyer in New Zealand, Sir Francis Bell. To all of us it was a great treat. I hope for many years we may have the privilege of hearing him.

HON. JOHN MACGREGOR (Dunedin): I am glad to hear there is a prospect of the next Conference being held in Dunedin, but it makes me a little nervous at the possibility of not being able to carry out the arrangements with the complete success that has attended this gathering. However, that is for the future, and, in the meantime, it gives me great pleasure to second the motion. I feel that particularly with regard to the paper Mr. Williams has referred to. We know, in Dunedin, what to expect from Mr. Callan, but I have been gratifyingly astonished at the valuable papers read by the other gentlemen. Professor Algie has dealt with a subject that may possibly require legislation, and I shall be glad to be of service in that direction if it becomes necessary.

Motion carried by acclamation.

MR. E. H. WILLIAMS (Hastings): I wish to make special reference to the recent appointment of Mr. H. F. Johnston of Wellington, and Mr. A. C. Hanlon, of Dunedin, as King's Counsel. I move that the Conference extend its congratulations to them on being called to the Inner Bar and express its hope that they will have a successful career as King's Counsel.

MR. C. W. TRINGHAM (Wellington) seconded.

Motion carried by acclamation.

MR. G. M. SPENCE (New Plymouth): I wish to propose a hearty vote of thanks to the committee in control of this Conference. We have had a wonderful time. Visitors from all parts will agree that the Auckland committee has spared no pains to give us a hearty time while we have been here.

MR. A. COLEMAN (Stratford) seconded and expressed appreciation of the work of the ladies' committee and of the programme they had mapped out for the wives, daughters and other ladies attending the Conference. He assured them the programme they had provided had kept all the ladies out of mischief. They would be encouraged to go to other Conferences and, if unable to go themselves, would encourage their husbands to go without them.

THE CHAIRMAN: I add my own testimony to the splendid way in which the work of the committee has been done and appreciation of the way in which the visitors have been entertained by the members of the Council and the ladies' committee.

Motion carried by acclamation.

MR. R. P. TOWLE (Auckland): On behalf of the ladies' committee and general committees I thank you very much for the resolution you have carried. I am voicing the feelings of all in saying that it has been our pleasure to see you here and the way you have entered into the festivities has fully compensated us for the time spent in making the arrangements.

MR. J. F. W. DICKSON (Auckland): Regarding the proposed legislation which the Attorney-General intends to bring before the House, I think some indication of the attitude of the Conference might be expressed at this meeting.

THE CHAIRMAN suggested that that had been sufficiently dealt with. The matter had not been overlooked.

MR. A. H. JOHNSTONE (Auckland): I desire to move a hearty vote of thanks to the President and Council of the University College for the privilege of using this hall. The relations between the profession and the College have always been most cordial. We must not take too much for granted, but we should record on our minutes our appreciation and send a letter to the College Council.

MR. F. L. G. WEST (Auckland) seconded.

Motion carried by acclamation.

MR. G. P. FINLAY (Auckland): It is peculiar that it has fallen to me of all men to pronounce the benediction on the Conference. I want to propose a very hearty vote of thanks to the Chairman for his good service to the Conference. If Sir Charles Statham should now relinquish the Speakership, we have a very excellent man to put in his place. Our Chairman has shown that he possesses the qualities to be chairman in any constituted authority.

There is one other debt I would like to pay. As a good Scotchman I like to pay debts. This one is to the Press. We have had very full and accurate reports of our proceedings. We all feel we are rendering to the public a very earnest and important service, but the public will never know it unless the Press help us to tell them so. Therefore, it is with a great deal of gratitude I ask you to express to the Auckland Press and to the Press of the Dominion how much we appreciate their assistance.

MR. P. THOMSON (Hawera): As a visitor it is my desire to second the resolution of thanks.

THE CHAIRMAN, in acknowledging the expressions of thanks, said: My labour has been exceedingly light and I have had great pleasure in taking the chair. I think I am entitled to say that the Conference has been a complete success and that is a great argument in favour of its being continued.

Social Functions.

The social functions incident to the Auckland Conference were undoubtedly one of its most attractvie and valuable features, and all were complete successes. On this side great assistance was given by the Ladies' Committee consisting of Mesdames R. P. Towle (Chairwoman), R. M. Algie, E. L. Bartleet, A. St. Clair Brown, G. P. Finlay, J. M. Hogben, T. N. Holmden, J. B. Johnston, F. G. Massey, J. H. Reyburn, H. P. Richmond, H. M. Rogerson, J. Stanton, Miss E. Melville and Miss G. M. Hemus.

On Tuesday afternoon Mr. R. P. Towle (President of the Auckland District Law Society) and Mrs. Towle held a reception at the Lewis Eady Hall in Queen Street. For Wednesday afternoon the Committee arranged a most enjoyable excursion around the Auckland Harbour. In the evening there was a reception and bridge party for ladies at the Lyceum Club, Mrs. R. P. Towle, Mrs. R. M. Algie and Miss Melville receiving the guests. The Bar Dinner was held the same evening at the Auckland Club. Mr. R. P. Towle proposed the toast of "Our Guests" which was replied to by Mr. J. B. Callan. The toast of "His Majesty's Judges—Present and Past" was proposed by the Rt. Hon. Sir Francis Bell, K.C., the Hon. Mr. Justice Reed and the Hon. Sir Walter Stringer replying. The Solicitor-General (Mr. A. Fair, K.C.) proposed the toast of "The New Zealand Law Society" which was replied to by Mr. A. Gray, K.C.

On Thursday afternoon golf and tennis were played at Titirangi, and there was a motor drive for the ladies, and afternoon tea at the Titirangi Club House. The evening was spent at the Civic Theatre, lawyers and their wives later adjourning to the winter garden, which had been reserved for the occasion, for supper and dancing.

Law Journal Cup.

Fair and Others v. Cousins and Wiren.

IN THE COURT OF HONOUR: Before MR. JUSTICE BOGEY.

This was a very interesting action concerning a valuable silver pottle of ancient design. Some forty claimants headed by no lesser a dignitary than the Solicitor-General contested the right of Messrs. A. M. Cousins and S. A. Wiren of Wellington (Law Scriveners or such like) to possession of the Pot. The action was correctly one of detinue and might have been tried at *nisi prius* but the terrors of such a trial were so forcibly portrayed by learned brother Claude H. Weston that the defendants insisted on their right to wager of battle still extant in such disputes. Accordingly the matter was removed "into the lists" and that celebrated Judge, Colonel Bogey, took charge.

The contestants were tenants by the courtesy of the Maungakiekie Golf Club, the charm and setting of whose battle ground at Titirangi delighted everyone. It proved the downfall of many. Some two hundred guests and followers—subtlers—were in attendance and found the wherewithal to comfort and entertain themselves. Several ladies entered the lists and did battle among themselves, wielding the approved weapons in no mean manner.

Of the contest itself: Ever and anon arose the great battle cry "Fore! Fore!" Many a doughty blow was struck, not always in vain. Many a little victim suffered wounds gaping beyond repair. Some "lay dead" upon the green; others were lost in the heat of battle; many were struck away from sight for ever. All the fighters were armed with the long-handled club, but the trusty iron was the favoured blade. Here and there the great "spade" was in demand "to dig the beggar out." For the *coup de grace* the little steel putter was often lamentably ineffective. Some struck straight and hard; some vainly beat the air; many essayed the underhand scuffle stroke; while the slice, the pull, the lunge, the mighty swipe, the graceful chip, all were practised with and without result. Many great oaths were sworn: "'Sdeath" "'Struth" "Hell and Damnation," "Bunkered again Goddam," and the like, of which a great many are either meaningless or not printable. So the battle raged.

Defendants with the caution of their kind previously sought discovery and inspection, and traversed the ground prior to trial, as also did many others. Hardly a sod remained unturned by the time the fight was over. At one stage it appeared the defendants might sustain their title. We understand they were caught in side issues or buried deeply once or twice in extraneous matter. The Colonel insisted on taking his toll of them accordingly, and judgment went against them.

For the claimants Fair, K.C., and his partner were not altogether happy. The Solicitor-General evidently enjoys appearing "in bunko." One, Page, was observed to strike powerful blows but annotated his strokes a good deal. This is a strength that becomes a weakness on occasions. Many were the disputations and pitfalls. Numbers were guilty of wilful trespass, and the law of bounds and boundaries they seemed to know not. Execution and ejectment went accordingly. There were not wanting those who insisted on exercising "fishing and hunting rights." Students of "Waters and Watercourses" abounded. The law of the seashore was an open book to all, particularly in its application to the right to dig in sand and gravel pits. The old prescriptive right to cut turves found some great advocates. The hazardous law of the road was well observed. Some few failed to "sight their pills," dishonour and disaster resulting.

And so in the gathering gloom of a dying day those who were last were first. A little knot of interested spectators gathered on a nearby mound, watched the last stroke of the day, in the picturesque nautical language of Mr. Mackay himself who made it, steered to a safe anchorage under heavy weather conditions, while Messrs. Rogerson and Ward took what comfort they might that they were second when they certainly—but for hard luck it is said—should have been first. Alas! It is always so.

Some of the scores—we cannot trace them all—are as under:—

Goulding and Mackay ..	4 up
Rogerson and Ward	3 up
Cousins and Wiren	2 up
Hanna and Holmden ..	1 down
Bartleet and Wilson ..	1 down
Cunningham and Christensen	2 down
North and Free	2 down
Fair and Anderson	3 down
Wilson and Dorrington ..	3 down
Todd and Page	3 down

—A. M. GOULDING.

Australian Notes.

By Wilfred Blacket, K.C.

John Brown of Newcastle, N.S.W., owned some hundreds of race horses—quite recently on one day he registered 240 of them with the A.J.C.—but only had a few in training. He also owned coal-mines, railways and ships. He died a few days ago and by his will left the bulk of his estate to his close personal friend Sir Adrian Knox, Chief Justice of the High Court, who decided that his newly-acquired business interests compelled his resignation from the Bench, and the vacancy was at once filled by the appointment of Sir Isaac A. Isaacs, senior member of the Bench, who has been a Justice of the High Court since 1906 and is now seventy-five years of age.

It is greatly to be regretted that Sir Adrian Knox had to retire. As a Chief Justice he was a worthy successor to Sir Samuel Griffith—high praise indeed—and public confidence in his integrity and firmness has known no bounds. The new Chief Justice has high renown for his learning in law and literature.

The High Court Bench when Sir Samuel Griffith, Sir Edmond Barton, and R. E. O'Connor were its members was always courteous and dignified. Later, when Sir Isaac A. Isaacs was appointed, its dignity was not always maintained, for the Chief and Mr. Justice Isaacs were frequently in conflict. Here is one instance that I do well remember. It occurred in a criminal appeal. The Chief could not see that there was any evidence of the guilt of the accused. Mr. Justice Isaacs thought the evidence conclusive, and after there had been a considerable amount of argument he said in an absent-minded kind of way: "I have heard of an admiral who put a telescope to his blind eye so that he should not be able to see." "And I," hotly retorted the Chief, "have heard of a man who put a drop of water under a microscope and saw lions, and elephants, and tigers." Which somehow suggests another story. Knox, K.C., afterwards Sir Adrian Knox, C.J., arguing in a stamp duty case, was tormented by questions, of which some were relevant, put by Mr. Justice Gavan Duffy who finally said: "Now Mr. Knox I want you to answer this question—Suppose that a Bill were brought into Parliament providing that all cheques should be printed on parchment in letters half an inch long—now what do you say as to that?" And Knox wearily replied: "Well, your Honour, if any Parliament were to bring in such an utterly ludicrous Bill as that I think someone ought to write to the papers about it."

There is another matter of law and politics which is worthy of mention. The Bavin Ministry in New South Wales has passed an Act of Parliament providing for a re-constitution of the Legislative Council, and prohibiting any alteration of the Constitution of the Council or its abolition unless affirmed by a referendum, and this Act is not to be operative unless affirmed upon a referendum which will probably occur in October next. This is said to be a means of preventing a mere Parliamentary abolition of the Council, but I confess that I cannot see anything to prevent a Parliament, desirous of avoiding a referendum, from repealing the Act that requires that a referendum should be taken. It may be that the Ministry has found a way of enabling one Parliament to bind its successor, but I doubt it.

The reference to 1,000 guinea fees in your Journal (*ante* p. 27) reminds me of two Australian instances. F. Leverrier, then leader of the Equity Bar, N.S.W., and an extra specialist in cases involving scientific question accepted a brief with the four figures marked thereon for an infringement suit at Perth, W.A. Before he started, however, it was found that he could not be "called" there in time to be able to appear. Notwithstanding this disability the client insisted on his attending the Court and the result abundantly justified the client's decision. Another instance occurred sixty years ago. W. B. Dalley was asked his fee for defending in a cattle-stealing case at Bourke, the trip there and back involving 600 miles of coach travelling. He asked 1,000 guineas, and the solicitor later replied that although he did not think the fee excessive his client had thought it better to brief Mr. McNaghten, who travelled the circuit, at a fee of 30 guineas, and "distribute £500 or more judiciously among residents of the district." But the prisoner was convicted.

New South Wales, as far as my memory serves me, has hitherto been free from prosecutions for embracery, but a charge of this kind is now pending. One Davies was plaintiff in a Supreme Court case: Beckman was foreman of the jury. It is alleged that Davies paid £300 to or on account of Beckman, and the two have now been arrested on a charge of conspiring to pervert the course of justice, but no evidence has yet been taken.

Ernest Judd, Socialist, was a candidate at last Federal Election, and, thinking that the Sun Newspaper had erred in its statement of the motives that had induced him to become a candidate and had erroneously described his actions during the campaign, he sued the paper for £10,000 damages. Several witnesses gave evidence on his behalf, but when he went into the box his counsel merely asked him his name, and whether he was the plaintiff. Counsel for the defence then cross-examined at considerable length, for Mr. Judd is a gentleman whose conduct on several occasions has afforded opportunity for unkind criticism. Nearly all the matters referred to by counsel were irrelevant to the statements declared upon, and the Chief Justice charged the jury in accordance with the decision in *Hobbs v. Tinling*, (1929) 2 K.B. 1, that these matters were relevant to the question of credit, but not capable of being considered in mitigation of the damages caused by the libel sued upon. There was a verdict for one farthing, as there probably will be in every other case when the precedent of *Judd v. The Sun* is followed. *Vidal v. Temperley*, 16 N.S.W. L.R. 223, was on somewhat similar lines. Plaintiff's counsel proved publication of the libel and that it referred to the plaintiff, but anticipating some evidence of justification by the defence, kept his client out of the box, intending to call him in reply, but the defence did not go into evidence and the jury returned a verdict for the defendant. The plaintiff moved for a new trial, but the Court held that although there should have been a verdict for the plaintiff no more than nominal damages could have been expected by a plaintiff who did not go into the box, and therefore refused to disturb the verdict.

The High Court has delivered its judgment in the case of *Wright v. Cedzich* previously mentioned by me, (see vol.v, p.348), and has decided by four opinions to one, Mr. Justice Isaacs dissenting, that a wife has no right of action against a woman who alienates her husband's affections, and induces him to leave her. Counsel

for the plaintiff contended that the legal rights of a wife are similar to those of a husband in respect of consortium; but the majority of the Court, adopting the view of Lord Wensleydale, held that this was not so, and that whereas "the right of a husband was of material value capable of being estimated in money, the right of a wife was no more than the right to the comfort of the husband's society and affection." Mr. Justice Isaacs "utterly rejected the view that consortium in point of law meant on the part of the woman her society and services, and on the part of the man, the one duty of cash remuneration in maintaining her" and declined "to declare judicially, that Australian wives occupy such a repellant position of legal and moral degradation." The various Womens' Clubs have voiced some indignation about these "man-made laws" and find no consolation in the fact that a husband is valueless as a cause of action, although a wife may be worth many thousands for damages.

A Bill to "reform" the Federal Constitution by taking away the necessity of a referendum and giving power to Parliament to amend it at will is now before the House of Representatives and will certainly be passed. Whether it can be carried in the Senate is another question. One "reform" that is strongly pressed upon the Ministry is intended to deprive the High Court of the power of declaring any Federal enactment *ultra vires*, while there are other Ministerial supporters who urge the abolition of the High Court. The political happenings in Australia should make interesting reading for some time to come, and with regard to these it may be a relevant, and even an ominous fact that in January last Mr. Scullin through official channels invited Soviet Russia to send a resident Consul to Canberra. Notoriously there has been an organisation in Sydney for some years whose members are sworn to obey the orders of the Soviet. Why these traitors have not been prosecuted for their sedition, evidenced, as it has been, by a constant succession of overt acts, is a question that I am not able to answer.

* * * * *

Some days ago the newspapers simultaneously announced that Mr. Scullin, Prime Minister of the Commonwealth, had offered to the Chief Justice of the High Court, Sir Isaac A. Isaacs, the position of Governor-General. The statement was not contradicted by either of the parties concerned but was affirmed by a later and apparently official statement that the Canberra allowance of £2,000 a year was not to be granted to Sir Isaac A. Isaacs, and that he would receive £10,000 a year only.

The transaction is one of startling significance. No notice seems to have been given to the Home Office of the intention to disregard the established constitutional practice of appointing, after consultation with the Office, some person who was free from any tinge of prejudice in connection with local politics and politicians. The wisdom of that course is now made more apparent than ever before, for there can be no doubt, after his brilliant career in politics and his twenty-four years on the Bench, as to the views of Sir Isaac on industrial and constitutional matters. In the "Australian Encyclopaedia,"—a book written by very learned writers—it is stated of him, p. 678, that "His career as a judge has been marked by special attention to constitutional questions, on which he adopts an attitude strongly favourable to the extension of the Commonwealth's powers."

Still more important considerations arise out of the fact that Lord Stonehaven has six months further tenure of his Vice-Regal office. Assuming that presently there will be a belated denial that any offer was made, will it not be reasonable for the public to assume that a similar offer will be made later on? The only way of destroying this assumption will be for Mr. Scullin immediately to make another appointment to the position of Governor-General. Even so there will be a doubt about the whole business. If on the other hand Sir Isaac Isaacs is to be appointed it is obvious that he must retire at once from the Bench. For a judge to continue to sit when he has a favour from the Crown in his pocket is inconceivable. A new meaning would be imposed on the phrase *quamdiu se bene gesserit* if this were possible. The latest statement from Canberra is that Sir Isaac "has not accepted the offer." Does this mean that he has refused it, or that he is delaying acceptance?

Canterbury District Law Society.

Annual Meeting.

The annual meeting of the Canterbury District Law Society was held in the Supreme Court on Friday, 21st March, 1930, when there was a large attendance of members. The annual report showed a membership of 140; 202 practising certificates were issued during the year. Reference was made to the deaths of Messrs. D. Bates and T. A. Murphy who were members of the Society.

The retiring president, Mr. M. J. Gresson, was in the chair and spoke shortly, giving members information on matters of interest which had been dealt with by the Council during the year, particularly with regard to the Solicitors' Guarantee Fund. The report and balance-sheet having been adopted the election of officers for the ensuing year took place and resulted as follows:—

President: Mr. G. T. Weston.

Vice-President: Mr. H. C. D. van Asch.

Treasurer: Mr. A. F. Wright.

Council: Messrs. A. T. Donnelly, T. D. Harman, A. S. Taylor, C. S. Thomas, Roy Twyneham, D. E. Wanklyn.

Representatives on N.Z. Law Society: Messrs. G. T. Weston, M. J. Gresson and K. Neave.

Representatives on Council of Law Reporting: Messrs. George Harper and A. T. Donnelly.

Discussion ensued as to many matters of interest including the necessity for bringing under the notice of the public the benefits of the Guarantee Fund.

Court of Arbitration.

The following fixtures have been arranged by the Court of Arbitration:

Westport: Tuesday, 27th May, at 10 a.m.
Greymouth: Friday, 30th May, at 10 a.m.
Christchurch: Saturday, 7th June, at 10 a.m.

Bench and Bar.

Mr. H. F. Johnston, of Wellington, and Mr. A. C. Hanlon, of Dunedin, have been sworn-in as King's Counsel. Both appointments undoubtedly maintain the prestige of the patent.

We regret to have to record the death of Mr. D. K. Logan, of Masterton. The late Mr. Logan was born at Otakaia, Otago, in 1881. He was educated at Wellington College and gained his LL.B. degree at Victoria College in 1903. He was for some years in partnership with Mr. F. C. Gawith, of Masterton, under the style of Gawith and Logan, but he left the firm a few years ago and had since then been practising on his own account. At Rugby Mr. Logan for many years represented Wairarapa. He was offered a place in the New Zealand team of 1905, but was forced, for business reasons, to decline For many years he was a vice-president of the New Zealand Rugby Union. At cricket also he represented Wairarapa and he was regarded as one of the best all-round cricketers in the Wellington Province. Mr. Logan always took a keen interest in local affairs. He was for many years a member of the Cameron Memorial Board and the Wairarapa Claims Board of the Patriotic Association.

Messrs. Perry and Perry, of Wellington, have admitted into partnership Mr. R. E. Pope, LL.M., who has been for several years their managing clerk. The new firm will practise under the style of " Perry, Perry and Pope."

Mr. T. A. Kinmont, who has been in practice in Hawera for the last two years under the style of " Spratt and Kinmont," has been joined in partnership by Messrs. St. Leger H. Reeves and J. Edmondston. The practice will in future be conducted under the name of " Kinmont, Reeves and Edmondston " by Messrs. Kinmont and Reeves, at Hawera, and by Mr. Edmondston at New Plymouth.

Mr. H. de R. Flesher has been admitted into partnership by his father, Mr. J. A. Flesher, of Christchurch. The practice will be carried on as " J. A. Flesher & Son."

Mr. J. A. Kennedy, who for some years was with Mr. R. L. Saunders, has commenced practice at Christchurch on his own account.

Rules and Regulations.

Industrial and Provident Societies Act, 1908.—Rules relating to procedure.—Gazette No. 30, 17th April, 1930.

Land and Income Tax Act, 1923. Additional regulations.—Gazette No. 30, 17th April, 1930.

Motor-vehicles Insurance (Third Party Risks) Act, 1928. Motor-vehicles Insurance (Third Party Risks) Regulations, 1930.—Gazette No. 30, 17th April, 1930.

Music Teachers Registration Act, 1928. Amended and additional regulations.—Gazette No. 17, 10th April, 1930.

National Provident Fund Act, 1926.—National Provident Fund Regulations, 1930, Amendment No. 2.—Gazette No. 27, 10th April, 1930.

Stock Act, 1908. Regulations for the prevention of the introduction into New Zealand of diseases affecting stock.—Gazette No. 30, 17th April, 1930.

Legal Literature.

Butterworth's Index to the New Zealand Statutes, 1929.

By H. J. V. James.
(pp. 78 : Butterworth & Co. (Aus.) Ltd.)

In comparison with its predecessors of recent years, the Statute Book of 1929 is insignificant in point of size—a mere 310 quarto pages as against (for example) the 804 pages of 1928 or the 783 pages of 1921–22. That the subject-matter is not insignificant is evidenced by this excellent Index of 78 octavo pages compiled by Mr. James.

At first glance, it might appear to be a work of supererogation at this late date to publish a new Index to the New Zealand statute-law, for every practitioner is familiar with the Index commonly known as " Curnin," which for many years was edited by the late Mr. E. Y. Redward, and the 26th Edition of which was published a few months before his death. A mere glance of comparison is sufficient, however, to disclose the entirely different methods of treatment employed in the two indexes. " Curnin " is a subject-matter index of all the public general Statute-law in force, with a great many additional features ; for example, lists of the geographical divisions of New Zealand ; chronological tables of Imperial and New Zealand Acts in force in the Dominion (including local and personal as well as public general statutes) ; lists of Provincial Ordinances still in force, and lists of Imperial and New Zealand Acts that have been repealed or have become obsolete. The main feature of " Curnin " however, is its subject-index (arranged in alphabetical order of subject-matter), with references to the Imperial and New Zealand Statutes bearing on each subject, and also to relevant regulations, rules, Orders in Council, etc. Mr. James' Index is a less ambitious work, but should be equally invaluable to the practitioner. The volume here reviewed deals only with the Statute-book of 1929. It begins with a Table arranged in alphabetical order of (1) the Public and General Acts of that year ; (2) the Local and Personal Acts ; and (3) the Private Acts. In addition to the Short Title, this Table gives with respect to each Act its number, the page of the Statute-book containing the first page of the Act, and the page of the Index on which detailed reference to the Act is to be found.

Coming to the Index itself, each Act is dealt with in its appropriate alphabetical order, and an alphabetical arrangement of subject-matter within each Act is also adopted. With respect to each item of the subject-matter, reference is given to the section number of the Act, and to the page number of the Statute-book. Included in the subject-matter of each Act is a valuable reference to other Acts that have been repealed, amended, or otherwise affected. This is particularly valuable in " omnibus " Acts like the Finance Acts of recent years. The Editor has allowed four pages of the Index for the adequate treatment of the Finance Act, 1929, and his excellent arrangement shows at a glance that upwards of 60 other Acts (local as well as public general Acts) have been directly affected. Other Acts have received the same careful and generous treatment. It would be difficult to imagine a readier way of acquiring a general knowledge of last session's Statute-book than by a perusal of this Index.

—J.C.