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" Whether or not strict legal theory openly avows it, it is certain that our Common Law would have stood still if Judges had not behaved as men of the world."
—Professor C. K. Allen.

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Legal Education.

A few years ago, as a result of co-operation between the Judges of the Supreme Court, the Law Society, and the University, several alterations to the law examinations were made; these alterations were, so far as they went, certainly directed towards the best interests of the public and the profession alike, but, nevertheless, a good deal of the ground, some of it controversial perhaps, was left uncovered. The next move, so far as we are aware, towards any further improvement was a resolution proposed at the Christchurch Conference in April, 1928, by Mr. Robert (now Mr. Justice) Kennedy, seconded by Mr. (now Professor) H. H. Cornish, and unanimously carried, recommending that practical experience of legal work on the part of all candidates for admission to the profession be ensured by a return to the system of articles, or by the adoption of some other system having the like purpose and effect. No action was taken to give effect to the Christchurch remit, and the next move was taken at the Wellington Conference in the following year as a result of the inaugural address of the present Attorney-General and of a paper by Professor J. Adamson, when a Committee was set up on the motion of Mr. M. Myers, K.C., as he then was, to consider the matters raised by those gentlemen and to report to the New Zealand Law Society. This Committee met early this year at the summons of the Attorney-General and, after deliberation, 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."

The words which we have italicised express what we believe was the Committee's intention that the Academic Board should not have power to make recommendations to the Senate different from the recommendations of the Council of Legal Education.

At the Auckland Conference the Attorney-General outlined the provisions of the legislation dealing with the subject which he proposes, during the coming session of Parliament, to introduce. A Council of Legal Education is to be set up consisting of two Judges of the Supreme Court, two persons appointed on the recommendation of the Council of the New Zealand Law Society, and two teachers of law of the University, appointed on the recommendation of the Senate. This body as the proposals were then outlined, would make recommendations on the matter of legal education to the Academic Board of the University and the latter body, after considering such recommendations, would in turn, pursuant we assume to S. 18 of the New Zealand University Amendment Act, 1926, make recommendations to the Senate. We at once took the objection, in this column, that no real powers were given to the Council of Legal Education and that in the result it might be found that the recommendations of the Council of Legal Education were disregarded either by the Academic Board or by the Senate, and, this being so, we suggested that the profession ought seriously to consider whether it would surrender its existing control, which it has in effect through the Judges, in favour of such a scheme.

We have since, however, been informed by the Attorney-General that it is now intended that, as well as sending its recommendations to the Academic Board, the Council of Legal Education will send them also to the Senate. This alteration in the proposals makes, in our view, considerable difference, for it will at all events ensure that the views of the profession are placed before the body whose duty it will be, as in the case of all other courses of study, finally to prescribe the curriculum, and, with this alteration, Sir Thomas Sidey's proposals appear to merit favourable consideration. The profession is, as a general rule, well represented on the Senate—at the present time its personnel includes five lawyers—and it is perhaps hardly likely, though it must be admitted it is possible, that that body would disregard recommendations from the Council of Legal Education.

The danger, in the view we formerly expressed, was that the profession's recommendations might be disregarded through lack of appreciation by the Academic Board—a body of twenty-one University professors without a professor of law among its number. But, now that the recommendations of both bodies must go to the Senate, the weight of our objection is largely gone. It may well be a question, however, whether there is, in such a very specialised matter as legal education, anything to be gained by any reference at all to the Academic Board: holders of chairs of chemistry, mathematics, agriculture, biology, geology and engineering constitute a majority on the Board and we have already pointed out that it does not at present comprise one professor of law.

Apart from this aspect of the matter, Sir Thomas Sidey's proposals appear to us to be admirable, and a very great debt is certainly owing to their sponsor, but for whose sympathy and activity nothing might for a long time have been done towards further improvement of the standard of legal education. One of the main advantages of his proposals will undoubtedly be greater facility for the making of alterations and extensions to the syllabus, for the University possesses wider powers than the Judges. Another benefit will be the abolition of the present duplication of examination prescribing bodies. At present the Judges prescribe examinations for admission to the profession and the University prescribes examinations for the degree of LL.B.; the unsatisfactory nature of this state of affairs (though it seems to be the fault of the University) is shown by the fact that the Judges prescribe an examination in bookkeeping but the University does not. No doubt, on the recommendation of the Council of Legal Education, the University would, along with other alterations, remedy this important deficiency.

Court of Appeal.

Herdman, J.
Reed, J.
Adams, J.
Ostler, J.
Smith, J.

April 1, 2, 3; May 23, 1930.
Wellington.

RAYNER v. THE KING.

Crown—State Forests—Contract—Minister—Authority—Appropriation—Statutory Authority to "Purchase or Otherwise Acquire" Land for Purposes of Permanent State Forest—Appropriation of Moneys by Parliament Not Condition Precedent to Minister's Power to Contract as Authorised—Appropriation Not Condition Precedent to Right of Subject to Petition Under Crown Suits Act—Authority to Purchase Land Not Authorising Agreement to Pay Sum of Money for Option to Purchase—Contract "Subject to All Titles Being in Order"—Land Subject to Restrictions of Part XIII of Land Act, 1924, and of S. 74 of Native Land Amendment Act, 1913—Defect in Title—Crown Entitled to Repudiate—Quaere as to Power of Minister to Purchase Lands for New State Forest—Crown Suits Act, 1908, S. 32—Forests Act, 1921-22, Ss. 22, 38—Land Act, 1924, Ss. 379, 380—Native Land Amendment Act, 1912, S. 7—Native Land Amendment Act, 1913, Ss. 72, 74.

Petition under the Crown Suits Act, 1908, claiming £35,000 as consideration for an option to purchase certain lands. The suppliant alleged that by an agreement dated 11th October, 1928, expressed to be made between himself and the Commissioner of State Forests the suppliant agreed to give and the Commissioner, acting for and on behalf of His Majesty, agreed to take, an option to purchase the forests of timber standing on certain land described; that the consideration for the grant of such option was fixed by the agreement at £35,000 which sum, in the event of the option being exercised, was to be treated as part of the purchase money and that the consideration became payable on the signing of the agreement but was not so paid. The plaintiff claimed to recover the full sum from His Majesty. On the application of the suppliant an order was made by the Supreme Court that certain questions of law be argued before trial, and it was also ordered that those questions be removed into the Court of Appeal for argument. The questions of law argued before the Court of Appeal were: firstly, whether the agreement referred to in the petition was *ultra vires* the Commissioner of State Forests under the Forests Act, 1921-22, and its amendments, or unenforceable; secondly whether any of the following facts entitled the Commissioner of State Forests to decline to be bound by the said agreement, namely: (a) The fact that the said land was subject to Part XIII of the Land Act, 1924, and S. 74 of the Native Land Amendment Act, 1913. (b) The fact that the suppliant was not the registered proprietor of the whole of the land in the said agreement but held only an option to purchase over a certain portion of the land and timber included in the said agreement comprising 653 acres, and was also a mortgagee thereof. It was common ground that the whole of the lands affected by the agreement had ceased to be Native lands and were European lands.

Gray, K.C., and **James** for suppliant.

The Solicitor-General (Fair, K.C.) and **Currie** for respondent.

ADAMS, J., delivering the judgment of the Court, said that the authority of the Commissioner, for convenience referred to as "the Minister," was questioned on several grounds which might be conveniently summarised as follows: 1. That S. 22 of the Forests Act, 1921-22, did not authorise the purchase by the Minister from a private owner of an area of standing timber in order to create a State forest independent of State forests already in existence, but was confined to the acquisition of private lands only for purposes incidental to or in connection with an existing State forest. 2. That the acquisition of an option to purchase or acquire land for the purpose of a State forest was not within the terms of the section and the Minister had no authority to incur on behalf of His Majesty a liability to pay for any such option. 3. That the lands being subject to the restrictive provisions of Part XIII of the Land Act, 1924, and S. 74 of the Native Lands Amendment Act, 1913, and the title to part of the lands being otherwise defective, the suppliant could not give a good title as required by the agreement. 4. That no moneys had been appropriated by Parliament for the purposes mentioned in S. 22 out of which the consideration for the option could be paid, and that without such appropriation the agreement was *ultra vires* the Minister.

The first question was whether the contract alleged was within the authority vested in the Minister by S. 22 (1) of the Forests Act, 1921-22, which provided: "The Minister may purchase or otherwise acquire any land for the purposes of a permanent State forest or a provisional State forest, or for the purpose of providing access to any State forest." The Solicitor-General submitted that that subsection authorised the purchase of lands only for purposes subsidiary to an existing State forest, but the Court assumed, without in any way expressing an opinion, that the power extended to the purchase or acquisition of lands for the purpose of creating a new State forest. The subsection did not in express terms authorise the Minister to contract for an option to purchase, and on first impression it was somewhat startling to find that the contracting parties appeared to have assumed that the power vested in the Minister to purchase private lands included by necessary implication a power to contract for an irrevocable option and to bind the Crown to the payment of such consideration for that option as he might think fit. If A. authorised an agent in general terms to purchase property for him, the agent might no doubt proceed to do all usual and proper things in the circumstances and complete the purchase by a proper contract, but it was surely unarguable that in such a case the agent could, before purchase and without express authority, bind A. to the terms of an option, and so make him liable for the consideration required by the owner of the property for that option. The Court could find no ground for concluding that the Minister was for that purpose in any different category. He was the agent of the Crown: **Attorney-General v. Lindegran,** (1819) 6 Price 286, 308; **Auckland Harbour Board v. Rex,** (1919) N.Z.L.R. 419, 432; **6 Halsbury's Laws of England,** par. 633—with statutory authority to purchase lands for the purposes of a State forest. If the authority was exercised, it was so exercised for the Crown, and must be within the terms of the statutory authority. When the Minister made a contract under the Act it was well settled that the presumption was that he contracted in his public capacity and subject to the particular restrictions which constitutional practice or the empowering statute imposed. Those restrictions everyone transacting public business with him must be taken to accept in so contracting: **Commercial Cable Co. v. Government of Newfoundland,** (1916) 2 A.C. 610, 616, 617. Looked at from another point of view, the Minister was a trustee of his statutory powers and must keep within the terms of those powers. If a trustee with power to purchase lands entered into such a contract it would, in the absence of express power, be a breach of trust to pay for the option out of the trust fund. The acquisition of an irrevocable option was not a purchase or acquisition of private lands within S. 38 (a) of the Forests Act, and that section, therefore, did not authorise the payment of money as consideration for such a contract. The agreement alleged by the suppliant was, therefore, *ultra vires* and unenforceable. The petition might be disposed of on that point alone.

Referring to the questions of the title, the agreement contained the following stipulation: "This agreement is subject to all titles being in order, but any errors or misdescriptions not being of substance shall not annul this agreement but if they cannot be amended shall be the subject of compensation." That stipulation must be construed according to its tenor as referring to the whole agreement, including the contract to pay £35,000 which the suppliant sought to recover. The contract to pay, if valid, was thus subject to a condition that the titles should be in order. If the suppliant could not fulfil that condition, liability under the agreement did not attach. It was admitted in the present case that the whole of the lands affected by the agreement were subject to the restrictions on acquisition imposed by Part XIII of the Land Act, 1924, and S. 74 of the Native Lands Amendment Act, 1913, and that those restrictions were duly noted on certificates of title issued under the Land Transfer Act. The effect of the statutory provisions referred to was considered by Cooper, J., in **McDonald v. Wake,** (1919) G.L.R. 106, which case was followed by Ostler, J., at Auckland in **Scholium v. Francis,** 6 N.Z.L.J. 52. There were therefore two decisions of the Supreme Court holding that land subject to those restrictions could not be forced upon a purchaser who was a subject and who could demand a title such as might be required in the present case. In each case the question arose between two private persons. The Court agreed with and adopted the reasoning and conclusion of Cooper, J. Mr. Gray submitted, however, that the Crown was in a different position, not being bound by the statutory restrictions. But the pro-

position which counsel had to meet was that lands coming within Part XIII of the Land Act, 1924, or lands within Part XII of the Native Land Act, 1909, as amended by S. 72 (2) of the Native Lands Amendment Act, 1913, and lands within S. 7 of the Native Land Amendment Act, 1912, were made subject to the restrictive provisions imposed by those enactments; that on every alienation of such lands by the Crown made on or after 20th November, 1907—the date when the Land Laws Amendment Act, 1907, came into operation—the land so alienated became, and at all times thereafter remained, subject to those restrictions, and, therefore, that the title was not in order as required by the agreement. It was true that the statutory restrictions were not imposed on the Crown but on private persons, and applied only on and after alienation by the Crown, but whenever and so often as such an alienation took effect the restrictions applied automatically to the land included therein except in cases falling within S. 380 of the Land Act, 1924. That was expressly provided for in S. 379. It was plain, therefore, that the statute operated on lands so alienated in every such case, no matter how or when the title to that land might have been acquired by the Crown. If the lands became vested in the Crown the restrictions were suspended only during the time of such vesting, and on an alienation by the Crown they became active as against the purchaser. If in those circumstances the Crown should at any time desire to sell the land, an important section of possible buyers would be excluded from purchasing, with the probable result of a substantial reduction in the market value of the lands. Unless it were shown that the Minister had notice of the restrictions in circumstances which amounted to waiver of the contractual right to a good title free from restrictions and that he had power to accept a defective title, the Crown would be entitled to repudiate the transaction on the ground of defect in title. Counsel for the suppliant submitted that the Minister or his responsible advisers knew the lands in question and therefore must have known of the restrictions before entering into the agreement. That inference was, however, not justified on the facts before the Court and the Solicitor-General stated that the responsible advisers of the Crown had no such knowledge until some time after the agreement was signed, when the titles were searched and the facts discovered. For those reasons the Court was of opinion that the title was not in order and the condition as to title had not been performed.

As to the question of appropriation, their Honours did not agree that an appropriation of public money was a condition precedent to the exercise of the authority vested in the Minister by S. 22 (1) of the Forests Act, 1921-22, or in the Governor-General by S. 22 (2). It was sufficient if Parliament had authorised the contract in any sufficient manner. That authority was plainly conferred in S. 22. Nor could their Honours concur in the view expressed by the Solicitor-General that in New Zealand an appropriation of public moneys to the satisfaction of the claim of a subject was a condition precedent to the right of a subject to avail himself of the process provided in Part II of the Crown Suits Act, 1908. That Act was procedural only, its object being to simplify the mode of suing the Crown—**Alcock v. Fergie,** 4 W.W. & A'B. 285, 317, 318—and the finding of the Court in favour of a suppliant was in the nature of a declaration and not coercive. The constitutional principle which was discussed in the argument was the principle that the complete and absolute control of all public moneys rested in Parliament alone, and that such control was secured by providing that no such moneys could be paid away without a definite appropriation by the Legislature of a sum to the specific purpose for which it was to be applied—**Auckland Harbour Board v. The King,** (1924) A.C. 318; **Attorney-General v. Great Southern and Western Railway Co. of Ireland,** (1925) A.C. 754, 772, 773. In the present case the authority to purchase was given in Part II of the Forests Act where nothing whatever was said about payment. The provision for payment was found in Part IV, S. 38, which authorised the payment of such amounts as might be appropriated by Parliament for the purpose. In cases such as the present the appropriation might be made before or after the contract of purchase had been entered into, but by requiring appropriation as a condition precedent to payment Parliament retained full control over the acts of the Minister and might repudiate or allow his action as it thought proper. Moreover, in New Zealand, Parliament had not surrendered its control to the Courts. On the contrary that control was expressly retained by specific provision in S. 32 of the Crown Suits Act which required a special appropriation as a condition precedent to payment of a sum awarded by a judgment. In New Zealand, therefore, the control of Parliament was not affected by the award or judgment of the Court on a petition under the Act, and it rested entirely with Parliament to say whether or not any sum found by the Court to be payable should be paid. Viscount Haldane in **Att. Gen. v. Great Southern and Western Ry. Co. of Ireland** (*cit. sup.*) said: "All grants of public money, either direct or prospective, must be in the discretion of the Legislature, and, where the system is that of responsible government, there is no contract," that is, no contract to pay, "unless that discretion has been exercised in some substantial fashion." The supervision was thus extended to the moment when Parliament made a special appropriation to satisfy the amount certified in form (3) in the third schedule to the Act. The effective control of Parliament was thus ensured while the subject had access to the Court to establish his claim. The authority of the Minister to make the contract depended, not on a precedent appropriation, but on the provisions of S. 22 (1), but the payment out of the public funds was conditional on specific appropriation. In that sense the contract was conditional. Every person contracting with a Minister or other authorised person was presumed to know that whenever a contract was made by Ministers or other persons acting on behalf of the Crown, payment of moneys which might become due thereunder was conditional upon the appropriation by Parliament of public moneys for that purpose. The classic pronouncement on that point was found in the judgment of Shee, J., in **Churchward v. The Queen,** L.R. 1 Q.B. 173, which was quoted and adopted by Viscount Haldane in **Attorney-General v. Great Southern and Western Railway Co. of Ireland,** (*cit. sup.*) at p. 773. On the same page Viscount Haldane pointed out that, since the Settlement, the Crown's ordinary contracts meant only that it would pay out of funds which Parliament might or might not supply, but, as their Honours had said, the right to proceed under the Crown Suits Act was not affected. To hold otherwise would be to stultify the Act, since by the very fact of making a special appropriation Parliament had acknowledged the liability and authorised its payment by the proper authorities in terms of the Public Revenues Act. If the right to petition were given only to persons in whose favour a special appropriation had been made the main object of that part of the Act would be defeated. The questions of law ordered to be argued were accordingly answered as follows: (1) The agreement alleged in the petition was *ultra vires* the Minister and, if otherwise valid, would be unenforceable for defect of title. (2) The lands being subject to the restrictions mentioned the agreement was unenforceable. The case would be remitted to the Supreme Court to be dealt with accordingly. The Crown was entitled to costs on the highest scale in the Court of Appeal, following **Teira Te Paea and Others v. Roera Tahera and Anor.,** 15 N.Z.L.R. 91, 118, and to such further costs as the Supreme Court might allow in respect of proceedings in that Court.

Solicitors for suppliant: **Hall Skelton and Skelton,** Auckland.

Solicitor for respondent: **Crown Law Office,** Wellington.

Supreme Court.

Myers, C.J. April 14; May 1, 1930. Wellington.

IN RE HATRICK.

Trust—Sale—Terms of Will Prohibiting Sale at Less than Named Sum—Fall in Values—Application for Approval of Court to Sale at Much Lower Price—Approval Refused—Semble Private Estate Bill Proper Mode of Obtaining Authority to Sell in Circumstances—Administration Act, 1908, S. 9.

Originating summons issued by the plaintiffs, as trustees of the will of one, Hatrick, for an order approving a proposed sale by them for £6,000 of a warehouse site in Wanganui forming part of the testator's residuary estate. The testator, who died on 30th July, 1918, made his will on 13th May, 1913. After various specific gifts he devised all the residue of his real and personal estate upon trust to convert into money his personal estate and a certain named farm as and when the trustees should think fit. He settled the residuary estate, giving life interests to his wife and children with remainder to his grandchildren. There were a number of such grandchildren, all of whom were infants. Clause 41 of the will provided as follows: "At any time after all my children who shall live to that age shall have attained the age of 21 years if my trustees shall be of opinion

that it would be distinctly to the advantage of my estate so to do and if my wife should she then be living and all my said children then alive shall consent thereto but not otherwise I empower my trustees to sell either by public auction or private contract all or any part of my real estate not herein specially provided for in such lots or otherwise as they shall think fit with full discretionary powers as to terms and conditions of sale and as to allowing the whole of any part of the purchase money to remain on mortgage on the security of the property so sold or on any other security in addition to or in place thereof. Provided that my warehouse freehold in Wanganui and the quarter acre adjoining shall in no case be sold under this my will for less than £30,000 . . . ." Affidavits had been filed showing that the quarter acre adjoining the warehouse freehold was valued at the present time at about £2,800. The net value of the estate was said, as at 31st March, 1919, to have been £173,153 16s. 10d., and as at 31st March, 1929 to be £256,046 5s. 5d. The testator's widow and children consented to the proposed sale but the trustees could not proceed with it on account of the remaindermen being infants.

Spratt for plaintiffs.

Von Haast for infant grandchildren.

MYERS, C.J., said that for the application made counsel relied mainly upon **In re New,** (1901) 2 Ch. 534, and S. 9 of the Administration Act, 1908. The case just cited, which was said by Cozens-Hardy, L.J., in **In re Tollemache,** (1903) 1 Ch. 955, to constitute the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts, had been followed several times in New Zealand in cases which were referred to by Sim, J., in **McCrostie v. Quinn,** (1927) G.L.R. 37. The order asked for in the present case went a great deal further than what was done by the Court in **In re New** (*cit. sup.*) or any other of the reported cases. Mr. Spratt referred to the Scottish case **Chalmers Hospital (Banff) Trustees,** (1923) S.C. 220, where an order was made contrary to the directions contained in the trust instrument, but the order was made by virtue of a section of a statute which made it competent to the Court, on the petition of the trustees under any trust, to grant authority to the trustees to do any of the acts mentioned in the section of the Act relating to general powers of trustees, notwithstanding that such act was at variance with the terms or purposes of the trust, on being satisfied that such act was in all the circumstances expedient for the execution of the trust. There was no such statutory provision in New Zealand. Mr. Spratt also referred to a recent unreported case in Wellington, where Mr. Justice Ostler, relying upon **In re New** (*cit. sup.*), made an order authorising trustees to sell land which the testator had directed should not be sold. His Honour understood from the learned Judge, however, that the land in that case was rural land which was deteriorating through the growth of noxious weeds and otherwise, and which there was a probability of the mortgagee selling under his power of sale. The circumstances were of a very special character and there was a probability of the land being lost to the estate or becoming practically valueless. The order that the learned Judge made was regarded by him as really of the nature of a salvage order. Similar conditions did not exist in the present case. True, conditions were said to have changed very much in Wanganui from what they were when the testator made his will, but they had not to His Honour's mind so changed as to justify the Court in authorising the trustees to sell the property at a price of very little over one-fourth the amount (if the value of the adjoining land were taken into account) below which the testator expressly prohibited a sale. Mr. Spratt also referred to **In re Douglas,** (1922) N.Z.L.R. 984, but it was sufficient to say that that case was widely different from the present case. S. 9 of the Administration Act, 1908, empowered the Court upon such terms as it thought fit to make such orders and directions as it thought proper with respect to various matters which were not material to the question under consideration, " and generally in regard to the administration of the estate for the greatest advantage of all persons interested." As was said by Chapman, J., in **Quill v. Hall,** 27 N.Z.L.R. 545, 564, that section conferred power under which sales of shares and debentures might be sanctioned without reference to exceptional emergency. Even so, His Honour should feel inclined to adopt the view expressed by Sim, J., in **McCrostie v. Quinn and Ors.** (*cit. sup.*) that the jurisdiction conferred by the section ought not to be exercised to sanction a deviation from the strict letter of a trust unless the case came within the rule laid down in **In re New** (*cit. sup.*). Even if that statement went too far, His Honour still thought that the Court should be extremely careful before authorising a sale of land contrary to the express directions of the testator. If authority for a sale was to be obtained in a case like the present, His Honour thought that the proper method of obtaining such authority was by a Private Estate Bill; at all events His Honour was not prepared to make the order asked for.

Solicitor for plaintiffs: **R. M. S. Jones,** Hunterville.
Solicitor for defendant grandchildren: **H. F. Von Haast,** Wellington.

Myers, C.J. April 9; May 1, 1930.
Wellington.

IN RE NATIONAL PORTLAND CEMENT CO. LTD.

Company—Winding-up—Failure to Commence Business Within One Year—Failure of Substratum—Failure to Raise After Five Years Sufficient Capital to Carry on Primary Object—Directors Proposing to Carry on Another Object—Winding-up Order Made Notwithstanding Desire of Majority of Shareholders to Carry on—Companies Act, 1908, S. 177.

Petition for compulsory winding-up of the above-named company upon the grounds: (1) that the company did not within a year of its incorporation commence, and had not yet commenced, its business; and (2) that it was just and equitable that the company be wound up because (*inter alia*) the substratum of the company had failed. The company was incorporated on 15th December, 1924, with a nominal capital of £300,000 divided into shares of £1 each. In June, 1926, the nominal capital was increased to £350,000. The petitioner was the holder of 200 contributing shares and in addition represented 30 shareholders with an aggregate holding of 4,185 shares. The primary or dominant object of the company was that stated in paragraph (a) of the first objects clause of the company's memorandum of association namely " to manufacture and deal in cement." Paragraphs (i) and (j) referred to the options proposed to be acquired by the company. The prospectuses showed plainly enough the intention to exercise those options and to acquire the properties over which the options were given for the purpose of a cement-manufacturing business. Three prospectuses, dated respectively 16th September, 1924, (prior to the incorporation of the company), 15th November, 1926, and 9th March, 1929, each of which emphasised the establishment of cement works as the primary object of the company, were issued. The company had at the date of the proceedings after the lapse of five years allotted only 27, 946 shares. It was true that the company at first had difficulty in selling shares owing to the number of fully paid shares alloted to the vendors to the company, but that difficulty was removed in October, 1926, by the reduction of the number of fully paid shares so allotted from 30,000 to 25,000. The company endeavoured to explain the delay for the rest of the period which had elapsed since the formation of the company on the ground that financial stringency prevailed during such period. The total amount collected by the company in respect of calls upon the contributing shares was £9,188 17s. 0d., and a further sum of £262 2s. 6d. in advance of calls. Unpaid calls amounted to £1,466 14s. 6d. The head office expenses of the company up to 30th September, 1929, (according to the balance-sheet) amounted to £2,526 3s. 0d. In addition there had been paid £4,588 9s. 7d. for preliminary and flotation expenses. No less, therefore, than £7,114 12s. 7d. had gone in expenses out of the company's total receipts of £9,450 19s. 6d. In addition sums aggregating almost £3,000 had been paid by the company on account of rents, rates, maintenance of options, etc. Up to the commencement of the proceedings the company had not done anything amounting to the commencement of the business for the carrying on of which it was formed. The directors proposed to proceed with the installation, not of a cement-manufacturing plant, but of a hydrated lime plant. To establish even that plant the company would have to obtain further capital of £5,000 to £7,000 in addition to calling up the whole of the uncalled capital on the contributing shares at present allotted. It appeared from the affidavit filed that the installation of an hydrated lime plant would be practically a new thing in New Zealand and in the nature of an experiment. The Chairman of Directors stated that he verily believed from information that the directors had received regarding the use of hydrated lime in the United States of America and in Australia that a good and increasing market could be found for it in New Zealand.

Watson and **Arms** for petitioner.
Cunningham for company.

MYERS, C.J., said that the facts of the case bore a close resemblance to those in **In re Southland Woollen Mills Ltd.,** (1929) N.Z.L.R. 289, except that in that case the majority of the shareholders desired a winding-up while in the present case it would appear at first sight that a majority desired to carry on the company. Except for that point the facts were stronger in favour of a winding-up order than they were in the case cited. Apart from the fact that the hydrated lime business proposed seemed to His Honour to be of an experimental nature, it was clearly not the business for which the company was established. In each of the three prospectuses the establishment of cement works was emphasised as the object of the company. Though it would appear that a combination of circumstances might be sufficient to induce the Court to make an order for compulsory liquidation when none of the circumstances taken alone would be sufficient—**Diamond Fuel Co.,** 13 Ch. D. 400, 410, and **In re Thomas Edward Brimsmead,** (1897) 1 Ch. 406, 420—His Honour was clearly of the opinion that, on the facts stated, either of the grounds relied on was sufficient to justify a winding-up order. Dealing with the first ground, it was to be observed that there had been a delay of over five years in commencing the company's business, and it had not been commenced even to the present date. That delay had not been fully and satisfactorily explained by the company, and His Honour was satisfied on the evidence before him that there was no reasonable probability of the company ever being able to carry on the business for which it was formed. His Honour went further and said that it was not shown that there was even a reasonable prospect of the company commencing the business of manufacturing hydrated lime within a reasonable time. Two reasons had been suggested by the company for the delay. Firstly it was said that certain difficulties arose with the vendors which rendered necessary negotiations for a modification of the preliminary agreement; but those negotiations were completed in October, 1926, when an arrangement was made whereby 25,000 fully paid up shares were issued to the vendors in lieu of the number provided for by the agreement. Secondly, Mr. Cunningham suggested that the company was delayed by reason of the efforts which it made in England and Australia, as well as by its prospectuses in New Zealand, to obtain capital. The answer to that was that, except for the second and third prospectuses in New Zealand, all the other overtures came to an end in April, 1926. Then Mr. Cunningham suggested that, if allowed more time, the company might still be able to obtain more capital to enable it to proceed with its main object, particularly if it proceeded in the meantime with the business of hydrating lime and that business was successful. His Honour could not accept that suggestion. The company had had from December, 1924, until the present time to procure its capital. From the date of the incorporation of the company until about June, 1929, money was available in New Zealand in plenty for investment, yet the company was successful in placing only about 28,000 shares during the whole of that period.

As to the second ground, His Honour agreed with the view submitted on behalf of the petitioner that in the circumstances of the case the substratum of the company must be deemed to have failed. The most that could be said by the directors was that if their present proposed experiment of hydrating lime was successful they might be able to secure capital to carry out the main object for which the company was established. It seemed to His Honour that that really involved an abandonment of the primary object of the company; and that the shareholders who had taken up contributing shares were being asked to leave their money in a venture different altogether from that to which they had subscribed. If the company had actually established a cement-making plant and also an hydrated lime plant and then suspended its cement manufacture but continued its business in hydrated lime, it might well be that a winding-up order would not be made, but the matter must be approached from a different viewpoint when the company had never commenced any business at all. It was contended on behalf of the company that the Court should consider the fact that the majority of the shareholders desired to carry on in the manner proposed by the directors. No doubt, as the authorities showed, that was a factor to be taken into consideration, but there were many cases where, the substratum of the company having failed, the Court had made a winding-up order notwithstanding the desire of the majority of the shareholders to carry on the company; for example—**In re Haven Goldmining Co.,** 20 Ch. D. 151; **In re German Date Coffee Company,** 20 Ch. D. 169; and see **re British Oil and Cannel Co.,** 15 L.T.601. In any case the allegation by the company that a majority of the shareholders desired the company to carry on was inconclusive. According to the Secretary's affidavit, a meeting was held on 9th October, 1928, when there were present or represented by proxy shareholders holding 19,020 shares in the company, and a resolution that the company be wound up voluntarily was defeated upon a poll being taken, 18,095 votes being recorded against the motion and 925 in favour of it. It was not stated, however, how many of the 18,095 votes were recorded in respect of fully paid up shares issued to the vendors. The affidavit also said that the question of liquidation was considered at the annual meeting of the company held on 29th November, 1929, when 15,800 votes were recorded in favour of, and 900 against, the company carrying on. It was further said that, of the 15,800 votes cast in favour of carrying on, 6,500 were given by shareholders and proxies holding contributing shares whilst of the 900 contrary votes 300 were given by shareholders and proxies holding contributing shares. It would be seen, therefore, that of the 15,800 votes cast against liquidation 9,300 were given in respect of fully paid up shares issued to the vendors. Mr. Cunningham on the second ground urged by the petitioner relied upon such cases as **Pedlar v. Road Block Gold Mines of India Ltd.,** (1905) 2 Ch. 427, and **Cotman v. Brougham,** (1918) A.C. 514. Those were, however, cases where the question was whether or not certain actions of the company were *ultra vires*. They were not winding-up cases. The difference between those two classes of case was referred to by Lord Parker in **Cotman v. Brougham,** (*cit. sup.*) at p. 520, and by Lord Wrenbury, at p. 522. The case for a compulsory winding-up had, in His Honour's opinion, been made out, and the usual order would go accordingly.

Solicitors for petitioner: **Chapman, Tripp, Cooke and Watson,** Wellington.

Solicitors for company: **Luke, Cunningham and Clere,** Wellington.

Reed, J. March 4; April 28, 1930.
New Plymouth.

IN RE HAWERA COUNTY ELECTRIC CO. LTD. (IN LIQUIDATION)

Company—Winding-up—Articles of Association—Construction—Surplus Assets—Reserve Fund and Balance in Profit and Loss Account Part of Surplus Assets—Preference Shareholders Entitled to Share pro rata with Ordinary Shareholders in Surplus Assets—Companies Act, 1908, Ss. 205, 226.

Motion under Ss. 226 and 205 of the Companies Act, 1908, by the liquidator of the Hawera County Electric Company Ltd. (in liquidation) to determine certain questions arising in the matter of the winding-up of the company, and for an order adjusting the rights of the preference and ordinary shareholders. The company had sold its undertaking to the South Taranaki Electric Power Board, and on 16th October, 1929, the day after the Board took possession, went into voluntary liquidation. After discharging the debts and liabilities of the company and returning to its shareholders the value of the capital, £80,000, the liquidator remained in possession of large surplus assets. The capital of the company was originally £14,000, all ordinary shares. On 18th May, 1927, it was increased to £80,000 divided into £15,186 preference shares and £64,814 ordinary shares. Article 104 (m) provided as follows: "They (i.e. the Directors) may out of the available cash capital of profits of the Company set aside, before recommending any dividend, such sum or sums as they may think fit as a reserve fund; and they may invest the several sums so set aside upon such investments as they may think fit, and may from time to time deal with and vary such investments and dispose of all or any part thereof for the benefit of the Company; but they shall have power to employ the assets constituting the reserve fund in the business of the Company, and that without being bound to keep the same separate from the other assets." Article 110 (a) after providing that there should be 15,786 preference shares and 64,814 ordinary shares, went on to provide as follows: (b) "The holders of the preference shares shall be entitled to receive out of the profits of each year in which a dividend is declared a preferential dividend for such year at the rate of seven per cent. on the capital for the time being paid up on the preference shares held by them respectively without any right however in the case of deficiency to resort to subsequent profits. (c) "The surplus profits in each year available for dividend shall be applicable to the payment of dividends to the holders of the ordinary shares in proportion to the capital paid up on them." Article 45 provided: "The new shares may be issued upon such terms and conditions, and with such rights and privileges annexed thereto, as the Directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of assets of the Company, and with a special right of voting." The terms

and conditions neither dealt with "the distribution of assets of the Company" nor "with a special right of voting." All shareholders had equal voting powers: Article 68. Article 49, which permitted the rights and privileges attached to preference shares to be "modified, commuted, affected, abrogated or otherwise dealt with" by mutual agreement, was never acted upon, nor was the power given to the directors by Article 117 to capitalise any undivided profits, whether standing to the credit of any reserve fund or not, and to appropriate the sum or sums so capitalised among members, ever acted upon. The reserve fund in the company's books bore the name "Reserve for Depreciation Account," but was in fact treated as a general reserve and was the only one appearing in the balance-sheets of the company. The two main issues before the Court were as follows: (1) Whether a reserve in the company's books, the Reserve for Depreciation Account, should be taken notice of by the liquidator and if so whether in adjusting the rights of the shareholders the amount lying to the credit of this account should be distributed among the ordinary shareholders to the exclusion of the preference shareholders? (2) Whether the balance in the Profit and Loss Appropriation Account belonged to the ordinary shareholders to the exclusion of the preference shareholders?

North for liquidator.

Taylor for preference shareholders.

O'Dea for ordinary shareholders.

REED, J., said that the Reserve for Depreciation Account was in effect a general reserve, and was so dealt with by the directors, and was established under the powers conferred by Article 104 (m). Although later His Honour should have to contrast the provisions contained in the articles under consideration with those of another company, he proposed to follow the advice of Lord Loreburn in **Will v. United Lankat Plantations Co. Ltd.,** (1914) A.C. 11, 18, and first endeavour to construe the contract contained in the articles as it stands. It must be premised that when the company went into liquidation the affairs of the company became crystallised and where no provision to the contrary was made in articles the rule was that a preference shareholder was entitled, after repayment of all the paid-up capital, to participate in the surplus assets of the shareholders in proportion to the nominal amount of the shares: **Birch v. Cropper,** 14 A.C. 525, 538, per Lord Herschel. The rights *inter se* of the preference and ordinary shareholders were a matter of bargain and the contract should be defined in the memorandum and articles of association. If, as in the present case, the memorandum and articles of association were silent as to the disposal of the surplus on liquidation it became necessary to consider what inference as to the respective rights could be properly drawn from such terms as were included.

The reserve fund was established by a discretionary setting aside by the directors of sums out of the "available cash capital or profits" of the company and was done prior to the recommendation of any dividend. Holders of preference shares were entitled to receive a non-cumulative preference dividend of seven per cent. on their shares but only in such years in which a dividend was declared. Then came the important clause 110 (c) which defined the rights of the holders of ordinary shares. What, in that article, constituted "profits available for dividend?" That expression had received judicial interpretation in **Fisher v. Black and White Publishing Co.,** (1901) 1 Ch. 174, as meaning "profits which after making all proper deductions, remain for the purpose of paying dividends." But the article did not state that the whole of such surplus "profits available for dividend" should be applied to the payment of dividends to the ordinary shareholders, it stated that they should be applicable, that was capable of being applied; in other words the article authorised a payment of a dividend and particularised the fund out of which it was to be taken; it did not purport to vest absolutely in the holders of ordinary shares any portion of the surplus profits. That was the only article which purported in any way to define the interests of ordinary shareholders in the profits. The principle had never been laid down that reserves built up by surplus profits were the property of the ordinary shareholders to the exclusion of the preference shareholders. It could only be so if from the terms of the contract upon which the preference shares had been issued it could be so deduced. As His Honour should have occasion to show later from the evidence, that reserve account was purely a book entry, and, the fund having been employed from time to time in the extension of the company's plant and system and the purchase of stock in trade, had increased the value of the company's assets, the benefit of which was included in the lump sum paid in the purchase of the undertaking. The appropriations to the reserve were not earmarked in any way as the property of the ordinary shareholders, indeed it was specifically provided (Article 104 (m)) that the directors might "dispose of all or any part thereof for the benefit of the company." In His Honour's opinion the interest of the ordinary shareholders in the surplus profits was as much circumscribed as that of the preference shareholders, the former by making the amount of their dividend dependent on provision being first made (1) for the preferential dividend and (2) for necessary appropriations, and the latter by the fixed dividend. Neither class had any claim to supplement its dividend from the reserve account. His Honour had not overlooked Article 117. Specific authority to the directors to deal in a particular way with the reserve fund in a manner inconsistent with the general authority in no way assisted the ordinary shareholders in their claim that the reserve fund belonged to them. It was not acted upon. His Honour thought, therefore, that the ordinary shareholders were not entitled to the money represented by the credit in the Reserve for Depreciation Account to the exclusion of the preference shareholders, but that the sum so represented was absorbed in the surplus assets for distribution among all the shareholders. For similar reasons the balance in the Profit and Loss Appropriation Account as at the date of liquidation was part of the surplus assets. No dividend could be declared after that date and the balance, therefore, was not impressed with any particular destination but fell into the general balance of assets for distribution.

The strongest authority of those relied upon by the ordinary shareholders was **Re Bridgewater Navigation Co.,** (1891) 2 Ch. 317, on an appeal from the judgment of North, J., reported (1891) 1 Ch. 155, where it was held that the three reserve funds there provided for represented undrawn "profits" uncapitalised, and should therefore be treated as income to which the ordinary shareholders were exclusively entitled, and not as "capital" or "assets" distributable among both the ordinary and the preference shareholders. Whether the present case came within, what Eve, J., in **In re Madame Tussaud and Sons,** (1927) 1 Ch. 657, 665, described as "the mischief of the **Bridgewater** judgment" depended on a close comparison of the respective articles of association. His Honour dealt at length with the judgments in the **Bridgewater case** and compared in detail the articles and the methods of dealing with the reserves in the **Bridgewater case** and in the present case, and said that the position, therefore, was entirely different from that which obtained in the **Bridgewater case,** and that case was not only not an authority in favour of the ordinary shareholders but in fact supported the contention of the preference shareholders.

Upon the general question as to the right of the preference shareholders to receive anything more on the winding-up of a company than a return of their capital a number of authorities had been cited. The general proposition as laid down by the House of Lords in **Birch v. Cropper,** 14 A.C. 525, that after the return of the whole of the capital both classes were on an equality and equally entitled to share in the surplus assets of the company was of course dependent on there being no contrary intention appearing in the contract evidenced by the articles. The cases therefore all turned on the construction of the particular articles. It would appear to be clear that if the language of articles was capable of being construed as an exhaustive delimitation of the whole rights of the preference shareholders they were confined strictly to those rights. Whether or not the particular articles were capable of being so construed was the question debated in those cases. Where the articles provided for preference in return of capital on winding-up in addition to preference in dividend there was a considerable conflict of opinion, Swinfen Eady, J., in **Espuela Land Co.,** (1909) 2 Ch. 187, Astbury, J., in **Fraser and Chalmers,** (1919) 2 Ch. 114, and Eve, J., in **Anglo-French Music Co.,** (1921) 1 Ch. 386, holding that, although preference in return of capital was provided for, nevertheless all the shareholders shared rateably in the surplus assets after repayment of capital. Sargant, J., in **National Telephone Co.,** (1914) 1 Ch. 755 took a contrary view. Astbury, J., in **Collaroy Co. v. Giffard,** (1928) 1 Ch. 144, reviewed the whole of the cases and distinguishing the articles from those in **Fraser and Chalmers,** (1919) 2 Ch. 114, held that the preference shareholders were not entitled to participate rateably with the ordinary shareholders in the distribution of the surplus assets. In the present articles no preference was given in respect of capital and no provision whatsoever was made with regard to the distribution of assets on dissolution. No case could, His Honour thought, be found in which a preference, merely in respect of dividend, had been held to restrict the rights of preference shareholders to share rateably with the ordinary shareholders in the distribution of the assets on a winding-up. There being no provision to the contrary, therefore, the shareholders' rights were equal.

For the reasons already stated, His Honour said that a true interpretation of the articles of association showed that the ordinary shareholders had no more claim to unallocated profits than had the preference shareholders. The principle enunciated by Lindley, L.J., in **In re Armitage,** (1893) 3 Ch. 337, 346, was applicable. His Honour also pointed out that preference shareholders were entitled to no dividend for the broken period between 31st March, 1929, and October, 1929, none having been declared: **In re Crichton's Oil Co.,** (1902) 2 Ch. 86; **In re Odessa Waterworks Co. Ltd.,** (1901) 2 Ch. 190 (n); **In re Smeetons Ltd.,** (1928) N.Z.L.R. 190.

Questions answered accordingly.

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

Solicitor for preference shareholders: **L. A. Taylor,** Hawera.

Solicitors for ordinary shareholders: **O'Dea and Bayley,** Hawera.

Ostler, J. March 5; April 16, 1930.
Masterton.

KJAR v. MASTERTON BOROUGH CORPORATION

Charitable Trust — Municipal Corporation — Lease — Validity — Land Vested in Corporation in Trust for Library—Small Portion Not Required for Library Leased for Twenty-one Years with Perpetual Right of Renewal at Rent to be Fixed by Valuation and Reserving to Corporation Right to Determine Lease on Paying Value of Lessee's Improvements—Lease Provident and in Interests of Trust and Therefore Valid.

Originating summons under the Declaratory Judgments Act, 1908, for an order declaring valid a certain lease granted by the defendant to the plaintiff and for an order declaring that the plaintiff was entitled to have the provisions for renewal of the lease carried out. The lease was of a small portion of section 104 on the plan of the town of Masterton. That section was by Ordinance of the Wellington Provincial Council of 1870 and 1871 set apart in trust for a library, and by S. 10 of the Masterton and Greytown Lands Management Acts Amendment Act, 1883, the land was vested in the Masterton Borough Council for the purposes of a public library. On 28th November, 1887, a small portion of the land which was not then required for the purposes of a library, and which would probably never be required for that purpose, was leased by the defendant to one Lang. The lease was for 21 years at a yearly rental of £17 with a perpetual right of renewal for terms of 21 years at an upset rental fixed by valuation, but with the right reserved to the defendant to determine the lease at the expiration of any 21 year term upon paying to the lessee the value of the buildings and improvements erected on the lands. If the defendant did not wish to pay for the improvements and determine the lease, then it was to be put up for auction, and the purchaser (if any) had to pay the lessee the value of his improvements. Lang assigned his lease and upon 21st August, 1908, a renewal upon the same terms (except that the rent was increased to £22 10s. 0d.) was granted to one Peterson. During that term the lease was assigned to the plaintiff. In 1929 the plaintiff applied to the defendant for a renewal upon the terms of the lease but the Corporation having then been advised that the lease was invalid declined to carry out its provisions. The plaintiff brought the present originating summons for a declaration that the lease was valid.

Marsack for plaintiff.

Douglas for defendants.

OSTLER, J., said that even assuming that a corporation had no statutory power to grant such a lease yet in His Honour's opinion the lease was not *ultra vires* of the defendant. The trust for a library was a charitable trust: see **Abbott v. Fraser,** L.R. 6 P.C. 96. A municipal corporation had power to accept and administer such a trust: see **Public Trustee v. Wanganui Borough Council,** (1916) G.L.R. 486. Therefore the defendant in the present case was the trustee of a charitable trust. The law in England before the passing of the Charitable Trusts Act, 1853, was the law which was in force in New Zealand in 1887 when that lease was first granted and was the law still in force in New Zealand. Under that law trustees of a charitable trust might grant leases, not only in pursuance of directions given by the founder of the trust or of express powers contained in the instrument of trust, but also in the absence of such directions or powers if such leases were in the course of the provident management of the trust: see **Re Mason's Orphanage,** 73 L.T. 465. The authorities had laid it down that long leases amounting virtually to absolute alienation were *prima facie* not in accordance with provident management: see **Attorney-General v. Green,** 6 Ves. 452; **Attorney-General v. Pilgrim,** 2 H. & Tw. 186. But, if proved to be beneficial to the charity, even such leases might be upheld: see **Attorney-General v. South Sea Company,** 4 Beav. 458. Leases containing covenants for perpetual renewal were *prima facie* not provident: **Watson v. Hamsworth Hospital,** 14 Ves. 342, but it all depended upon the consideration. If the consideration given made such a lease a provident one in the interests of the trust, the Court would uphold it: **Attorney-General v. Hungerford,** 2 Cl. & Fin. 357. The leasing by tender, as in the present case, was not objectionable: **Re Lady Peyton's Hospital,** 14 L.J. Ch. 129. The onus lay on the plaintiff in such a case as the present to satisfy the Court that the lease was provident and for the benefit of the charity: **Attorney-General v. Brettingham,** 3 Beav. 91. In His Honour's opinion that onus had been discharged in the present case. It was conceded on behalf of the defendant that the small portion of land in question was never likely to be required for a library. The rentals it brought in were, however, useful for the upkeep of a library, and, as Masterton grew in size and the rental became higher, the annual income would become a more valuable endowment. As to the provisions for perpetual renewal, the lease was subject to auction at the commencement of each term, so that the highest value ought to be obtained. Moreover the defendant had the power to put an end to the lease at the end of any term by paying the value of the improvements. In His Honour's opinion the lease was not only a provident one, but it was in the best interests of the trust, and therefore it was not *ultra vires* of the trustees. There would be a declaration that the lease was valid and that the plaintiff was entitled to have the provisions for its renewal carried out.

Solicitors for plaintiff: **Mackenzie and Marsack,** Masterton.

Solicitor for defendant: **H. M. Douglas,** Masterton.

Blair, J. May 1; 22, 1930.
Wellington.

SMITH v. WICKENS.

Negligence—Collision—Res Ipsa Loquitur—Application of Maxim in Running Down Cases—Maxim Applicable Where Circumstances Justify Necessary Inference of Negligence on Part of One or Both Drivers—Duty of Care Towards Person Unlawfully Using Highway—Quaere Whether Stopping on Roadway to Effect Necessary Temporary Repair to Vehicle an Unlawful User of Highway.

Action for damages in respect of injuries received through the alleged negligent driving of the defendant's motor-cycle. The accident occurred at about 8 a.m. on 13th December, 1929, in Wakefield Street in the vicinity of the entrance to the Todd Motor Company's premises. Wakefield Street was a paved street, fifty-five feet wide from gutter to gutter; the surface of the road was smooth and there was the usual slight camber in the road. There was some evidence that the road at the point where the accident occurred was notorious for skidding, but the weight of evidence was that there was nothing to justify

such a reputation. The plaintiff was stooping down examining the carburettor of a motor-cycle which had collided with his car, the motor-cycle being some three or four feet from the kerb of the street, when he was struck by the defendant, who was riding another motor-cycle from the direction of Clyde Quay on the proper side of the road. The road, with the exception of a van parked at the kerb-side a considerable distance further to the west from the scene of the accident, was bare of vehicles; that the defendant had 40 feet of clear road to avoid plaintiff.

Ongley and Arndt for plaintiff.

Cooke for defendant.

BLAIR, J., said that at the time of the accident the position as between the plaintiff and defendant was that the plaintiff was kneeling in the road in the plain view of defendant approaching from the eastward, and defendant had at least forty feet of clear roadway available to him for the purpose of clearing plaintiff. Nevertheless the defendant hit and injured plaintiff. It appeared to His Honour that, if there were no further evidence than the above, the maxim "*res ipsa loquitur*" would apply, because the defendant had a clearly visible object in front of him and had also at least three-quarters of a fifty-five foot roadway available to him to clear that object. His Honour, after considering at length the evidence given on behalf of the plaintiff and the defendant relating to the question of whether or not the defendant was negligent, said that the doctrine of *res ipsa loquitur* did not mean that the onus of proof of negligence changed from the plaintiff to the defendant. It meant merely that the facts as far as the plaintiff had proved them were evidence of negligence upon which it would be competent for a jury to find negligence proved. In other words the defendant had a case to answer. But the facts as proved by the plaintiff carried the case further than a pure case of *res ipsa loquitur* because the statement made by the defendant immediately after the accident, which statement was made part of the plaintiff's case, contained clear admissions of negligence. The case as made by the plaintiff, therefore, was a substantial one of proof of negligence and, notwithstanding the evidence of the defendant, His Honour found negligence proved. If the case as proved had been that a skid had taken place unexpectedly when travelling at a moderate speed and at a moment when defendant was so close to the plaintiff that it was impossible to avoid an accident His Honour doubted if the doctrine of *res ipsa loquitur* would apply: see **Wing v. London General Omnibus Co.**, (1909) 2 K.B., 652. But the facts in the present case as His Honour found them put the case into quite a different category. **Thompson v. Leathart**, 4 N.Z.L.J. 187, was the case of two vehicles colliding, and Stringer, J., held there was a presumption of negligence where two vehicles collided in broad daylight. The Court of Appeal held that the maxim *res ipsa loquitur* had no application unless there was something in the circumstances of the collision to justify the Court holding that it necessarily involved negligence on the part of one or both of the drivers. That want was in the present case supplied because the defendant ran into a stationary object on a wide street with ample room to avoid it. He raised the question of a short and unexpected skid, but His Honour was not satisfied that that was established, and, on his own statement, it would at some possible cost to himself have been possible to avoid hitting the plaintiff.

Mr. Cooke raised the question that the plaintiff was not using the road for a lawful purpose, but was in effect a trespasser on the road in that he was kneeling on the roadway examining a possibly damaged motor-cycle. Mr. Cooke, while admitting that that would not absolve defendant from the duty of care, suggested that it called for a lower standard of care than was required for a person lawfully using the road. His Honour doubted whether the temporary stopping on a roadway to see why a vehicle would not go, or to effect some necessary temporary repair, was an unlawful user of the roadway. Nor could His Honour accept the proposition that a lower standard than the ordinary standard of reasonable care was called for in such circumstances. The fact that a person or object was unlawfully or improperly on the roadway might be relevant to a defence of contributory negligence, but could not in His Honour's opinion, call for a new standard of care. Contributory negligence was pleaded but His Honour did not think it was established.

Judgment for plaintiff.

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

Solicitors for defendant: **Chapman, Tripp, Cooke and Watson,** Wellington.

Smith, J. May 30, 1930.
Auckland.

IN RE SNELLING: SNELLING v. HANNA.

Family Arrangement—Deed Varying Provisions of Will—Approval of Court—Practice—Accounts to be Taken and Deed to Provide for Release of Executors from Trusts of Will.

Originating summons for the approval of a deed of family arrangement. The relevant facts are as follows. A testator made a will in which he purported to confer certain benefits upon his children. The will was intended to be a mere rough draft and was to be replaced by a proper formal will as soon as this could be done. In the meantime, however, the testator became ill. On one occasion, when he was visited by his sons, he intimated his desire to sign this rough draft. Some doubt existed in the minds of those present as to the proper number of witnesses necessary for a valid attestation.

Finally it was decided that the will should be signed by the testator and that it should be witnessed by a nurse and by one of the sons, who was also a beneficiary. The testator died soon afterwards and probate was duly granted to the executors named therein. It was then discovered by the beneficiaries that the son, by attesting the will, had forfeited his right to any benefit thereunder. To remedy this, it was at once agreed by all concerned that a deed of family arrangement should be drawn up to give effect to the known wishes of the testator. This was duly done and, as some of the beneficiaries were infants, an application was made to the Court for its approval of such deed.

Finlay for the plaintiffs.

Goulding for some of the defendants.

A. H. Johnstone, for other defendants.

Ferner for the remaining defendants.

SMITH, J. (orally) said that the deed was in form a variation of the will and the executor was directed, as executor, to hold the property upon the trusts of the will as varied by the deed. The will left by the testator might give rise to difficult questions of construction. Probate of the will had already been granted to the executors named therein, and, if they should apply to the Court for an order interpreting some of its provisions, there could be no doubt that questions of difficulty would have to be considered. As the will stood, it was clear that an injustice must be done to one of the children of the testator. It would be unfortunate if, owing to his having signed the will as a witness, he should have to lose the benefits which his father clearly intended to confer upon him. Under the circumstances, it was proper that some effort should be made by a deed of family arrangement to overcome that difficulty. But the question arose as to whether the Court could approve of the deed in its present form. The executors had been granted probate of the will and they had sworn to administer the trusts of that will. Before they assumed the obligations imposed upon them by the deed of family arrangement, they should be released from the duties imposed upon them by the will. His Honour's opinion was that that course should be followed in all cases of that character. Accounts should be taken and the deed should specifically provide for the release of the executors from their obligations under the trusts of the will. The property could then be vested in certain persons as trustees under the deed (whether the same persons as the executors or not) and they could hold it subject to the trusts set forth in the deed. As the present deed did not specifically release the executors in the manner which His Honour suggested, His Honour was unable to approve of it as it now stood. Some alterations were, therefore, necessary. If the deed was carefully drawn to avoid difficulties of interpretation, and if its provisions could be shown to be for the benefit of the infants, there should be no difficulty in obtaining the approval of the Court. It was said that the present deed followed the original will very closely; but His Honour pointed out that slight departures from the will as it stood would not prevent its being approved by the Court so long as its terms were shown to be beneficial to the infants. His Honour thought, therefore, that the proper course would be to stand the application over to enable counsel to consider the question of preparing a new deed on the lines indicated.

The matter of costs would be reserved.

Solicitors for plaintiffs: **G. P. Finlay,** Auckland.

Solicitors for defendants: **Melville, Ferner and Broun,** Auckland.

Transmissions

UNDER THE LAND TRANSFER ACT.

(By ROY FELLOWES BAIRD).

[*The views here expressed must not be regarded as binding upon the author in his official capacity as a District Land Registrar, nor, of course, are they in any way binding on other District Land Registrars.*]

(*Continued from page 139.*)

When an executor or administrator makes application for transmission the District Land Registrar and Examiner of Titles must see that he is the true personal representative according to the rules for establishing the chain of personal representation. The executor of an executor is not entitled to be registered unless he shows that he is the executor of the sole executor named in the will, or, if there was another executor, that such other executor has died, been cited, or has renounced and has not retracted such renunciation: *The King v. Registrar of Titles, Ex parte Maddock and Miller*, 20 Argus L.R. 247, approved by the High Court, (1915) V.L.R. 152; and other cases previously cited. Even where the administratrix had procured registration of herself upon the register under the Torrens System, it was held that her administratrix could not obtain transmission: *In re O'Connor*, (1899) 5 Argus L.R. 179; 24 Vic. L.R. 896.

It is also necessary for the District Land Registrar and Examiner of Titles when examining an application for transmission to decide whether an estate or interest in land held by the deceased as registered proprietor was held by him as executor, as administrator, as trustee, or otherwise, so that it may be ascertained in what right the land was held.

Under the common law if the executor took land under the express provisions of the will in order to carry out a trust he took it, not as executor, but as devisee upon trust. Where the executor did not take the land under any express provision in the will it passed direct to the devisee if it had been devised, and direct to the heir if not the subject of a valid devise. If the person appointed by the will as executor was directed by it to hold lands, goods or moneys after he had performed the duties annexed by the common law to the office of executor, he held these as trustee and not as executor and having fulfilled the common law duties of an executor became *functus officio* as such executor: *In re Timmins*, (1902) 1 Ch. 176.

The additional functions superadded by statutes to the common law duties of an executor or administrator have made it more difficult to distinguish when an executor is *functus officio* as such. The writer's submission is that the essential test, however, still remains the same, namely, whether he continues acting as the personal representative of the deceased to carry out the executorial duties cast upon him by the common law and by statute or is now acting solely for the convenience of, and, either expressly or impliedly, with the autho ity and under control of, the beneficiaries who have become entitled to the assets of the estate in their own right.

When the distinction between the duties and office of the executor and his duties and position a trustee is not clearly defined by the will, the matter is often one leading to complexity. The distinction is not of mere academic interest because in the eye of the law, as distinguished from the rules of equity,—and the Land Transfer register concerns itself only with the legal estate—an executor or administrator still carrying out his executorial or administrative duties is holding, not in his own right, but in the right of the deceased owner, (or as it is called in Norman French *in auter droit*) whereas the property held by a trustee is his own *at law* although his conscience may be burdened with the trust which will be enforced by equity. An executor or administrator still functioning is cognisable to Courts as a personal representative whereas a trustee is viewed as himself: *Dobbs v. Brain*, (1892) 2 Q.B. 207, 214.

In giving judgment upholding the right of an administrator to transfer from himself as such personal representative to himself in his private capacity as person entitled beneficially, A'Beckett, J., is reported in *Ex parte Danaher*, (1911) 17 Argus L.R. 160, as stating: "The holding of land by a proprietor as executor or administrator, and the holding of land by the same man in his own right, is a distinction which the system recognises as fully as if one man were two. Otherwise the land held by an executor could be sold under a judgment against the executor personally." It has been held that land held *in auter droit* cannot be sold by the sheriff for a private debt of the registered proprietor: *Clarke v. Rowe*, (1899) 1 W.A.L.R. 123.

The common law duties of an executor have been added to by statute, e.g., the Death Duties Act, 1921, requires him to make the necessary returns and pay the duties levied under that Act. By the Administration Act, 1908, the real property of a deceased owner is made to vest in his executor or administrator in the same manner as personalty. The results of the Land Transfer Act, 1915, are to make it necessary for the person acquiring estate or interest on the death of another to register his transmission under that Act before he can sue or be sued as legal owner: *Howie v. Barry*, 28 N.Z.L.R. 681; *Messiter v. Wollerman*, 10 Gaz.L.R. 58. So also before he can transfer the property for the purpose of distributing it amongst those entitled to call for it. Should the administrator *cum testamento annexo* die before this has been completed a fresh grant of administration is needed: *In re Allan*, (1912) V. L.R. 286.

It may be said that at present the executorial or administrative duties imposed by the law upon the executor as such are, in their order: (1) To bury the dead in a manner suitable to the estate he has left behind him, and, unless otherwise directed by the will, according to his circumstances in life. Although there is a well-recognised rule of the revenue departments to the contrary, it has been held in Australia that where the relatives of the deceased or the beneficiaries do not erect a gravestone to his memory the executor or administrator is entitled as a matter of common decency and propriety to erect one if the estate fairly warrants it: *Grunden v. Nissen*, (confirmed by Full Court) (1911) V.L.R. 267; followed in *Chesterman v. Mitchell*, 24 S.R. N.S.W. 108. (2) To prove the will in the form necessary: in the case of an administrator it is necessary to obtain a grant of administration. (3) To make an inventory of the assets, both real and personal. (4) To collect the goods and chattels and to obtain

registration of title as executor (similarly if administrator) to all property of such a nature that the title in it cannot pass except by registration: (5) To pay the funeral and testamentary expenses, including death duties, and then to pay the debts in their legal order of priority. (6) To pay the legacies in their legal order of priority to those entitled to receive them and to vest the legal estate in the real property in the persons entitled to hold such legal estate. (7) To hand over any residuum to the persons entitled to it.

When an estate has been wound up and the trust property is in the hands of the executor freed from his executorial duties, the office is changed from that of executor to that of trustee: *Eaton v. Daines*, (1894) W.N. 32; *In re Smith*, 42 Ch. D. 302. See also *In re Adams*, (1906) W.N. 220, for the case of an administrator *cum testamento annexo*. The same results follow where an administrator is *functus officio* as such; *In re Ponder*, (1921) 2 Ch. 59, 62. A person appointed under a will as both executor and trustee may assent without formality to the change from the holding of property by him as executor to the holding of it by him as trustee: *Attenborough v. Solomon*, (1913) A.C. 76.

It was said by Kekewich, J., in *In re Rowe*, 58 L.J. Ch. 703, 704: "Trustees and executors are differently treated, and properly treated as different, in the textbooks and authorities. For many purposes, and in many senses, an executor is a trustee; and for many purposes and in many senses he is not. But he can, I have no doubt, become a trustee, either by express declaration on his part, or by his acts, from which the law implies or infers the creation of a trust, in the strict sense of the word, which did not exist before."

Thus, although it has been held that where part of an estate consisted of lands subject to the Torrens System the executor or the administrator *cum testamento annexo* is not *functus officio* as such until he has become registered proprietor of the lands and conveyed them to the persons entitled—*In re Allan*, (1912) V.L.R. 286.—it has also been held that where three sisters allowed one of their number to take out administration and after she had carried out all other administrative duties to retain the property in her own name for the benefit and convenience of all three, the estate had been fully administered: *Blake v. Bayne*, (1908) A.C. 371. The distinction between the two cases is that in one the administrator was still acting in the place of the deceased while in the other she was acting solely in the interests of the beneficiaries with their evident approbation.

The beneficiary under a will is not the owner of the property until the executor has administered the estate and his right is to have the estate administered: *Lord Sudeley v. Attorney-General*, (1897) A.C. 11. He cannot claim a conveyance of the property until one year after the testator's death: *Bell v. Courtney*, (1919) N.Z.L.R. 170. Once, however, the executor severs a beneficiary's share from the estate it becomes a trust fund or property and the executor ceases to hold it as an executor holding the estate and holds it as a trustee for the beneficiary: *Phillips v. Munnings*, 2 My. & Cr. 309; *Dix v. Burford*, 19 Beav. 409. Until, however, the estate has been administered and the shares of the beneficiaries are all ascertainable the estate belongs to the executor as executor: *Barnardo's Homes v. Special Income Tax Commissioners*, (1921) A.C. 1. The duty of the administrator is to realise and divide the estate. If the beneficiaries are not *sui juris* he is to invest and secure their shares, and if he continues to hold the land after the administrator's year he is taken to be holding as a trustee and holding upon a discretionary trust for sale: *Holden v. Black*, 2 C.L.R. 768. Apart from agreement among themselves the next-of-kin have only a right to a distributive share of the proceeds of the real estate in the hands of the administrator: *In re Farrell*, (1930) Argus L.R. 8. An administrator *cum testamento annexo* should not sell the property but should convey the property to the beneficiaries under the will: *Public Trustee v. Arthur*, 25 S.A.L.R. 59.

Where the surviving executrix held under a will which directed that the property be held for her for her life and after her death for her children, and at the time of her death she had not appointed a new trustee to act with her or taken any steps to put the land out of her own sole control so that there would be someone left after her death to hold on behalf of her children when her death made it no longer possible to act for them, it was held that her executorial functions had not been completed and that she did not hold as a trustee: *In re Hepburn*, (1917) Gaz.L.R. 452. Somewhat similar was the case of *In re Mackay*, (1906) 1 Ch. 25. There a testator devised to his wife and children and made the wife executrix but did not expressly create her trustee. The mother married again and as executrix lent all the money to her second husband who became insolvent. The mother afterwards died leaving all her property away from her daughter. The daughter sued the executors of the mother as trustees of the money. It was held that the amount was a legacy and the mother was not an express trustee. It is noticeable that the beneficiaries' share had never been severed to create them trust funds. Where the executors had paid the debts and duties and appointed a new trustee to act in place of one of them and the estate was being held for certain infant beneficiaries, it was held that the persons holding the property held as trustees and not as executors. An application having been made under the Administration Act for leave to sell, Salmond, J., said: "Section 7 of the Administration Act applies to executors only in their capacity as such, and is to be used for the purposes of their executorship. It does not apply to trustees as such and it makes no difference that the testator has appointed the same persons both as executors and as trustees. When such persons by completing their executorship and assenting to the trusts imposed upon them by the will, have ceased to hold the property as executors and have commenced to hold it as trustees, they cease in respect of that property to have the rights, powers and obligations of executors, and have the rights, powers and obligations of trustees in lieu thereof: *In re Johannes Anderson*, (1921) N.Z.L.R. 770; Gaz.L.R. 323. Where a mortgage debt created by the intestate had not been paid (or compounded for by novation) it was held that the estate had not been cleared: *In re Clover*, (1918) Gaz.L.R. 703, 704.

Speaking of cases where the will does not expressly differentiate between the duties of executors and trustees, Madden, C.J. said: "While it is true that in certain wills those appointed executors are sometimes appointed trustees as well, and when the executorial duties are finished they then hold in the special character of trustees and hold according to the trusts of the will where the will does not create that distinction of office, it should be remembered also that the statute itself provides that executors having performed their executorial functions otherwise, shall hold the balance of the estate according to the trusts of the will. The statute makes them do that, not because it appoints

them trustees, but because it adds to the old common law executorial function a further function arising from the alteration of the common law as to the matter of real estate and the applicability of real estate to the payment of debts" : *In re Allan*, 18 Argus L.R. 217.

The statute does not of itself make the executor, as such, a trustee but makes the legal estate in real property vest in him so that it may descend as if it were personal property into the hands of the same person and at the same time as the personal property. It then becomes assets in the hands of the personal representative for the payment of debts as if it were personal property and is to be distributed by him as if it were personalty. Once the executor has taken the legal estate in the real property and paid the debts and distributed the property so far as the administrator might have distributed personalty the statute has operated and, its purposes having been fulfilled, it leaves the legal estate in the hands of the executor to carry out the trusts which the will has imposed upon him without expressly designating him by the name of trustee. Where no administrative duties remain to be performed but merely continuing trusts, administration *de bonis non cum testamento annexo* will not be granted : *In re* Graham, (1910) V.L.R. 466, 468 ; *In re Martin*, (1912) V.L.R. 206.

(To be concluded)

Misappropriations.

Questions in the House of Commons.

On April 16th last, in the House of Commons, Sir John Ferguson asked the Attorney-General if he could give the number of solicitors convicted under the criminal law for fraudulent conversion of client's property for the period May 1, 1929, to April 14, 1930.

The Solicitor-General (Sir James Melville): My honourable and learned friend is informed by the Law Society that there have been eleven convictions during the period mentioned.

Sir J. Ferguson : Is the honourable and learned gentleman aware that there is a very general feeling among the public that the Law Society ought to put its house in order in this respect ?

Mr. Marjoribanks (for Captain Cazalet) asked the Attorney-General whether he would introduce legislation, by way of insurance or otherwise, by which solicitors convicted of fraud may be enabled to refund, in whole or in part, the losses of those who had suffered by their fraud.

The Solicitor-General : I am fully aware of the importance of the matter to which the honourable and gallant member has drawn attention. I understand that it has for some time been under the consideration of the Law Society, with which my friend the Lord Chancellor is in communication. The time is not yet ripe for the introduction of legislation upon the subject.

Mr. Marjoribanks : Will the honourable and learned gentleman communicate with the Law Society ?

The Solicitor-General : Yes, certainly, and, if I do not do it, I will ask my noble friend the Lord Chancellor to resume negotiations with them if he is not still in communication with them.

Australian Notes.

(By Wilfred Blacket, K.C.)

Two recent criminal cases in Sydney are of special interest: In *R. v. Tibbitt* the prisoner had pleaded guilty to a charge of perjury, and had been sentenced to twelve months' imprisonment, the sentence being suspended under the provisions of the law relating to First Offenders. The Crown, acting under a recent Amending Act, appealed to the Supreme Court. It was shown that the prisoner had no interest in the case in which he had given false evidence, and had received payment for his crime. The Court was of opinion that twelve months' imprisonment was "not a day too much" and amended the sentence by deleting the direction that it should be suspended. In *R. v. Hamilton*, tried at Wyalong (N.S.W.) before Judge Coyle, the prisoner was charged with carnally knowing his step-daughter, a girl under the age of 17, so there were a large number of women present in Court. The Judge, as reported, "in order to do a great right in the interests of the decency of the community, did what was only a little wrong in having the galleries cleared," and the prisoner, being convicted, was sentenced to seven years' penal servitude. Upon appeal the Supreme Court, "very reluctantly," following the principle laid down in *Scott v. Scott*, (1913) A.C. 717, held that the proceedings were *coram non judice*, quashed the conviction, and ordered a new trial, but, as in the case cited, suggested that an amendment of the law might well be the subject of legislative action.

Mrs. Sybil Morrison, who has been a member of the New South Wales Bar since 1924, has now been admitted to the Middle Temple and presumably will practise in London. It is cabled that she has received many important cases. Unfortunately, there seems still to be some early Victorian prejudice here against legal practitioners who are females. It is quite possible that the errors of their godfathers and godmothers may have some influence in this matter. One Australian practitioner was named "Jollie" at baptism, and the first Victorian practitioner was Miss "Flossie" Greig. "Portia" is recommended to future godmothers if the babe is intended to wear her silk in the Law Courts.

In *Ex parte Turnbull*, Sydney Supreme Court, the point was whether liquor supplied by the steward of a bowling club to a member, upon payment by him, was "sold" within the meaning of the Liquor Act. The Court, following *Graff v. Evans*, 8 Q.B.D. 373, held that it was not, and held also that *Knabe v. Prest*, (1909) S.A.L.R. 47, to the contrary was a bad decision which it therefore treated with great respect, but could not follow.

In *Land Development Co. Ltd. v. Provan*, also at Sydney Supreme Court, action on a contract for sale of land, the facts were that the sale took place on a Sunday, but the contract sued upon was dated and signed the following day. The Court held that it was illegal under the Act 29 Car. II, ch. 7. In this it followed a local case, *Terry v. McGirr*, 22 N.S.W.S.R. 453, which was on all fours, in preference to *Palmer v. Snow*, (1900) 1 Q.B. 725. The defendant had not pleaded the Statute, but the Court held that the defence could be raised without plea.

In *McGinty v. The Dubbo Despatch*, which I mentioned in my last notes, and where, you will remember, the defendant had paid 1s. into Court and the jury found a verdict for the plaintiff for one farthing, it has been held, on appeal, that judgment must be entered for the defendant who therefore becomes entitled to the costs of trial.

In *Judd v. The Sun*, (see *ante* p. 126) the Supreme Court on appeal granted a new trial on the question of damages only on the ground that the trial Judge had followed the rule laid down in *Henley v. Isles*, 8 N.S.W. S.R. 23, that on the question of damages the jury could take into consideration the evidence that the plaintiff had made scurrilous attacks on other persons. The Court unanimously overruled that case and held that the jury should have been directed that such evidence only affected the witness's credit. Without desiring to criticise the present decision, I may be permitted to mention that, even when directed in the way required by the present decision, the jury may still be found to prefer the rule in *Henley v. Isles*.

A. E. Dalwood of Sydney contracted by deed that he would pay to the executors of Teasdale Smith a sum of £25,000 owed by H. D. McIntosh to them, and indemnify him against any claim on account of the said sum. Dalwood did not pay the debt and the executors threatened proceedings against McIntosh who thereupon sued Dalwood for specific performance of his contract. For the defendant it was argued, with a degree of courage meriting commendation, that the suit was not maintainable, and that the only remedy available to McIntosh was to pay the debt himself and sue Dalwood at common law for damages. A decree in terms of the claim was made by the Chief Judge in Equity and this was affirmed on appeal, the Full Court holding that where there was a contractual right of indemnity, and adequate relief could not be had at law, a party could sue in Equity for the full relief to which he was entitled, and that, in this case, the plaintiff had the right to require that the defendant should relieve him from the burden of being compelled to pay the debt.

An interesting question of jurisdiction is now before the Equity Court. Five members of a trade union, having been, as they declared, illegally suspended and expelled, sued for the appropriate relief. Counsel for the union objected that the Court had no jurisdiction because the New South Wales Industrial Arbitration Act of 1926 had provided for the constitution of a Court of three Judges having the status of justices of the Supreme Court, and had conferred upon such Court jurisdiction to deal with all matters relating to trade unions. The contention on behalf of the defendant union was that the Act had given exclusive jurisdiction in these matters to the Industrial Arbitration Court. The case stands over for further consideration, but I mention it now because law-makers of your Dominion have had the New South Wales system of Arbitration under close consideration recently, and quite possibly are confident of their ability to achieve something better than the (alleged) systems of conciliation and arbitration prevailing in Australia.

From a recent statement of your Chief Justice I assume that intending applicants for silk in New Zealand have to notify the Judges of their intention to apply. It is not so here, for notice is required to be sent only to barristers who are senior to the applicant. Then the Attorney-General advises the Governor to appoint, and when the new silk announces his appointment in Court their Honours hear of the matter—possibly with some surprise—for the first time. I will bring this matter before our Council of the Bar for it certainly seems desirable that the Judges should review these applications as they do now in the matter of applications for admission to the Bar. Certificates of character are then required, but when a solicitor of seven years' standing applies for admission as a barrister the motion is of course. One legal practitioner was twice a solicitor and twice a barrister, and on his third application to the Court the Chief Justice quite naturally made some remarks of a semi-humorous nature. Of the forty-four King's Counsel in New South Wales, there is not one who has practised as a solicitor.

The position with regard to Sir Isaac A. Isaacs, Chief Justice of the High Court, is unchanged since I last wrote of the matter (*ante* p. 127) except that His Honour continues to preside at its sittings. None of the daily papers that I have seen refer to the point I mentioned, but *Stead's Review* has some very moderate and weighty words which I prefer to use in place of my own, because they are more moderate than those I should write, as follows :—

> "Though it is nowhere seriously suggested that the Australian community cannot produce a man capable of filling the position and worthy of doing so, there are certain marked disadvantages in promoting the holder of high judicial position to such an office. It is sound policy to insist that Judges should have nothing to fear and nothing to hope for once they achieve the eminence of the bench. This is even more true in Australia than elsewhere, as Judges may be called upon to adjudicate in political issues in which the Government of the day is closely implicated or in which the rivalries of Commonwealth and States are actively expressed. It is not necessary to suggest that our Judges might be influenced in giving decisions by any 'lively expectation of favours to come.' It may well be that the tradition of their profession and office would enable them to survive all such temptations ; but it cannot relieve them from the dangers of popular criticism."

Old Reports.

Their Value.

The following interesting illustration of the fallibility of law reports was given by Lord Macnaghten in *Keighly Maxsted and Co. v. Durant*, (1901) A.C. 240, at page 248 :

> "The case is instructive, I think, and useful, because it tends to shake one's confidence in the infallibility of reports, which always seem to carry the more weight the less opportunity there is of testing their accuracy. Why should an obscure report be taken for gospel merely because it is old ? *Bird v. Brown* (4 Ex. 786 ; 19 L.J.N.S. (Ex.) 154 ; 14 Jur. 132) was heard by four judges. Only one judgment was given. The Exchequer Reports attribute the judgment to Rolfe, B. The *Law Journal* ascribes it to Parke, B. The *Jurist* puts it in the mouth of Pollock C.B. No one gives it to the fourth judge ; but then there were only three sets of reports current at the time. The *Weekly Reporter* did not begin till later."

Correspondence.

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

Sir,—

Taranaki's Remit.

I shall be grateful for a little space in your Journal in which to carry this matter a little further than it was at the Conference. I rather incline to thinking that the close proximity of the luncheon adjournment was responsible for the closure of the debate.

The remit aims at having the annual Conferences held as general meetings of the Law Society—that is of all members of District Societies and broadly speaking of all members of the profession in New Zealand—with every member present eligible to vote.

The first obvious observation to be made is that it depends upon the good graces of the Dunedin Committee next year as to whether we are given an opportunity of discussing the matter at the next Conference.

The next is—and it is a very serious one—as to the predilections of the debaters. The turn that the debate took impressed me with the mutually irreconcilable aims of the barristers' and solicitors' branches of the profession respectively. Messrs. Coleman and Spence who moved and seconded the resolution may both be said to belong to the solicitors' side—while Messrs. O'Leary, Richmond, Leicester and Holmden may be said to belong to the barristers' side. Mr. O'Leary, in what I characterised as a fighting speech, asked vehemently what the Law Council had done improperly. "Wherein have we been remiss?" he asked. In my answer to him I said that it seemed to me that a feeling was abroad that the Law Society had got out of touch with the profession as a whole. It seems to me that this is so. The overwhelming majority of the members of the Council are drawn from the barristers' side and consequently matters which have affected the other side have suffered. And now when it is suggested that the voice of the whole profession be taken, Mr. O'Leary is afraid of mob-psychology and a land-slide vote one way or the other.

And, sir, it is obvious that the great majority of questions submitted to the Council affect conveyancing practice. And further that it is on the conveyancing side that there have been shortcomings by reason whereof the credit of the profession has suffered. The barrister is not ordinarily bothered with large trust sums and if he do wrong he merely suffers a diminution of business; but the solicitor may not only submerge himself but many others in company. Vague references were made at the Conference to "putting our house in order." That must mean so far as the solicitors' side is concerned. If not what does it mean? If it do mean this what can we expect from a governing body drawn from the other side of the profession?

Mr. Richmond held up his hands in deprecation of any mention of costs. Who said costs? I heard no one. If Mr. Richmond had said that in debating the subject we were inferentially discussing our livings, then I could have understood him. I recognise that a debate upon costs would be low and vulgar but feel that more than that was meant.

When he made the remark, Mr. Richmond forgot temporarily that on the barristers' side success depends chiefly upon forensic ability—that on the conveyancing side it depends largely upon connection. Mr. Richmond is safe in his situation. The barristers will never in the English judicial system be a civil servant as a postal or railway officer is—and when the Public Trustee is engaged in litigation of magnitude he is compelled to go outside his office for the best quality. But he has now eighty-seven solicitors working for him. These men, I take it, are those who were unable to do well enough to stay in private practice—for I dare swear that all of them would prefer the independence of private practice to being subservient to the wishes of the head of a public department of State. The pertinent enquiry may be made: Do the members of the Council see no danger to the community in the attempts of the Public Trustee to make the solicitors' side of the profession a department of state? For instances can be quoted where he not only administers estates but acts as a solicitor.

Last year a considerable part of our time was taken up with considering the Crown in business—but now apparently we are to give no time to the matter of how the Crown in business affects our own work. There are numerous lines upon which enquiries could be made in order to fit the profession on the solicitors' side to the changing conditions. Legal education as has been mentioned is one. Bankruptcy these days is a farce, the Native Land Laws are killing the Native population and yet nothing is being done by the profession to point out defects, and when a suggestion is made whereby the profession may be enabled to speak with effect, the proposition is shelved.

Thanking you for the space granted to me,

I am, etc.,

L. A. TAYLOR.

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

Sir,

Taranaki's Remit.

I have to thank you for sending me a copy of Mr. L. A. Taylor's letter to you. The suggestion that some of us whose personal practice is principally at the Bar overlook the difficulties of our conveyancing brothers is hardly justified. From the practical aspect we are, of course, just as much concerned in the conveyancing business of the firm to which we belong as we are in our more personal work as barristers.

No one regrets more than I the effect of state competition on the legal profession. District Law Societies and the New Zealand Law Society are, and always have been, most fully alive to this danger. In my own experience the problems of the legal profession on its conveyancing side occupied the greater part of the time of both the District Law Society of which I was a member and of the New Zealand Law Society. If there be an excessive number of barristers on any Council the blame must surely rest with the conveyancing side of the profession who so largely outnumber those whose practice lies at the Bar.

I doubt if members of our profession who have not served on the Councils of the Law Societies have any conception of the amount of work which members of those Councils perform. Proposals which come before them are carefully scrutinised and debated with an

individual sense of responsibility and with a thoroughness which is impossible in a large conference. The views of District Societies are exchanged and considered. If deemed advisable general meetings of District Societies are held. Finally, in matters of general importance, the already formulated proposals go to the New Zealand Law Society for final consideration and action. Can it be suggested that the vote of the Conference, after an impromptu debate of an hour or two, would be a good substitute for the existing method of dealing with the interests of our profession ?

What many of us earnestly desire is that the public should understand that we, as a profession, do seriously concern ourselves not merely with our livelihood, but with the wider aspect of public affairs and interests. If, at our Conferences, we educate ourselves on matters of public importance in which we can assist, then we shall at the same time be educating the public to a higher appreciation of our profession.

To conclude, therefore, my feeling is that the Annual Conferences cannot usefully be employed in substitution for the Law Societies, which can and should be fully representative, but rather as supplementary to the Societies and as having a social and educational value.

I am, etc.,

H. P. RICHMOND.

Judicial Notice!

In *Curtis v. Geeves*, 94 J.P. 71, the Divisional Court upheld a conviction for driving a motor car over a footpath notwithstanding the fact that the only means of access to a courtyard of the National Provincial Bank, where the defendant was going, was across the footpath. Mr. Justice Avory expressed the reasons for his judgment as follows :

> " I do not see how they have established any right, merely because they are adjoining owners, to drive vehicles across the footway into their premises. If that could be laid down as a general proposition there would be nothing to prevent the owners of these small cars in any part of London or in the City of London from driving over the footway into their front doors and claiming that that was the only means of access for the car into the house."

Rules and Regulations.

Discharged Soldiers Settlement Act, 1915.—Amended regulations.—Gazette No. 44, 12th June, 1930.

Orchard Tax Act, 1927. Orchard-tax Regulations, 1930.—Gazette No. 43, 5th June, 1930.

Public Works Act, 1928. Motor-Lorry Regulations Amendment No. 4.—Gazette No. 42, 31st May, 1930.

Stock Act, 1908. Regulations governing introduction into New Zealand of animal manures from New South Wales.—Gazette No. 43, 5th June, 1930.

Forensic Fables.

THE CAUTIOUS SOLICITOR AND THE CHINESE WITNESS.

There was Once a Solicitor who was both Learned and Cautious. He never Allowed Himself to be Taken by Surprise ; and he Invariably had his Tackle in Order. Whilst Preparing for the Trial of a Case of Great Importance, the Cautious Solicitor Suddenly Realised that Mr. Chi-Hung-Chang, the Principal Witness for his Client, was a Chinaman, and that he would have to be Sworn in Whatever might be the Appropriate Fashion. The Cautious Solicitor Made Anxious Enquiries and Gathered that Everything Depended on the Precise Place of Origin of Mr. Chi-

Hung-Chang. It appeared that if he Came from the Northern Regions the Breaking of a Saucer was the Central Piece of Ritual ; that if he was from Kwei Chow (or the Parts Adjacent thereto) he would Require a Lighted Candle which would be Blown Out at the Critical Moment ; and that if he Happened to be a Native of Kwangsi he would not Deem himself Properly Sworn Unless and Until he had Sacrificed a White Cockerel in the Witness Box by Cutting its Throat with a Steel Knife. The Cautious Solicitor Took no Risks. He Procured a Dozen Porcelain Saucers of Various Sizes ; a Box of Best Spermaceti Candles and a Box of Superior Quality Wax Ditto ; and (from Leadenhall Market) a Cockerel of Unblemished Purity, which Spent the Night in his Bed-Chamber and Inconvenienced him a Great Deal by Crowing Enthusiastically when the Dawn Broke. On the Day Fixed for the Hearing of the Case the Cautious Solicitor Conveyed the Saucers, the Candles, and a Hamper Containing the White Cockerel to the Royal Courts of Justice, and there Awaited the Arrival of the Chinese Witness. When Mr. Chi-Hung-Chang Turned Up he Told the Cautious Solicitor that he had to Catch the

Three-Thirty as he was Going to the Grand National. He also Remarked that *Silly Billy's* Price Seemed to have Shortened a Bit. On the Cautious Solicitor Enquiring whether he would Prefer a Saucer, a Lighted Candle, or a Cockerel for the purposes of his Oath, Mr. Chi-Hung-Chang Said he had become a Bit of a Christian Scientist at Balliol, and Thought, on the Whole, he would Like to Affirm. He then Asked the Cautious Solicitor to Come and Have a Drink.

MORAL: *Safety First.*

Appeals from Judge Alone.

Principle Applicable.

The weight which an appellate Court attaches to the findings of the trial Judge on questions of fact, particularly where the credibility of witnesses is involved, is well known, but a very happy and useful expression of the principle is to be found in the judgment of Lord Buckmaster in the recent case of *Blair v. Saddler and Co.*, (1929) A.C. 584, at p. 592 :

> "In all such questions I attach great importance to the finding of the learned Lord Ordinary, who saw the witnesses and before whom the evidence was given, associated with all the incidents due to inflection of voice, appearance, and manner of the witnesses, and the circumstances that make a living scene of that which on appeal is reduced to the flat monotony of print. No question is raised here as to the effect of documents or verbal testimony nor any of the matters upon which it might have been possible to hold that important elements in the evidence had been overlooked or overstressed."

Lord Reading.

Abinger's "Forty Years at the Bar," contains some interesting references to Lord Reading. The author expresses the view that Lloyd George and Lord Reading together made "one very clever man, and it is a very curious coincidence that, although Lloyd George was possibly the best Prime Minister the country could have had during the Great War, so soon as Rufus Isaacs went to India Lloyd George's Coalition Ministry fell to pieces." It appears to have been in fact an ideal combination of barrister and solicitor; and the close friendship still survives without diminution. A matter not without public interest; for Lloyd George now holds in his hands the fate of the Government. "I said to him (Lord Reading) once," says Abinger, "'You will be the Lord High Chancellor of England.' 'What about the religious part of it?' I reminded him that the Act of Settlement did not apply to Jews, but only to Papists. 'You may be right,' said Rufus, 'Nevertheless I do not think I shall ever reach the Woolsack.'"

"You cannot tell what a pleasure it is to sit upon the Bench and to be able really to tell solicitors what you think of them."

—MR. JUSTICE CHARLES.

Bench and Bar.

Mr. R. McCallum, of Blenheim, has been appointed to the Legislative Council.

Messrs. Levi and Jackson, Wellington, have admitted into partnership Mr. J. B. Yaldwyn. The style of the firm will be Levi, Jackson and Yaldwyn.

Dr. J. Giles, aged ninety-seven, died recently at Auckland. Dr. J. Giles was a surgeon in the Crimean War, and for a time editor of the "Southern Cross" magazine. He was a Warden on the West Coast and later Magistrate at Wanganui. From 1888 to 1893 he was Magistrate at Auckland.

Messrs. McCallum & Co., Blenheim, and Messrs. McCormick and Tracy, Wellington, have amalgamated their practices. The new firm will practise as McCallum, M'Cormick and Tracy, in Blenheim, and McCormick, Tracy and Co., in Wellington.

"The New Despotism."

Lord Hewart Overruled.

It is a notable fact that when the divisional Court recently considered the question as to whether or not a certain order of the Minister of Health was *ultra vires* and invalid, the Lord Chief Justice held that the order in question was *intra vires* and valid: and he gave a reasoned and admirable judgment. Swift, J., alone of a Bench of three Judges, held that the order was invalid. He delivered a forceful judgment and uttered strong words of and concerning the "new despotism." But the Court of Appeal (Scrutton, Greer, and Slesser, LJJ.) have unanimously preferred the conclusions of Swift, J., to those of the majority in the Divisional Court. Lord Hewart is no lover of bureaucratic legislation or of the powers which in many cases place a Minister above the law, but his decision in this case shows plainly that the judgments of the author of the "New Despotism" are in no wise affected by his dislike of the results to which they lead.

Court of Arbitration.

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

Oamaru: Wednesday, 25th June, at 2.15 p.m.
Timaru: Friday, 27th June, at 10 a.m.
Auckland: Friday, 4th July, at 11 a.m.

"So much latitude is now given to prisoners as almost to create a second standard of the admissibility of evidence."

—MR. JUSTICE SHEARMAN.

Legal Literature.

Law and Practice of Bankruptcy in New Zealand.
By FREDERICK CAMPBELL SPRATT, LL.B.

(pp. lxxv ; 453 ; liii : Butterworth & Co. (Aus.) Ltd.)

Authorship is a tradition in the firm of which the writer of this most useful book on Bankruptcy is a partner. The name of the late Mr. C. B. Morison, K.C., will long be associated with "Company Law" and "The Principles of the Rescission of Contract." Illness and comparatively early death prevented Mr. Morison from bringing his book on Companies up to date, a work that had become very necessary at the time of his death in 1918 as the book had been published in 1904. The task was, however, taken up by his partner, Mr. D. S. Smith (as he then was), on his return from the War ; and at the time of the latter's elevation to the Bench the work of preparing a new and enlarged edition of the work was practically completed. It is to be hoped, by the way, that Mr. Justice Smith will give the profession the benefit of all his work when the new Companies Act is placed on the Statute Book. Mr. Spratt is thus the third member of the firm to engage in the very valuable work of writing a text-book on New Zealand Law.

A work on Bankruptcy Law in New Zealand was overdue, as the last book on the subject was published twenty-four years ago. The case law, both English and New Zealand, that has accumulated during that time is enormous. The task of digesting and stating what is still valuable in it is more than considerable. Mr. Spratt has done this and done it well.

In his preface the author states : "The plan of the work is to annotate the major statutes with reference (even at the risk of redundancy) to *all* the reported decisions of the New Zealand Courts that are not clearly obsolete, and to as many of the English cases as are required for completeness ; to gather and place in proper context the numerous provisions relating to bankruptcy to be found in other statutes, the titles of which are set out in the Table of Statutes ; and by these means to present a comprehensive statement of the law. For the benefit of those who may wish to refer to English works or reports the differences between the English law and that of New Zealand have been indicated in the text." While writing primarily for the practitioner, Mr. Spratt has not overlooked the needs of the accountant and the law student. To each of these his book should prove of the greatest assistance.

What Mr. Spratt calls "annotations" are in many cases clear and compendious statements of the law. Thus under S. 61 of the Act (property passing to the assignee) he has fifty pages of well-ordered exposition of the law in which every proposition is supported by citation of modern decisions. All New Zealand cases decided in 1929, and English decisions of the same year of which the reports were available in New Zealand in December last have been drawn on by the writer.

The practitioner will find few (if any) problems arising in his practice the answer to which is not at least suggested by this work ; and it is believed that he will find none in respect of which a reference to Mr. Spratt's book will fail to direct him to the line of relevant and determining authorities.

It is only fair to the publishers (Messrs. Butterworth & Co.) to say that they have printed well what Mr. Spratt has written well.

—H. H. CORNISH.

Mozley and Whiteley's Law Dictionary.

Fifth Edition : By F. G. NEAVE, LL.D. in collaboration with GRANGE TURNER, M.A.
(pp. ix ; 560 : Butterworth & Co. (Publishers) Ltd.)

"A book to keep in a handy place on the office shelf," is unquestionably a fair description of *Mozley and Whiteley's Law Dictionary*, now in its fifth edition. It can be safely asserted that no practitioner claims to be absolutely familiar with all the queer terminology of the law. There are very many words and expressions the meaning of which even some of the most learned of the profession would hesitate to guess at ; and there are many more of which one may have a general conception and understanding, sufficient for most practical purposes, but which one would find very difficult to define or explain with absolute accuracy. The unusual in the way of legal terminology is generally met with while studying the reports and any doubts as to meaning are, of course, best resolved then and there. Thus the great value of a legal dictionary, and for this purpose *Mozley and Whiteley*, while not as large a treatise as that *magnum opus*, *Wharton*, will be found admirable. Not only are short concise explanations of all legal words and phrases of past and present use, including Norman French and Latin, given by the authors, but in each case a short exposition of the law is added. Legal maxims also fall within the scope of the work. A useful feature to the practitioner is a complete catalogue of the different series of law reports, giving in each case the names of the Courts and the years covered. The work should be useful as well to students—indeed it is difficult to see how a student can appreciate fully his reading unless he makes frequent use of a work of reference such as *Mozeley and Whiteley*.

New Books and Publications.

Chambers in the Temple, Comments and Concerts "In Camera." By C. P. Hawkes. (Methuen). Price 9/–.

Notable British Trials—Trial of George Chapman. Edited by H. Adam. (Butterworth & Co. (Aust.) Ltd.). Price 9/–.

Negotiable Securities. By W. Willis, K.C. Fifth Edition. By A. W. Baker Welford. (Sweet & Maxwell Ltd.). Price 12/–.

Equity for Examiners. By R. W. Farrin. (Sweet & Maxwell Ltd.). Price 8/–.

Letters to a Young Barrister. By F. J. Wrottesley. (Sweet & Maxwell Ltd.). Price 8/–.

The Law and Practice of Bankruptcy in N.Z., by F. C. Spratt. (Butterworth & Co. (Aus.) Ltd.) Price 60/–.