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"The pronouncements of His Majesty's Judges, as reported in the newspapers, show that the law is probably the last bulwark left to the individual citizen against his Parliament." —*Mr. Gilbert Frankau.*

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The Report on Workers' Compensation.

At the time of writing, the report of the Royal Commission set up by the Government to enquire into the operation of the Workers' Compensation Act is, although the recommendations have been made public, not yet available in print; consequently discussion of the report can only proceed upon what has so far appeared in the columns of the daily press. The report has attracted much attention and seems, so far as we are aware, to be acceptable in the main both to the workers and to the employers. The principle of making industry carry the burden of injuries received by workers, even in the absence of negligence on the part of employers, has now stood for so long that even the lawyer comes to accept almost as a matter of course the extension of the provisions of the Act and the increase of the extent and quantum of liability thrown upon persons not otherwise liable at law. Indeed, with the extension of the provisions of the Act the lawyer, viewing it merely as a matter of agreement between the workers on the one hand and the employers and insurers on the other, feels, in the absence of any protest by the parties affected, hardly concerned.

But with the tribunal that is to administer the Act, and with the constitution and procedure of that tribunal, the lawyer is certainly concerned. The existing Court of Arbitration, apart from recent grave delays due in no way to the Court itself, has, we believe, given almost complete satisfaction to the profession; but it has, however, been for some time obvious that the work of the Court, both as to industrial matters and as to compensation matters, has increased to such an extent that it is impossible now for it to deal promptly with all matters coming before it for determination.

Before the constitution of the Royal Commission the matter had been much discussed by individual members of the profession, and the Wellington District Law Society sent forward to the last Annual Conference a remit in the following terms:

> "That the Workers' Compensation Act, 1922, be amended to provide:
>
> (1) That claims to recover compensation should be heard and determined in the Supreme Court and the Magistrate's Court (if within the ordinary jurisdiction of the latter Court) and not in the Court of Arbitration.
>
> (2) (In the alternative) that in dealing with claims to recover compensation there shall be a right of appeal (on questions of law only) from the decisions of the Court of Arbitration to the Court of Appeal."

When this remit, the last on the agenda paper, was reached the time for discussion was limited and the Conference was disposed to accept an amendment urging the Government to take the necessary steps to ensure that workers' compensation cases be dealt with with greater expedition. To many it was a matter for regret that no definite conclusion was expressed upon either branch of the remit, particularly as it was then supposed to be likely that the Commission would, as it has since done, recommend the setting up of a separate Court to deal with these claims. His Honour the Chief Justice, however, touched upon the matter in the course of his inaugural address; he said:

> "If necessary, although the Judges of the Supreme Court are not looking for these cases, they will be quite prepared to take them. They are not desirous of doing so, but if the choice is between their doing the work and the setting up of a new Court, with its attendant expense, the work could be done by the Judges of the Supreme Court . . . .An alteration would only be justified by the fact that there was too great a pressure of work on the Court of Arbitration."

The Attorney-General expressed no opinion on the main question, but said:

> "The Government has learned with much satisfaction that the Judges of the Supreme Court are willing, if desired, to undertake the work of dealing with compensation cases."

The Royal Commission, though admirably constituted for the purpose of dealing with other aspects of the operation of the Act, must have been, without a lawyer in its personnel, at a serious disadvantage in dealing with this particular question, and its lack of qualification must be weighed when considering its recommendation that a separate Court should be set up.

While we agree entirely that it is impossible for the Court of Arbitration to continue to deal with claims under the Act, we are by no means convinced that the Commission's recommendation affords the best solution of the difficulty. We are inclined to think that the preeminently satisfactory nature of the Supreme Court as a tribunal for the determination of these cases cannot adequately have been put before the Commission, and it may perhaps be that there are one or two who still quite wrongly regard the abolition by the Judges in 1924 of trial by jury in, among others, master and servant cases, as in some way an unfriendly gesture to the working man. So far as expedition in disposing of claims is concerned the Supreme Court must always, in our view, have a very considerable advantage over any Court composed of one Judge travelling the whole country. Wellington and Auckland are practically never without a Supreme Court Judge, and from Christchurch and Dunedin the resident Judges are only occasionally absent, and then for but short periods; in nearly all the circuit towns the Supreme Court sits four times a year, and it is difficult to see how anything more could be done by the proposed new Court. We see but little in the suggestion that specialisation is necessary in dealing with these claims, and indeed it may well be that any given branch of the law is likely to be better and more equitably administered by a Bench of eight Judges versed in and dealing with all branches of the law than by a single Judge whose jurisdiction is confined to the particular branch in question, particularly when there is no right of appeal from the so specialising Court. The present Court of Arbitration scale of costs could easily be made applicable to compensation claims heard in the Supreme Court, and there could then be no objection that the change might mean increased costs to those not able to bear them. A transfer of jurisdiction to the Supreme Court would cost the country nothing; the expense attendant on the constitution and maintenance of a separate Court would probably be considerable. Moreover a multiplicity of Courts administering justice appears not to be without grave dangers.

Supreme Court.

Myers, C.J.
Reed, J.
Blair, J.

April 15; June 11, 1930.
Wellington.

A.B. v. COMMISSIONER OF TAXES.

Revenue—Income Tax—Income Derived from Use or Cultivation of Land—Income So Derived During Year Ending on 31st March, 1929, Taxable—Land and Income Tax Act, 1923, Ss. 2, 8, 11, 35, 48, 72, 73, 75, 76, 77, 78, 79, 174, 177—Land and Income Tax Amendment Act, 1929, Ss. 1, 2, 11, 12.

Case stated by Commissioner of Taxes under S. 35 of the Land and Income Tax Act, 1923.

Johnston, K.C., and **Wilson** for taxpayer.
Cooke for Commissioner of Taxes.

MYERS, C.J., delivering the judgment of the Court, said that by S. 72 (2) of the Land and Income Tax Act, 1923, it was enacted in reference to income tax as follows: "Subject to the provisions of this Act, such tax shall be payable by every person on all income derived by him during the year preceding the year in and for which the tax is payable." The year in which income was so derived was referred to in the Act as "the income year," and the year in and for which income-tax was payable was referred to as "the year of assessment"—S. 72 (3). Those terms were similarly defined by S. 2 of the Act, by which Section also "year" was defined as meaning a year commencing on 1st April and ending on 31st March, both those days being included. By S. 73 (1) and (2) it was provided that income tax should be assessed and levied on the taxable income of every taxpayer at such rate or rates as might be fixed from time to time by the "annual taxing Act" to be passed for that purpose. S. 73 (3), so far as it was material, made provision that for the purpose of computing the taxable income of any taxpayer certain deductions from the assessable income should be made by way of "special exemption" as provided by such sections as Ss. 75, 76 and 77. No question arose in the present case in regard to those special exemptions. "Assessable income" was defined by S. 2 as meaning income of any kind which was not exempted from income-tax otherwise than by way of a "special exemption" expressly authorised as such by the Act. "Taxable income" was defined as meaning the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer was entitled. By S. 78, paragraph (l), so far as that paragraph was material, it was provided that income derived by any owner of land in respect of the profits derived from the direct use or cultivation thereof should be exempt from taxation. The Land and Income Tax Amendment Act, 1929, was passed on 1st November of that year and by S. 1 it was provided that the Act should be read together with and deemed part of the Land and Income Tax Act, 1923, therein referred to as "the principal Act." So far as it was material to the present case the Act made two important alterations in the matter of land-tax and income-tax respectively. First of all provision was made for the imposition of what was called a "special land-tax," which by S. 2 (2) was to be levied and paid for the use of His Majesty in and for the year commencing on 1st April, 1929, and in and for each year thereafter. By subsection (3) it was provided that the special land-tax should be payable by all persons who at noon on 31st March preceding the year in and for which the tax was payable were the owners of farm lands—which term by subsection (1) included all lands used or capable of being used for agricultural or pastoral purposes—of a total unimproved value of more than £14,000. By subsection (6) it was provided that that section (i.e. S. 2) should be deemed to be incorporated in and to form part of Part V of the principal Act, which Part dealt with the question of what might be called ordinary land-tax as opposed to the new special land-tax imposed by the Act of 1929. The imposition of special land-tax was the important alteration in the matter of land-tax made by the new Act of 1929. There were certain other amendments affecting the question of ordinary land-tax but they were not material to the present case.

It was by Ss. 11 and 12 of the Act of 1929 that the important alteration was made in the law relating to income-tax. By S. 11 (4) par. (1) of S. 78 of the principal Act was repealed, and subsection (1) (a) of S. 11, so far as it was material to the present case, enacted that the assessable income of any person should for the purposes of the principal Act be deemed to include all profits or gains derived by any taxpayer from the use or occupation of lands used for agricultural or pastoral purposes if the unimproved value of all such lands owned by the taxpayer at any time during the income year was not less than £14,000. Section 12 (1) of the Act was as follows: "From the amount of income-tax assessed in any year in respect of income derived from land in accordance with the provisions of the last preceding section there shall be deducted an amount equal to the amount of land-tax payable by the taxpayer for the same year in respect of the same land, and the residue (if any), after the making of such deduction, shall be the amount of income-tax for that year payable by the taxpayer in respect of the income derived from that land." The appellant was both at the date of the proceedings and during the year ending on 31st March, 1929, the owner of lands within the description contained in paragraph (a) of S. 11 (1) to the value of not less than £14,000, and had been assessed by the Commissioner for payment of income-tax thereunder for the year of assessment commencing on 1st April, 1929, in respect of the income derived by him during the year ending on 31st March, 1929, including the profits or gains derived by him from the use of his farming lands during that income year. Whether or not the Commissioner was right in so doing was the first and main question that arose for determination.

The appellant relied upon the judgment of the Privy Council in **Commissioners of Taxation of New South Wales v. Adams,** (1912) A.C. 384. In their Honours' opinion, however, a careful examination of that case and of the New South Wales statutes upon which it was decided showed that it was clearly distinguishable. The language of the sections of the New Zealand Act which had already been quoted was quite different from that of the New South Wales Acts. The expression "income" was not in terms defined by the principal Act of 1923, but by S. 79 (1) it was enacted that, without in any way limiting the meaning of the term, the assessable income of any person should for the purposes of the Act be deemed to include, save so far as express provision was made in the Act to the contrary, various classes of income set out in a number of successive paragraphs. The first class in paragraph (a) was: "All profits or gain derived from any business." Then followed various classes of income in paragraphs (b) to (g); and then came paragraph (h) expressed thus: "Income derived from any other source whatsoever." Prior to the Act of 1929 of course the assessable income of a farmer, by virtue of paragraph (l) of S. 78, excluded income derived by him as the owner of land in respect of the profits derived from the direct use or cultivation thereof. But by S. 73 (1) income-tax had to be assessed and levied on the taxable income of every taxpayer. That clearly meant, in their Honours' opinion, income which was taxable in the year of assessment; and S. 72 (2) provided that subject to the provisions of the Act income-tax should be payable by every person "on all income derived by him during the year preceding the year in and for which the tax is payable." It seemed to their Honours, therefore, that what was to be taxed was everything which under the provisions of the statutes in force in the year of assessment came under the head of "income" derived during the income year—that was to say all income less such deductions or exemptions as the taxpayer was entitled to under the law as it existed in the assessment year. Put in a slightly different way, income was brought forward from the income year to the year of assessment, and "taxable income" in S. 73 (1) meant the taxable income in and for that year, and not the income which was taxable in the preceding year. The basis of calculation or assessment was not in New Zealand as it was in the New South Wales Acts under consideration in **Commissioners of Taxation of New South Wales v. Adams** (*cit. sup.*), "the amount of taxable income from all sources for the year immediately preceding the year of assessment." It was the "income" of the previous year that was the basis. The liability to taxation of any portion of that income depended upon the law in existence in the year of assessment. It was true that S. 6 (1) of the principal Act provided that for the purpose of the assessment and levy of income-tax every taxpayer should in each year furnish to the Commissioner a return in the prescribed form setting forth a complete statement of all the "assessable income derived by him during the preceding year," but, having regard to the definition in S. 2 of assessable income and to the other sections of the statute to which reference had already been made, in their Honours' opinion the words quoted meant assessable income in the year of assessment though the income was derived during the preceding year. As a matter of practice, based no doubt on convenience for the purpose of office administration, the returns were required by the Commissioner to be furnished to him by 1st June, which date was invariably prior to the commencement of the session of Parliament held under ordinary circumstances during the year of assessment. S. 11 provided that in addition to the returns previously men-

tioned, every person should as and when required by the Commissioner, make such further or other returns as the Commissioner required for the purposes of the Act. No assessment could, of course, be made till the annual taxing Act had been passed. If then during the session of Parliament held in the year of assessment an Act was passed which took effect at once and by which the incidence of income tax payable for that year was altered, plainly the Commissioner must of necessity require further or other returns to be made under S. 11. That was in fact what the Commissioner did after the passing of the Act of 1929.

If Ss. 11 and 12 of the Act of 1929 came into force during the then current year of assessment commencing on 1st April, 1929, then in their Honours' opinion the Commissioner was right in requiring the appellant to include in his assessable income for that year the profits or gains derived by him in the income year ending on 31st March, 1929, from the use or occupation of his land which he used for agricultural or pastoral purposes. It was contended on behalf of the appellant either that Ss. 11 and 12 of the Act of 1929 must be read as if there were an express provision in the statute that those sections should not come into operation until 1st April, 1930, or alternatively that they should not be regarded and construed as having a retrospective effect. As to both those points it was plain that neither contention could apply to S. 2 of the Act which created the special land-tax, because subsections (2) and (3) of that section expressly said that the special land-tax should be levied and paid in and for the year commencing on 1st April, 1929, and that the tax should be payable by all persons who at noon on 31st March, 1929, were the owners of farm lands of a total unimproved value of more than £14,000. It was of course necessary to make those special provisions in the section of the Act relating to special land-tax because it was an entirely new tax created by the Act. The position was not the same in regard to income-tax because Ss. 11 and 12 did not impose any new tax. They simply altered to some extent the provisions of the principal Act as to the income upon which that tax was payable. As already pointed out, paragraph (l) of S. 78 of the principal Act was repealed by subsection (4) of S. 11 of the Act of 1929, and that repeal took immediate effect. So also in their Honours' opinion did the preceding subsections of S. 11 take immediate effect. Their Honours could see no reason for saying that any part of the Act of 1929, which was to be read with and was deemed to form part of the principal Act, should not according to the ordinary principles of interpretation of statutes, take effect immediately upon its being passed. It should be remembered that it was the principal Act, with of course its amendments, by which the tax was imposed. The rate of the tax was then fixed by the annual taxing Act. If then an amendment of the principal Act was passed in a particular year of assessment prior to the passing of the annual taxing Act, and the amendment provided for certain new deductions or exemptions from tax, should not the annual taxing Act, which provided for the rate of income-tax to be paid on the income of the taxpayer, be regarded as taxing only the income subject to the deductions or exemptions provided for by the amendment Act as well as by the principal Act? Similarily, if an amendment, whether or not it provided for some new deduction, included within the ambit of taxable income some class of profit which was previously exempt, it seemed to their Honours that when the annual taxing Act was passed and fixed for the current year of assessment the rate of tax payable upon a taxpayer's income, what was taxed was the income that was taxable by the statutes as existing at the time when the annual taxing Act was passed. If, as was contended by counsel for the appellant, it had been intended that Ss. 11 and 12 of the Act of 1929 were not to come into operation until 1st April, 1930, one would expect an express provision to that effect in the Act. In the absence of such a provision it would be undoubted, their Honours thought, that the general law applied as declared by S. 8 of the Acts Interpretation Act, 1924, namely: "Every Act assented to by the Governor-General in His Majesty's name which does not prescribe the time from which it is to take effect shall come into operation on the date on which it receives the Governor-General's assent." The Land and Income Tax Amendment Act, 1929, was assented to on 1st November. The annual taxing Act of that year was assented to on the same date. The former Act was No. 12 of the Statutes of the year, the latter No. 13. Section 3 of the annual Act expressly invoked at least some of the provisions of the Act of 1929 amending the principal Act. That section, under the title "Special Land-Tax," enacted that for the year commencing on 1st day of April, 1929, special land-tax should be assessed, levied, and paid pursuant to Part V of the Land and Income Tax Act, 1923, at the rate specified in Part II of the Schedule to the annual Act. There was no "special land-tax" under the principal Act until it was amended by the amending Act of 1929. It was by that Act and that Act only that a special land-tax was imposed, and when S. 3 of the Annual Act of 1929 referred to Part V of the Land and Income Tax Act, 1923, it meant of course Part V of the principal Act as amended by, and incorporating, the provisions of S. 2 of the amending Act of 1929 which section provided for the imposition of the special land-tax. S. 4 of the annual taxing Act of 1929 enacted that for the year commencing on 1st April, 1929, income-tax should be assessed, levied, and paid pursuant to Part VI of the Land and Income Tax Act, 1923, at the rates specified in Part III of the annual taxing Act. The reference to Part VI of the principal Act must similarly mean, in their Honours' opinion, Part VI of the principal Act as amended by Ss. 11 and 12 of the amending Act of 1929. All the alterations made by those sections to the provisions of the principal Act were made to sections thereof contained in Part VI. In addition to what their Honours had already said, not only was it not stated that Ss. 11 and 12 should not come into operation until 1st April, 1930, but subsection (3) of S. 11 contained a strong indication to the contrary. That subsection provided that nothing in S. 81 of the principal Act, which section provided for an adjustment in certain cases in favour of the taxpayer, should apply so as to entitle any taxpayer to whom paragraph (a) of subsection (1) of S. 11 related to a deduction or set-off against his assessable income for the year of assessment commencing on the 1st day of April, 1929, or any subsequent year of assessment. That provision was in their Honours' view a clear indication that S. 11 was to take effect for the year of assessment commencing on 1st April, 1929, and that connoted that the assessable income for that year (though such income was derived during the previous year) must include the profits or gains referred to in S. 11.

As to the appellant's contention that Ss. 11 and 12 should not be construed so as to give them a retrospective operation, the answer was in their Honours' opinion—apart from what they had already said—that the construction contended for by the Commissioner did not involve any retrospective operation within the usual meaning of that term: the most that could be said was, their Honours thought, that a part of the requisites for the action of the statute was drawn from a time antecedent to its passing: **Maxwell on Statutes,** 7th Edn., 191, citing **Reg. v. St. Mary Whitechapel,** 12 Q.B. 120, 127.

But even if, as their Honours thought was the case, the Commissioner was right in applying Ss. 11 and 12 of the Act of 1929 to the appellant's income for the year commencing on 1st April, 1928, and ending on 31st March, 1929, for the purpose of assessment of taxation for the year commencing on 1st April, 1929, it was still contended on behalf of the appellant that S. 12 contemplated a severance as between the assessment of income derived from land and the assessment of income derived from other sources or, in other words, as their Honours understood the argument, that for the purpose of computation under S. 12 there must in effect be two separate assessments: (1) an assessment of the income derived from the land, and (2) an assessment of income derived from other sources. Their Honours could not agree with that contention. For the purpose of assessing income-tax under paragraph (3) of Part III of the Schedule to the annual taxing Act, 1929, there could be but one assessment,—that was to say one assessment of all income not included (and income under S. 11 of the Act of 1929 was not included) within the preceding clauses of that part of the Schedule. That meant in their Honours' opinion that the income derived from the land was to be assessed with income derived from other sources. No separate or independent return was either contemplated, provided for, or required by the statutes. On the contrary S. 8 (1) of the principal Act required a complete return to be furnished of all assessable income, and S. 11 (1) (a) of the amending Act of 1929 said that the assessable income in the cases to which the paragraph applied should for the purposes of the principal Act be deemed to include all profits or gains derived from the use or occupation of lands. That was in conformity with S. 79 (1) of the principal Act. The necessary result, where the tax increased progressively as the amount of assessable income increased, was that the greater the income from all sources the greater was the amount of tax for each £1 of the income from each and every source. The words of S. 12 (1) of the Act of 1929: "From the amount of income-tax assessed in any year in respect of income derived from land in accordance with the last-preceding section" must, their Honours thought, mean that the income derived from land was to be included in the assessable income of the taxpayer for the purposes of the principal Act, and that the deduction of land-tax must be made from the income-tax in so far as it was assessed in respect of income derived from the same land. But there was to be only one return and one assessment. For the purposes of S. 12, therefore, the amount of income-tax assessed in respect of income derived from land was in amount equal to the rate

per pound on the whole assessable income from all sources multiplied by the number of pounds of income derived from the land. The Commissioner was then required to deduct from the amount of income-tax so assessed, so far as it was in respect of income derived from land, an amount equal to the amount of land-tax payable by the taxpayer in respect of the same land. And S. 12 (1) provided that the residue (if any) after the making of such deduction should be the amount of income-tax for that year payable by the taxpayer in respect of the income derived by him from that land. If the land-tax exceeded that income-tax, there was no residue. The greater could not be subtracted from the less, but the taxpayer would have a deduction in respect of land-tax equal to the total amount of the income-tax assessed in respect of his income or profits from the land. The appellant's real ground of complaint seemed to their Honours to be that he had to pay income-tax amounting to £186 5s. 10d. in respect, he said, of an income from other sources amounting to only about £825. The answer was that by reason of there being only one assessment of income from all sources for the purposes of determining the amount of income-tax before applying any of the provisions of the Act relating to deductions, the rate for each £ of income from any source was increased by reason of the graduated scale provided for by the annual Act. The deduction under S. 12 of the Act of 1929 was then made, not as against the total amount of the assessment of income from all sources but only as against so much thereof as was applicable to the income or profits from the land.

For the foregoing reasons their Honours thought that the Commissioner's assessment was correct and must be confirmed.

Solicitors for appellant: **O. & R. Beere** & **Co.**, Wellington.
Solicitors for respondent: **Crown Law Office,** Wellington.

Myers, C.J. April 10; May 22, 1930. Wellington.

DOMINION FARMERS' INSTITUTE LTD. v. COMMISSIONER OF TAXES.

Revenue—Income Tax—Deduction—Company Owning Land with Buildings Thereon Carrying on Business of Erecting Buildings and Letting Accommodation Therein—Subsequent Purchase of Vacant Land Adjoining—Rents and Other Profits Received from Vacant Land—Claim to Deduction from Total Assessable Income of Five per cent. on Capital Value of Both Properties—Rents and Profits from Vacant Land Less Than Five per cent. on Its Capital Value—Deduction in Respect of Vacant Land Allowed Only to Extent of Rents and Profits Therefrom—Taxpayer Not Entitled to Treat Both Pieces of Land as One Rent-Producing Property—Land and Income Tax Act, 1923, S. 83.

Appeal from an assessment of the Commissioner of Taxes. The appellant company, several years prior to 1926, acquired certain land at the corner of Featherston and Ballance Streets in the City of Wellington, for convenience referred to as "property," upon the whole of which it erected a large modern building of eight storeys in height, known as the Dominion Farmers' Institute. The whole of that building, save certain rooms which it used for its own offices, was let by the appellant to various tenants. In 1926 the appellant purchased an adjoining piece of land in Featherston Street (for convenience referred to as "property Y"). During the material taxation years property Y was vacant, except as to a small portion thereof occupied by a party wall. The Government valuation of property Y during the material taxation years was £7,310. During those years the appellant had from time to time granted the use of property Y for short periods, thus deriving a revenue from the property during two successive taxation years of £90 and £81 respectively. Those sums were included in the appellant's ordinary income tax returns. The appellant claimed exemption under S. 83 of the Land and Income Tax Act, 1923, on the basis and to the extent of 5 per cent. per annum of £7,310, by way of deduction from its total assessable income from all sources. The Commissioner disallowed that exemption, but, for the purpose of assessing taxation, regarded the income of property Y separately from the income derived from property X and allowed by way of deduction an amount equal in each year to the income derived from property Y. Thus in one year the amount of income derived from property Y was £81 the appellant by way of deduction from its total income claimed an exemption of £365 10s. 0d., being an amount equal to 5 per cent. on the Government value of property Y, in addition of course to an exemption equal to 5 per cent. of the capital value of property X, as if the two properties together formed one property which was being actually used exclusively for the purposes of the appellant's business: the Commissioner refused to allow this deduction of £365 10s. 0d. but allowed a deduction of £81, the result being that the appellant paid no income tax on the income derived from property Y but of course paid land tax in respect of that property. The appellant claimed that the Commissioner's decision was erroneous.

Foden for appellant.

Solicitor-General (Fair, K.C.) for respondent.

MYERS, C.J., said that the Court was asked to determine to what exemption if any the appellant was entitled. Mr. Foden contended on the one hand that the appellant actually used property Y exclusively for the purposes of its business, or alternatively for the purpose of deriving rent or other profits therefrom. The Solicitor-General on the other hand contended that there had been no such actual user for either of such purposes exclusively. The grounds of Mr. Foden's argument that property Y was actually used exclusively for the purposes of the appellant's business were firstly that such business, as he contended, was the letting of property, and secondly that to some extent the letting value of some of the rooms and offices in property X was enhanced by the fact that property Y remained vacant. His Honour was unable to accept that view. It might be that to some extent the letting value of some of the rooms in the building on property X was increased by reason of the better lighting obtained through property Y remaining vacant, but that by no means necessarily required that the whole of property Y should remain vacant. The same result could have been obtained if the greater part of property Y had been built upon, leaving only a comparatively narrow strip for the purpose of improving the lighting of a limited number of rooms in the building on property X. Moreover, according to facts stated in the case, the appellant had consistently from the time of its acquisition of property Y had under consideration a building programme in connection with that property and early in 1927 erected a notice board on the property inviting prospective tenants to apply for space in the proposed building. As a matter of fact the appellant had since commenced erecting a building which would, so His Honour understood, occupy the whole of property Y. It could only be inferred from the facts stated in the case that that would have been done much earlier had it appeared that tenants could have been secured for the proposed building, or in other words that the land could have been used for the purposes of the appellant's business. It was to be observed that, though no doubt the appellant had the power under its memorandum of association to acquire and hold land, its actual business was the erection of buildings and the letting of the accommodation therein. No doubt, as Mr. Foden said, the appellant's business was the derivation of rent, but the answer was that its business was not the derivation of rent from vacant lands. Just as was said in **Commissioner of Taxes v. Kauri Timber Co.,** 24 N.Z.L.R. 18, so in the present case, there was no certainty that the appellant would ever use property Y at all for the purposes of its business. It might have sold the land in its vacant state. The land no doubt was actually used for a purpose, but not for the purposes—certainly not exclusively for the purposes—of the appellant's business: **Chief Commr. for Railways v. Municipal Council of Sydney,** 10 N.S.W.S.R. 783, and **Wanganui Borough v. Wanganui High School Board of Governors,** (1923) N.Z.L.R. 515, 520, supported that view.

Property Y was, however, actually used, His Honour thought, and might reasonably be said to have been exclusively used for the purpose of deriving from it rent or other profits. Mr. Foden contended that the two properties, X and Y, must be regarded as one block, one rent-producing property, and that the rents or profits derived from both properties must be treated as one for the purpose of computing the deduction or exemption under S. 83 of the Act. His Honour could not agree with that contention. The position was, in the circumstances of the case, precisely the same in His Honour's opinion is if property Y were quite a separate property situate at the other end of the city. Even where there was one piece of land, part only of which was actually used exclusively for a purpose mentioned in sub-

section (1) of S. 83, subsection (3) showed that, for the purpose of computing the deduction or exemption, that portion which was used for the purposes mentioned in subsection (1) was to be dealt with separately from that which was not so used. If then, as His Honour thought, property Y might be regarded as having been actually used exclusively for the purpose of deriving rent or other profits therefrom, the appellant was entitled to an exemption, but in computing such exemption due regard must be paid to the words of subsection (1)—and what the appellant was entitled to was a deduction from "the assessable income derived by him during the income year, so far as derived from such use of the land," that was, property Y. If the rent or other profits so derived exceeded a sum equal to 5 per cent. of the capital value of the land, then the taxpayer was entitled to have a deduction of an amount equal to such full 5 per cent. If on the other hand, as in the present case, the amount of the rent or other profits was less than 5 per cent. of the capital value it was impossible to subtract the greater from the less and the taxpayer was entitled to a deduction to the extent of the rent or other profits so derived. It followed that in His Honour's opinion the Commissioner's assessment was right.

Appeal dismissed.

Solicitors for appellant: **Foden and Thompson,** Wellington.
Solicitors for respondent: **Crown Law Office,** Wellington.

Myers, C.J. March 10th, 1930.
Wellington.

NORMAN v. NORMAN.

Divorce—Jurisdiction—Practice—Act on Petition—Wife's Petition for Divorce—Husband Resident Outside Jurisdiction—Unconditional Appearance—No Answer Filed—Decree Absolute Made—Wife's Petition for Permanent Maintenance—Act on Petition Taken Out By Husband Objecting to Jurisdiction of Court—Too Late After Decree Absolute to Raise Question of Jurisdiction on Act on Petition—Divorce and Matrimonial Causes Act, 1928, Ss. 10, 12, 58—Divorce Rules 27, 56.

Act on petition filed by respondent pursuant to leave granted under Rule 56 of the Divorce Rules. The material facts of the case were as follows: The petitioner filed her petition on 15th March, 1928, praying for a divorce and custody of the one child of the marriage, the ground of the petition being that there had been an agreement for separation between the parties dated 11th March, 1925, which agreement for separation was still in full force and had so continued for a period of not less than three years. At the date of the petition the respondent was, and had been for some time, living at Ipoh, Perak, in the Federated Malay States, and the citation as served upon him there on 16th May, 1928. The respondent, while in Perak, had left his wife and child in the family home at Hamilton in New Zealand. On 21st July, 1928, an unconditional appearance on the respondent's behalf was entered by his solicitor, but no answer was filed. The petition came before Reed, J., on 4th December, 1928, when a decree *nisi* was granted, the respondent not appearing or being represented. On 4th October, 1929, on motion in that behalf before Blair, J., the decree was made absolute, and an order made giving the petitioner custody of the child. The notice of motion had been duly served at the respondent's address for service. On 15th March, 1928, the petitioner had filed a petition for alimony *pendente lite*, a copy of which was also served upon the respondent personally at Ipoh on 16th May, 1928. No further steps were taken upon that petition: such steps were really unnecessary because the respondent continued his payments in the meantime under the separation agreement. On 4th October, 1929, immediately after the decree was made absolute, the petitioner filed a petition for permanent maintenance. That petition was served upon the respondent on 9th October, 1929, he being then in New Zealand, but whether he had arrived before or after 4th October did not appear. On 22nd October, 1929, the respondent issued a summons for an order: (1) giving leave to the respondent to be heard on his petition touching the question as to whether the Court had jurisdiction to make an order against the respondent on the petition for permanent maintenance, and (2) giving leave to the respondent to file his act on petition in the Registry of the Court. Ostler, J., on 29th November, 1929, made an order granting leave to the respondent under rule 56 to file his act on petition.

Hay and **James** for respondent.

P. W. Jackson for petitioner.

MYERS, C.J., said that Mr. Hay at the hearing of the act on petition argued on behalf of the respondent that the respondent had acquired a domicile of choice in the Federated Malay States and that the Court had no jurisdiction to make an order for permanent maintenance. In His Honour's opinion the act on petition must fail on the following grounds: Firstly, it was enacted by S. 10 of the Divorce and Matrimonial Causes Act, 1928, that any married person who was domiciled in New Zealand and at the time of the filing of the petition had been domiciled there for two years at least might present a petition praying for a divorce; and S. 12 (2) and paragraph (i) of S. 10 of the Act provided (*inter alia*) that where a wife prayed for a divorce on the ground that the petitioner and respondent were parties to an agreement for separation, and that such agreement was in full force and had been in full force for not less than three years, and her husband was domiciled in New Zealand when the agreement for separation was made, the wife should be deemed for the purposes of the Act to have retained her New Zealand domicile notwithstanding that her husband had since acquired some other domicile. It was, therefore, the duty of the Court on the hearing of the petition for divorce to satisfy itself on that point and His Honour had no doubt that that duty had been performed. Secondly, the decree having been made absolute, and not being the subject of appeal under S. 58 of the Act, and being therefore final, His Honour did not see how at that stage the Court could say, at all events in the present proceedings, that the decree was void. Whether it was possible to set aside the decree in any independent action His Honour was not called upon to consider. So far as the present proceedings were concerned the decree must be presumed to have been validly and properly made. Thirdly, Rule 56 said that any party to a cause who had entered an appearance might apply to the Court or a Judge thereof to be heard on his petition touching any collateral quesrion which might arise in a suit. Rule 27 provided that if a party cited wished to raise any question as to the jurisdiction of the Court he or she must enter an appearance under protest and within eight days file in the Registry his or her act on petition and on the same date deliver a copy thereof to the petitioner. The rule, however, proceeded as follows: "Notwithstanding the entry of an unconditional appearance the Court, or a Judge thereof, shall have power to permit a party to raise a question of jurisdiction at any stage of the proceedings." Mr. Hay contended that although in the present case the respondent filed a unconditional appearance he could still raise the question of jurisdiction by an act on petition although a decree *nisi* had been granted and the decree made absolute. In His Honour's opinion that was not what the rules meant or contemplated. His Honour thought that the words "at any stage of the proceedings" in Rule 27 must mean at any stage prior to the decree being made absolute. It was, His Honour thought, too late to ask, after the decree had been made absolute, for leave to file an act on petition such as the respondent had done in the present case. His Honour felt satisfied that the respondent had taken the proceedings for no other purpose than to avoid, if he could, having to pay maintenance to the petitioner. That being so, he should have raised the question of domicile as a bar to the jurisdiction of the Court not to make an order for maintenance after decree absolute, but to grant the decree of divorce. It would be a most remarkable thing and might lead to extraordinary results if he could be allowed deliberately to file an unconditional appearance, stand by until after the decree was made absolute, and then raise the question of domicile to prevent the Court, while it could not set aside the decree, from acting upon it in the direction of making an order for the payment of maintenance.

His Honour added that even if he had to determine the matter on the merits his decision would be against the respondent. His Honour reviewed the evidence as to the domicile of the respondent and said that there was evidence from which it might reasonably and properly be concluded that the respondent still retained his New Zealand domicile at least up to the date of the deed of separation, and that he had certainly not proved the contrary.

Act on petition dismissed.

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

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

Reed, J. March 10, 11, 12, 15; May 13; 28; 30, 1930.
Wanganui.

STEWART v. MOWAT.

Negligence—Contributory Negligence—Collision—Jury Finding Both Plaintiff and Defendant Negligent—Finding That Defendant's Negligence Real Cause of Accident—Acts of Negligence Contemporaneous—No Separation of Time and Place or Circumstance to Justify Finding that Defendant Had Last Opportunity—Judgment Entered for Defendant Notwithstanding Jury's Finding—Jury Not Directed that Negligence of Both Parties Might be so Interwoven that Neither Could Avoid Other's Negligence—Non-direction Not Resulting in Miscarriage of Justice as Defendant Entitled to Judgment on Jury's Findings—Observations as to Issues Proper to be Submitted in Running Down Cases—Plaintiff Entitled to Judgment on Counterclaim—Costs—Defendant Given Costs of Action and Plaintiff Given Extra Costs Caused by Counter-claim—Witnesses Expenses—Code of Civil Procedure, R. 566.

Motion for judgment for the defendant on the jury's answers to the issues submitted to them. The action was for damages resulting from a collision between two motor cars driven respectively by the plaintiff and the defendant. A counter-claim by the defendant alleged that the collision was due to the negligence of the plaintiff and claimed damages. There was the usual conflict of testimony as to the speed, positions on the road, etc. The jury in answer to the specific issues put to it found that the defendant was negligent in driving at an excessive speed and in cutting the corner of Parsons Street and Springvale Road, and entering Springvale Road on his wrong side. The jury also found the plaintiff negligent in driving along Springvale Road on the wrong side of the road, in approaching the intersection on the wrong side of the road, and in failing to keep a proper and adequate look out. The jury found that the defendant's negligence was the real cause of the accident, and awarded the plaintiff the sum of £404 damages.

Cohen for plaintiff.

Bain for defendant.

REED, J., said that it was submitted that the defendant was entitled to judgment upon the findings of the jury that the plaintiff was negligent in the respects above-mentioned. The jury's finding that the negligence of the defendant was the real cause of the accident must be read in conjunction with His Honour's directions to the jury. His Honour had explained what constituted negligence, told the story of **Davies v. Mann,** 10 M. & W. 546, and charged them in the precise words of Scrutton, L.J., in **Cooper v. Swadling,** 46 T.L.R. 73, 74, as follows: "If you think the plaintiff was negligent, but that the defendant, after the plaintiff was negligent, by taking reasonable care could have avoided him, such negligence of the plaintiff is not, as a matter of law, negligence which contributes to the accident so as to prevent the plaintiff from recovering." His Honour told them that if they accepted the plaintiff's story, as to his reasons for being on the wrong side of the road, they could not find him guilty of negligence for being there, as it was due to his having been put in a perilous and difficult position by the negligence of the defendant, inasmuch as perfect presence of mind, accurate judgment and promptitude under such circumstances were not to be expected, and one had no right to expect men to be something more than ordinary men, basing that direction on **The Bywell Castle,** 4 P.D. 219; **The Tasmania,** 15 A.C. 223, and **Weir v. Colmore Williams,** (1917) G.L.R. 474, 477. His Honour further told them that if they considered that both parties had been in some particulars negligent they had to consider who had the last opportunity of avoiding the negligence of the other, and adopted the language of **Salmond's Law of Torts,** 7th Edn., 45, that when an accident happened through the combined negligence of two persons, he alone was liable to the other who had the last opportunity of avoiding the accident by reasonable care. His Honour then explained, on the authority of **British Columbia Electric Railway Company Ltd. v. Loach,** (1916) 1 A.C. 719, that in considering who had the last opportunity of avoiding the negligence of the other, another rule had to be considered, namely, that if the defendant's negligence was such that he was unable by the nature of that negligence to avoid the result of the plaintiff's negligence that would not prevent the plaintiff from recovering, and that the converse applied as regards the counter-claim. His Honour did not direct them that if they came to the conclusion that the negligence of both parties was so interwoven and continued up to a point where it became impossible for either one or the other to avoid the consequences of the other's negligence that they should say so, for in that case neither could recover. In the view that the jury apparently took of the evidence His Honour regretted that he did not so direct them. His Honour might say that Mr. Bain for the defendant asked him to add the issue as to whose negligence was the real cause of the accident the words "or were both to blame," but His Honour was averse to altering the form of issues given in **Black and White Cabs v. Anson,** (1928) G.L.R. 240, and it was not done. Parenthetically His Honour remarked that in **Service v. Sundell,** 99 L.J.K.B., 55, 59, Scrutton, L.J. deprecated the question in that form, but of course he also condemned the question as framed in **Black and White Cabs v. Anson** (*cit. sup.*). The facts in the latter case might well have put it in issue as to whether or not both were to blame, but, nevertheless, no question was directed to that point. No special request was made to His Honour to direct the jury upon the point.

A non-direction might of course amount to a misdirection—**Stout and Sim,** (6th Edn.) 201—but a new trial should not be granted on that ground unless "in the opinion of the Court, some substantial wrong or miscarriage of justice has been thereby occasioned in the trial of the action."—Rule 277, Had His Honour directed the jury as above they might have found that the negligence of both was contemporaneous. Such a finding would have definitely settled the case in the defendant's favour. On the other hand had they still found that the defendant's negligence was the real cause of the collision that would not, when taken in conjunction with their other findings, which were on questions of pure fact, have entitled the plaintiff to a judgment. If anyone was prejudiced by the misdirection it was the defendant and, as His Honour was of opinion that the defendant succeeded on the issues as they were answered, there had been no miscarriage of justice.

In view of the actual directions His Honour gave to the jury, His Honour thought their findings meant that they considered that the defendant by his excessive speed had put himself in the position of being unable to avoid the consequences of the plaintiff's negligence, and that consequently his negligence was a continuing one up to the point of impact. But their finding that the plaintiff whilst travelling on his wrong side of the road negligently failed to keep a proper look out was also a finding of continuous negligence up to the point of impact. Their finding that both being negligent the defendant's negligence was the real cause of the collision could not mean more, in view of the other findings, than that in their opinion the defendant was the more negligent of the two. If that were all that the finding meant then the plaintiff could not recover: **Dowell v. General Steam Navigation Co.** 5 E. & B. 195, 206. His Honour in referring to extracts from the judgments of Lord Justice Scrutton in **Dew v. United British Steamship Co.,** 98 L.J.K.B. 88, 93; **Service v. Sundell,** 46 T.L.R. 12, and **Cooper v. Swadling,** 46 T.L.R. 73, 76, dealing with the question of contributory negligence, said that it was difficult to ascertain what exactly the learned Judge considered the law. His Honour thought that later probably it might be found that His Lordship had been misreported on the question referred to in the case last mentioned. It was perfectly clear law in England that, if both parties were continuously in default, right up to a point where it became impossible for either one or the other to avoid the consequences of the other's negligence, neither could recover. There was ample authority in support of that proposition but if any were required the observations of Greer, L.J., in **Service v. Sundell,** (*cit. sup.*) at p. 63 were in point. The point that concerned us in New Zealand was whether the judgment of the Privy Council in **British Columbia Electric Railway v. Loach** was inconsistent with the principles applied in **Dew v. United British Steamship Co.** so as to affect the doctrine of last opportunity. His Honour referred at length to the facts of and passages from the judgments in **Dew v. United British Steamship Co.** (*cit. sup.*) and **British Columbia Electric Railway v. Loach,** (1916) 1 A.C. 719, and **Neenan v. Mosford,** (1920) 2 I.R. 258, 273 and stated that the distinction between **Dew's case** and **Loach's case** was that in the former case there was one continuing negligence on the part of both parties up to the point of the accident, whereas in latter case the negligence of the plaintiff was spent before the accident occurred. The principle of a negligent act being "spent" was not novel; **Davies v. Mann** was an example. Leaving the hobbled donkey on the highway was negligent but it was a spent negligence which

did not relieve the coach driver of his liability for his negligence in driving over the animal. The basic principle therefore that he alone was liable to the other who had the last opportunity of avoiding the accident by reasonable care was not affected by any of the later cases but it was subject to certain qualifications, the one immediately concerning them being that the negligence of both parties might be so nearly contemporaneous that the Court was unable to hold that there was such a last opportunity, In **Admiralty Commissioners v. S.S. Volute,** (1922) 1 A.C. 129. it was held that there must be "a sufficient separation of time place or circumstance" between the acts of negligence to enable the Court to hold that there was such a last opportunity as would prevent the acts of negligence from being treated as contemporaneous. See **Salmond on Torts,** 7th Edn. 48.

The jury found that, of the two cars approaching the point of collision, the plaintiff was negligently driving on the wrong side of the road, and negligently failing to keep a proper and adequate look out. It was clearly the duty of a person who selected the wrong side of the road on which to travel to be more than usually vigilant, particularly, as in the present case, when approaching a corner round which he might meet traffic. That duty the jury had found that the plaintiff failed to fulfil. His Honour referred to **Chaplin v. Hawes,** 3 C. & P. 554. The jury had by their finding fixed the point of collision as on the right-hand side—plaintiff's wrong side—of Springvale Road. The plaintiff had no right to be there, while it was the correct position for the defendant to be in when about to turn in to that road. If the plaintiff had been on his correct side of the road it was obvious the accident could not have happened. There was clearly contributory negligence on the part of the plaintiff, in the sense of its being negligence without which the accident would not have happened, and that threw upon the plaintiff the onus of proving that the defendant could by the exercise of reasonable care have avoided the consequences of that negligence: **Coyle v. Great Northern Railway Co.,** 20 L.R. Ir. 409, 428. The jury in finding that the plaintiff was not keeping a proper and adequate look out obviously based their opinion on his admission that he did not see the defendant's car till he was within 18 feet of it, whereas the defendant saw him 90 feet away. He did not see the defendant's car until 18 feet away and then turned to his right and the collision occurred. How would it have been possible for defendant to avoid a collision with a car that two lengths in front of him was turned to its right? In His Honour's opinion there was not "a sufficient separation of time place or circumstance" between the negligence of the plaintiff in driving on his wrong side of the road, approaching and crossing the intersection of Parsons Street and Springvale Road on his wrong side of the road, and failing to keep a proper and adequate look out, and the negligence of the defendant in driving at an excessive speed, cutting the corner of Parsons Street and Springvale Road on his wrong side, and entering Springvale Road on the wrong side of the road, to enable the Court to hold that there was such a last opportunity as would prevent the acts of negligence from being treated as contemporaneous. It was clear, therefore, that the plaintiff could not recover judgment, and the only question was whether the defendant was entitled to judgment, or the Court should decline to enter any judgment, leaving it to the plaintiff to set down the case for a new trial if that were desired. The difficulty was occasioned by the finding that although both the plaintiff and the defendant were negligent the defendant's negligence was the real cause of the collision. There was only one ground upon which that finding could legally be based and that was that the defendant had the last opportunity of avoiding the negligence of the plaintiff. But His Honour had shown that upon the findings of fact by the jury and the evidence supporting those findings such a conclusion was entirely unwarranted. His Honour was satisfied that no case could be found, in which the negligence was so interwoven and so little "separation of time, place or circumstance" existed between the acts of negligence, in which a finding for the plaintiff had been allowed to stand. The answer that the defendant's negligence was the real cause of the collision was unquestionably an answer to a mixed question of law and fact, and His Honour thought could only have been answered by the jury through a misunderstanding as to the legal position. His Honour referred to **Flexman v. The Standard Fire and Marine Insurance Co.,** 2 N.Z. Jurist N.S. 54, 70; **Dew v. United British Steamship Co.** (*cit. sup.*); **Dowell v. General Steam Navigation Co.** (*cit. sup.*) stating that it was clear that the Court had jurisdiction in circumstances such as were disclosed in the present case, to enter judgment for the defendant upon the findings of fact by the jury, and His Honour did not think that the Court should hesitate to do so. His Honour observed that the third issue in **Black and White Cabs v. Anson,** (*cit. sup.*) had been very largely adopted in cases involving the question of contributory negligence, but His Honour's experience lately had been that it was not the best form of question. His Honour was not disagreeing with the judgment that it was the correct form of issue in the circumstances of that case, but for general application His Honour thought it would be found that the following issues were more satisfactory. They were suggested by Sir James Campbell in **Neenan v. Mosford,** (*cit. sup.*) at p. 282: (1) Was the defendant negligent? (2) Was the plaintiff (or the injured person as the case may be) negligent? (3) If you find that both were negligent, could each up to the last moment have avoided the accident by the exercise of ordinary care? (4) If not, could either of them, and, if so, which? Some English Judges deprecated the putting of any specific questions to the jury: see per Sankey, L.J., in **Dew v. United British Steamship Co.** (*cit. sup.*) at p. 97. It was undoubtedly very much simpler to leave the general issue to the jury, but whether it would be in the interests of justice was another question. His Honour very much doubted whether the obscure and difficult law of contributory negligence could be made clearer to a jury on a general question than when dealing with specific questions. The temptation to a jury, when not required to direct their attention to specific questions, would be to throw on one side the refined niceties of the law and decide the matter on the bald question, whose fault was it, with a strong leaning in favour of the injured man. In the present case the jury had conscientiously devoted themselves to a consideration of the specific questions and from those answers it was possible to apply the law affecting the case.

In dealing with the counter-claim His Honour stated that it was obvious, for the reasons already given, that the plaintiff was entitled to judgment upon the counter-claim, the effect of the jury's verdict being that there was continuous negligence on the part of both parties up to the point of impact. The plaintiff submitted that in those circumstances no costs should be allowed to either party and cited the judgment of Denniston, J. in **Gardner v. Murchison,** 14 G.L.R. 376. That case, had, His Honour stated, been brought to his notice in **Boyd v. Thacker,** (1925) G.L.R. 15, where it was distinguished without comment. His Honour in that case held that the law was as stated in the notes to R. 566 in **Stout and Sim,** namely: "Where claim and counter-claim are both dismissed, the defendant is entitled to the general costs of the action, and the plaintiff is entitled to extra costs occasioned by the counter-claim." There was no specific Rule dealing with the question. The learned authors of **Stout and Sim** had based their statement of the law on certain English decisions where also there was no specific rule. His Honour referred to certain dicta of Fry, J., at page 418, in **Saner v. Bilton,** 11 Ch.D. 416, adding that that case had been expressly approved by the Court of Appeal in **Mason v. Brentini,** 15 Ch., D. 287. In New Zealand in **Crown Brewery Co. (Ltd.) v. Buckley and Marshall,** 3 N.Z.L.R. S.C. 385, Johnston, J., followed those two cases. There were no decisions to the contrary and His Honour thought it might be taken as an established rule. In view of that, had a Judge jurisdiction to disregard the rule and make an order as in **Gardner v. Murchison** (*cit. sup.*)? **Cates v. Glass,** (1920) N.Z.L.R. 37, the effect of which was stated by Stout, C.J., in **Public Trustee v. Wing,** (1920) G.L.R. 486, had not been then decided. The cases as to what constituted "good cause" justifying the depriving of a successful party of costs were collected in **23 Halsbury 181,** note (c) and were discussed by Edwards, J., in **Cates v. Glass** (*cit. sup.*) at p. 63 *et seq.* The only ground that could be urged in the present case was that both parties were in fault. That had never been held to be a "good cause." His Honour thought that, in the circumstances, there was no jurisdiction to depart from the rule; even if there were, His Honour thought that it should not be departed from.

Judgment would be for the defendant on the claim with costs on the highest scale and there would be judgment for the plaintiff on the counter-claim, with such costs as might have been incurred by reason of such counter-claim. There were no witnesses called, by either party, exclusively in support of it. As stated by Williams, J., in **Varcoe v. Blue Spur and Gabriel's Gully Consolidated Gold Company,** 29 N.Z.L.R. 450, the plaintiff was not "entitled to the expenses of witnesses who were called to support both the counter-claim and the defence of the claim, except for the additional period of time which was caused by the hearing of the counter-claim." No appreciable time, in the present case, had been taken up in the hearing of the counter-claim. His Honour thought, therefore, that the plaintiff was entitled only to the cost of preparing and filing the statement of defence to the counter-claim, including filing fees, and for preparing for trial. Those would be allowed on the middle scale.

Solicitor for plaintiff: **Louis Cohen,** Wanganui.
Solicitors for defendant: **Bain and Fleming,** Wanganui.

Reed, J. March 26; May 2, 1930.
Blenheim.

WAIRAU HARBOUR BOARD v. WAIRAU RIVER BOARD.

River Board—Harbours—River Board Entitled to Erect Flood Protection Works Within its District Although Also Within Boundaries of Harbour District—"Harbour District"—Harbour Act, 1923, SS. 6, 59, 166—River Boards Act, 1908, Ss. 73, 76.

Action by plaintiffs against the defendant Board claiming an injunction restraining it from prosecuting certain flood protective works in the area apparently under its jurisdiction, and, also claiming a mandatory injunction requiring it to remove such works as had been already completed. By arrangement the outstanding legal question was first argued whether or not upon the true construction of the statutes, the defendant River Board had any power or authority to erect flood protection works within the Wairau Harbour District which, by S. 9 of the Wairau Harbour Board Act, 1907, was defined as comprising the Borough of Blenheim and the Omaka Road District. For a period of about forty years various River Boards, united in 1922 in the defendant Board, had constructed and maintained protection works against floods on the Wairau River. Without those protective works large areas of land, and the town of Blenheim itself, would be repeatedly inundated, and silt deposited over the countryside. The Wairau Harbour Board claimed that those works were occasioning the silting up of the harbour and destroying its navigability.

Gresson, Mill and Nathan for plaintiffs.
Johnston and Churchward for defendants.

REED, J., said that the whole question turned on the construction of S. 73 of the River Boards Act, 1908, which read as follows: "(1) All rivers, streams, and watercourses within any river district constituted under this Act, whether or not the same are navigable or are altered by the ebb and flow of the tide, shall be to all intents and purposes within and subject to the jurisdiction of the board, so far as may be requisite for the construction or maintenance of any works necessary to prevent or lessen any damage which may be occasioned by the overflow or the breaking of the banks of the same. (2) Nothing in this section shall be construed to authorise a river board to exercise jurisdiction within any district within the jurisdiction of any harbour board." What was the "district within the jurisdiction of any harbour board?" The word "district" was not defined in either the River Boards Act or the Harbours Act, 1923. S. 6 of the latter Act gave power to the Governor-General to "define the limits of any harbour." That had been done in the case of the Wairau Harbour Board and none of the protective works attacked were within those limits. No power was given to define the boundaries of a harbour district. Such boundaries were always defined in the special Act constituting the harbour. It was submitted by Mr. Johnston that a harbour district was only constituted for the purpose of defining the electoral and rating area, whereas, within the defined limits of a harbour, wide jurisdiction was given to a harbour board. From that it was argued that S. 73 (2) referred only to the harbour limits and not to the harbour district. But the section did not say, as it well might if so intended, "within the limits of a harbour within the jurisdiction of a harbour board." Moreover S. 59 of the Harbours Act, 1923, made a clear distinction between the limits of a harbour and a harbour district and referred to the board's jurisdiction over both. Again, if His Honour correctly understood that the limits of the Wairau Harbour were up to high-water mark in the several navigable rivers referred to, S. 166 of the Harbours Act, 1923, was in point. It provided that "the board may within the limits of its jurisdiction" do a number of things. If those were examined it would be found that a number of those could not be carried out below high-water mark, for example (c) "erect, provide, maintain, or carry-on freezing works and cool chambers." "Within the limits of its jurisdiction" must mean the limits territorially and therefore include the harbour district. Subsection (b) was also instructive; a harbour board was authorised to erect buildings, etc., "on any lands vested in it." But those must be "within the territorial limits of its jurisdiction." On the whole, therefore, His Honour was driven to the conclusion that a literal interpretation must be given to the section and that "district within the jurisdiction of any harbour board" included the harbour district as defined by the Wairau Harbour Board Act, 1907.

The position, therefore, was that by various Statutes there were several local bodies having defined jurisdiction within overlapping areas; the Blenheim Borough under the Municipal Corporations Act, the Owaka Road District under the Road Boards Act, the Wairau Harbour under its special Act and the Harbours Act, and the Wairau River Board under the River Boards Act. S. 73 (2) of the Harbours Act contemplated a river board having jurisdiction within the area of a harbour district; the Section could not be construed as meaning that no river board should be constituted having any jurisdiction within the area of a harbour district, nor could it be construed as meaning that on the establishment of a harbour board an existing river board should *ipso facto* cease to function so far as regards an area within the boundaries of a harbour district. The section must be construed literally and all it said was that "nothing in this section shall be construed to authorise a river board to exercise jurisdiction," etc.; in other words if the boundaries of a river board encroached on those of a harbour district the section could not be relied upon to give the river board jurisdiction within the boundaries of the latter, one must look elsewhere. The reason was obvious. The section was very wide; it placed within the jurisdiction of the river board "all rivers streams and watercourses," whether or not the same were navigable. Navigable rivers fell naturally under the jurisdiction of a harbour board, and an impossible situation would be created were a river board and a harbour board both given jurisdiction to carry on their operations in navigable waters. The full powers granted by the section might well be given to a river board where no harbour board existed but it became necessary to make provision for restricting those powers where the contrary was the case. Had it been intended that a river board should have no jurisdiction whatsoever within the boundaries of a harbour district it could have been quite easily so provided. To give subsection (2) the full effect contended for would mean that Parliament, which controlled the establishment of both harbour boards and river boards, inserted this provision in order to provide for the accidental establishment of a river board which would operate within the area of a harbour district, for it could not be conceived that Parliament would authorise such establishment knowing that it could not function; and, of course, the converse would apply, the authorisation of a harbour district within a river board district.

His Honour thought, therefore, that the effect of subsection (2) was confined strictly to S. 73, and that its provisions did not affect the powers granted to a river board by the succeeding sections. It was stated at the Bar, but His Honour did not decide the point, as it might be a matter of controversy, that all the works executed by the river board were covered by the powers granted by S. 76. On the main question His Honour accordingly ruled that S. 73 (2) did not render *ultra vires* the construction of flood-protection works by the defendant Board within the harbour district of the Wairau Harbour Board.

Solicitors for plaintiffs: **Claude H. Mills; A. C. Nathan,** Blenheim.

Solicitors for defendant: **Burden, Churchward and Reid,** Blenheim.

Note Books for Juries.

In *United Diamond Fields of British Guiana Ltd. v. Joll*, heard recently before McCardie, J., and a jury, the learned Judge suggested that in view of the possible length of the case the jury might be provided with note-books and pencils. Counsel themselves at once arranged for the materials to be supplied and several of the jurors forthwith made use of them. Mr. Justice McCardie's suggestion might well be noted in this country. Here one seldom sees a juror taking a note—when he does so it is frequently on some scrap of paper laboriously selected from one of his inside pockets. Judges and counsel find it necessary to take notes: why not also juries?

"The lay arbitrator trying to decide a matter which calls for a trained intellect is an anachronism."
—MR. R. S. DEANS, LL.B., M.P.

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.*]

(*Concluded from page 155.*)

Prior to the Real Estate Descent Act and the Administration Act if a person and his heirs were appointed as trustees such heirs became trustees on the death of their ancestor: *In re Morton and Hallell*, (1880) 15 Ch. D. 143, 149. In like manner if a person and his heirs and assigns were so appointed his devisees could execute the trust: *Hall v. May*, 3 K. & J. 585. If a person and his heirs, executors, administrators and assigns should be appointed trustee, the executors of such person are the trustees upon his death: *In re Waidanis, Rivers v. Waidanis*, (1908) 1 Ch. 123. If, however, the deed creating the trust gives certain persons a definite power to appoint new trustees they may do so and oust the executors from the trust: *In re Routledge's Trust, Routledge v. Saul*, (1909) 1 Ch. 280.

The legal estate in trust property devolves upon the executors of the surviving trustee and they may be able to make a valid disposal of it: *In re Mills'* Trusts, 37 Ch. D. 312. As such trust property descends to the personal representatives of the trustee it must go to the executors of his own estate and will not go to special executors nominated by him for the sole purpose of administerting such trust property: *Re Parker's Trusts*, (1894) 1 Ch. 707. Such executors of a trustee, unless appointed as trustees by the trust deed, are of the nature of constructive trustees. As was said by Parker, J.: "Unless the person in question is indicated in the instrument as a person who is to succeed to the trust, he is not a trustee and cannot execute it. Though he may hold the property subject to the trust and be a trustee in that sense, he is not a trustee in the sense that he can actually execute the trusts": *In re Crunden and Meux' Contract*, (1909) 1 Ch. 690.

The provisions in New Zealand relating to the appointment of new trustees are contained in the Trustee Act, 1908, under S. 78 of which the personal representatives of the last surviving trustee may by writing appoint any other person as trustee in his place. It has been held under this section that the person with the power of appointment given by it may not appoint herself: *In re McGregor*, (1919) N.Z.L.R. 551; Gaz.L.R. 285. A power to appoint "any other person or persons" has also been held in England not to allow the donee to appoint himself: *Re Skeats' Settlement*, 42 Ch. D. 522. A power to appoint "any new trustee" enables the donee to appoint himself: *In re Christina Brown*, 22 N.S.W. S.R. 90; *Montefiore v. Guedalla*, (1903) 2 Ch. 723. In England it has been held that the power for the executors of the last surviving trustee to appoint a new trustee applies also to the executors of a sole trustee: *In re Shafto's Trusts*, 29 Ch. D. 247.

The personal representative of a deceased trustee has an absolute right to decline to accept the position and duties of a trustee if he chooses so to do: *Legg v. Mackrell*, 2 De G. F. & J. 551. The statutory right of appointment has not lessened this right: *Re Ridley*, (1904) 2 Ch. 774; *Re Bennett*, (1906) 1 Ch. 216. Nor can the personal representative be compelled to exercise the statutory power of appointment: *Re Knight's Will*, 25 Ch. D. 82.

The administratrix of a sole trustee who appointed new trustees without vesting the property in them was held not to have accepted the trusts: *Re Bennett* (*cit. sup.*). If the personal representatives of an executor and trustee are appointed trustees by the original creator and after their immediate testator's death act as trustees in respect of trusts in his hands at time of death, they become trustees for all purposes: *Re Waidanis*, (1908) 1 Ch. 123. Where the personal representatives of a deceased trustee act in the trust and one dies, the survivors can appoint a new trustee to act jointly with them: *Re Howarth*, 100 L.T. 263.

Where the testator appoints one person as executor of his will and another as trustee the legal estate in the property of such testator passes to the executor who must first perform his executorial duties and then hold the legal estate to transfer it to the trustee who becomes entitled to call for it when such executorial duties have been performed. The estate vested by the statute in the executor becomes the dry bones of a legal estate once he is *functus officio* as executor and he must pass the legal estate on to the trustee who has the power to deal with the land and consequently the right to call for the legal estate in it. To assign to trustees for the beneficiaries is the same thing as assigning to the beneficiary: *Smith v. Smith*, 1 Dr. & Sm. 384.

When an application for transmission of land held by a deceased proprietor is being examined it is necessary to remember that such lands may be held in different ways. First, there are lands which may have been held by him as the absolute owner thereof both at law and in equity; secondly, there are lands which may have been held by him as a trustee; and thirdly, there are lands which may have been held by him in a purely representative capacity, or, as it is called *in auter droit*. There is no difficulty in ascertaining the method of devolution of lands of the first class; but there is a wide difference in the methods of devolution of the other classes which are so deceptively similar in first appearance and so distinct in fact. Lands held by a trustee are his own at law although his conscience may be considered as burdened with the trust which can be enforced only by equity. Lands held *in auter droit* include lands held by an executor, administrator, Official Assignee in Bankruptcy, etc., and attach to and follow the office and not the person holding the office, he being considered but a human manifestation of his office.

By S. 4 (1) of the Administration Act, 1908, it is provided that immediately upon the granting of administration of the estate or probate of the will of any deceased person all the real estate then unadministered of such person, whether held beneficially or in trust, shall vest in the administrator or executor to whom such administration or probate is granted for all the estate therein of such person. The section also makes the estate vest back to the date of death once the grant has been obtained. The section does not refer to the personal property nor does it refer to succession to any office. S. 5 makes such real estate assets for the payment of duties and fees and for the payment of debts

in the ordinary course of administration and gives the personal representative the powers of disposal necessary for this purpose. S. 10 makes the executor or administrator representative in the real estate in the same manner as he represents the personal estate and S. 11 directs how he is to hold the real estate. S. 38 expressly states that so far as possible the previous practice of the Court is not to be altered except so far as circumstances admit. Speaking of S. 4, Hosking, J., said: "In my opinion it has not the effect of transmitting the office of administrator to the executor of a deceased administrator. If that were the meaning one would not expect to find the vesting confined to the unadministered real estate without mentioning unadministered personal estate. The provision for the vesting of the real estate was obviously desirable for the purpose of carrying out the assimilation for the purposes of the Act of real estate to personal estate and for vesting the real estate in the same person, and at the same time as the personal estate": *Re Clover*, (1918) Gaz.L.R. 703, 704.

It will be noticed that S. 4 speaks of real estate "of such person" and says whether held "beneficially" or "in trust." Lands held by the deceased owner as his own property both at law and in equity are held by him "beneficially" and lands held by him as a trustee are his at law and are inside the definition of lands held by him "in trust." These lands, therefore, pass to his executor or administrator. Such person takes them with the same title and subject to the same equities as the person he represents: *Kissick v. Black*, 10 N.Z.L.R. 519. The controlling words of the section are "of such person." The lands must be his *at law* and it matters not whether beneficially or in trust. Lands held *in auter droit* attach to the office itself and cannot be held by anyone not filling that office "for all the estate" of the deceased proprietor. Though the executor has during his life-time the fullest powers of dealing with the property of the estate, it is only because and, therefore, so long as he holds the office: on his death, as the office passes so does the property. If he dies intestate, he does not pass the office, and so the Court must. An administrator *de bonis non*—not of the executor but of the original testator—must be appointed: *Maddock and Miller v. Registrar of Titles*, 19 C.L.R. 681, 693. In the case of an executor, since the office of executor is transmissible the estate of the testator unadministered at the death of the executor is, if the chain is unbroken, transmitted at his death to his executor, if any: *Ibid.*, 689. When an executor dies leaving a will such property as he holds belonging to the estate passes to his executor, but not as part of his estate, either beneficially or in trust: *Ibid.*, 694. The Act vests the realty of the original deceased in his executor, and regards it henceforward for the purposes of administration as personalty. It forms no part of the executor's estate when he dies, but passes by operation of law to the person whom he appoints as his executor; it passes to the latter as representing the original testator, and passes as still being the property of the original testator: *Ibid.* 695. The estate vests in the person of whom it can for the time being be predicted that he is the executor or administrator of the original testator or intestate: *Ibid* 689.

For these reasons it was held by Sir Charles Skerrett, C.J., in *Public Trustee v. Registrar-General of Land*, (1927) N.Z.L.R. 839, that, where an administratrix had paid all the debts, collected all the assets and caused herself to be registered as proprietor of the land, but no facts were sufficiently evidenced by which it could be determined that she had severed or defined the share of the other beneficiary so as to constitute it a trust fund, or that she was holding the land with the consent, expressed or implied, of the other beneficiary, her executor was not entitled to registration of the land. The judgment, however, was clear that, if the deceased personal representative could have been sufficiently proved to be *functus officio* as administratrix and holding as trustee, her executor could have claimed title to the land.

The Cost of Litigation.

Views of London Chamber of Commerce.

The Council of the London Chamber of Commerce has adopted and forwarded to the Lord Chancellor, the Bar Council, the Law Society, and other professional bodies a Report of its Parliamentary and Commercial Law Committee on the subject of the expense of litigation. The Report examines this important matter from a common-sense and practical point of view, and makes a number of suggestions designed to effect an improvement in the present position in England. In considering this subject, the committee include in the term "litigation" both actions in the High Court and arbitrations which are conducted on the same lines as an action in Court with solicitors, counsel and witnesses, and the "cost" of litigation embraces the total expenses of all kinds incurred by each of the parties in prosecuting the proceedings to a hearing and final decision. The fact that one party or the other may recover some of his costs does not, as the report points out, affect the actual expense, but merely shifts the burden. A litigant does not distinguish between the various items which go to make up the total of his expenses, but looks at the whole only. But they have limited their observations to litigation arising from disputes arising out of business relationships, and have not dealt with domestic or strictly personal matters such as divorce, libel, etc. This limitation is of considerable importance when the proposals in the report for shortening the hearing of cases are considered.

After summarising the procedure by which an action is brought to trial in the High Court, the Committee proceed to consider the question of whether, apart from reforms of procedure, the cost of litigation is excessive—in other words, whether barristers and solicitors are over-remunerated. They come to the conclusion that the average barrister or solicitor does not earn a larger income than the average doctor or accountant. It is suggested that the "two-thirds" rule—by which a junior receives two-thirds of the fee paid to his leader—should be abolished; but it is recognised that if this is done the fees allowed to junior counsel for interlocutory work, and particularly for such matters as advice on evidence, would have to be substantially increased.

The main conclusion of the Committee is, therefore, that the cost of litigation must be decreased by reforms of procedure, though they suggest also that, in cases involving less than £1,000, counsel's fees and solicitors' costs might be fixed on a sliding scale according to the

amount involved. There may be considerable doubt as to whether this is practicable; for many actions of the greatest importance to the parties are concerned with comparatively small amounts of money, and any scheme which attempts to base fees and costs on the pecuniary value of the amount at stake would have to be hedged about with so many exceptions and reservations that it might easily become unworkable.

Turning to the reforms of procedure advocated by the report, the most important is with regard to the simplification of the proof of cases. It is suggested:

(1) That all documents should be accepted in evidence unless formally challenged and oral proof demanded, in which case the challenger should have to pay the costs of the oral proof unless the Court otherwise orders.

(2) Evidence of witnesses to be presented in the form of statements signed by the witnesses and attested by a credible witness. If any party desires a witness to be produced for cross-examination he should deposit the cost of the examination and witness's expenses, which should be paid by the challenger unless the Court otherwise orders.

(3) Evidence from abroad should be given by affidavit, and commissions for verbal evidence should not be allowed. In technical matters, an assessor should sit with the judge.

(4) No expert evidence should be given; but in cases involving, say, £2,000, parties should be allowed each to put forward one expert on each side to act as a demonstrator of the technical points at issue, but not as a witness. In cases involving over £10,000 the parties to be allowed to call one expert witness on each side if they wish.

With regard to proceedings before trial, it is recommended that they should be simplified and shortened, and that the points at issue should merely be shortly stated in the pleadings so that an opponent may not be taken by surprise. The pleadings should go into reasonable detail, but if sufficient is said to show the general line of the issues involved, that should be enough. With regard to interlocutory applications, the employment of counsel should become the exception rather than the rule, and fees to counsel should only be allowed on such applications where important principles are involved. It is also suggested that the printing of pleadings should cease to be compulsory, and that in all cases dates should be fixed for trial. With regard to the latter point the report says:

> "Even if this were to result in a judge sometimes being unemployed for a day or so the slight loss to the public of a day or two's salary would be much more than compensated for by the expenses saved to litigants, and consequently litigants would be encouraged to go into Court instead of either avoiding litigation or settling out of Court. Uncertainty of date of hearing and waiting about is one of the greatest discouragements preventing persons from bringing their disputes to Court, and is a great cause of expense."

"The coincidences of falsehood, which are agreed upon by those who are telling the falsehood—you can explore them and detect them; but the coincidences of truth are innumerable."

—Lord Hewart.

Income Tax Appeals.

The Position in England.

Criticism has for some time past been levelled at the practice of the Crown in regard to income tax appeals, and the matter has been one of frequent discussion in the English legal journals. The matter was raised again in the House of Lords by Viscount Dunedin, on the 3rd April last, and we publish below a condensed report of the interesting debate. While it cannot be suggested that any corresponding evil, if it be an evil, exists in this country, the discussion is nevertheless of some interest here in view of recent discussions on appeals to the Privy Council and on the suggestion that there ought to be a right of appeal in workers' compensation cases.

Viscount Dunedin, in the course of his speech, said: My Lords, it may possibly be within the knowledge of some of your Lordships that on a recent occasion I indicated, in the judicial business of the House, that I thought it necessary to call attention to what I considered a practice which was being abused, of the Crown coming to your Lordships' House on every occasion on which they had lost, irrespective of whether the case was really worth being brought to the Supreme Tribunal. I am not going into that matter again. I am content to let bygones be bygones, and that all the more because I have been informed that in the last case in which I made these remarks the Crown has, I think very properly, told the litigant, who had won the case before every Judge before whom it came, that they are prepared to pay his costs as between solicitor and client; but I should not have put down the notice on the Paper merely to say what I have said. I put it down because I do not wish to appear as a mere critic when, as I believe, there is a perfectly easy remedy to meet what I think is an abuse, and what I think, from the notice taken of my remarks in the Press, is evidently considered an abuse by a widespread feeling throughout the country.

The proposition which I have to make is not original. It is not my own and I do not claim any credit for it, but it is much the best that I have seen put forward. There has been a certain amount of correspondence, and various people have proposed that in every case between taxpayer and Crown the costs should be met by the Crown. I do not think that that would ever do. I think that would simply lead to an abuse at the instance of the taxpayer—precisely the same abuse as the abuse at the instance of the Crown. But what I do propose is this. When the Crown wins in the Court of Appeal then let matters be just as they are. If the taxpayer chooses to go to the House of Lords, let him go at his own risk. But when the Crown loses in the Court of Appeal, then I would propose that the Crown should not be allowed to come to your Lordships' House except with the leave of the Court of Appeal, and that it should be possible, although not at all necessary, that the Court of Appeal should clog that permission to appeal with such conditions as to costs as it should think fit. I confess I think that that would meet the situation. I think the Court of Appeal could perfectly be trusted to give leave in all proper cases. And I do believe that if that was done the two objects which are sought would both be obtained. The two objects are: first, that the Crown should have the chance of

having really general questions decided by the highest Tribunal, and, secondly, that some unfortunate mortal should not be made the whipping boy to stand the expense of having the general question determined. I am not, of course, expecting for one moment that the Government should say " Yes " to what I am saying, but I ask them, if they will, to give an undertaking that they will consider this proposal, so that if it commends itself to them it may be put in the next Finance Bill.

THE PAYMASTER-GENERAL (LORD ARNOLD): My Lords, I need scarcely tell you that any suggestions or remarks of the noble and learned Viscount will receive full consideration by the Government. He has not expected anything in the nature of a definite reply on this occasion, and I am quite sure that he will not look for anything of the sort at such short notice; but I can assure him that his suggestion will be considered. I do not think it necessary to trouble your Lordships at any length on the general question, but, as the noble and learned Viscount spoke, I think, of the abuse which had taken place in regard to these matters of appeals, I think it is only right for me to say that the Board of Inland Revenue do not enter appeals from decisions given against them by the Court of Appeal or the Court of Session unless there is a very large sum of money at stake, or an important point of principle is in issue, which would involve large sums of money in other cases. But in all cases where the Board are themselves seeking to establish some new point of principle in Income Tax administration they pay the taxpayer's costs, whether they are successful or not.

VISCOUNT HAILSHAM: I am bound to say that, speaking from my experience, I do not think the suggestion which my noble and learned friend has put forward for consideration is one which commends itself to me, at any rate on such consideration as I have been able to give to it, and, as he knows very well, it is a suggestion which is not now made for the first time. The suggestion is that the Crown in revenue cases shall have imposed upon it a limitation to which no other litigant is submitted. The suggestion is made on the ground, which no doubt is a perfectly true ground, that the Crown has behind it resources which the ordinary litigant cannot command and that, therefore, there is a risk of those resources being abused to the oppression of the poorer litigant. That, of course, is true. It is true in every case in which one litigant has large resources behind him and the other is in a comparatively poor position. It is not limited to the cases in which the Crown is one of the parties. In every case in which the Crown is a party it cannot fail to happen that there must be a certain, I do not want to be misunderstood if I use the word bias, but a certain feeling of sympathy against the Crown. In every case in which there is a wealthy corporation on the one side and an individual on the other there is a natural feeling in favour of the individual and against the corporation. It seems to me that by limiting the right of appeal to those cases in which the Court of Appeal chooses to give leave, you are preventing the Crown from appealing, and, therefore, preventing, your Lordships will remember, the general body of taxpayers (because those are the people whom the Crown represents) from appealing in precisely those cases in which it may be most necessary to give the Crown the right to appeal—namely, those cases in which, unhappily, the Judges in the Court of Appeal have allowed themselves to be a little misled by the sympathy to which I have already referred. From my own experience I am quite sure that some of the cases in which I have been most successful in obtaining in this House a reversal of decisions of the Court of Appeal have been precisely those cases in which the Court of Appeal were most certain that the Crown was wrong and would have been absolutely unanimous in refusing leave to appeal had I asked them. The real remedy for the abuse, if there be an abuse, of the Crown's power, lies in the proper discharge of their duties by the Law Officers of the Crown. Again I speak of my own experience only because this is a matter in which I can speak with some little knowledge. It was my practice, and the practice of the Solicitor-General, my learned friend Sir Thomas Inskip, and I doubt not it is the normal practice of a Law Officer (I expect my noble and learned friend Lord Hanworth would be able to confirm me) before signing notice of appeal in a Revenue case to give some consideration to the case, which, after all, he has argued, with the merits of which he is well acquainted and the importance of which he will be able to judge. Unless he thinks it is a proper case to bring before your Lordships' House it would be the duty of the Law Officer (a duty which I have discharged before now) to ask the solicitor for the Board of Inland Revenue to come to see him, and to explain either that there ought to be no appeal at all, or if there were an appeal, that an undertaking should be given to pay the costs, whichever way the appeal went. As the noble Lord, Lord Arnold, has pointed out, the Inland Revenue normally do that in cases in which they are seeking to decide some great point of principle on a matter in which the actual sum at stake in the individual case is unreasonably small. It is in that direction that a proper check ought to be imposed, and is imposed, upon any risk of abuse of the resources of the Crown in such litigation as the noble and learned Viscount has brought to your Lordships' attention.

THE LORD CHANCELLOR: Far be it from me to give a judgment before I hear all that can be said, but as at present advised I am not quite sure that my mind will go in the same way as that of the noble Viscount. I think every case should depend upon its own facts, and I rather agree with what has been said by the noble and learned Viscount, my predecessor, Lord Hailsham, that this is rather a matter for the exercise of their functions by the Law Officers of the Crown. At the same time, the noble and learned Viscount's remarks shall be most carefully considered.

VISCOUNT DUNEDIN: My Lords, I have no right to speak again except with leave of the House. I do regret the remarks that have fallen from the noble and learned Viscount in front of me (Viscount Hailsham). But really the result of his speech is that things ought to remain just as they are. I am perfectly certain that the general feeling in the country is that they ought not to remain just as they are. I had said that I would not go back into matters, but it has really become necessary to say something. I will take an instance. There were various comments in the newspapers as to what I had said. I happened to go into a shop and they said: " Oh, we have seen what you have been saying. You know that was just our case. We had a case and we thought we were right, and our solicitor asked about it, and the answer he got was, ' Well, you may try the case if you like, but we will take you to the House of Lords.' " That is the general feeling in the country, and I believe if the solicitors

of London were asked everyone would say that when a client comes to them upon an Income Tax case they say: "Well remember, you won't win short of the House of Lords." There are statistics I would like to get and they are these. Within the last two years how many cases have been decided against the Crown in the Court of Appeal, and of those cases how many have been taken on appeal to this House? I should not be a bit surprised to hear it was every one. As far as the general question is concerned, I readily acknowledge the courtesy of the Government in the statement that they will consider the matter, but I am afraid they will not consider it very favourably after what my noble friend has said. I must say that it seems to me that the idea that is dominant in the speech of my noble friend is a thorough distrust of the Court of Appeal. Why the Court of Appeal cannot be trusted to give leave in a proper case I cannot imagine. As to the conduct of Crown cases, while he held office as a Law Officer, I do not doubt it was all right, but after all one may have many benefits but we cannot have him as a sempiternal Attorney-General.

"In Person."

Woman Wins Appeal Before Privy Council.

"The palm for the greatest forensic achievement by a woman in this country, since women have been called to the Bar goes to Mrs. Bethune Campbell, of Boston, U.S.A. She is neither barrister, solicitor, nor any other kind of legal practitioner; but during a twenty-hour speech, packed with legal citations and sound legal argument, she persuaded the Judicial Committee of the Privy Council to advise His Majesty to set aside the judgment of the Supreme Court of Canada. It is not surprising that my Lords paid her the handsome tribute of a sincere and well-turned compliment. Not for the first time in our history has a woman conducted her own case to a successful issue in the highest Court; but never, so far as I can find, has a woman on her own, by forensic skill combined with serene endurance, evoked or earned such high approval."

—"Outlaw," in the "*Law Journal.*"

"Barrister-Premiers."

There have been only three practising barristers who have become Prime Minister of England. Two are well-known—Pitt and Asquith—and the third was Spencer Perceval. He was called to the Bar in 1786, at the age of twenty-four, and before many moons had made his name. Contemporary solicitors were so impressed by a speech he made in a criminal trial that in a very short time he is reported to have had the largest practice on the Midland Circuit. He entered Parliament in 1796, and became Solicitor-General in 1801 and Attorney-General in the following year. From 1807 to 1809 he was Chancellor of the Exchequer. From 1809 till May 11, 1812, he held the Premiership, his career in that office being brought to an end by assassination at the hand of the madman, Bellingham.

Bench and Bar.

Messrs. McGregor & Lowrie, and Messrs. Inder and Metcalfe, both of Auckland, have amalgamated their practices. The new firm will be known as McGregor, Lowrie, Inder and Metcalfe.

Mr. F. H. Haigh, who has been for some years with Messrs. Russell, McVeagh, Bagnall & Macky, Auckland, and who was previously managing clerk to Mr. P. J. O'Regan, Wellington, has commenced practice on his own account at Auckland.

The practices of Messrs. Dolan, Rogers, and Stephenson, of Wellington, and of Mr. F. B. Anyon, of Wellington, have been amalgamated. The style of the new partnership will be Dolan, Rogers, Stephenson and Anyon.

The Annual Golf Tournament of the legal practitioners of Wellington was held on the Miramar Links on the Prince of Wales' Birthday. Forty-seven players took part in the competitions, and several good cards were returned.

The bogey competition in the morning resulted in a tie between J. C. Peacock (7) and L. C. Hemery (8), with scores of 3 up. The play off was won by L. C. Hemery. Other cards returned were A. T. Young (12) 1 up; J. W. Ward (5) all square; D. R. Richmond (11) 1 down; and E. S. Toogood (5) 2 down.

The four ball bogey played in the afternoon was won by H. N. Burns (10) and H. F. Bollard (18) with the score of 7 up. The next best scores were A. B. Buxton (12) and S. A. Wiren (14) 4 up; J. W. Ward (5) and C. W. D. Bell (8) 4 up; A. M. Cousins (8) and R. L. A. Creswell (11) 4 up; R. E. Pope (17) and A. M. Dunkley (18) 3 up; H. S. T. Weston (10) and L. B. Dinniss (15) 3 up; M. J. Crombie (8) and D. R. Richmond (11) 3 up; L. C. Hemery (8) and D. F. Stuart (11) 2 up.

Judicial Ages.

The average age of the Judges of the King's Bench Division is sixty. The youngest is Finlay, J., aged fifty-four; Swift and Wright, JJ., are fifty-five. Among the others whose ages may be specially singled out are Avory, J., 78, Horridge, J., 72, and Rowlatt, J., 67; McCardie, Hawke and Macnaghten, JJ., are each aged the average, and so also is the Lord Chief Justice. Fifty-nine is the average age of the six Chancery Judges; but for Eve, J., the average would be fifty-six.

During the financial year ending on 31st March, 1929, the sum of £10,327 8s. 2d. was paid in fees by the Crown to the Attorney-General. During that year there were two holders of the office—first, Sir Douglas Hogg and then Sir T. W. H. Inskip. The former received £2,473 5s. 10d., and the latter £7,854 2s. 4d.

Forensic Fables.

THE K.C., M.P., AND THE BILL FOR THE SUPPRESSION OF NIGHT CLUBS.

A Distinguished K.C., M.P., having Ballotted Successfully, became Entitled to Introduce a Bill Under the Ten Minutes' Rule. He Decided in Favour of a Bill for the Suppression of Night Clubs. The K.C., M.P., was a Man of Blameless Life and Old-Fashioned Views. Of Night Clubs he had no Personal Experience, and he Felt that he Ought to See for himself the Evils which he Desired to Stamp Out. Disguised in a Curly Wig and a Moustache (which he Secured in Covent Garden) he Repaired on Monday to the "Giddy Goat." His Worst Expectations were Realised. On Tuesday he Tried the "Bubble and Squeak," where he was Greatly Surprised and Distressed. On Wednesday he Obtained Admission to the "Tiddlywinks" and Got Home at Four A.M. On Thursday he Tried the "Giddy Goat" again. On Friday he Took Some Dancing Lessons

from Madame Frou-Frou in Shaftesbury Avenue. On Saturday he became a Life Member of "Pongo's." At the Latter Establishment he Found a Lady Member who Told him that he Danced Awfully Sweetly, and they Had Supper Together. The Bill (Including Eight *Creme-de-Menthes* and Two Bottles of *Veuve Monte Cristo*) Came to Nine Pounds Eleven Shillings and Nine Pence. During the Raid which Occurred in the Small Hours of the Morning the K.C., M.P., Mingled with the Orchestra and was Able to Satisfy the Police that he was a Professional Player of the Ukulele. Thinking Matters Over during the Week-End he Came to the Conclusion that the Case against Night Clubs had been Greatly Exaggerated. The K.C., M.P., therefore Scrapped his Projected Measure, and Substituted a Bill for the Further Amendment of the Law of Property Act, 1925.

MORAL: *Experientia Docet.*

Minister's Powers.

Comments of Lord Justice Scrutton.

The English Housing Act of 1925 confers on the Minister of Health wide powers and subsection (5) of S. 40 of the Act reads: "The order of the Minister when made shall have effect as if enacted in the Act." In *R. v. Minister of Health: ex parte Yaffe*, the Court of Appeal on the 10th April last unanimously, despite such words, held an order of the Minister bad. Lord Justice Scrutton had some hard comments to make of and concerning legislation of this class and the final paragraph of his judgment might with considerable advantage be borne in mind by those responsible for the form of some of our own legislation:

> "As a matter of constitutional importance, I hope that Members of Parliament and Ministers and parliamentary draftsmen will consider whether this form of legislation is really satisfactory. It may be convenient to Ministers not to have to consider whether the powers they are purporting to exercise are within their statutory authority and the powers delegated to them by statute. Parliamentary draftsmen may have got into the habit of inserting this kind of Star Chamber clause either on the instructions of the Minister or as a matter of habit without his instructions. Members of Parliament may not trouble to consider what the sections to which they are giving legislative authority really mean; but simply follow the authority of the Minister and the Government Whip. But I cannot think it desirable that when Parliament delegates authority to affect property and persons only if certain statutory conditions are observed it should then pass clauses which it may be contended allow their delegates to contravene these conditions, and make *ultra vires* orders which cannot be controlled by the Courts which have to administer the laws of the land."

Pleading.

The Days of Demurrers.

The importance of pleadings in the days of Sir Thomas Chitty, the prince of pleaders and the grandfather of the late Sir Thomas Willes Chitty, was much greater than now, as the following illustration narrated in a post-prandial speech by Walton, J., well shows. Mr. Baylis, a former Judge of the Liverpool Court of Passage, in his professional youth drew a declaration in which he alleged that a certain watch had been borrowed by the defendant from the plaintiff and that the defendant had failed in his promise to return it. Thomas Chitty thereupon demurred to the declaration on the ground that it was not alleged that the plaintiff had lent the watch to the defendant. The demurrer was argued before Parke, B., who promptly gave judgment for the defendant with costs. Such triumphs on points of form are no longer possible in these degenerate days.

Consolidation of Statutes.

Attorney-General's Announcement.

The following statement as to a forthcoming Consolidation of the New Zealand Statutes has been made by the Attorney-General (The Hon. Sir Thomas Sidey):

"Towards the end of last year the Government was approached by Mr. Herbert Page, Australasian Manager of Butterworth & Co. (Aus.) Ltd., the well-known firm of law publishers, in connection with a proposal for the publication of a reprinted edition of the New Zealand Statutes. After consultation with the Hon. the Chief Justice, the Law Officers of the Crown, and the New Zealand Law Society, all of whom commended the scheme, the matter was referred to the Government Publications Committee, on which the Treasury, the Government Printing Office, the Department of Internal Affairs, and the Department of Industries and Commerce are represented. On receipt of a favourable recommendation from this Committee, the Government requested the Treasury to negotiate with Mr. Page as to the financial and other terms subject to which the proposal should be given effect to. These terms have been approved both by the Treasury and the Government Printer, and the Government has now completed arrangements with Mr. Page for the publication of the reprint which it is expected will be on sale in about two years' time. The following statement sets out the present position as to the statute-book, and discloses the essential conditions of the undertaking.

"At the present time all the volumes of the Consolidated Statutes of 1908 are out of print as are also the sessional volumes of 1908, 1909 and 1911. Though much of the legislation contained in the Consolidated Statutes of 1908 has been repealed, a considerable proportion is still in force, and the Government has taken the view that it is under an obligation to make the Statutes available for lawyers and others who may desire to purchase them.

"The arrangement now arrived at between the Government and Butterworth & Co. (Aus.) Ltd., is for the publication of an annotated edition of the Public General Acts now in force with all amendments incorporated in their appropriate places, omitting only those enactments the reprint of which would serve no useful purpose (for example those provisions of the annual Washing-up Bills that relate to special matters and do not amend the general law).

"It has been arranged that the editorial work in connection with the reprint shall be done by Butterworth's editorial staff, who have just completed a similar work in twenty volumes covering the complete Statutes of England, classified and annotated in continuation of *Halsbury's Laws of England*. The New Zealand reprint will be prepared on similar lines to the work above referred to and will be annotated in a similar manner. In addition to the text of the statutes it will comprise notes of cases, editorial notes showing (where such notes serve a useful purpose) changes that have taken place in the growth of the statute law on any particular matter, and the reasons underlying these changes, as well as notes on the common law, etc. Though the editorial work will mainly be done by Butterworth's editorial staff, the printing and publication will be carried out by the Government Printing Office in Wellington.

"In connection with the reprint it is proposed to set up a New Zealand Editorial Board to whom the work will be submitted and whose certificate to the effect that the work has been satisfactorily carried out will be required before publication is proceeded with. It is the Government's intention to appoint as members of the Board, the Honourable Sir Thomas Sidey, Attorney-General, the Honourable Sir Michael Myers, K.C.M.G., Chief Justice, Mr. Arthur Fair, K.C., Solicitor-General, and Mr. J. Christie, LL.M., Parliamentary Law Draftsman. It is further intended that Mr. Christie shall proceed to London immediately upon the close of the present session of Parliament to confer with Butterworth's editorial staff.

"The work will probably comprise seven royal 8 vo. volumes and will be available to the public at sixteen guineas."

Butterworth's Statutes Annotations.

Messrs. Butterworth & Co. (Aus.) Ltd., approached in regard to the effect on the utility and value of their existing Statutes Annotations of the proposed Reprint, advised that their system of annotations was designed in anticipation of a consolidation coming out, and that their Annotations will be just as valuable after the publication of the Consolidated Reprint as they are to-day. They intend, after the Consolidated Reprint is available, to add to their Annual Supplements an additional section which will enable them to keep the Consolidated Reprint up to date with the most perfect annotations. All of the original subscribers to the Annotations will benefit in regard to the price of their Annual Annotations after the Consolidated Reprint is issued.

Bills Before Parliament.

Local Authorities Empowering (Relief of Unemployment) Extension. (Hon. Mr. Forbes). Extension to 30th June, 1930, of period within which local authorities may borrow money in relief of unemployment.—S. 2 (1). Local Authorities Empowering (Relief of Unemployment Extension Act, 1929, and S. 2 (1) of Act of 1928, consequentially repealed.—S. 2 (2). (Passed by both Houses: assented to 30th June, 1930.)

Imprest Supply. (Hon. Mr. Forbes). Imprest grants of £2,973,000 authorised out of funds and accounts in First Schedule, and imprest grant of £302,000 authorised out of accounts in Second Schedule.—S. 2. Charging of grants.—S. 3. (Passed by both Houses: assented to 30th June, 1930.)

Rating Amendment. (Mr. Mason). S. 47 of Rating Act, 1925, repealed.—S. 2. Repeal retrospective from passing of principal Act, but not to affect any judgments heretofore given or any *lis pendens*.—S. 3.

Coroners Amendment. (Mr. Macmillan). Supreme Court, upon application made by Attorney-General, may in certain cases order an inquest or fresh inquest to be held and quash inquisition of previous inquest. Power conferred by Act to apply to every inquisition found by any Coroner on or after 1st January, 1928. Nothing in Act to restrict existing powers of Supreme Court.—S. 2.

Local Bills.

City of Christchurch Sinking Fund Commissioners Empowering.
Masterton Trust Lands Amendment.
Waiapu County Council Empowering.

Legal Literature.

Riddell and Holmes's Destitute Persons Acts.

Second Edition: By C. A. L. TREADWELL. (pp. xii; 107; 18; Butterworth & Co. (Aus.) Ltd.).

Every year many thousands of cases relating to the summary separation of husbands and wives, to the making of affiliation orders and to the maintenance of children and destitute persons are litigated in the Courts of the Dominion. An adequate text-book on these subjects is a necessity. It is seventeen years since the first edition of *Riddell and Holmes's Destitute Persons Acts* was published, and the law has since undergone a number of important changes. In undertaking the authorship of a second edition of the work, Mr. C. A. L. Treadwell has achieved a very satisfactory result.

The whole text has been revised and the case law brought up to date. Amongst a number of useful features is an important chapter dealing fully with the nature and the degree of corroboration necessary in affiliation proceedings. Another special article discusses at length the question of persistent cruelty and reviews the case law on that subject.

The book is well indexed and well printed, and the whole result is a workmanlike and useful production.

E. PAGE, S.M.

New Books and Publications.

Annual Survey of English Law, 1929. (Sweet & Maxwell Ltd.). Price 12s. 6d.

Gibson's Practice of the Courts. Fourteenth Edition. By A. Weldon and R. L. Mosse. (Law Notes). Price 24s.

The Local Government Act, 1929 including Poor Law Act, 1930 and Public Assistance Order, 1930. By A. M. Trustram Eve, B.A. (Oxon.) and F. A. Martineau, M.A. (Cantab.). (Knight & Co.). Price 47s.

Ringwood's Bankruptcy Law. Sixteenth Edition. By A. Roper. (Sweet & Maxwell). Price 23s.

The Law of Aviation. By G. D. Nokes, LL.D., and H. P. Bridges, LL.D. (Chapman & Hall). Price 15s.

Poor Law Statutes and Orders. Second Edition. By Herbert Davey. (Stevens & Sons and Hadden Best & Co.). Price 35s.

Evidence of Service Abroad. By Herbert Hinton. (Stevens & Sons). Price 12s.

The French Civil Code. Revised Edition. By Henery Cachard. (Stevens & Sons). Price 24s.

The Law List of Australia and New Zealand, 1930. (Butterworth & Co. (Aus.) Ltd.). Price 20/-.

The largest annual income earned at the English Bar is reputed to be that of Austin who, in 1847, at the Parliamentary Bar, made a total of about £100,000.

Wellington Law Students' Society.

The following case was argued recently before Mr. A. Gray, K.C. "A solicitor's chauffeur who was driving his employer's car without a passenger, from the office to his employer's garage, observed one of his employer's clients going in the same direction and offered him a lift. The client entered the car and was badly injured in an accident due to the chauffeur's carelessness. The client sues the solicitor for £1,000 damages on the above facts."

Clark for plaintiff. Master liable for torts of servant during course of employment. Two conditions: (1) relationship and (2) course of employment. Master also liable for improper modes of doing what actually authorised: *Barwick v. E. J. S. Bank*, L.R. 2 Ex., at p. 266; *Limpus v. London General Omnibus Co.*, 1 H. & C. 526. Three possibilities: Act (1) actually or impliedly authorised; (2) unauthorised; (3) forbidden. Where a deviation by servant for own purposes master not liable. *Venables v. Smith*, 2 Q.B.D. 279; *Patten v. Wray*, 2 C.B. (N.S.) 606; *Gracey v. Belfast Tramways Co.*, (1901) 2 I.R. 322. These cases distinguishable from present set of facts. Master exempt only when servant exclusively on own business.

Foot in support. The offeror in cases of gratuitous service is liable if loss is suffered through negligence. See *Coggs v. Bernard*, 2 Ld. Raym. 909; *Elsee v. Gatward*, 5 T.R. 143; *Lygo v. Newbold*, 9 Ex. 302, approved in *Harris v. Perry and Co.*, (1903) 2 K.B. 219; *Pratt v. Pattrick*, (1924) 1 K.B. 488; *Rex. v. Jones*, 22 L.T. 217. These cases in point in present case. Defendant vicariously liable for negligence of servant rendering a gratuitous service in course of employment.

Bannister for defendant. Course of employment a condition of liability of defendant. Liability when act (1) expressly or impliedly authorised or (2) an unauthorised mode of performing an authorised act: *Salmond on Torts*, 7th Edition, page 114; *Clerk and Tindsell on Torts*, 8th Edition, p. 69. Here no evidence of authorisation. Act of servant neither for master's benefit nor dictated by necessity. Cases quoted not in point for two reasons: (1) facts differed; (2) there a servant was performing his master's business in an authorised mode.

McCarthy in support. No implied authorisation in this case. Court has implied such only where the act necessary for the preservation of the master's property: See *Clerk and Lindsell on Torts*, 8th Edition, 74; *Houghton v. Pilkington*, (1912) 3 K.B. 308. *Harris v. Perry and Co.* (*cit. sup.*) distinguishable: (1) there master aware of practice of servant in carrying passengers and took no step to prevent it; (2) plaintiff there an employee. Unless plaintiff could here show an emergency plaintiff must fail.

Mr. A. Gray, K.C., delivering "judgment" recapitulated the facts. The servant was ostensibly in course of employment. No evidence that chauffeur in habit of driving clients, but he took it upon himself to offer a ride to plaintiff. To fix liability there must be in cases of negligence a legal duty to take care towards some certain person. Here plaintiff was not owed any duty by defendant; the former was a volunteer, entirely without master's knowledge. Liability, if conceded, might be enormously extended. If plaintiff had been bystander and had been injured, the liability of employer would be indisputable. *Houghton v. Pilkington* (*cit. sup.*) was very much in point, and even stronger than the present case. That case was referred to in *Hayward v. Drury Lane Theatre Ltd.*, (1917) 2 K.B. 899, at p. 905.

Rules and Regulations.

Animals Protection and Game Act, 1921-22. Animals Protection and Game Regulations, 1930.—Gazette No. 46, 24th June, 1930.

Opticians Act, 1929: Opticians Regulations, 1930—Gazette No. 48, 26th June, 1930.

Sale of Food and Drugs Act, 1908. Amended Regulations.—Gazette No. 48, 26th June, 1930.

Plumbers' Registration Act, 1912: Certain Boroughs and Town Districts removed from the list of districts and localities within which all sanitary plumbing shall be done by persons registered under the Act.—Gazette No. 48, 26th June, 1930.