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"To my mind, principles and decisions should change with the times."

—*Mr. Justice McCardie.*

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The Proposed Rules Committee.

In England, by s. 99 (4) of the Supreme Court of Judicature Act, 1925, a Rules Committee is constituted, consisting of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, four other Judges, two practising barristers, and two practising solicitors. The four other Judges and the barristers and solicitors are appointed by the Lord Chancellor and hold office for the time specified in the appointment. The two barristers must be members of the General Council of the Bar; of the two solicitors one must be a member of the Council of the Law Society and the other a member of the Law Society and also of a provincial Law Society. To this Rules Committee is delegated the power of making all manner of rules relating to the procedure and the practice to be followed in the Court of Appeal and the High Court. The Committee has wide powers including—opponents of our Judges' restrictions of 1924 on trial by jury in civil actions might notice—power to prescribe "in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury." The Committee has not, however, curiously enough, power to make rules under either the Bankruptcy Act or the Companies Act.

We have on more than one occasion in these columns suggested the desirability of the constitution of a similar body in this country, and we believe that this view is held by the majority of the profession. At all events, Sir Thomas Sidey's intimation at the recent Auckland Conference of his intention to bring down a Bill making such provision met with the obvious approval of those present. The Bill has now been duly introduced by the Attorney-General and a detailed summary of its provisions will be found elsewhere in this number.

The Rules Committee for which the Bill makes provision is to consist of the Chief Justice, four other Judges of the Supreme Court, the Attorney-General and three persons being barristers or solicitors. The Chief Justice selects the four Judges; the "three persons being barristers or solicitors" are to be nominated by the Council of the New Zealand Law Society and to be approved by the Chief Justice. The members of the Committee, other than the Chief Justice and the Attorney-General, are appointed for a term of three years, but are eligible for re-appointment. It is only perhaps a small matter, but we would like to see it expressly made a condition that the "three persons being barristers or solicitors" should be members of the Law Society. While, no doubt, in practice, they will always be so, we see no reason why non-members of the Law Society should be even eligible for appointment.

While in constitution similar to the English Committee, our Committee is not to have power itself to make rules. The rule-making power, under the Bill, is vested in the Governor-General in Council, but the concurrence of the Chief Justice and four other members of the Committee, one, at least, of them a Judge, is made necessary. However, the difference is probably a matter of no importance, for even in England the Rules Committee is, through the Lord Chancellor, subject to the control of the Executive. Under our Bill the power to make rules under the Judicature Act, is transferred to the Governor-General in Council with the concurrence of the Rules Committee, as is also the power to make rules of procedure in relation to proceedings in the Supreme Court and Court of Appeal at present conferred by a dozen Acts listed in the Schedule. At present these Acts between them provide for a miscellany of rule-making authorities—sometimes three or more Judges including the Chief Justice, sometimes three or more Judges without express reference to the Chief Justice, and sometimes simply two Judges—and one of the advantages of the Attorney-General's measure is to introduce a very desirable uniformity. In passing, we wonder why the Bankruptcy Act is omitted from the Schedule of Acts referred to? It may simply be an oversight, or the position may be thought to be sufficiently covered by the existing provisions of the Act which require rules thereunder to be made in manner prescribed by the Judicature Act, but if the latter view is taken by the Law Drafting Office it is difficult to explain the insertion in the Schedule of the Crown Suits Act which contains provision in all material respects identical.

There cannot be the slightest doubt that the existing rules under our Judicature Act are full of defects and anomalies, and the same applies to the Divorce Rules, the Bankruptcy Rules, and to the rules made under the Companies Act. Defects and anomalies expose themselves in most cases only when the rules are put to the test; found one day, there is always a tendency for them to be forgotten the next, and thus the *status quo* remains. One reason, and probably the chief reason, why little has for so long now been done to remedy the position is the fact that there has been no readily accessible body to whom suggestions can be made, and a change can with some confidence be anticipated under the new regime. We are not sure, however, that piecemeal amendments made from time to time as the necessity for them appears will, as regards the rules under the four statutes last mentioned, meet the case. These particular sets of rules seem to us to demand, as soon as possible, first a careful comparison with the corresponding English rules, and then a complete and thorough revision. We venture, however, to express the hope that too much will not be attempted in the name of simplification or "law reform." To the layman, our Supreme Court Code may seem to contain a number of unnecessary rules, but underlying each one of them is generally some very sound reason. There is at present a tendency to laxity in matters of pleading which is not, in our view, deserving of further encouragement. While it is doubtless in general right that a litigant should not be able to lose his case through mere non-compliance with a bare technicality, the fact should not be lost sight of that very many matters of procedure are not bare technicalities but matters of importance and substance.

Supreme Court.

Myers, C.J. May 17; June 16, 1930.
Palmerston North.

DANNEVIRKE WOODWARE CO. LTD. AND OTHERS v. DANNEVIRKE BOROUGH.

Wages Protection and Contractors' Liens—Subcontractors—Priority of Claims—Contract to Erect Building for Lump Sum—No Provision in Contract for Progress Payments—Owner Making Progress Payments but Retaining more than One-Fourth Contract Price—Notices of Claims of Lien Given by Several Subcontractors—Subcontractor First Giving Notice Not Entitled to Priority as to Amount Retained in Excess of One-Fourth Contract Price—No Moneys Immediately Payable by Owner to Contractor when Notice Given—Wages Protection and Contractors' Liens Act, 1908, Ss. 56, 58, 59, 61.

Series of summonses under the Wages Protection and Contractors' Liens Act, 1908, brought by five plaintiffs, the Dannevirke Woodware Co. Ltd., J. Malley, W. Anderson, Stewart Brothers, and P. McIlvride & Son, all sub-contractors, claiming charges on moneys owing or payable by the defendant Borough to one Christiansen under a contract for the erection of a grandstand in the Domain at Dannevirke. The facts appear in the report of the judgment.

Dorrington for Dannevirke Woodware Co., Ltd., and P. McIlvride & Son.

Gibbard for W. Anderson and Stewart Bros.

Lloyd for Malley.

MYERS, C.J., said that the contract was dated 29th October, 1929, and the contract work was completed on 16th April, 1930. The contract price was £1,485, and there were extras amounting to £69 19s. 0d., the total cost being, therefore, £1,554 19s. 0d. The contract was somewhat crudely framed and consisted merely of an agreement and specifications without any usual general conditions. The contract was unusual in that it contained no provision for progress payments. Strictly speaking, therefore, the contractor was not entitled to receive any portion of the contract price until the work was completed. The Borough, however, made progress payments of £200 on 9th December, £150 on 20th December, and £500 on 1st February, before receiving any notices from sub-contractors under the statute, and there remained in the hands of the Borough £704 19s. 0d. If there had been no notices of liens or charges up to the time of the completion of the work the Borough could, so far as the statute was concerned, have paid three-fourths of the contract price, and need under S. 59 (2) have kept in hand only one-fourth, that was to say £388 14s. 9d. The Borough had in fact £316 4s. 3d. in excess of such one-fourth. Counsel had agreed that the sum held by the Borough should be regarded as having been paid into Court under S. 70 of the Act. The Borough submitted to the judgment of the Court. It was unnecessary in view of the arrangement made between counsel for the various parties that His Honour should make a formal order for consolidation under S. 81, and His Honour would proceed to deal with the cases and make a final order in accordance with the arrangements made at the hearing. His Honour held on the facts that the respective plaintiffs had established their claims to the following extent: Dannevirke Woodware Co. Ltd. £702 15s. 5d., Malley £210 0s. 0d., Anderson £37 15s. 0d. P. McIlvride & Son £25 0s. 0d., Stewart Bros. £94 0s. 0d.

The question accordingly arose, the amount in the hands of the Borough being insufficient to satisfy the claims, as to how the fund in hand was to be apportioned. The Dannevirke Woodware Co. Ltd. contended that it was entitled to priority over the other subcontractors in respect of the amount held by the Borough in excess of one-fourth of the total contract price. That contention was based upon the fact that the company had served its notice on 4th April, prior to notice being given by any of the other subcontractors. McIlvride & Sons and Stewart Bros. gave their notices on 5th April, Malley on 7th April, and Anderson on 10th April. Mr. Dorrington based his contention upon what was said by Edwards, J., in **McAndrew v. Tudehope,** 24 N.Z.L.R. 851, and **Taupo Totara Timber Co. Ltd. v. Smith and Egden,** 30 N.Z.L.R. 77. His Honour quoted from the judgment of Edwards, J., in the latter case, at pp. 80 and 81, and said that, applying those observations to the present case, it was clear that Mr. Dorrington's contention could not be upheld as at the time when the company's notice of claim was given there were no moneys immediately payable by the Borough to the contractor, nor under the contract would any moneys become payable after the company's notice was given until the whole of the contract work was completed. His Honour saw no material difference between the position here and that in **McAndrew v. Tudehope** (*cit. sup.*). The same result, therefore, followed, namely that there was no priority of one subcontractor over another and that all who had given their notices, taken the requisite proceedings, and established their claims to a charge, were entitled to the fund rateably according to the amounts of their respective claims. If Mr. Dorrington's contention was sound, it would be possible, inasmuch as notice of the claim of charge might be given under S. 56 although the work was not completed, to give notice immediately after the commencement of the work or the supply of materials, and then claim priority over all other subcontractors in respect of moneys which did not become payable until the completion of the whole of the contract work in so far as those moneys exceeded one-fourth of the total contract price. In His Honour's opinion that was not the meaning or effect of the statute. Subject to the payment out of the fund of costs to the various plaintiffs as fixed by His Honour, the various plaintiffs were entitled to the fund rateably in proportion to the amounts of their respective claims as already held to be established.

Solicitors for Dannevirke Woodware Co. Ltd. and P. McIlvride & Son: **P. W. Dorrington,** Dannevirke.

Solicitors for Anderson and Stewart Bros.: **Gibbard and Yortt,** Dannevirke.

Solicitors for Malley: **Lloyd and Lloyd,** Dannevirke.

Myers, C.J. May 14; June 21, 1930.
Palmerston North.

IN RE STEPHENS.

Family Protection—Time for Application—Application for Extension by Widow, Daughter, and Son—Estate Insolvent at Testator's Death But Owing to Successful Conduct of Business by Applicants and to "Nursing" of Real Estate for Sixteen Years Becoming Valuable—Delay in Making Application Not Satisfactorily Explained—Extension of Time Refused—No Manifest Injustice—Applicants Not Entitled to Further Provision as Circumstances to be Regarded at Date of Testator's Death When Estate Insolvent—Family Protection Act, 1908, S. 33.

Originating summons under Part II of the Family Protection Act, 1908, by the widow, a daughter (Olga) and a son of H. H. Stephens, deceased. The testator died on 1st April, 1913, having made his will on the previous day just prior to undergoing a serious surgical operation. Probate was granted on 7th June, 1913, to one Turton, one of the executors, the other executors having renounced. On the same day an order was made appointing the widow and Mr. Barltrop trustees in place of Turton. In addition to the plaintiffs the testator left also a widowed daughter, Mrs. Minogue, for whom no provision was made in his will, but she seemed to be well able to earn her own living and though served with the proceedings did not appear. The present proceedings were not commenced until 8th November, 1928, and the plaintiffs applied (1) for an order that the time limited for making an application under Part II of the Act be extended, and (2) for an order under S. 33 making further provision out of the testator's estate for them and each of them. By his will the testator gave all his real and personal estate to his trustees upon trust for sale and conversion in their discretion, with interim powers to lease and to carry on any business of the testator and (in effect) upon trust for the widow during her life or until re-marriage. Upon her death or re-marriage the estate was to be held upon trust to pay the income in equal shares to the daughter, Olga, and the son, for life, and if either of the two children should die without issue then to pay and apply the whole of the income to the survivor during his or her life, and if either of the two children should die leaving issue then to apply one half of the income to the survivor and the other half equally between the children of the deceased child. Upon the death of both the son and the daughter, the estate was to go, half to the children of the daughter and half to the children of the son. If only one of the two children should leave issue the whole estate was to be divided equally amongst such issue. In the event of both the son and the daughter dying without

issue then the estate was to be divided into two equal parts, one of such parts going to the testator's brother Evan Stephens or his issue if he was then dead, and the other part between the children of the testator's brother William Stephens. Prior to his death the testator had carried on a storekeeping business at Awahuri. In addition to that business he seemed to have been a speculator in real estate. When he died it was found that his estate was insolvent, the accounts filed for death duty purposes shewing an excess of liabilities over assets to the amount of £725 11s. 11d. The widow with the assistance of the daughter, Olga and, to some extent, of the son, continued to carry on the storekeeping business. For some years it was carried on successfully, but it had shown a loss during each of the last two or three years. By reason partly of the successful conduct of the business during the greater part of the period since the testator's death and partly of the "nursing" of the real estate assets so as to receive the benefit of the unearned increment, the estate was now worth about £4,000 after payment of all debts and liabilities. The widow had assets of her own worth about £3,700 net. The daughter and son had also saved a little money, the former £400 and the latter £200. The daughter, who was about 30 years of age, was said to be in delicate health, and in addition suffered from the congenital disability of having but one hand, her right hand being missing. In addition to helping her mother in the business, she had been earning £103 per annum as Postmistress at the Awahuri Store, though it was suggested that if the store were sold or the business discontinued she might lose that position and might have some difficulty in obtaining another. The son, aged 27 years, was said to be of inferior mentality and to require some attention and supervision. He had, however, assisted in the carrying on of the business and had been able to save £200. Both the daughter and the son were unmarried.

Cullinane for plaintiffs.
Barltrop in person.
Kelly for Public Trustee, representing other interests.

MYERS, C.J., said that counsel for the plaintiffs relied upon such decisions as **In re Smith, deceased,** (1927) N.Z.L.R. 342, where an application for maintenance under Part II of the Act was allowed to be made after a lapse of seven years after testator's death; and **In re Wakelin, deceased,** (1927) N.Z.L.R. 846, where a similar course was adopted after about 12 years had elapsed since the death of a testator. His Honour had carefully considered those cases but had come to the conclusion that he could not extend the time in the present case. In applications under S. 33 it had been said by the Court on more than one occasion that the circumstances had to be regarded as at the date of the testator's death. In the present case if an application had been made soon after the testator's death it was quite plain that no order could have been made because as far as could be seen there was nothing to which such an order could attach. If, on the other hand, one could look at the position as at the time when the application was made, then the fact was that the widow had £3,700 of her own and an order would not, His Honour thought, be made in her favour; and as far as the other plaintiffs were concerned they would each be entitled upon the death of the widow to one half of the income so that each should receive not less than £100 per annum. It was suggested that it was only comparatively recently that the plaintiffs ascertained that they had a right to make an application under the Family Protection Act. So far as the widow herself was concerned His Honour could not accept that view of the position because she admittedly was aware of her rights for two years prior to the making of her first affidavit (9th November, 1928), her reason for not commencing proceedings earlier being that she was afraid that, if she did, claims would be made against the estate and herself personally in respect of certain old liabilities which, however, were settled between the date when she said she became aware of her rights and the date when her affidavit was made. So far as the other plaintiffs were concerned it was said that they became aware of their rights only about six weeks before the date of the affidavit. His Honour found it difficult to accept that statement. His Honour could not help thinking that they must have known of their rights at the same time as their mother, and that they delayed proceedings for the same reason. His Honour thought that the real reason why proceedings were not taken earlier was, not that the plaintiffs were unaware of their rights, but that so far as could be seen the estate was either insolvent or of little or no value, and that therefore any proceedings would be useless. In **Re Milne,** (1917) G.L.R. 408, Sim, J., refused to grant an extension of time on the ground that there had been long and inexcusable delay in commencing proceedings after the plaintiff became aware of her rights. In **Newman v. Newman,** (1927) N.Z.L.R. 418, a case before the Full Court, it was said that, while each application for an extension of time should be dealt with on its own merits, so great an extension as was asked for in that case, namely after about ten years, should be granted only in cases in which a refusal would lead to manifest injustice. In **Sheehan v. The Public Trustee,** (1929) G.L.R. 478, Kennedy, J., reviewed the various authorities and refused to allow an extension on an application made about seven years after a testator's death where he thought that there had been long and inexcusable delay and it did not clearly appear that the refusal would in the circumstances result in a manifest injustice. In the present case His Honour came to the same conclusion. The delay had been great; it had not to His Honour's mind been satisfactorily explained and was, therefore, inexcusable. The refusal to extend the time could not in His Honour's view result in a manifest injustice because His Honour did not think the case was one where if an extension of time were granted an order for further provision out of the estate could properly be made in favour of any of the plaintiffs. The application for extension of time was therefore refused.

Solicitors for plaintiffs: **Kelly and Cullinane,** Feilding.
Solicitor for defendant: **J. E. Barltrop,** Feilding.

Myers, C.J.
Blair, J.

April 29; May 23, 1930.
Wellington.

PUBLIC TRUSTEE v. JELLICOE AND JELLICOE.

Power of Appointment—Marriage Articles—Public Trustee—Marriage Articles Providing That Income of Trust Property to be Settled on Husband During Joint Lives of Spouses and Then on Wife for Life and After Wife's Death Capital and Income to be Held in Trust for Such Children of Marriage as Wife Should Appoint and in Default of Such Appointment for Such Person or Persons as Wife Should Appoint—Provision for Certain Children Equally in Default of Appointment Among Children Deleted and Alteration Signed by Both Parties—*Semble* No Presumption That Alteration Made Before Execution—General Power Subordinate to Limited Power and Not Capable of Exercise so long as Possibility of Children—Presumption of Law That Wife Past Child-bearing—Permissive and Not Imperative Order Made Authorising Trustee to Act on Directions of Beneficiaries *in esse*—Public Trustee—Acceptance of Trust—Execution by Public Trustee of Deed Not Necessary—Public Trust Office Act, 1908, Ss. 4, 6, 13, 47—Public Trust Office Amendment Act, 1917, S. 7.

Originating summons for the determination of certain questions arising on the construction of the marriage articles of the defendants. The articles were dated 1st November, 1910, and provided as follows: "In consideration of a marriage which is intended forthwith to be solemnised between the said Edwin George Jellicoe and Lydia Florence Bainbridge it is hereby agreed as follows: 1. A settlement of all the share of the said Edwin George Jellicoe whether in possession reversion or expectancy and whether vested or contingent of or in the real and personal estate of the late Mary Kate Jellicoe deceased including Downs house and all my furniture and effects horse and carriage therein shall as soon as may be after the said intended marriage be prepared settling all the said property as follows—to pay the income of the said trust premises during the joint lives to the said Edwin George Jellicoe and after his death to the said Lydia Florence Bainbridge for her life and after the death of the said Lydia Florence Bainbridge in trust as well as to capital as income for all or any of children of the said intended marriage in such shares and manner in all respects as the said Lydia Florence Bainbridge shall by deed or will or codicil appoint and in default of and subject to any such appointment [*in trust for all or any child or children of the said intended marriage and if more than one in equal shares on attaining twenty-one years or being a daughter marrying and if there shall be no child then] in trust for such person or persons and for such purposes as the said Lydia Florence Bainbridge shall by deed or will or codicil appoint and in default of appointment in trust for the next of kin." The agreement further provided that the parties should when required execute such a settlement and all such assurances as might be necessary or proper in order fully to effectuate the said settlement and that until such settlement

*The words within these brackets appeared originally in the document, but were struck out and the alteration initialled by the parties.

and instrument should have been executed the persons in whom the settled property was vested should hold the same upon the trusts and subject to the powers and provisions of the agreement. It was also provided that the power of appointing trustees should be vested in both parties during their joint lives and the survivor of them during his or her life. The alteration in the articles as shown above was signed by the parties. The defendants had been married for twenty years and the wife was now 54 years of age. There had been no issue of the marriage. No formal deed of settlement such as was contemplated by the articles of agreement had ever been executed. The main contention arose because the defendants had purported to exercise the wife's general power of appointment in favour of herself and her husband, and the question arose whether the trust was ended by such exercise of the general power of appointment or whether the trust still subsisted.

A further question arising under the originating summons was whether the powers, duties, or status of the Public Trustee in respect of the trust estate vested in him were in any manner affected or invalidated by the fact that he had not executed a deed accepting the trust. The Public Trustee had acted as trustee ever since 1916, but had not executed a deed accepting appointment as trustee.

Gray, K.C. and **O'Leary** for plaintiff.
Jellicoe for defendants.

MYERS, C.J., delivering the judgment of the Court, dealing with the question whether the appointment of the Public Trustee was affected by his failure to execute a deed accepting the trust, said that the Court could find no provision in the Public Trust Office Acts which made the execution of a deed by the Public Trustee necessary for the valid acceptance by him of a trust. Mr. Jellicoe referred to S. 47 (3) of the Public Trust Office Act, 1908, which enacted that the evidence of acceptance or rejection of any appointment should be conclusive if such acceptance or rejection was in writing signed by the Public Trustee. It did not, however, follow from that, especially having regard to the provisions of S. 11 of the Act, that an acceptance which was not in writing was invalid, or that there could be no acceptance other than in writing signed by the Public Trustee. S. 47 (3) dealt only with the matter of proof and was merely an evidentiary provision. Apart from the evidence contained in the affidavits filed on behalf of the parties certain correspondence was by consent handed to the Court during the argument. One of the letters so handed to the Court was a letter from Mr. T. S. Ronaldson to Mr. Jellicoe, dated 5th December, 1926, in which Mr. Ronaldson, writing in his capacity of Deputy Public Trustee, said: "I have now assumed the management of the settlement property." At that time S. 6 of the Public Trust Office Act, 1908—since repealed by the Public Trust Office Amendment Act, 1917—was in operation. That section specially provided for the appointment of a Deputy Public Trustee, and sub-section (3) was as follows: "No person shall be concerned to inquire whether or not any occasion has arisen requiring or authorising such Deputy Public Trustee to act as such Deputy, or as to the necessity or propriety of such appointment; and all acts or things done or omitted by such Deputy Public Trustee shall be as valid and effectual and shall have the same consequences as if the same had been done or omitted by the Public Trustee." Under S. 4 (2) of the Act of 1908 it was provided that the signature of the person for the time being holding the office of Public Trustee, or of Deputy Public Trustee, should be judicially taken notice of without further proof. His Honour referred also to S. 13 (2). Apart from Mr. Ronaldson's letter (which was in itself a sufficient answer to the contention made by the defendants) there was, in the Court's view, ample evidence to show that the appointment was accepted in accordance with the provisions of the Statute, and after the Public Trust Office Board had duly consented to such acceptance. The case of **Re Shaw,** 110 L.T. 924, on which Mr. Jellicoe relied, was decided under an English statute and rules made thereunder the provisions of which were quite different from those of the New Zealand Act, and was clearly distinguishable.

Dealing with the question whether the exercise of the wife's general power of appointment in favour of herself and her husband put an end to the trust, the Court said that Mr. Jellicoe had argued that the trust was ended whereas the Public Trustee had contended that so long as there was a possibility of children their interests could not be excluded by exercise of the general power of appointment, and the trust therefore still subsisted. Mr. Jellicoe contended first of all that the words shown as struck out in the articles must be regarded as if they had never been there, and he relied upon a presumption that the erasure was made before the document was executed. Mr. Gray, on the other hand, contended that though that presumption arose in the case of a deed, it was different where the document was an instrument other than a deed: **10 Halsbury's Laws of England,** 431 and the cases there cited; **Earl of Falmouth v. Roberts,** 9 M. & W. 469, 471; **Addison on Contracts,** 11th Edn., 191; **Taylor on Evidence,** 11th Edn., 1214. The defendants had submitted no evidence as to when the erasure was made, and, in the circumstances, especially as the erasure had relation to the interests of possible children for whose benefit the articles were presumably entered into, it might be that the presumption relied on by Mr. Jellicoe could not be made in the present proceeding though it might be open in any other proceedings to establish by evidence that the erasure was made prior to execution. The point as to when the erasure was made did not, however, seem to the Court to be really material in the present case, and the Court did not think it necessary to express any opinion upon it, but had referred to it because it was greatly stressed by Mr. Jellicoe, and in order to indicate that it had not been overlooked.

In construing a document of the kind under consideration, regard must be had to what must at the date of execution have been in the contemplation of the parties. Mr. Jellicoe embarrassed himself in argument by paying regard mainly to the present position as disclosed by the affidavits. At one stage their Honours understood the contention of the defendants to be that, on the true construction of the document, and treating the erased words as not there, there was a limited power of appointment, but without any implication of a gift to children, and that such limited power was overridden by the subsequent general power. As the argument proceeded, however, their Honours gathered that such was not the contention, and that the contention was that Mrs. Jellicoe had a general power of appointment which she could exercise at any time but which could not take effect while there was a possibility of children and would be divested in the event of any children being born. But if the exercise of the general power could not take effect while there was a possibility of children, or if the birth of a child would divest the interest of any appointee under the general power, that seemed to their Honours to be tantamount to an admission of the Public Trustee's contention that the general power was subordinate to the special power in favour of children. It seemed to their Honours first of all that if clause (1) of the articles had ended with the word "appoint"—being the last word in the first power of appointment—the rule stated in **Farwell on Powers,** 3rd Edn. 528 would apply, and the case would be that of something more than a mere power: it would be the case of a gift to children with power to Mrs. Jellicoe to select, or to such of the children as Mrs. Jellicoe should select by exercising the power. The case, therefore, differed from **In re Weekes' Settlement,** (1897) 1 Ch. 289 and **In re Combe,** 94 L.J. Ch. 267, cited by Mr. Jellicoe. In the present case the document could and should, in their Honours' view, be read as in **In re Hughes,** (1921) 2 Ch. 208, as implying a trust for all the children subject to the power of selection.

Their Honours next proceeded to express their view as to the construction of the document on the assumption that the erasure was made prior to execution and that the instrument had to be read as if the erased words had never been there. Even on that assumption the defendants were still, their Honours thought, in a difficulty. Either the rule as stated in **Farwell on Powers** still applied, or else it must be contended that the general power at the end of clause (1) overrode the previous special power. Such a result as that second contingency could hardly have been contemplated by the parties because it would have meant that the day after the marriage the wife, had she so wished, could have (subject of course to the life interests) irrevocably appointed the property to a stranger and defeated the very object for which marriage articles were intended: **25 Halsbury's Laws of England,** 538; **Kentish v. Newman,** 1 P. Wms. 233; **Lewin on Trusts,** 13th Edn. 78, citing **Blackburn v. Stables,** 2 V. & B. 367 at pp. 369 and 370; **Targus v. Puget,** 2 Ves. Senr. 194. There was authority which showed, in their Honours' opinion, that in such circumstances the Court could construe the articles as if the contemplated deed of settlement had been executed and had contained all proper provisions which might reasonably be assumed to have been contemplated by the parties: **Glenorchy v. Bosville,** Cas. t. Talbot 3; **Legg v. Goldwire,** *ibid.* 20; **White and Tudor's L.C.,** 9th Edn., Vol. 2, pp. 720, 728, *et seq.* If such a deed had been executed their Honours felt that the interests of children would have been properly protected thereby. But, even without resort to the principle enunciated in the authorities cited, and construing only the marriage articles themselves it might well be said that they should be construed as subordinating the right of the exercise of the general power of appointment to the power of appointment in favour of children. In **Bristow v. Warde,**

2 Ves. Junr. 336, it had been agreed that funds, partly of the intended wife and partly of the intended husband, should after her death be applied in such manner as the intended husband should appoint, and for want of such appointment should be divided among the issue of the marriage. On the principle that the articles were made to secure a provision for the intended wife and the issue of the marriage, the Lord Chancellor held that the husband's power was not indefinite but was confined to the issue. That case, however, must not be considered as establishing a general rule to the effect that it was impossible by any words to give a general power in a marriage settlement which should defeat the limitations in favour of children: **Peover v. Hassel,** 1 J. & H. 341. As was pointed out in **Vaizey on Settlements,** 183, the Lord Chancellor in **Bristow v. Warde,** (*cit. sup.*) appeared to have treated the instrument before him as executory, and the great distinction between an executed settlement and executory articles was referred to in **Peover v. Hassel** (*cit. sup.*) at p. 351. **Bristow v. Warde** had been similarly distinguished in other cases, for example **Lanause v. Malone,** 3 Ir. Ch. R. 356. The present case was not that of a general power of appointment followed by a limited power—**Farwell on Powers,** 3rd Edn. 118 *et seq.*—but of a limited power followed by a general power; and, as was said in **Sugden on Powers,** 8th Edn. 439, where the intent could be collected, a general power in terms might be cut down to a particular purpose. That was not the present case, but the authorities their Honours thought were useful as assisting to the conclusion that the general power could not be effectively exercised if there were children of the marriage, or so long as there was the possibility of children. Since the argument Mr. Jellicoe had referred the Court to the provisions of the Settled Land Act, 1908, whereby an agreement for a settlement was included within the definition of "settlement." That was so, of course, for the purposes of the statute, but it did not affect the principles to be applied for the purpose of determining the meaning and effect of the instrument. In the result their Honours concluded that the instruments whereby Mrs. Jellicoe had purported to exercise her general power of appointment were not, nor could any exercise of such general power be, effective and operative while and so long as the possibility of children existed. Each of the documents which the defendants had executed and formally delivered to the Public Trustee had been executed upon the assumption that the general power of appointment could be fully and effectively exercised. Their Honours had already said that in their view the documents were ineffective and as far as the Public Trustee was concerned he was entitled and in fact bound to treat them as ineffective to end the trust. The Court added that those documents were for various other reasons of most doubtful validity.

In order to obtain finality all parties in the present proceedings had specially requested the Court to consider the question whether on the evidence before it the Court would make an order as to the possibility of issue of the marriage. The Public Trustee was willing and in fact anxious to give up the trust, and Mr. and Mrs. Jellicoe were equally anxious to have the trust ended. Until the possibility of issue was exhausted their Honours could see no way of determining the trusts of the marriage articles. The Public Trustee, if another suitable trustee were agreed upon, could transfer the trust, but the trust would still subsist. Mr. Jellicoe contended that on the affidavits filed he had established the impossibility of issue, and that therefore the deeds, or one of them, which he and his wife had executed, were binding upon the Public Trustee. As before stated, their Honours thought all the deeds were ineffective. However, as the Public Trustee, representing as he did not only himself as trustee but also the possible children of the marriage, concurred in the question of the possibility of issue being considered and dealt with, it was most desirable in the interests of all parties that that question should be considered. The Public Trustee did not really contend that there was a possibility of children, and that was only to be expected from the fact that the marriage had subsisted for a period of 20 years and the wife was 54. Mr. Jellicoe contended that in the circumstances there was a presumption of law that the lady was past child-bearing age. An examination of the many authorities cited on both sides lead their Honours to the conclusion that an order should not be made in the form in which Mr. Jellicoe desired it. If the subjectmatter of the application were a fund actually in Court over the payment out of which the Court had control, the position might be different. But the authorities showed, their Honours thought, that in such a case as the present one the Court would give the trustee liberty to act according to the directions of the beneficiaries *in esse*. That was the position as stated in **Underhill on Trusts,** 8th Edn. 374, where it was said, after stating the understanding that the Court would not in such cases imperatively order the trustee to act on the presumption, that there was no reported decision on the point but that it was the well known practice. Their Honours thought that an order in accordance with that practice, that was to say a permissive but not an imperative order, would be proper in the present case. If the defendants desired anything more than that, their proper course in their Honours' opinion was to go to Parliament for a Private Estate Act. A reference to the Statutes of 1912 (p. 283) showed an instance where that course was adopted under circumstances somewhat similar to those in the present case.

Order accordingly.

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

Solicitor for defendants: **E. G. Jellicoe,** Wellington.

Reed, J. June 9; 25, 1930. Wellington.

CLARKE v. ELLERMAN, BUCKNALL & CO. LTD. AND OTHERS.

Practice—Discovery—Right to As Between Co-Dependants—Action Against Shipowners and Stevedores Claiming Damages for Personal Injuries Received During Unloading of Cargo—Question to be Decided in Action Whether Shipowners or Stevedores Responsible for Use of Unsuitable Gear—Stevedores Entitled to Discovery Against Shipowners—"Opposite Party"—Code of Civil Procedure, Rule 161.

Summons issued on behalf of the defendant the N.Z. Shipping Co. Ltd. for an order for discovery by the two other defendants, Ellerman, Bucknall & Co. Ltd. and the Federal Steam-Navigation Co. Ltd.

The action was by a waterside worker for damages for injuries sustained whilst engaged in unloading a ship. The N.Z. Shipping Company was not, in the first instance, made a defendant. The statement of claim alleged that plaintiff was employed by that company to unload a ship of which the other two defendant companies were alleged to be respectively the owner and agent. It was alleged that owing to a defect in the applicances for unloading, for which defect it was claimed that those two defendants were responsible, plaintiff was injured. Those defendants pleaded, *inter alia*, that the ship was being discharged by the New Zealand Shipping Company Ltd. as an independent contractor for the discharge of the ship and had full and exclusive control of the work of unloading, and they alleged that in discharging a piece of machinery, weighing over two tons, that company had failed to use the gear provided for lifting cargo of that weight and used gear rigged for the purpose of discharging only light cargo. Evidence upon commission was taken. The plaintiff thereupon applied for and obtained an order to join the N.Z. Shipping Co. as a defendant. That company asks for an order for discovery against the other two defendants and, it was stated at the Bar, that it was required mainly in order to see the loading chart or documents showing how and in what manner the cargo was stowed. It appeared that that would settle the order in which the cargo was intended to be removed from the hold which would be material to the question as to which party was responsible for the use of unsuitable gear in the unloading of a heavy piece of machinery.

Treadwell and **James** in support of summons.

Shorland to show cause.

REED, J., said that the summons was issued under Rule 161. The first question was whether the words "any opposite party" in that rule included a defendant when the applicant was also a defendant? There was no New Zealand case directly deciding the question. The corresponding English rule was O. 31 r. 12, but the words used there were "any other party to the cause." It was, however, held in **Brown v. Watkins,** 16 Q.B.D. 125, that those words meant "any opposite party" which was the expression used in O. 31 r. 1, which related to interrogatories. The words "Any opposite party" were held in **Molloy v. Kilby,** 15 Ch.D. 162, under the last-mentioned rule not to mean party or parties having an adverse interest, but a party or parties between whom and the applicant an issue was joined. That case was cited in argument in **Brown v. Watkins** (*cit. sup.*) which was a case under O. 31 r. 12 and the learned judges, after deciding that the different words in the two sections had the

same meaning, attached practically the same meaning as in **Molloy v. Kilby** (*cit. sup.*). However, a strong Court, Lord Esher, M.R., Lindley and Lopes, L.JJ. in **Shaw v. Smith,** 18 Q.B.D. 193, explained **Brown v. Watkins** (*cit. sup.*) as not being a decision that an order for discovery must in all cases be by plaintiffs against defendants or *vice versa*, but that it must be by and against parties between whom there is some right to be adjusted in the action. That interpretation had not been since questioned and was applied by the Court of Appeal in **Birchall v. Birch Crisp and Co.,** (1913) 2 Ch. 375.

The second question then was whether or not, in the present case, there was some right to be adjusted in the action as between the defendants. His Honour reviewed the facts and said that the question which party was responsible for the use of unsuitable gear in the unloading of a heavy piece of machinery would be in issue, and would be decided in the action, and that, in His Honour's view, constituted a right to be adjusted between the defendants. His Honour referred again to **Shaw v. Smith** (*cit. sup.*) and to **Birchall v. Birch, Crisp and Co.** (*cit. sup.*). and also to **Alcoy and Gandia Railway and Harbour Co. Ltd. v. Greenhill,** 74 L.T. 345.

His Honour thought that R. 161 of the Code conferred a discretionary power upon the Court, and therefore enabled terms to be imposed where the plaintiff was likely to be prejudiced by the delay occasioned by defendants fighting the question out between themselves. In the present case the defendants opposing the application stated that the necessary affidavit of documents must be obtained in England. The applicant was willing to have the affidavit confined to documents which were in New Zealand and to accept the affidavit of a responsible officer in New Zealand. There would be an order for discovery on oath by the defendants Ellerman, Bucknall and Co. Ltd., and Federal Steam Navigation Co. Ltd., within ten days, of all documents that were or had been in their possession or power in New Zealand relating to any matter in question in the action.

Solicitors for N.Z. Shipping Co. Ltd.: **Treadwell and Sons,** Wellington.

Solicitors for the other defendants: **Chapman, Tripp, Cooke and Watson,** Wellington.

[A motion to review and rescind this order for discovery was argued before the Full Court on the 18th inst. Decision was reserved.—Ed. N.Z.L.J.]

Reed, J. May 28; 30, 1930.
Wanganui.

WANGANUI HARBOUR BOARD v. ATTORNEY-GENERAL

Harbours—Harbour Board—Statute—"Special Resolution"—Phrase Not Defined in Statute—Formalities Necessary—Sufficient if Reasonable Notice Given to Each Member of Board of Special Meeting to be Held on Specified Date to Consider and, if Approved, to Pass as Special Resolution the Resolution Set Out in Notice—Special Act of No Assistance in Interpretation of General Act.—Harbours Act, 1923, Ss. 82, 83, 84, 85—River Boards Act, 1908, S. 87—Electric Power Boards Act, 1925, Ss. 57, 61, 62—Counties Act, 1920, S. 128—Rating Act, 1925, S. 85.

Originating summons for an order determining what steps were required to be taken by a Harbour Board to pass a special resolution as required by Ss. 84 and 85 of the Harbours Act, 1923.

Izard for plaintiff.

W. J. Treadwell for Wanganui City Council and Waitotara County Council.

County Clerk of Wanganui County Council in person.

REED, J., said that the Attorney-General left the case for argument to the interested parties. The various local bodies concerned were represented with the exception of the Waimarino County Council which, however, had been duly served and had written stating that they did not propose to be represented. Under S. 10 of the Wanganui Harbour District and Empowering Act, 1913, the plaintiff board had authority to make and levy rates. Under Ss. 82 and 83 of the Harbours Act, 1923, the procedure for levying such rate was provided. There was no difficulty in carrying out that procedure. If, instead of itself levying a rate, the Harbour Board decided that it would be more advantageous to allow the local bodies of the harbour district to collect the rates it was entitled under S. 84 of the Act to direct that it be so levied. The difficulty was as to the procedure necessary to be adopted by the Harbour Board to carry that out. His Honour quoted S. 84 and S. 85 (1) of the Act, and said that the question arising was what was a special resolution; it was not defined in the Act. It was contended by Mr. Treadwell, for the local bodies concerned, that the words not being defined it was impossible to state definitely what the correct procedure was and, therefore, the Board was precluded from acting under the section. Mr. Izard on the other hand contended that "special resolution," not being defined, must be interpreted literally, and that it meant a resolution passed at a special meeting convened for the purpose of considering it. The term "special resolution" not being defined it became necessary to see whether any light could be thrown upon its meaning by a comparison with statutes *in pari materia*, namely statutes conferring powers of taxation upon local authorities. It might be first observed that in order to make and levy a rate, collectable by its own officers, a harbour board had but few formalities to observe, but when it proposed to delegate the authority to collect a rate to its constituent local bodies it had to "direct" such rate to be so collected by "special resolution." Similarly a river board might make and levy a rate, collectable by its officers, with but few formalities, but, when it desired the constituent local bodies to collect it, it must "direct" them by "special order": River Boards Act, 1908, S. 87, as amended by the Schedule to the Act of 1910. An electric power board might make and levy a rate by "resolution" and might also delegate its powers by "resolution," and a copy of such resolution sent to the constituent local bodies had all the effects of a direction, with penalties for non-observance: Electric Power Boards Act, 1925, Ss. 57, 61, 62. It was only if it proposed to exempt parts of its rating district not served by electricity that it was required to do so by "special order": Electric Power Boards Amendment Act, 1927. Under S. 128 of the Counties Act, 1920, delegation to constituent boards must be by "special order" and a county council might, by "special order," "direct" such boards to collect: Rating Act, 1925, S. 85.

There were, therefore, three expressions used in those Acts, namely: "special order," "special resolution," and "resolution." Each of the statutes, in which the local body was required to do any act by "special order," contained its own definition, and the requirements in each case varied. For instance there were less formalities in the passing of a "special order" under the Counties Act than under the Municipal Corporations Act, and less still under the River Boards Act. It was clear that a "special order" was not the same as a "special resolution," and a "special resolution" was not the same as a "resolution." The formalities required in the passing of a "special order" could not be necessary in the case of a "special resolution," otherwise the Legislature would not have used the latter term in preference to a term which was well known in local body legislation. It must have been intended that something less in the way of formality should be required. His Honour's attention had been drawn to the definition of "special resolution" in S. 2 of the Bankruptcy Act, 1908, and in S. 91 of the Companies Act, 1908. But those statutes were not *in pari materia* and the formalities and requirements were entirely inappropriate to the Act under consideration, and the Legislature could not have intended those definitions to apply. The difficulty of determining the meaning of "special resolution" in the Act had been felt by, at all events, one other harbour board, for by the Napier Harbour Board Rating Regulation Act, 1925, the acts of that Board, in acting under its own construction of the expression, were validated. That Act, however, went still further for it provided in S.7 as follows: "Sections eighty-four and eighty-five of the Harbours Act, 1923, shall, in relation to the Board, be read and construed as if the word 'special' did not occur before the word 'resolution' in every case where the words 'special resolution' occur in the said sections respectively." That statute could not, His Honour thought, be treated as *in pari materia* with the Harbours Act. It was a special Act within the meaning of the Harbours Act and was not a part of a code of general legislation. "The parliamentary history of local Bills excludes the inference that they were intended to explain or construe public general Acts." **Craies on Statute Law,** 2nd Edn., 149; and see **Church Property Trustees v. Registrar of Deeds,** (1926) N.Z.L.R. 388, 397. It would appear, however, that the Legislature attached so little importance to the prefix "special" that, without any apparent reason for discrimination, it authorised that particular harbour board to do what was required under Ss. 84 and 85 by a simple resolution.

His Honour thought, however, that the question must be dealt with on broader grounds. The expense attached to the direct collection of rates by a harbour board, in areas within the jurisdiction of the various local bodies in its rating area, was so great that the alternative much cheaper method provided by Ss. 84 and 85 was introduced by way of amendment in 1923. That Act was, therefore, essentially a remedial Act, and, even before the Acts Interpretation Act, would have received such fair large and liberal construction as would best ensure the attainment of the object of the Act. To hold that it failed in its attainment of that object by not having defined what a "special resolution" was would render nugatory beneficial legislation. The words had no technical meaning such as would attach to "special order" and should therefore be construed according to their ordinary meaning. It was not competent for the Court to proceed upon the assumption that the legislature had made a mistake and intended, but forgot, to define the words: **Commissioners for Income Tax v. Pemsel,** (1891) A.C. 531, per Lord Halsbury at p. 549. His Honour thought, therefore, that by "special resolution" was meant a resolution that was passed specially, as distinguished from an ordinary resolution, which would be moved without notice on matters arising at a regular meeting of the Board. To constitute a special resolution, therefore, reasonable notice—say 14 days—should be given to each member of the Board of a special meeting to be held on a specified date to consider, and if approved, to pass as a special resolution (setting it out). It should be passed as a special resolution *eo nomine*, and communicated as such to each local authority as provided in S. 85. His Honour thought that in adopting that course the Harbour Board would have complied with the requirements of the Act.

Solicitors for plaintiff: **Marshall, Izard and Barton,** Wanganui,
Solicitors for defendant: **Treadwell, Gordon and Treadwell.** Wanganui.

Reed, J. June 12; 25, 1930.
Wellington.

AUCKLAND AUTOMOBILE ASSOCIATION (INCORPTD.) v. PALMER AND MAHOOD LTD.

Practice—Judgment by Confession—Plaintiff Accepting Confession Entitled Only to Relief Specifically Claimed in Statement of Claim Notwithstanding General Prayer for Further or Other Relief—*Semble* **Plaintiff Entitled to Disregard Confession and Proceed to Trial—Code of Civil Procedure, Rules 127, 309.**

Motion for judgment in an action for infringement of copyright. The prayer of the statement of claim was as follows: "(1) That the defendant its servants and agents be perpetually restrained from infringing the plaintiff's copyright in the said map and in particular from printing publishing selling delivering or otherwise disposing of motorist maps of the North Island of New Zealand being copies of the plaintiff's map or of material and substantial portions thereof or any colourable imitations thereof. (2) That an account be taken of the number of the said maps which have already been printed published sold or circulated and of the maps which still are in the defendant's possession or in the possession of any other person by the defendant's order. (3) That all copies of the said maps be delivered up to the plaintiff. (4) That all plates used or intended to be used in connection with the said maps be delivered to the plaintiff. (5) Such further or other relief as to this Honourable Court shall seem just. (6) The costs of this action." The defendant, on the day before the case was to come on for trial, confessed judgment in the prescribed form, viz.: "The defendant hereby confesses judgment in the above action." A draft order for judgment containing a good deal of matter not included in the prayer was submitted for approval to the defendant who rejected it, and the matter was brought before the Court to settle the form of order. The principal objection by the defendant to the form of judgment was a clause which read as follows: "That an account be taken of the number of maps printed published sold or otherwise disposed of by the defendant in breach of the Plaintiff's copyright **and of the profit earned thereby.**"

Professor Cornish and **James** for plaintiff.
Cooke for defendant.

REED J., said that counsel for the plaintiff submitted that an account of the profit earned was a remedy incidental to an injunction, and that where damages were not claimed would be granted as of right, and that the general prayer for further or other relief was a sufficient notice to the defendant, and **Cargill v. Bower,** 10 Ch. D. 502, 508, was cited. It was submitted that the draft order was not inconsistent with either the facts alleged or the relief expressly asked. That, however, was not the point; when a defendant filed a confession he thereby confessed judgment in terms of the prayer. The plaintiff association could have claimed: (1) an account of profits or (2) an inquiry as to damages. It would have been required to elect at the trial whether it would take one or the other, it would not be entitled to both: **De Vitre v. Betts,** L.R. 6 H.L. 319. But in the prayer in the present pleadings it had claimed neither; it had confined its prayer to certain specific relief. It was no answer that it was entitled to claim one or the other, or even that on the prayer for general relief the Court might have made an order in terms as was then desired. His Honour was not required to consider whether the Court would do so or not, but if the plaintiff's argument were carried to its logical conclusion all that was required was a prayer for an injunction and for "further or other relief" and the Court would make an order for everything that a plaintiff could claim as ancillary to an injunction, including damages. On principle it was obvious that such could not be done without amendment. As to what a Court would do or would not do upon a trial, however, did not afford any guide to what could be done upon a confession. His Honour thought that a judgment by default was more nearly analogous to a judgment upon confession, and referred to **Faithful v. Woodley,** 43 Ch. D. 287, and **Tacon v. National Standard Land Mortgage and Investment Co.,** 56 L.T. 165, where plaintiffs on judgments by default were held entitled only to the relief expressly claimed. His Honour had not lost sight of the fact that the plaintiff in the present action asked for "further or other relief," but such an application would have been implied in the cases cited by virtue of O. 20 r. 6 of the English rules. It was true that in **Dillon v. MacDonald,** 21 N.Z.L.R. 378, Edwards, J., expressed the opinion that our rule 116 was wider than the English rule, but that did not affect the principles embodied in the above-cited cases where there was a motion for judgment by default, and those principles should, His Honour thought, be applied to a judgment by confession. The plaintiff association was entitled, if it desired to enter up judgment upon the confession, to do so in accordance with the terms of the prayer for relief. It might be entitled to some minor alterations but to nothing which would impose upon the defendant company any serious burden in addition to the relief specifically prayed. The question had not been argued, and His Honour did not, therefore, express any concluded opinion, but, *ex facie* it would appear as if the plaintiff would be entitled to disregard the confession, and proceed to trial in the ordinary way. R. 309 would appear to be purely permissive.

Solicitor for plaintiff: **Wynyard, Wilson, Vallance and Holmden,** Auckland.
Solicitor for defendant: **J. J. McGrath,** Wellington.

Smith, J. June 12, 1930.
Auckland.

A. v. A.

Divorce—Desertion—Wife's Petition—Husband Suffering from Venereal Disease Insisting on Co-habitation with Wife—Wife Under Medical Advice Refusing to Live with Husband—Husband Guilty of Constructive Desertion.

Petition for divorce upon the ground of desertion. The facts were that the parties had been married in 1921, and had lived together as man and wife until the end of 1926, when the respondent deserted his wife. The petition before the Court was founded upon an allegation of desertion without just cause continuing down to the date of the filing of the petition. At the hearing, evidence was adduced to the effect that the real cause of the separation of the parties was the fact that the husband, who was suffering from an existing venereal disease, had insisted upon cohabitation with his wife, and that she, acting upon medical advice, had refused to continue to live with him. Upon these facts the Court was asked to grant a divorce upon the ground of desertion.

Fawcett for petitioner.

SMITH (orally), after referring to the facts, said that he was satisfied that the evidence adduced before them justified him in holding that there was constructive desertion on the part of the respondent: see **Meech v. Meech,** (1919) N.Z.L.R. 553. His Honour was prepared to make a decree in terms of the petition.

There would be a decree for the dissolution of the marriage. Order *nisi*, to be moved absolute after the expiration of three months.

Decree *nisi* granted.

Solicitors for the petitioner: **Dufaur, Lusk, Biss and Fawcett,** Auckland.

Smith, J. May 26; 28, 1930. Auckland.

OLIPHANT v. CORBETT.

Trust—Power of Sale—Settled Land—Deed Creating Trust for Persons Living at Future Date and Issue of Those Dying Before Date—Provision for Accumulation of Interim Income—Deed Not a Settlement Within Settled Land Act—Income of Trust Property Insufficient to Meet Outgoings—No Immediate Power of Sale Conferred by Deed—Jurisdiction of Court to Authorise Specific Sale in Emergency—No Jurisdiction to Grant General Power of Sale to Trustees—Settled Land Act, 1908, Ss. 3, 45, 75.

Originating summons. By a deed of settlement dated 20th August, 1924, one Oliphant settled upon the plaintiffs as trustees property situated in High Street, Auckland, upon and for the trusts and purposes set forth in the settlement. The deed recited that the settlor had six children, called in the deed "the beneficiaries," and that in consideration of natural love and affection for the beneficiaries, he was desirous of making the settlement. The trustees were authorised to erect, and did erect, a building upon the trust property. The trust property was at the date of the originating summons mortgaged to the Public Trustee to secure payment of the sum of £9,500 with interest at the rate of £6 per centum per annum. Clause (1) of the deed provided: "The trustees shall hold the trust estate upon trust for such of the beneficiaries who upon the expiration of twenty-one years from the date hereof or at such time as the mortgage referred to in Clause 2 hereof shall have been fully paid satisfied and discharged whichever shall first happen shall be alive and the issue then living of any deceased beneficiary (such issue being treated per stirpes and not per capita) as tenants in common in equal shares." The property was to be held in the meantime by the trustees upon trust after payment of the rates taxes interest and other outgoings to accumulate the residue of the income, and to pay the accumulations to the mortgagee in reduction of the principal sum and interest. The trust property was a city building comprising a basement and six floors, with rooms and suites of offices. The outgoings for the years ending 31st March, 1927, 1928, and 1929 exceeded the income and the deficiencies had been met by the trustees by raising money on bank overdraft. In November, 1929, such overdraft amounted to £394 14s. 6d. and interest. Although the trustees had made every effort to let the rooms and suites of offices in the building, they had been unsuccessful, and the income derived from the building was still insufficient to meet the annual outgoings in respect thereof; and that was so although the trustees had not drawn, except in one year, their authorised remuneration of £52 per annum. The only power of sale contained in the deed was as follows: "The trustees may at or after the date of expiration of the twenty-one years or the satisfaction and discharge of the mortgage whichever shall first happen as mentioned in Clause I hereof sell and dispose of the trust estate at the request in writing of the majority of the beneficiaries then surviving." There was no immediate prospect of improvement in the financial position of the trust, owing to the present surplus of office accommodation in Auckland. The originating summons asked: (1) whether the deed of settlement was "a settlement" within the meaning of the Settled Land Act, 1908; (2) whether the land comprised in the deed of settlement was "settled estate" within the meaning of such Act; (3) whether there was a tenant for life of the said land under and by virtue of the said deed of settlement within the meaning of the said Act; (4) What steps (if any) should be taken by the plaintiffs as trustees of the said deed of settlement to preserve the trust property in view of the fact that the income derived therefrom was insufficient to pay all rates taxes insurance premiums mortgage interest and other annual outgoings payable in respect of the trust property? Other questions were also asked but were not dealt with by the Court.

Finlay for plaintiffs.

Thorne for defendants.

Johnstone for Public Trustee.

SMITH, J., said that the answer to the first three questions depended upon whether the deed of settlement was a settlement within the meaning of the Settled Land Act, 1908. In His Honour's opinion, it was clear that it was not. The definition of settlement in S. 3, and the definition of settlement in S. 45, both depended upon the question whether the land was limited to or in trust for any person "by way of succession." Those words were explained by Kennedy, J., in **Attorney-General v. Owen,** (1899) 2 Q.B. 253, 266. That explanation was approved by Stirling, L.J. in the Court of Appeal in **In re Campbell,** (1902) 1 K.B. 113, 123. The character of the present deed of settlement was determined by the provisions of Clause (1). It was clear that the limitations there expressed was not to the trustees to hold successively upon the death of any person. The deed was, on the contrary, a conveyance of land to trustees to hold for certain beneficiaries living at a specified date as tenants in common in equal shares. There was no limitation to hold successively upon the death of any person. It followed that the deed did not constitute a settlement within the definition of S. 3, or of S. 45 of the Settled Land Act, 1908. It was plain also, His Honour thought, that the beneficiaries of the deed were not within the description of persons who had the powers of a tenant for life as set out in S. 75 (1) of the Settled Land Act, 1908. Not one of them was entitled to income so as to comply with the provisions of S. 75 (1) (h). The provisions of the Act could not, therefore, apply to that deed or to the land comprised therein, pursuant to the provisions of S. 75 (2). No other provisions were referred to in argument which would bring the deed or the land within the scope of the Settled Land Act, and His Honour had not found any. Questions (1), (2), and (3) were accordingly answered in the negative. The result was that the remaining questions had mainly an academic importance upon the present application. With regard to Question (4), it might be said, however, that if the emergency, which had arisen in the administration of the property, continued, it might be essential for the trustees to take steps for the purpose of salvaging the property. It seemed that the present circumstances were not foreseen or anticipated by the author of the trust, and they had not been provided for in the instrument. It might be the case, then, that upon the authority of **In re New,** (1901) 2 Ch. 534, and cases of that type, the Court would approve a specific sale of the property. See also **In re Wells,** (1903) 1 Ch. 848; **Re Tollemache,** (1903) 1 Ch. 457, and 955; **Potter v. Ewington,** 17 G.L.R. 534; and **O'Neill v. The Public Trustee,** 17 G.L.R. 539. Mr. Finlay suggested that the circumstances were such in the present case that the Court might grant to the trustees a general power of sale. There was no precedent for the grant of any such general power of sale. In the words of Romer, L.J., in **In re New,** (1901) 2 Ch. 534, 543: "The Court may, on an emergency, do something not authorised by the trust. It has no general power to interfere with or disregard the trust; but there are cases where the Court has gone beyond the express provisions of the trust instrument—cases of emergency, cases not foreseen or provided for by the author of the trust, where the circumstances require that something should be done." It was clear that when the Court acted in such a case it must be able to weigh and measure all the circumstances. To grant a general power of sale to meet a state of emergency would be not only to deprive the Court of the opportunity of judging of all the circumstances of the emergency, and the means employed to meet it, but also, if the emergency passed, and the general power of sale had not been exercised, to alter the character of the trust. In His Honour's opinion, the Court had no inherent jurisdiction to alter an instrument of trust by inserting a general power of sale to meet an emergency arising in the administration of an estate, but it had an inherent jurisdiction to approve, in a proper case, a specific transaction for that purpose.

Solicitors for plaintiffs: **Thorne, Thorne, White and Clark-Walker,** Auckland.

The Late Right Honourable Sir Robert Stout, P.C., K.C.M.G.

A Notable Career.

We regret to have to record the death on Saturday last of the Right Honourable Sir Robert Stout, P.C., K.C.M.G., in his eighty-seventh year.

Sir Robert Stout was a native of Lerwick, in the Shetland Islands. His father was a merchant and landed proprietor, and his son Robert was sent to the best school in the island, one which ranked high among the academies of Northern Scotland. Such was his success at school that at the early age of 13 he was installed as a pupil teacher. At 16 he had passed all his examinations with credit. Two years later, when his term as teacher was completed, he determined to seek a wider field for his energies, and at the age of 18 came to New Zealand. Landing at Dunedin in 1864, at the time of the southern gold rush he at first thought of adopting the profession of surveyor; he had already learned surveying in Shetland. As no opening offered in that line he secured an appointment as second master at the Dunedin Grammar School, and was shortly afterwards transferred to a similar position in the North Dunedin District School. Here he continued till 1867, when he decided to study for the law.

After three years' study of the law, Mr. Stout was admitted a barrister and solicitor and in 1871 he began his career as a lawyer. His success is well known. In the Supreme Court he gained laurels in his first criminal case, and he soon became noted as a sound lawyer and a successful pleader, particularly effective in addressing juries. He had also an extensive practice in the Court of Appeal. The first session of the University of Otago was held in the year of Sir Robert's admission to the Bar, and he continued his studies at the University. Attending the course of lectures in mental and moral science, he gained first-class honours in these subjects, and stood first in the political economy class of the next session. During the three following sessions he was law lecturer in the University.

The year 1872 saw Mr. Stout's entry into politics. In that year he was elected to a seat on the Provincial Council of Otago, and in the following year he became Provincial Solicitor in the Executive of which Mr. Donald Reid was the head. He was elected to the House of Representatives in 1875. Three years after his election to the House he was invited by Sir George Grey to accept the position of Attorney-General, which he filled with credit to his party and complete satisfaction to the country till June of the following year, when he was compelled to resign both his office and his seat in Parliament on account of the serious illness of his partner, Mr. Sievwright. In 1877, as a member of the General Assembly, he was on the Waste Lands Committee, and had charge of the Land Act of that year in its passage through the House. In 1882 he was appointed a member of the Land Board of Otago. In 1884, after an absence from Parliament of about five years, Sir Robert offered himself for re-election, and was returned by a large majority. This election decided the fate of the Atkinson Ministry, and Sir Robert became the head of the Ministry known as the Stout-Vogel Administration, of which he assumed the office of Attorney-General and Minister of Education. The Administration resigned in less than a fortnight, when it was replaced by the Atkinson Party for a few days. Then, on 3rd September, 1884, on the resignation of the Atkinson Government, the Stout-Vogel Ministry entered upon office and continued in power until 8th October, 1887. It was during this period (in 1886) that Sir Robert was created a Knight Commander of St. Michael and St. George. At the General Election in 1887 he stood for re-election by his old constituency, and was unexpectedly defeated by a bare majority. A few years later he successfully stood for Inangahua at a by-election. In 1893 Sir Robert announced himself a candidate for the Wellington City seat, and he was returned with enthusiasm, and represented the constituency until 1898, when he retired from active politics.

Sir Robert was appointed Chief Justice of the Dominion on the resignation of the Hon. Sir James Prendergast in 1899, and he held that office until February, 1926. In 1921 he took nine months' respite from his work on the Bench in order to visit the Old Country, and his departure was preceded by a memorable legal gathering. Sir Robert was presented with his portrait in oils, and with an illuminated address signed by 124 members of the Wellington Bar. He returned to his duties with renewed vigour after several months' absence. In May, 1921, he was appointed a member of the Privy Council, being the second New Zealand Judge to have this honour conferred upon him. On several occasions Sir Robert acted as Governor-General during the period between the departure of one Governor and the arrival of his successor. In 1926, after his retirement from the Bench, he was appointed to the Legislative Council in which Chamber he was an exceptionally active member right up to the end of last session.

One of Sir Robert's spheres of activity was the writing of newspaper articles. He wrote frequently on all conceivable topics, for English and American magazines and reviews, and he was a regular contributor for a long time to the columns of the Christchurch "Press."

Sir Robert was keenly interested in matters of education. For forty-six years he was a member of the Senate of the New Zealand University. He was elected Chancellor of the University in 1903 and held that office until January, 1923. Sir Robert held the honorary degrees of D.C.L. (Oxon.), LL.D. (Manc.), and LL.D. (Edin.).

A distinguished lawyer, a politician of conspicuous ability, and a great educationalist, Sir Robert Stout *must*, without doubt, always be remembered as one of New Zealand's most notable citizens.

Tributes of Bench and Bar.

Reports of the tributes paid to the Right Honourable Sir Robert Stout at the gatherings of the Bench and Bar at Wellington and Auckland came to hand too late to be included in this number. They will appear in full in our next issue.

Gaming and Wagering.

Some Differences Between the English and New Zealand Statutes.

By H. F. Von Haast.

The purpose of this article is to point out some of the main differences between the English and New Zealand statutes dealing with gaming and wagering, and to call attention to some of the problems that have arisen in the Dominion as the result of our own legislation. "Bets and wagers were valid contracts at common law, but they have been made void by legislation. But they have not been made illegal." *Salmond and Winfield, Law of Contracts*, 163. Hence it is the statute law that concerns us, and in applying the English decisions we must be alert to notice even slight variations in the New Zealand statutes from the English ones.

Section 69 of the Gaming Act, 1908, is as follows: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void, and no action shall be brought or maintained in any Court for recovering any sum of money or valuable thing alleged to be won upon any wager, or which has been deposited in the hands of any person to abide the event upon which any wager has been made." That section is identical with section 18 of the English Gaming Act, 1845 (8 & 9 Vict. c. 109) except that the English Act has this proviso, which was in section 33 of our Gaming and Lotteries Act, 1881, but was repealed by section 7 of our Gaming Act, 1894—"Provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winner of any lawful game, sport, pastime or exercise."

The repeal of this proviso and the enactment of section 71 of our Gaming Act, 1908—"No action shall be brought or maintained in any Court for recovering any sum of money or valuable thing alleged to be won by way of stakes or prize on any event or contingency of or relating to any horse-race, or other race, game, sport or exercise"—which has no counterpart in England, has saved the New Zealand Courts from the determination of disputes of the type that are examined in *Coldridge's Law of Gambling*, 2nd Edn., pp. 153-170, as to who was the winner of a prize, whether the jurisdiction of officials or racing clubs has been properly exercised, whether the contributors to a plate, prize, or sum of money who are also competitors are entering into a wager, and whether if so such a transaction is validated by the proviso, and from the hearing of such a friendly action as *Lord Ellesmere and Others v. Edgar Wallace*, 45 T.L.R. 238.

Our legislation has freed our Courts from the obligation of determining racing disputes that used to occupy their attention. In New Zealand the Courts will not even make an order that will enable an owner indirectly to recover stakes from a racing club, although the club is willing to pay. In *Patterson v. Wolland*, (1915) 34 N.Z.L.R. 746, the defendant was entitled to £69 won by his horse at a meeting of the Feilding Jockey Club, and the club had a cheque ready for him. But the plaintiff had obtained judgment against the defendant and issued a charging order on moneys due to the latter by the club. Hosking, J., held that section 71 precluded the Court from making the order absolute, it being the duty of the Court itself to take notice of the enactment and to second the purpose of the Legislature not to lend the aid of the State, by the medium of an action in its Courts, for the recovery of money or prizes won.

Section 70 of our Gaming Act, 1908, is as follows: "Any promise, express, or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by this Act, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract or agreement, or of any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money, *or any sum of money won, lost, or staked in any betting transaction whatever.* This section applies to New Zealand section 1 of the English Gaming Act, 1892 (55 Vict. c. 9) but adds to it the words in italics. For what purpose they were added does not appear from *Hansard*, and the Memorandum attached to the Bill simply says: "The words at the end of the section are new," without giving any reason for their addition.

The effect of these words was considered by Edwards, J., in *Sharp v. Morrison*, (1921) N.Z.L.R. 254. In that case there had been a wager on the Stratford election. After the election the loser of the wager told the stakeholder not to pay over the stake to the winner on account of irregularities. The stakeholder, however, did pay over. The loser sued him and recovered. It was contended that these words had altered the law as laid down in *Hampden v. Walsh*, 1 Q.B.D. 189, and in *Burge v. Ashley and Smith Ltd.*, 82 L.T. 518, that a stakeholder holds stakes as agent only of the person depositing them with him, and that the latter can, before payment over to the winner, give the stakeholder any direction he pleases with respect to the money, even after the event on which the wager depends has been ascertained. Edwards, J., held that the Magistrate from whom the appeal was brought was correct in pointing out that "money staked in any betting transaction whatever" is equivalent to the words in section 69, "money which has been deposited in the hands of any person to abide the event on which any wager has been made." The learned Judge held that "if the concluding words of section 70 have any effect at all it is to remove the doubt, if there be a doubt, whether the earlier part of the same section is sufficient to prevent the loser of a wager whose stake has been paid over to the winner from recovering it back from him." He called attention to the fact that "the other classes of action forbidden by the concluding words of section 70, namely, actions by the winner of the bet against the loser, and actions for the recovery of stakes, as stakes, from the stakeholder, are forbidden also by section 69. So far as actions of these classes are concerned, the concluding words of section 70 are mere surplusage." In *Johnston v. George*, (1927) N.Z. L.R. 490, however, Skerrett, C.J., said (at p. 505): "I am inclined to the opinion that the words (at the end of section 70) only apply to cases where the sum of money won, lost or staked in the betting transaction has not been paid over to the winner." This was, however, an *obiter dictum*, as he continued: "It is unnecessary to express a definite opinion on the point." All that he had to decide was whether the New Zealand

statute concerned itself with any security given in respect of the transaction, or with payment of the money thereby secured, and it was clear that it did not so concern itself. The decision of Edwards, J., seems sound and will probably be followed if the point comes before a higher Court. We may take it therefore that the addition at the end of our section 70 has made no change in the English law on the point and that the English decisions on the sections corresponding to our sections 69 and 70, apart from those relating to the proviso mentioned, which we have repealed, apply in New Zealand.

Section 1 of the Gaming Act, 1835, by which notes, bills and mortgages which were by certain Acts of Parliament declared to be void, including notes, bills and mortgages given as security for money lost in bets on horse races, are to be deemed to be made, drawn, accepted or given for an illegal consideration, is in force both in England and New Zealand. But section 2 of that Act, although repealed in England by section 1 of the English Gaming Act of 1922, is still in force in New Zealand. Its effect is as follows: "In case any person shall . . . . make, draw, give or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited 'Gaming Acts' declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of record."

In *Sutters v. Briggs*, (1922) 1 A.C. 1, the loser of a bet on a horse-race drew a cheque for the amount of the bet and crossed it "Not negotiable a/c payee." The winner indorsed the cheque in blank and handed it to his bankers for collection. The bankers presented the cheque and obtained payment of it. In an action by the loser against the winner under section 2 of the Act of 1835, to recover the amount of the cheque as having been paid to a holder, it was held that the term "holder" includes the original payee and also a banker who receives the note or bill for collection, that the bankers were indorsees and holders of the cheque and that the plaintiff was entitled to recover. It was this decision that led to the repeal of the section. In *Johnston v. George*, (1927) N.Z.L.R. 490, Skerrett, C.J., held that section 2 remained in force in New Zealand and had not been impliedly repealed by the final words of section 70 of our Gaming Act of 1908, which dealt with an entirely different set of circumstances. In that case it was a bookmaker who sought to recover from the defendant the amount of a cheque given and paid by him to the defendant in pursuance of a lost wager on a horse-race. His action failed, his claim being dismissed on the ground that by our Gaming Amendment Act, 1920, the making of a bet by the plaintiff in the course of his occupation as a bookmaker was unlawful, and the making of the bet by the defendant with the plaintiff, who was a bookmaker, was also illegal, and the Court could not lend its aid to enforce such an unlawful transaction or give any remedy in respect of the same. Had the bookmaker been an ordinary individual, he could have succeeded, as *Sutters v. Briggs* applies.

(To be Concluded.)

Judicature Amendment Bill.

Provision for Rules Committee.

The Judicature Amendment Bill now before Parliament, standing in the name of the Honourable Sir Thomas Sidey, makes provision, along the lines mentioned by him in his address to the Auckland Conference, for the establishment of a Rules Committee.

Clause 2 (1) provides that for the purposes of the principal Act there shall be a Rules Committee to consist of:

(a) The Chief Justice and four other Judges of the Supreme Court;

(b) The Attorney-General; and

(c) Three persons, being barristers or solicitors of the Supreme Court, to be nominated by the Council of the New Zealand Law Society and approved by the Chief Justice.

By Subclause (2) the members of the Rules Committee, other than the Chief Justice and the Attorney-General, shall be appointed by the Chief Justice for a term not exceeding three years. Any such member may be reappointed, or may at any time resign his office by writing addressed to the Chief Justice.

By Clause 3 the Governor-General in Council, with the concurrence of the Chief Justice and any four or more of the other members of the Rules Committee, of whom at least one shall be a Judge, may from time to time alter or revoke any of the rules contained in the Code of Civil Procedure or the rules of the Court of Appeal and may make such additional rules touching the practice and procedure of those Courts. The power to make rules of procedure includes the power to fix scales of fees and costs. Sections 51 (2), 71 (2) and (3), and 75 of the Judicature Amendment Act are consequently repealed (Clause 4).

The power to make rules of procedure in relation to proceedings in the Supreme Court or the Court of Appeal conferred by certain statutes is after the passing of the Act to be exercised by the Governor-General in Council in accordance with Clause 3 and not otherwise. These statutes are: Commissions of Inquiry Act, 1908; Companies Act, 1908; Crimes Act, 1908; Crown Suits Act, 1908; Industrial and Provident Societies Act, 1908; Public Trust Office Act, 1908; Settled Land Act, 1908; Aged and Infirm Persons Protection Act, 1912; Patents, Designs, and Trade-marks Act, 1921-22; Justices of the Peace Act, 1927; Electoral Act, 1927; Divorce and Matrimonial Causes Act, 1928.

"Nothing could be more misleading than to assume, as some persons appear to assume, that law is the same thing as litigation. The body of rules and principles which constitute the law, whether civil or criminal, is not habitually violated by the citizens of a civilised state. On the contrary it is habitually observed. The civil action or the criminal prosecution is not the rule but the exception. . . . . The knowledge that there is a right of recourse to a Court of Law tends in practice to help people to act in such a way that recourse to a Court of Law is in fact comparatively rare."

—Lord Hewart.

Australian Notes.

By Wilfred Blacket, K.C.

Modern Australian legislation tends towards government by dictators, and this tendency is startingly evidenced by the Arbitration Act Amendment Bill now before the Commonwealth House of Representatives. It provides for the appointment, upon such terms and conditions as the Government shall think fit, of Conciliation Commissioners, who are to exercise powers of *quod voco sic jubeo* quality. Any one of them may make an order altering the standard hours of work, or the basic wage. A Commissioner may also prohibit the Supreme Court of a State from dealing with an industrial dispute. Every order of a Commissioner is to be final and without remedy by appeal. A Commissioner may make an award in any dispute (of the existence of a dispute he is to be sole judge) and when an award is made workmen may with impunity go out on strike against it, for all penalties against strikers are expressly repealed. Apparently the orders of a Commissioner may be made *ex mero motu*. The existing provision prohibiting a Federal Court from dealing with a particular industry if it is more properly within the province of a State Court is expressly repealed, so also is the existing section requiring that the Court in making an award shall take into consideration the economic effect of an award on the industry and the community. Absolute preference to unionists is ordered by the Bill, and it is also provided that piece-work shall not be worked if prohibited by the rules of any trade union.

Australia is now in a critical state because wages are so high that production of exportable goods has decreased disastrously, and so there is unpleasant relevancy in the quotation: *quem perdere vult prius dementat deus*, but, passing over the economic considerations pertaining to the proposed legislation, many very interesting questions of law may be visioned. The power of a Commissioner to prohibit a State Supreme Court from exercising the jurisdiction it undoubtedly possesses seems to be quite a novelty, and one hardly knows how far the power may be deemed to extend. For instance, if the Central Criminal Court at Sydney is trying some strikers on a charge of inflicting mayhem—now more properly described as "stoush"—upon four labourers, could a Commissioner order the Chief Justice to stop the trial and discharge the prisoners and jury? If the Bill becomes law in its present form, it seems likely that the High Court will have a very strenuous time, and it is also clear that in giving full exercise to their statutory powers the Commissioners will need all the support that the High Court Bench of six Judges may be able to extend to them. As may have been already revealed there are many dreadful provisions in this Bill, but the power to the Government to appoint these Commissioners upon such terms and conditions as may be thought fit is to my mind the most un-English thing that has ever been done since His Majesty's Judges ceased to sit *durante bene placito*.

The Transport Act, N.S.W., recently assented to provides for some more Dictators. Power is given to appoint a Commissioner of Road Transport who is to be chairman of the Metropolitan Trust and of every other trust under the Act. There are four other members of each Trust, elected by the aldermen within its area of jurisdiction, but they only get £150 a year, and need only be summoned to attend once a month. Each trust is a corporation sole, and the Commissioner has a seven-year term of office. Section 12 (2) of the Act enacts that:

> "A trust constituted under this Act shall, within its district . . . adopt all measures tending to ensure adequate supervision and regulation in the public interest of all road transport and omnibus services operating in its district for the conveyance of passengers . . . take all necessary steps to co-ordinate all such operations, mitigate wasteful competition and overlapping in service, and shall take such steps in its judgment as are essential to secure to the public safety, regularity, efficiency, and convenience of service, at just and reasonable rates."

When the Bill was before the Legislative Council, honourable members reading this and other clauses became and were somewhat timid and added a proviso that "Nothing in this Act shall authorise the Trust (Metropolitan) to sell the tramway service without the authority of Parliament." It is consoling to foot passengers not yet killed by motor cars to know that every Trust is "specially charged to take all measures calculated to render the streets safe for pedestrians." It was a kindly thought on the part of the Ministry to bring out this Act at this time, for "long are now the winter evenings," and lawyers when the cold south winds blow will be able to find prolonged and pleasureable occupation in perusing its 175 quarto pages of closely printed matter—say 300,000 words.

Sydney affairs once more are controlled by a Municipal Council. The Bavin Government has done great things in this behalf. When it acceded to office in 1927, some disgraceful acts of fraud and corruption had been discovered. The City franchise then allowed lodgers to vote, and roll-stuffing on a large scale enabled Labour to secure a clear majority of aldermen. The Government promptly suspended the Sydney Corporation Act and appointed three admirable Commissioners in place of elected representatives. Now by a recent Act the Commissioners have been retired and provision made for election of aldermen by ratepayers. The first election was held on the 18th June, and Labour met its Waterloo, only six of its candidates being returned as against nine Reform candidates. Labour, headed by one J. S. Garden, who notoriously has been a member of the Third International, and his followers, openly promised "spoils to the victors" and definitely undertook to obtain £1,000,000 relief to the unemployed. The result of the election was gratifying to those who desire purity in administration, and it was some consolation to those who, upon very reasonable grounds, regretted the passing of the Commissioners.

Mr. Justice Campbell, whose somewhat uncertain age determined his occupancy of the Supreme Court Bench of New South Wales, has for some time past been sitting as a Royal Commissioner at Brisbane, to inquire into certain strange things that happened in Queensland when Mr. MacCormack was Premier, Mr. Theodore Treasurer, and the Government was carrying on some very unprofitable smelting at a mine it had purchased at Mungana. From the evidence, it appears that Mr. MacCormack and Mr. Theodore were heavily interested in another mine that supplied ore to the smelters. The Commissioner desired the attendance of Mr. Theodore but he, being the Federal Treasurer, in very lengthy

telegrams explained that his duties at Canberra did not permit his attendance at Brisbane. At last the Commissioner notified him that his evidence would be taken on the 24th June, but as Mr. Theodore in reply only sent a long and chatty telegram indicating that no date in the near future would be acceptable to him, the Commissioner completed the taking of evidence and counsel proceeded with their addresses. The Commissioner's report will be awaited with the keenest interest.

The promise made by the Bavin Ministry some time ago that an increase of salaries to the Supreme and District Court Judges would be arranged, has not yet been fulfilled. The Puisne Judges now get the same salary that they had 70 years ago, but a retirement age of 70 has been enacted and the pensions have been reduced. Income tax amounts to about £600, so that taking into account the increased cost of living, their remuneration is about half what it was in 1850. The District Court Judges only get the same salary as they did 60 years ago, viz., £1,500, although their jurisdiction has been extended from £200 to £400, and their salary is now diminished by about £300 for tax. They also must retire at 70, and the pension, formerly £900 per annum, is determined according to their periods of service. One could not expect a Labour Government to deal with this matter, but it is a regrettable thing that the present National Government has not done so.

Mr. Cleary, Commissioner for Railways, and just about the best administrator that ever held office in New South Wales, having resolved to make the railways pay—they are now losing £2,000,000 a year—arranged to enforce the 48-hour week and to effect other economics, and gave £2,500 of his salary as a contribution to the relief fund for the benefit of retrenched employees. As he still has to pay £1,500 a year for tax, his net income now is £1,000 a year, and if the Federal Arbitration Act is amended as proposed, the annual loss on the railways will amount to many millions. New South Wales is a land of very great possibilities but none of these are very pleasant to contemplate.

An Unapproved Argument.

Judges occasionally, and probably with cause, have hard words to say concerning the arguments of counsel. Sometimes the judicial rapier is used; sometimes the judicial sledgehammer. Lord Justice Scrutton's criticism of a King's Counsel's argument in the very recent case of *Consett Iron Co. Ltd. v. Durham County Assessment Committee*, (94 J.P. 115) savours, perhaps, more of the latter weapon:

> "When one gets at what it is, it is really quite a short question. Mr. ———, who has said everything that could be said, and a good many things I did not think could be said, for his client, has taken two days in addressing us on the subject and has referred us to a large number of cases which, in my view, have not very much to do with the case. The point when appreciated is really very short."

"A man who has a good solicitor does not care a straw for anybody."

—Sir W. Arbuthnot Lane.

Bills Relating to the Profession.

Provisions of Law Practitioners Amendment Bill and New Zealand University Amendment Bill.

We publish below for general information the terms of Sir Thomas Sidey's new Bills affecting the Profession. Since these contemplated measures were last discussed in our columns provision has been made empowering the Senate of the University to prescribe courses of practical training and experience for candidates for admission: to this emendation the Attorney-General is certain to have the wholehearted support of every member of the profession.

There are several provisions in the Bill to amend the Law Practitioners Act dealing with matters other than legal education. Clause 5 restricts the rights of solicitors under twenty-five years of age in respect of private practice; Clause 6 provides for the voluntary removal of a barrister's or solicitor's name from the rolls; Clause 7 increases the maximum number of members of District Law Society Councils.

Law Practitioners Amendment Bill.

1. (1) This Act may be cited as the Law Practitioners Amendment Act, 1930, and shall be read together with and deemed part of the Law Practitioners Act, 1908 (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the *first* day of *January*, nineteen hundred and *thirty-one*.

2. (1) The examination of candidates for admission as barristers or solicitors of the Court shall hereafter be conducted by the University of New Zealand.

(2) The Senate of the University shall prescribe the nature and conditions of such examinations, and the educational and practical qualifications of candidates, and may also prescribe such courses of study and practical training and experience for such candidates as it thinks fit.

(3) Except as provided in the *next succeeding* subsection, no person shall hereafter be admitted as a barrister or solicitor of the Court unless the Court or a Judge thereof is satisfied, by the production of a certificate signed by or on behalf of the Registrar of the University, that the candidate has completed the prescribed courses of study and of practical training and experience, that he has passed the prescribed examinations, and that he has otherwise complied with the requirements prescribed by the Senate of the University in accordance with this section.

(4) Nothing in the foregoing provisions of this section shall apply with respect to—

(*a*) The admission as barristers or solicitors of the Court of persons who at the commencement of this Act are qualified to be admitted as such; or

(*b*) The admission as barristers or solicitors of the Court of persons qualified to be admitted as such, without examination, as provided in the proviso to paragraph (*a*) of section four of the principal Act or in the proviso to paragraph (*b*) of section fifteen of that Act; or

(*c*) The admission as barristers of the Court of solicitors applying for admission as barristers pursuant to section five of the principal Act.

(5) Any person of a class referred to in the *last preceding* subsection may hereafter be admitted as a barrister or solicitor of the Court, as the case may be as if this Act had not been passed.

(6) Sections four and fifteen of the principal Act, as consequentially amended by the *next succeeding* section, shall be read subject to the provisions of this section.

3. [Clause 3 makes only the necessary consequential amendments, and it is thought, accordingly, unnecessary to reprint it.]

4. All rules of Court required for the purposes of the principal Act may from time to time be made in the manner prescribed by the Judicature Act, 1908.

5. (1) Except with the authority of the Court, given under subsection *two* hereof, no person admitted as a solicitor of the Court after the commencement of this Act shall, while under the age of twenty-five years, practise in any district as a solicitor, either on his own account or as a member of a partnership firm of which no member is over the age of twenty-five years, without having first obtained the written consent of the Council of the District Law Society for such district.

(2) Any solicitor aggrieved by the withholding or refusal of such consent may apply to the Court in a summary manner for authority to practise as aforesaid, and the Court may, in its discretion, grant such authority subject to such terms and conditions (if any) as the Court thinks fit.

6. The Court may, on the application of any barrister or solicitor of the Court, and upon such terms as it thinks fit, make an order for the removal of his name from the roll of barristers or the roll of solicitors, as the case may be, or, in the case of a person enrolled on both rolls, from either or both of such rolls.

7. Section sixty-one of the principal Act is hereby amended by omitting the word "nine," and substituting the word "eleven."

New Zealand University Amendment Bill.

1. (1) This Act may be cited as the New Zealand University Amendment Act, 1930, and shall be read together with and deemed part of the New Zealand University Act, 1908 (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the *first* day of *January*, nineteen hundred and *thirty-one*.

2. (1) For the purpose of enabling the University to discharge its functions under the Law Practitioners Amendment Act, *1930*, there is hereby established a Council of Legal Education, to consist of—

(*a*) Two Judges of the Supreme Court (one of whom may be the Chief Justice), to be appointed upon the recommendation of the Chief Justice;

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

(*c*) Two persons, each being a professor of law or a lecturer in law of a constituent college, to be appointed upon the recommendation of the Senate.

(2) The members of the Council of Legal Education shall be appointed by the Governor-General, and, subject to the provisions of this section, shall hold office for a term of three years, but shall be entitled to continue in office until the appointment of their successors.

(3) The term of office of the first members of the Council of Legal Education shall expire on the *thirty-first* day of *March*, nineteen hundred and *thirty-three*.

(4) The provisions of section sixteen of the New Zealand University Amendment Act, 1926, relating to the Academic Board, shall, with the necessary modifications, apply with respect to casual vacancies in the membership of the Council of Legal Education and to the filling of such vacancies.

(5) The Senate may be statute prescribe the procedure to be adopted by the Council of Legal Education.

3. (1) The Council of Legal Education shall have power of its own motion or at the request of the Academic Board to make recommendations to the Academic Board with respect to any matter relating to legal education; and in particular may make recommendations with respect to the courses of study, the examination, and the educational and practical qualifications of candidates for admission as barristers or solicitors of the Supreme Court.

(2) The Academic Board shall not make any recommendation to the Senate with respect to any matter relating to legal education until it has first received and considered any recommendations that the Council of Legal Education may make in that behalf, unless that Council, having had reasonable opportunity to make such recommendations, has failed so to do. Every recommendation made to the Academic Board by the Council of Legal Education shall be forwarded by the Board to the Senate, whether or not the Board makes any separate recommendation with respect to the same matter.

4. In addition to the powers conferred on it by section nine of the New Zealand University Amendment Act, 1926, the Senate, acting under that section, may from time to time make statutes, not inconsistent with the Law Practitioners Act, 1908, with respect to the courses of study, the examination, and the educational and practical qualifications of candidates for admission as barristers or solicitors; the granting of certificates; and generally with respect to any matter relating to legal education:

Provided that the Senate shall not make or alter any such statute until it has first received and considered any recommendations that may be made in that behalf by the Academic Board or the Council of Legal Education, unless the Board or the Council, as the case may be, having had reasonable opportunity to make such recommendations, has failed so to do.

5. Such reasonable fees shall be charged for examinations under this Act and for certificates granted by it in relation to such examinations as the Senate from time to time by statute prescribes.

In March last one Cushnan was found guilty of murder by a jury in Northern Ireland. The Lord Chief Justice sentenced him, in error, to be executed on "April 8, 1929." On discovery of the mistake the prisoner was brought back into Court and the impossible date in the past was corrected. There is plenty of precedent for such correction of an erroneous sentence. Judges in the past have courteously apologised to the prisoner for imposing, in error, some minor punishment and have corrected the mistake by sending him to the scaffold.

Forensic Fables.

THE JUDGE WHOSE APPEARANCE TERRIFIED THE PUBLIC.

On the Opening Day of the Michaelmas Sittings no Figure in the Judicial Procession was More Awe-Inspiring than that of Mr. Justice Mildew. His Lordship's Grim Countenance Struck Terror into All Beholders. As he Walked up the Central Hall of the Royal Courts of Justice, Barristers, Managing Clerks, Office-Boys, and Flappers Shook in their Shoes and Thanked their Stars they were not Standing before him in the Dock. It was Clear to All of them that Mr. Justice Mildew had something of Grave Importance on his Mind, and that he was Thinking Deeply. They were Right. Mr. Justice Mildew was Reflecting, as the Procession Started, that the Champagne at the Lord Chancellor's

Breadfast was (for a Light Wine) Uncommonly Good, that it was a Pity he had not Taken a Third Glass, and that he had Better Find Out Where it Came From before he went Circuit. Half-way up the Hall, Mr. Justice Mildew was Wondering whether the Port at Forty-Two Shillings (of which a Considerable Quantity had been Left Over from the Last Circuit) would be Good Enough for the Bar when they Came to Dinner, and was Sincerely Hoping that his Brother Judge would be a Bit more Lively than his Colleague at the Recent Assizes. And during the last Five Yards, when his Expression became Particularly Fierce, Mr. Justice Mildew was Internally Debating whether he should Purchase a "Wilfred" or a "Gollywog" for his Youngest Grand-Daughter, and Trying Hard to Remember whether her Birthday was on Tuesday or Wednesday.

Moral: *Look Impressive.*

Soviet Marriages.

Jurisdiction of English Courts.

Some time ago we noticed (*ante* p. 10) the case of *Nachimson v. Nachimson*, 46 T.L.R. 166, where Hill, J., held that the Divorce Court had no jurisdiction in respect of a Russian marriage under Soviet law, since such a marriage was not a marriage at all. The learned Judge relied on the definition of marriage by Lord Penzance in *Hyde v. Hyde*, L.R. 1 P. & D. 130, as "the voluntary union for life of one man and one woman to the exclusion of all others." The State, indeed, may dissolve the marriage, put an end to the status, and discharge the parties from the obligations of the contract; but under Soviet law either party can dissolve the marriage at will, and in Mr. Justice Hill's view this was inconsistent with the voluntary life-long union which is the essence of marriage. But the Court of Appeal has now reversed this decision. It regards the mode of termination of the marriage as irrelevant to the question of its original validity. If, in its inception, it was valid by the law of the country where it was made, that is enough, and the marriage is treated as valid under English law, provided at least that the local law does not permit polygamy. How it may be terminated is a different matter, and does not affect the existence of the marriage until it is terminated. Hence the Court of Appeal was unanimous in holding that the marriage, being when it was made a valid Russian marriage, must be recognised as valid in England.

Circumstantial Evidence.

Lord Mansfield and Lord Campbell.

Judges have not at all times extolled the value of circumstantial evidence. For example, there was the case where Lord Mansfield, as Chief Justice, presided over the trial of a Catholic priest who was charged, under an Act of William III, with the crime, then current, of saying Mass. If proved, the offence was punishable with imprisonment for life. Determined to secure an acquittal, his Lordship explained to the jury that they must not infer either that the prisoner was a priest because he appeared to be saying Mass, or that he was really saying Mass because he appeared to be a priest. The jury took the hint and returned a speedy verdict of "not guilty."

Lord Campbell criticised Lord Mansfield for that performance, and likened it to that of a certain Judge of long ago who disapproved strongly of the game laws. It was proved before him that the defendant, being in a field with two dogs and armed with a gun, had fired at a covey of partridges and that two of the said covey had fallen immediately after the discharge of the shot aforesaid. The Judge directed the jury that, in the absence of definite and direct evidence as to the cause of death, it was their duty to assume that the birds had died of fright.

Bills Before Parliament.

Judicature Amendment. (Hon. Sir Thomas Sidey). The provisions of this Bill are stated in detail at p. ——.

Census Postponement. (Hon. Mr. de la Perelle). Unless Governor-General shall otherwise direct by proclamation after passing of Act, census which by S. 4 of the Census and Statistics Act, 1926, is required to be taken in 1931, shall not be taken, and first census to be taken in accordance with that section shall be taken in 1936.—Cl. 2.

Apprentices Amendment. (Hon. Mr. Smith). Majority of members of Apprenticeship Committee appointed after passing of Act to consist of persons who are or have been engaged in industry or one of group of industries in respect of which Committee appointed: similar provision as to subsequent appointments to existing Committees. Validity of constitution of Committee or appointment of any member not to be questioned on ground that foregoing not observed but Court may remove unqualified member and appoint in his stead qualified member.—Cl. 2. S. 4 (1) of principal Act amended by adding additional subsection providing for vacation of seat on Committee of member absenting himself from three consecutive meetings without leave or reasonable cause.—Cl. 3. Where Apprenticeship Committee unable to come to a decision on any matter, matter to be referred to the Court.—Cl. 4. Where no Apprenticeship Committee appointed or where Court has discharged Committee, Court may, instead of appointing Committee, confer on District Registrar such powers of Apprenticeship Committee as it thinks fit.—Cl. 5. Area within which Apprenticeship Committee hereafter appointed may exercise powers limited to radius of twenty miles from point specified in agreement of employers or workers or in order of Court appointing such Committee: in case of existing Committees, radius twenty miles from principal post office in district: Court may extend locality to include specified area if satisfied employers and workers in area desire it.—Cl. 6. S. 5 (4) (k) of principal Act amended.—Cl. 7. S. 7 (2) of principal Act amended.—Cl. 8. Registrar or any Apprenticeship Committee may state a case for advice and opinion of Court.—Cl. 9. S. 8 of principal Act amended as to time for registration of contracts and altered contracts.—Cl. 10. Contract of apprenticeship to which body corporate a party need not be under seal.—Cl. 11. S. 9 (3) of principal Act amended as to time within which proceedings must be brought in respect of failure to register contract.—Cl. 12. On bankruptcy or winding up of employer Court may order payment out of assets to be made to apprentices in certain cases of amount not exceeding three months' wages.—Cl. 13. Suspension and discharge of apprentices for misconduct or grave incapacity by leave of Apprenticeship Committee, or, where none, by District Registrar obtained on application by employer: either party has right of appeal from leave to discharge or refusal to give leave to Magistrate's Court: appeals may be determined in open Court or in Chambers as Magistrate thinks fit: S. 15 of principal Act repealed.—Cl. 14. S. 16 of principal Act amended.—Cl. 15. Employer of apprentices to keep wages and time-book.—Cl. 16. Copy of apprenticeship order to be exhibited in place where apprentice employed.—Cl. 17. Principal Act not to apply to apprentices under Pharmacy Act, 1908.—Cl. 18.

Coroners Amendment. (Hon. Sir Thomas Sidey). Where, in respect of any death or fire, Supreme Court, on application made by or under authority of Attorney-General, satisfied either that Coroner refuses or neglects to hold inquest, or that necessary or desirable in interest of justice that another inquest should be held, may order inquest to be held and quash inquisition of previous inquest.—Cl. 2. Provision for inquest where body destroyed or irrecoverable.—Cl. 3. Coroner may order burial of body before inquest or where inquest unnecessary: Third Schedule of principal Act and S. 6 of Amendment Act, 1908, amended.—Cl. 4.

Law Practitioners Amendment. (Hon. Sir Thomas Sidey). The provisions of this Bill are reprinted at p. ——

New Zealand University Amendment. (Hon. Sir Thomas Sidey). The provisions of this Bill are reprinted at p. ——.

"For doctors, just as in the case of the Bar, it is serious misconduct in a professional respect to advertise."

—Lord Justice Scrutton.

Law Officers.

Incomes of Attorney-General and Solicitor-General in England.

By virtue of a Treasury Minute dated July 5th, 1895, the Attorney-General of England is granted £7,000 a year, and the Solicitor-General £6,000, to cover all business, of whatever nature, done by them as law officers for any department of Government, except certain contentious business. The exception applies to (a) cases in which the head of a Government department directs a law officer to be instructed; (b) cases in which the solicitor to the Treasury or the solicitor of a Government department thinks it desirable that a law officer should appear; (c) cases concerning prolongation of patents in the Privy Council; (d) informations on the Crown side and Customs cases; (e) cases in the Revenue paper; and (f) cases in the Court of Appeal, House of Lords and Privy Council. Obviously the excepted business is considerable; frequently it produces as much as the incomes above-mentioned.

Court of Arbitration.

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

Wellington: 7th August, at 10 a.m.
Palmerston North: 19th August, at 10 a.m.
New Plymouth: 21st August, at 10 a.m.
Wanganui: 25th August, at 10 a.m.

New Books and Publications.

Settled Land Conveyancing. By A. H. Cosway. (Effingham Wilson). Price 6s.

The Law Relating to Public Libraries in England and Wales. By Arthur R. Hewitt. (Foreword by His Honour Judge Tobin, K.C.). (Eyre & Spottiswoode). Price 12s. 6d.

Kerr on Receivers. Ninth Edition. By F. C. Watmough. (Sweet & Maxwell Ltd.). Price 21s.

Riddell and Holmes's Destitute Persons Acts. Second Edition, 1930. By C. A. L. Treadwell. (Butterworth & Co. (Aus.) Ltd.). Price 21s.

Rules and Regulations.

Fireblight Act, 1922. Fireblight Regulations, 1927, Amendment No. 4.—Gazette No. 49, 3rd July, 1930.

Samoa Act, 1921. Samoa Imprisonment for Debt Limitation Order, 1930. Samoa Dangerous Drugs Order, 1930.—Gazette No. 49, 3rd July, 1930.

Animals Protection and Game Act, 1921-22. Deer to cease to be imported game in certain Acclimitization Districts.—Gazette No. 50, 4th July, 1930.

Nurses and Midwives Registration Act, 1925. Nurses and Midwives Regulations, 1930.—Gazette No. 51, 10th July, 1930.

Post and Telegraph Act, 1928. Regulations for air-mail letters, etc.—Gazette No. 51, 10th July, 1930.

Sharebrokers Act, 1908. Rules of the Stock Exchange Association of New Zealand.—Gazette No. 51, 10th July, 1930.