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"Melius est petere fortes quam sectari rivulos."
—Lord Coke.

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Testators' Family Maintenance: The Year's Decisions.

Ever since the coming into operation of the Testator's Family Maintenance Act of 1900 the subject of testators' family maintenance has been a frequent source of litigation. The cases on the subject in the law reports are legion and the reports for the year just drawing to a close contain the usual quota of decided cases, none of them, perhaps, deciding any new principle, but all of them interesting.

The leading decision of the year is without doubt *In re Cavanagh*, (1930) N.Z.L.R. 376, 6 N.Z.L.J. 23. The testator left estate valued at approximately £3,700, and was survived by a widow and eleven adult children, five sons and six daughters. By his will he bequeathed the income from the whole of his estate during the lifetime of his widow, who was an invalid, to his widow and one daughter, who had cared for him during a long illness and who had cared also for his widow. Upon the widow's death he bequeathed the income from £3,000 to the same daughter, with power to her to appoint the capital upon her death. The only other members of the family who benefited under the will were the two youngest sons, who took equally the small residue after providing for the bequest to the daughter. The invalid widow lived for eighteen years after the testator's death and continued to be cared for by the daughter. Upon the death of the widow three of the sons and one daughter made application for provision out of the daughter's share. Smith, J., allowed each applicant the sum of £250 out of the daughter's share. The Court of Appeal (Myers, C.J., Blair, and Kennedy, JJ.; Herdman, J. dissenting) reversed this decision, and held that, taking into consideration the value of the testator's estate and that three of the applicants were adult sons capable of maintaining themselves, and the fourth a daughter who was being maintained by her husband, and that the daughter benefiting under the will had cared for the testator through a long illness and was left with her invalid mother to care for, the claims of the daughter were paramount, and what was left to her was none too much. The case reaffirms the principle that such applications must be dealt with in the light of the circumstances as they existed at the date of the death of the testator, subject, however, in the opinion of Blair, J, to this qualification, that if a claimant is content to delay the proceedings any change for the better in his or her circumstances can be regarded. The case is of interest also for the following observations of the Chief Justice:

> "Every case must, of course, be decided upon its own facts and circumstances; but I think that care should be taken, in applying the principles to the facts of the particular cases that come before the Court, to see that the pendulum is not allowed to swing too far. . . . . It is true that in this case the sons have burdens, but, even so, although it cannot be said that a testator has no moral duty to an adult son capable of earning his own living, I think that the principle of making an allowance in favour of able-bodied sons who are able to work and maintain and support themselves, even if they have burdens, may easily be carried too far, having regard to the apparent object of the provisions of the statute."

There has undoubtedly in recent years been a noticeable tendency to apply the provisions of the Act rather liberally, and it will be interesting to observe whether the observations above quoted mark a stopping point in this tendency.

Another decision of the Court of Appeal, is *In re Goodland*, (1930) G.L.R. 354, 6 N.Z.L.J. 213. The testator left estate of between £6,000 and £7,000 in value. He was survived by five daughters. He left the appellant, one of his daughters, a widow in poor circumstances aged fifty-nine, a life interest in £700, and left the whole of the rest of his estate to his other four daughters, stating that the appellant had been treated on a different basis because of her unfilial conduct. Reed, J., refused to make any further provision for the appellant, but the Court of Appeal (Myers, C.J., Herdman, and Adams, JJ.) held that, in lieu of the life interest in £700, the appellant should have £100 per annum during her life. This decision shows that, although unfilial conduct will be considered by the Court in determining whether or not adequate provision for the applicant was made by the testator, such conduct does not amount to anything in the nature of an absolute bar to relief.

In re Orr, (1930) G.L.R. 227, 6 N.Z.L.J. 134, a decision of Blair, J., approves the decision of Smith, J., in *In re Birch*, (1929) G.L.R. 121, that the Court has power to make a suspensory order. The estate was worth about £3,000. The testator had left his widow a small pecuniary legacy and a life interest in his estate and had given the remainder to charity. Applying the principle that a man must be just before he is generous, Blair, J., made further provision for the widow and made a suspensory order in favour of a stone deaf son.

In re Stephens, (1930) G.L.R. 325, 6 N.Z.L.J. 178, and *Public Trustee v. Kidd*, 6 N.Z.L.J. 285, deal with the extension of time for making application under the Act. In the first case Myers, C.J., refused the application as a delay of fifteen years had not been satisfactorily explained and as, even if an extension were granted, an order for further provision could not, in his opinion, properly be made in favour of any of the plaintiffs. The learned Chief Justice appears to leave open the point as to whether, where the estate is insolvent at the date of the deceased's death and subsequently, by reason of successful management, becomes valuable, an application under the Act is to be dealt with in accordance with the general rule, viz., as at the date of death, or whether one can look at the position as at the time when the application is made. In the second of the two cases last referred to Adams, J., refused to allow an extension of time after a delay of a year and seven months, as the whole of the estate except a small sum had been distributed, and by the terms of S. 33 (9) of the Act such distribution could not be disturbed.

Court of Appeal.

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

October 1, 3, 6, 7; 24, 1930.
Wellington.

CITY OF CHRISTCHURCH v. ATTORNEY-GENERAL (EX RELATIONE GOULD).

Municipal Corporation—Reserve—Land Reserved for Public Gardens and Promenades—Buildings Erected and Further Buildings Proposed to be Erected on Such Reserve—Statutes and Ordinances Showing That Land Vested in City Council for Use of Inhabitants of City as Public Gardens and Promenades—No Evidence That Reserve Maintained and Controlled and Used as a Public Highway for Statutory Period—Evidence as to Maintenance and Control of Footway Equally Consistent with Control as a Highway and with Control as a Promenade—Presumption That Footway Used as a Promenade in Accordance With Trust—Public Reserves Act, 1854, Ss. 5, 6, 7, 8—Christchurch City Reserves Act, 1877—Highways and Diversion Act, 1858—Municipal Corporations Act, 1867, Ss. 2, 226—Municipal Corporations Acts Amendment Act, 1871, Ss. 10–19—Repeals Act, 1878, S. 4—Cathedral Square Ordinances, 1858, 1859, 1864, 1872—Diversion of Roads Ordinance, 1859.

Appeal from the judgment of Herdman, J., reported 5 N.Z.L.J. 162.

O'Shea, Donnelly and F. J. Loughnan for appellant.

Gresson and Wanklyn for respondent.

BLAIR, J., delivering the judgment of the Court, traced the history of the various statutes and ordinances relating to the lands constituting the Cathedral Square. He referred to Ss. 5, 6, 7 and 8 of the Public Reserves Act, 1854, the Cathedral Square Ordinance 1858, Session X No. 5, the Cathedral Square Ordinance 1859, Session XI, No. 4, the Highways and Diversion Act, 1858, the Diversion of Roads Ordinance 1859, Session XI, No. 3, the Cathedral Square Ordinance, 1864, the Municipal Corporations Act, 1867, S. 2, 226, the Cathedral Square Ordinance, 1872, the Municipal Corporations Acts Amendment Act, 1871, Ss. 10–19, the Christchurch City Reserves Act, 1877, and the Repeals Act, 1878. Upon a consideration of the relevant provisions of those statutes, their Honours concluded that the Christchurch City Council took the land clear of any rights of roads or streets, and upon the trusts set out in the Christchurch City Reserves Act, 1877, namely, for the use of the inhabitants of the City of Christchurch as public gardens and promenades. The position must then be examined from the point of view that the Christchurch City had vested in it the whole of the land in Cathedral Square—other than the chain roads bounding the Square and other than the Cathedral site and other than the 86 ft. curved roadway bounding the Cathedral site on its westward boundary, which land their Honours designated the Godley Block "for the use of the inhabitants of the City of Christchurch as public gardens and promenades." Except for some trees planted in the Godley Statue enclosure there had been no gardens made in the Godley Block. At some time in the history of that block, the precise date being immaterial—but it was prior to 1870—the Godley Statue was erected and at some later period that statue was enclosed by a fence. That fence was probably erected subsequent to 1878. After 1878 the Council began to improve the Square, and they fenced in one bit and left the rest open. That fencing probably referred to the enclosure placed round the Godley Statue, which fencing was still there although the statue itself was in 1917 removed to another position in Cathedral Square. Since the hearing in the Court of Appeal counsel on both sides had intimated through the Registrar that they agreed that the iron railing round the statue was erected in 1879. The plans showed that that fencing enclosed a small portion of the crescent as well as land to the westward of the crescent, thus identifying a portion at least of the crescent as in a different category from an ordinary street. The most direct evidence in the case as to the subsequent improvement and development of the portion of the Square affected by the trust created by the 1877 Act (the Godley Block) was that provided by a series of photographs put in as exhibits in the case, from which it would appear that the original fenced enclosure surrounding the Godley Statue had been maintained ever since its erection in 1879. Their Honours said that no importance attached to the photographs or work done subsequently to 1906, because the defence raised by the Corporation was that it was constituted as a borough prior to 1st January, 1901, and that the Godley Reserve or portion thereof had actually been maintained and controlled as a public highway by the Council and so used by the public for 20 years or more immediately preceding 1st January, 1901, and was a "street" within the meaning of S. 171 of the Municipal Corporations Act, 1920. In other words the City claimed that the Reserve had been maintained controlled and used by the public as a street from the 1st January, 1881 at least. That defence involved the contention by the City that within four years of having that reserve vested in it, "for the use of the inhabitants of the City of Christchurch as public gardens and promenades" the City in disregard of that trust converted the reserve into a public highway and had so maintained and controlled it ever since. It appeared to their Honours that Mr. O'Shea was faced with two insuperable difficulties before he could derive any assistance from S. 171 of the Municipal Corporations Act, 1920. The first difficulty was that the photographs which constituted the most cogent evidence upon which he could rely did not bear out the contention that in 1881 or at any time up to at least 1906, that portion of the Godley Reserve comprising the fenced-in Statue and the wide footway or promenade surrounding it was a public street. The photographs Exhibits "D" and "P" and "N" appeared to their Honours to establish pictorially that at least the crucial portion of the reserve involved in the present case, namely, that portion of the crescent where the present shelter shed at present stands and where the new one was intended to be built, was not a street, but on the contrary was a kind of promenade and resting place and used by the citizens as such. It lay upon the appellant to establish as a fact that ever since at latest 1881 the place where the present shelter was and where the proposed one was to be built, was a street, and the pictorial evidence produced did not establish that. It was to be remembered also that the proposed new shelter shed encroached upon the fenced-in portion of the Reserve. After considering the evidence, their Honours said that it appeared to them that the evidence in the case fell far short of establishing that the portion of the reserve material to the present case was ever used as a highway or ever became a public road or street. Even assuming that the cab-stand round the Godley Statue Block constituted a user as a street of that portion of the Reserve comprised in the cab-stand, it could not be disputed that that cab-stand portion as shown by the photographs was not the portion of the reserve affected by the shelter shed and proposed additional shelter shed, parcels office, rest rooms, men's, women's and children's lavatories and tramway inspectors' offices, the subject-matter of the judgment in the Court below. The photographs showed that the fenced Statue Block and the footpath surrounding it were not streets and whether the user of portion outside of that area for cab-or cart-stands did or did not constitute user as a street was immaterial to the question to be decided in the present action, because those cab-stands were clearly outside the area whereon was erected the present shelter and also clearly outside the area upon which the new proposed buildings were to be erected. By no possible conception could it be suggested that a parcels office, rest rooms and lavatories and tramway offices were either promenades or gardens. The framers of the 1877 Act contemplated a planted and shady green oasis in the very centre of the City, not a place covered with tramway offices and sanitary conveniences.

The second difficulty facing the appellant was that it had called no evidence and was, therefore, compelled to rely on the evidence adduced by the plaintiff, including of course the plans, photographs and documents put in as exhibits. Conceding to Mr. O'Shea that maintenance and control for the requisite period had been shown, the question still remained whether such maintenance and control was as a highway. Their Honours were concerned only with portion of the crescent because it was upon it and not other portions of the Godley Block that the present buildings were erected and the proposed buildings were to be erected. The photographs showed clearly the nature of the maintenance and control of the "island" in the middle of the square. The most that could be said for the city was that such of the maintenance as was exercised on the footway portion of that "island" was *prima facie* consistent either with maintenance and control of such footway as a promenade in terms of the trust or equally consistent with its control as a highway. The only case cited where the meaning of the word "promenade" had been discussed was **Attorney-General v. Blackpool Corporation,** 71 J.P. 478. A footway where people might saunter or sit down on seats provided for the purpose might well be a promenade. It was not usual for seats to be provided on the footpaths of ordinary streets. It was clear,

therefore, that there could be no presumption that expenditure on the footpath or on any part of the "island" was expenditure on the land *qua* highway and not expenditure pursuant to the terms of the trust. Clearly there could not be a presumption in favour of a breach of trust. The presumption—if any presumption was to be made—must be in favour of the due performance of the trust. As their Honours had before said, an examination of the photographs led them to the conclusion that the "island" was not a highway, but even if that were not the case and the pictorial evidence were susceptible of interpretation as expenditure either on a highway or on a promenade, the presumption must be in favour of the preservation of the trust. Their Honours could find no evidence in the copies of the old reports and resolutions already quoted which led them to any view contrary to that just stated. S. 171 of the Municipal Corporations Act could be invoked, if at all in the present case, only when it could be established that the land covered by the present shelter and the land to be covered by the proposed new building was for a period of 20 years prior to the 1st January, 1901, maintained and controlled "as a public highway," and that the appellant had failed to establish.

Appeal dismissed.

Solicitors for appellant: **H. H. Loughnan**, Christchurch.
Solicitors for respondent: **Lane, Neave and Wanklyn**, Christchurch.

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

October 16, 1930.
Wellington.

HAZLETT v. BUTTIMORE (No. 2).

Practice—Appeal to Privy Council—Writ of Habeas Corpus in Respect of Committal of Appellant to Reformatory Institution Applied For on Ground of Lack of Jurisdiction of Committing Magistrate—Habeas Corpus Refused by Supreme Court and Refusal Upheld on Appeal—Matter Not One of Great General or Public Importance—Appeal to Privy Council Futile Because Appellant would be at Liberty Before Appeal Could be Heard—Leave to Appeal Refused—Privy Council Rules, R. 2.

Motion for conditional leave to appeal to the Privy Council from a judgment of the Court of Appeal reported *ante* p. 314.

Buxton in support of motion.
White to oppose.

MYERS, C.J. (orally) said that in his opinion the case was not one in which leave should be granted—if for no other ground than that before the time that the case could reach the Privy Council the period of the detention order would have expired. The case to His Honour's mind was quite distinguishable from **Gossage's case**, (1892) A.C. 326, relied on by Mr. Buxton, but nevertheless that case was an authority against him inasmuch as it appeared plain from what Lords Halsbury, Watson and Herschell all said that the writ of habeas corpus was inapplicable and should not be granted after the detention had ceased. The present case could not possibly reach the Privy Council before say March of next year, and it would then appear upon the face of the record that the period of detention had expired and that the detention must consequently have ceased. An order granting leave to appeal would, therefore, as it seemed to His Honour, be futile. If the appellant thought that that view was unsound and that he ought to have leave to appeal to the Privy Council it was still open to him, if so advised, to apply for special leave.

HERDMAN, J. (orally) said that if, as was said by Williams, J., it were material to consider whether the Court had any reasonable doubts of the accuracy of its decision, His Honour had no doubt whatever about the soundness of the judgment that had already been delivered; but in refusing leave to appeal His Honour would prefer to base his judgment upon the ground that it did not appear to him that the question involved was one which by reason of its great general and public importance or of the magnitude of the interests affected, or for any other reason, ought to be submitted to His Majesty in Council for decision. His Honour could not differentiate the present case from a number of other cases of the same description which had come before the Supreme Court, the question being whether a Stipendiary Magistrate had acted within the powers conferred upon him by the Legislature. That was the simple question that their Honours had to decide and His Honour could not see that the case was one of great general public importance. His Honour agreed that leave should be refused.

KENNEDY, J. (orally) said that it was clear that long before an appeal could be heard by the Privy Council, the appellant would be free. His Honour referred to **Bentwich's Privy Council Practice**, 2nd Edn. 179, where it was pointed out that when dealing with applications for special leave to appeal, it was not the practice of the Privy Council itself to encourage technical objections or readily to grant special leave where it was alleged that the Court had acted beyond or without jurisdiction. The proposed appeal, even if it concluded in favour of the appellant, would not give him any real relief because, being free before the hearing, he would not then be in need of the Court's assistance. His Honour thought that it would be futile, in the circumstances, to grant leave to appeal and that, even assuming the question to be one of general or public importance, leave to appeal ought, in the exercise of the Court's discretion, to be refused.

Motion dismissed.

Solicitor for motion: **J. J. Sullivan**, Auckland.
Solicitors to oppose: **Meredith and Hubble**, Auckland.

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

October 13; 24, 1930.
Wellington.

IN RE McD.

Solicitor*—*Professional Misconduct*—*Temporary Advances Made Out of Composite Trust Account To or For Benefit of Clients for Whom No Credits Held*—*Improper Use of Trust Funds*—*Duty to Keep Trust Funds Inviolate*—*Law Practitioners Act 1908, Ss. 54-56.

Application by Law Society under Law Practitioners Act, 1908, against a solicitor. The charges were of making improper use of trust moneys in that he resorted to the composite trust fund to make advances to clients on whose behalf he held no funds, and of unfitness to practise in that he failed to pay his practising and Fidelity Fund fees (since duly paid) and failed to observe his undertaking to the Hamilton District Law Society to have his trust account books supervised by his auditor. In 1926 the auditor reported certain irregularities which the Society investigated and came to the conclusion that they were due to lack of knowledge as to book-keeping and neglect, and not to any dishonest intention. All irregularities were corrected, and the solicitor having given the Society an assurance that his books would be properly kept and audited in the future, the Society took no further action. At the next annual audit some further accountancy irregularities were noted, but on investigation a satisfactory explanation was forthcoming. In the course of this investigation it was ascertained that the promised auditor's supervision had not taken place; the solicitor was reprimanded and he undertook to arrange for a continuous audit. That undertaking he carried out for approximately a year, but since March, 1929, he had not done so. The solicitor made an explanation of his failure to maintain the continuous audit. The truth of that explanation was not questioned by the Law Society, and it showed that his failure to fulfil his undertaking was not deliberate. The solicitor was charged that in the case of several small accounts shown in his trust ledger there were disclosed small debits without any supporting credits, thus indicating that advances must have been made out of the composite trust funds, the duration of those advances extending from a week or two in some cases to two or three months in other cases. Certain instances of overdrawing fees from the trust account were given, the total of those overdrawings being at the time of the audit, £17 13s. 3d. The solicitor's explanation was that his business was confined mainly to Native transactions and there were certain fees to be paid to permit transactions to be completed and enable costs to be collected. Those items had all been properly adjusted.

Von Haast and **Free** for the Law Society.
O'Regan for the solicitor.

BLAIR, J., delivering the judgment of the Court, said that their Honours could not too strongly emphasise the fact that any advance from composite trust funds unsupported by a corresponding credit to the client to whom the advance was made—whether such advance was of a large or a small sum, and even if of the most temporary nature—was improper and constituted professional misconduct justifying the exercise of the disciplinary provisions in the Law Practitioners Act. The trust funds must remain inviolate and a trust account must never at any moment be out of balance with the cash in hand or at the bank. If the solicitor wished to make to or on account of a client a payment of any sort or kind and had not moneys in hand belonging to that client, his duty was to make the payment out of his own funds or make a specific arrangement with someone else to advance the money; the solicitor must not under any circumstances use for the purpose moneys held in trust for other persons. In the present case any improper dealings with the trust account were on the clients' and not on the solicitor's own behalf, and there were other circumstances which in their Honours' opinion justified the Court in treating the present case as an exceptional one and not visiting it with the penalty of striking off or suspension, provided the solicitor gave the Court an undertaking that for the next three years he would faithfully and promptly comply with all proper requisitions made by the Law Society of the District in which he might for the time being be practising. The solicitor was ordered also to pay the Law Society's costs, £15 15s. 0d., and disbursements, and to reimburse the Society for the costs of the audit of his books already carried out by the Society.

Solicitors for the N.Z. Law Society: **Meek, Kirk, Harding, Phillips and Free,** Wellington.

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

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

October 13, 14, 15; 24, 1930.
Wellington.

IN RE C. & S.

Solicitor—Professional Misconduct—Failure to Have Trust Account Audited as Required by Regulations—Duty of Solicitor as to whom Special Audit Ordered by Law Society—Failure to Make Books Immediately Available to Auditor Misconduct—Duty of Solicitor as to Disclosure to Client of His Interest in Transaction in Respect of Which Client Advancing Money—Law Practitioners Act, 1908, Ss. 54-56—Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929, S. 23.

Application by Law Society under the Law Practitioners Act, 1908, against two solicitors practising in partnership. The facts appear in the report of the judgment.

Von Haast and **Free** for N.Z. Law Society.
Finlay for the solicitors.

MYERS, C.J., delivering the judgment of the Court, said that Mr. Finlay contended that there had been no personal dishonesty on the part of either practitioner and that all trust moneys had been fully accounted for. That appeared to be quite correct. One of the complaints was that trust moneys had been advanced irregularly, but their Honours could not disregard the affidavits filed by some of the clients to whom the moneys belonged stating that the advances were authorised. Nevertheless there was irregularity, in reference to the advances to Billing, in that it was not disclosed to the clients to whom the moneys belonged that the advances were being made to a person in connection with a business transaction or transactions in which the practitioners were concerned. That fact ought to have been disclosed. The failure of the practitioners to keep proper entries and accounts in connection with their trust account transactions,—even though there was no personal dishonesty, or dishonest intention,—especially after they had been fined for not having caused their trust account to be audited for the previous year as required by the regulations made under the Law Practitioners Amendment Act, 1913, was inexcusable. S. 14 (3) of the Act of 1913 enacted that wilful failure to comply with the regulations should, if the Court thought fit, be ground for the exercise of the summary jurisdiction of the Court under the provisions of the Law Practitioners Act, 1908. See also **In re M.,** (1930) G.L.R. 175; 6 N.Z.L.J. 66. The attitude of the practitioners regarding the investigation very properly instituted by the Law Society did not show a proper appreciation of their duties and responsibilities: Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929, S. 23 (3). The Law Society no doubt had but limited powers, but it was a disciplinary body with statutory power in certain circumstances to have an examination made of the trust account of a solicitor. Contumacy or failure and neglect on the part of a solicitor in connection with such inquiries might well amount to misconduct. In the present case the Law Society, pursuant to the power conferred by S. 23 of the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929, instructed an auditor to make an examination of the trust accounts of the practitioners. The facts showed that when the auditor called his investigation was postponed and it was not until after he had called on several later occasions that the books and documents were made available to him. It frequently happened that the element of surprise was of vital importance to the making of an audit and their Honours considered that if any solicitor as to whom a special audit had been ordered by the Law Society did not immediately make available to the auditor the whole of his trust accounts whatever might be their then condition, and whether the books had or had not been written up, such solicitor was guilty of delaying the auditor. There must never be any moment when the trust accounts of a solicitor were out of balance, and the fact that the books had not been written up did not in their Honours' view afford any excuse for not handing them over to the auditor for checking immediately he first called. In view of the fact that personal dishonesty was negatived, their Honours thought that the practitioners would have been sufficiently punished by the suspension that they had already undergone since the sitting of the Court in July, and by their having to pay a substantial amount for costs. The case was in principle something like **In re M.,** 12 N.Z.L.R. 26. Rule discharged, and a separate order made that the practitioners pay to the Law Society the sum of fifty guineas together with all disbursements including the fees paid by the Law Society to the accountant.

Solicitors for Law Society: **Meek, Kirk, Harding, Phillips and Free,** Wellington.

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

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

October 20; 24, 1930.
Wellington.

R. v. KING AND SCOTT.

Criminal Law — Recognisance — Forfeiture — Estreat — No Discretion in Judge as to Estreating Forfeited Recognisance——"May"—Crown Suits Act, 1908, Ss. 5, 7—Justices of the Peace Act, 1927, S. 288.

Application for the estreat of a recognisance of bail for the appearance of one G. A. King to stand his trial upon a charge of obtaining money by false pretences with intent to defraud. The accused failed to appear. The recognisance was entered into by the accused and by R. G. Scott as surety. Application was made to Adams, J., for the estreat of the recognisance, and the learned Judge made an order removing the application into the Court of Appeal for determination.

C. H. Taylor for the Crown.

MYERS, C.J., delivering the judgment of the Court, said that in **Rex v. Gunn,** 17 G.L.R. 306, an admission was made by the Crown Prosecutor that the matter of estreating recognisances had always been one in the discretion of the Court; and Stringer, J., accepted and adopted that view. In **Rex v. Taura Ngamu,** (1919) G.L.R. 169, the question arose again and it appeared from the judgment of Hosking, J., to have been urged on behalf of the Crown that the Judge had no discretion and that he was bound to estreat. The learned Judge, referring to a statement in **Archbold's Criminal Pleading and Practice,** said that in England a discretion was assumed to exist; but having regard to the provisions of S. 5 of the Crown Suits Act, 1908, he entertained a doubt whether a discretion existed in New Zealand. He consulted some of the other Judges and it was thought that in the particular case he ought not in any event in the circumstances to refuse to estreat. The general

question, however, was not decided, His Honour stating that it was thought not desirable to express an opinion without full argument when some future case arose in which the circumstances would appear to justify the exercise of the discretion if a discretion were permissible. The case of **Rex v. Gunn** was apparently not cited to Hosking, J.—at all events it was not mentioned in the judgment. The object of the removal of the present application into the Court of Appeal was to settle the question that was left open in **Taura Ngamu's** case.

After reading Ss. 5 and 7 of the Crown Suits Act, 1908, and referring to Form No. 3 in the Second Schedule to that Act, and pointing out that the position in England, where there seemed to be very little authority on the matter, was set out in **Archbold's Criminal Pleading and Practice**, 27th Edn., 96 *et seq.*, His Honour said that the question had to be determined on the construction of Ss. 5 and 7 of the Crown Suits Act, 1908, and that their Honours did not think that there was any purpose to be served by comparing the position in New Zealand with that in England where the question arose under statutes and rules expressed in language quite different from that of the provisions that they had to interpret. By the form of recognisance in operation in New Zealand the principal party and the surety severally acknowledged themselves bound to "forfeit" to the Crown the sums specified in the recognisance in case the principal party failed to perform his obligation—in the present case the obligation to appear at the sittings for the trial of criminal cases at the Supreme Court at Timaru and there surrender himself into the custody of the Gaoler of the Prison, there to plead to such indictment as might be found against him by the Grand Jury for or in respect of the charge on which he was held to bail. The idea seemed to have suggested itself that the forfeiture mentioned in S. 5 of the Act was a forfeiture decreed by the Judge. That, however, was not so. Their Honours thought that the words "where any person has entered into a recognisance to His Majesty and such recognisance is forfeited" meant where the parties to the recognisance had forfeited the sum specified in the recognisance by the failure of the principal party to appear. If that was correct, then the forfeiture arose at once upon and by reason of the failure to appear, and the section then proceeded that the Judge before whom the recognisance was forfeited 'may' cause such recognisance to be estreated; and every such estreat, the section went on to say, should be effected as thereinafter provided.

The real question for determination then was what was meant by the word "may." It was stated in **Maxwell on Interpretation of Statutes**, 7th Edn., 213, and also in **Craies on Statute Law**, 3rd Edn., 252, that whenever a statute conferred an authority to do a judicial act in a certain case it was imperative on those so authorised to exercise the authority when the case arose and its exercise was duly applied for by a person interested and having a right to make the application, and the exercise depended not on the discretion of the Court or Judge, but upon proof of the particular case out of which the power arose. See also **Maxwell** at p. 208. Both text writers cited as the principal authority for that proposition **McDougall v. Paterson**, 11 C.B. 755. In **Bell v. Crane**, L.R. 8 Q.B. 481, Blackburn, J. said at p. 482: "There is no doubt that 'may,' in some instances, especially where the enactment relates to the exercise of judicial functions, has been construed to give a power to do the act, leaving no discretion as to the exercise of the power when the facts are such as to call for it." In their Honours' opinion that principle applied to the present case. Part I of the Crown Suits Act dealt with the recovery of debts by the Crown. Immediately the principal party to the recognisance failed to appear in accordance with the recognisance a forfeiture arose and there was at once a debt due to the Crown. When, therefore, S. 5 said, that on that occurrence happening the Judge 'may' cause the recognisance to be estreated, and that the estreat shall be effected in manner thereinafter by the section provided, there was conferred upon the Judge an authority to do a judicial act in the particular circumstances, and that being so he had no discretion in the matter.

That result did not mean that the person affected was without a remedy. He had a remedy under S. 7, under which he might issue a rule *nisi* or summons calling upon a Law Officer to show cause, and he might, if he could, show the Court by affidavit that according to equity and good conscience and the real merits and justice of the case he ought not to be required to satisfy the judgment that was entered consequent upon the estreat. It was then, and only then, in their Honours' opinion, that the right to exercise a discretion came into existence, Their Honours thought that in effect Ss. 5 and 7 together formed a code dealing with those particular matters. The matter should, therefore, be dealt with by the learned Judge in the Court below in accordance with the view that their Honours had expressed. The formal estreat should be made, their Honours thought, by him and not by the Court of Appeal. It would, of course, be understood that nothing that had been said affected the practice to be adopted by Justices under Part VII of the Justices of the Peace Act, 1927, commencing with S. 288.

Solicitors for the Crown: **Crown Law Office, Wellington.**
Solicitors for R. G. Scott: **Emslie and Cameron, Timaru.**

Supreme Court

Ostler, J. October 15; 17, 1930.
Wellington.

LAIRD v. DIAMOND & HART.

Municipal Corporation—By-Law—Licensing of Itinerant Traders—By-Law Requiring Itinerant Traders to be Licensed and Providing for Termination of Licenses on Ensuing 31st March Invalid—Municipal Corporation Empowered Only to Issue and to Require Itinerant Traders' Licenses Remaining in Force for a Year from Date of Issue—Municipal Corporations Act, 1920, S. 354 (35), 358 (d).

Appeal by way of case stated on point of law from the dismissal of an information. The information was laid under the by-laws of the Blenheim Borough Council, and charged the respondents with exercising the trade or calling of an itinerant trader within the borough without having obtained a license to do so, contrary to the borough by-laws. The borough in its by-laws defined an itinerant trader as follows: "An 'itinerant trader' means any person not being a hawker or pedlar and not having his usual place of residence or place of business within the Borough: (a) Who seeks within the Borough personally or by agent or servant orders for the sale and delivery from any place or places without the Borough at any future time, of any goods or wares to any person other than persons who in their ordinary course of business deal in such goods, or (b) Who may take premises within the Borough for the sale of goods within the Borough for any period of less than six months, or (c) Who occupies any premises in the Borough for the sale of goods within the Borough for any period of less than six months." Clauses 438 and 439 of the by-laws were as follows: "438. Every person desirous of obtaining a hawker's license or pedlar's license, or itinerant trader's license, shall make application therefor to the Town Clerk. The renewal of any license shall not require a fresh certificate. 439. The Council may issue licenses to trade and carry on business as aforesaid, and every such license at whatever time of the year the same may be issued shall terminate on the 31st day of March then next ensuing, and for such license the following fees shall be paid to the Town Clerk.—Hawker or Pedlar: One pound per year or any part of a year. Itinerant Trader: Five pounds per year or any part of a year. Provided that such fee shall be refunded if the licensee remains continually in business in the Borough for six months."

The respondents carried on business and resided in Wellington, part of their business being the enlarging and colouring of photographs. They sent canvassers round to obtain orders for such enlargements. It was in respect of a visit of one of such canvassers, who did not apply for an itinerant trader's license that the present information was laid.

Nathan for appellant.
Spratt for respondent.

OSTLER, J., said that he had come to the conclusion that the learned Magistrate's judgment was erroneous. The power given to the Borough Council by S. 354 (35) of the Municipal Corporations Act, 1920, was, in His Honour's opinion, a power to impose an annual license fee not exceeding £5, just as the powers given under subsections (9), (24), (31), (33), and (34) were powers to provide for annual licenses. In none of those subsections was it prescribed that the license should be an annual one, but in all those cases the license was an annual one. That that was so was, His Honour thought, made clear by the provisions of S. 358 (d) of the Act. The learned Magistrate had used that subsection as an argument that subsection (35) of S. 354 did not give power to impose an annual license,

but subsection (34) which dealt with the licensing *inter alia* of hawkers and pedlars did not mention that the license should be an annual one. S. 358 (d), however, made it clear that the intention of the legislature was that the license granted to hawkers and pedlars should be an annual license. It merely provided for the maximum fee for such annual licenses. If the legislature in enacting subsection (34) intended that the license for hawkers and pedlars should be an annual license, then clearly in enacting subsection (35) it must have intended that the license to be granted to itinerant traders should be an annual license. The legislature might well have thought that itinerant traders would be doing business on a much greater scale than hawkers and pedlars, and thought it only fair that they should pay a larger license fee. The power which the proviso to subsection (35) gave seemed to His Honour to show that an annual license was intended. It enabled an itinerant trader who remained continuously in business in the Borough for six months to get back the license fee which had been paid for that year.

In His Honour's opinion, the by-law as drawn, went beyond the power granted to the Council by subsection (35). Should an itinerant trader apply for a license on 30th March in any year, as the by-law was drawn he would obtain only a license to trade for one day. The license would expire on 31st March, and on the 1st April he would be trading without a license. The power granted by the legislature was a power to grant a license for one year at a fee not exceeding £5. There was no power given to grant a license for part of a year. **Martin v. Otago Harbour Board,** 11 N.Z.L.R. 376, was in point and, in His Honour's opinion, the reasoning used in that case applied. The only way in which the Borough Council could keep within the powers given it by subsection (35) was to provide that every license issued to an itinerant trader should be in force for one year. In His Honour's opinion, a severance could not be made of the bad part of the by-law and the remainder held good. The only license provided for in the by-law was a license which terminated on 31st March then next ensuing, and such a license was bad. Any itinerant trader had the right to treat the by-law as a whole. See per Denniston, J., in **Banks v. Drysdale,** 16 N.Z. L.R. 67, 70. It was only where the bad part could be clearly severed from the good that the Court applied the doctrine of severability.

Appeal dismissed.

Solicitor for appellant: **A. C. Nathan,** Blenheim.

Solicitors for respondents: **Morison, Spratt and Morison,** Wellington.

Ostler, J. October 22, 1930.
Wellington.

RICHARDS v. RICHARDS.

Contract—Offer and Acceptance—Marriage Settlement—Letters Before Marriage—No Intention to Create Binding Contract—Alleged Contract Too Vague and Indefinite—Whole of Terms Not in Writing as Required by Statute of Frauds, S. 4.

Action by wife for specific performance of an alleged contract entered into with the defendant, her husband, in consideration of marriage, or alternatively damages for its breach. The terms of the alleged contract were contained in letters written by the defendant to the plaintiff before marriage. The plaintiff relied upon a letter written to her by the defendant on 12th October, 1928, in which the defendant said (*inter alia*): "If you will only say the word, all the income from my investments shall be made over to you to do as you like with." At the close of the plaintiff's case, counsel for the defendant moved for a non-suit on the grounds (1) that there was no evidence of any definite contract and (2) that the alleged contract, being in consideration of marriage, was not evidenced by a memorandum in writing sufficient to satisfy the Statute of Frauds. The relevant correspondence is referred to in the report of the judgment.

Watson and **Shorland** for plaintiff.

Cornish and **James** for defendant.

OSTLER, J., said that the first question was whether the letters did evidence an offer on the defendant's part that in consideration of the plaintiff marrying him he would cause the income from all his investments to be made over to her for life. In His Honour's opinion they did not. All the letters must be read together in order to see whether any person could reasonably spell from them a definite promise of a settlement, and if read together they were far too vague and indefinite to constitute a definite offer. There was not only no mention of the time such a settlement was to last, or how it was to be carried out, but if the letters were carefully read they plainly showed that the purpose of defendant was no more than to express a vague intention in his mind (to use the well-known but conventional words of the marriage service) "With all my worldly goods I thee endow." The letters read together made it clear that he had no intention of offering a definite settlement at all, and that all he meant was that he intended to lavish his income upon his wife. If the letter of 12th October stood alone, something might be said in favour of a definite offer of a settlement, though even then His Honour should have thought it too vague and indefinite. But in the very next letter he used expressions which showed that he had no intention of offering a settlement. He said: "My darling I want to give you all I possess and I want you to see that I regard you as a pearl beyond price. Everything else to me is of no value in comparison with you." On those words the plaintiff might as well claim not only all the income, but also all the capital. Take again the letter of 28th October in which the defendant *inter alia* said: "Before long I hope to have the pleasure of giving you a nice car and to teach you to drive." How could he do that if all his income was hers? He would then have no money either income or capital for purchasing cars. That passage should have made it plain to the plaintiff that the defendant had no intention of offering a settlement of the whole of the income. In his letter of 29th October defendant said: "As I have said, all that I have is to be yours and you are to have everything just as you like." That should have made it plain that all he was promising was to endow her with his worldly goods. He was using his wealth as an inducement to win plaintiff's acceptance; money, apparently, being his God, he thought it would intercede with her as powerfully as it appealed to him. That the defendant was not offering what the plaintiff claimed was also made clear in the defendant's letter of 2nd November, 1928, in which he said, *inter alia*—"How would we manage about our investments if we left the country. They are yours as well as mine now you know." Also, the letter of 8th November, which contained the following passage: "If I could only be sure I could get my securities looked after safely I should very much like to take you home to England to live there for a few years. . . . We could get a lot more out of our income there." In view of the statements in those letters His Honour found it impossible to draw the inference the plaintiff claimed from the earlier letters set out in the statement of claim.

There was a passage in defendant's letter to plaintiff of 28th October upon which the counsel for plaintiff relied as showing that he was offering a settlement. In that letter he said: "I have asked Collier to send me a list of the securities he holds for me and I shall send it on for you to see." It was claimed that defendant's intention in sending on that list was to give plaintiff a list of the securities the income of which he proposed to settle on her. In view of what followed in his other letters His Honour was unable to draw that inference. What was apparently in his mind was to show plaintiff what securities he possessed. He was already revolving in his mind a scheme for combining his fiancee's status as a solicitor, and his own investments, in a business which would give him an occupation, save all legal expenses, and enable him to keep for himself all the expenses connected with the managing of his fortune. This appeared clear from a passage in his letter of 3rd November.

There was another ground which in His Honour's opinion was equally fatal to the plaintiff's claim. Every agreement in consideration of marriage must be in writing to satisfy S. 4 of The Statute of Frauds. The plaintiff relied on the letter that had been quoted as evidence of a contract in writing. When she gave evidence, however, she deposed to other terms of the alleged contract which were not in writing, and those showed on her own admission that there was no memorandum in writing of the terms of the contract sufficient to satisfy the Statute of Frauds.

Plaintiff non-suited.

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

Solicitors for defendant: **Webb, Richmond and Swan,** Wellington.

"A Court of Justice is not a charitable institution."

—MR JUSTICE HERDMAN.

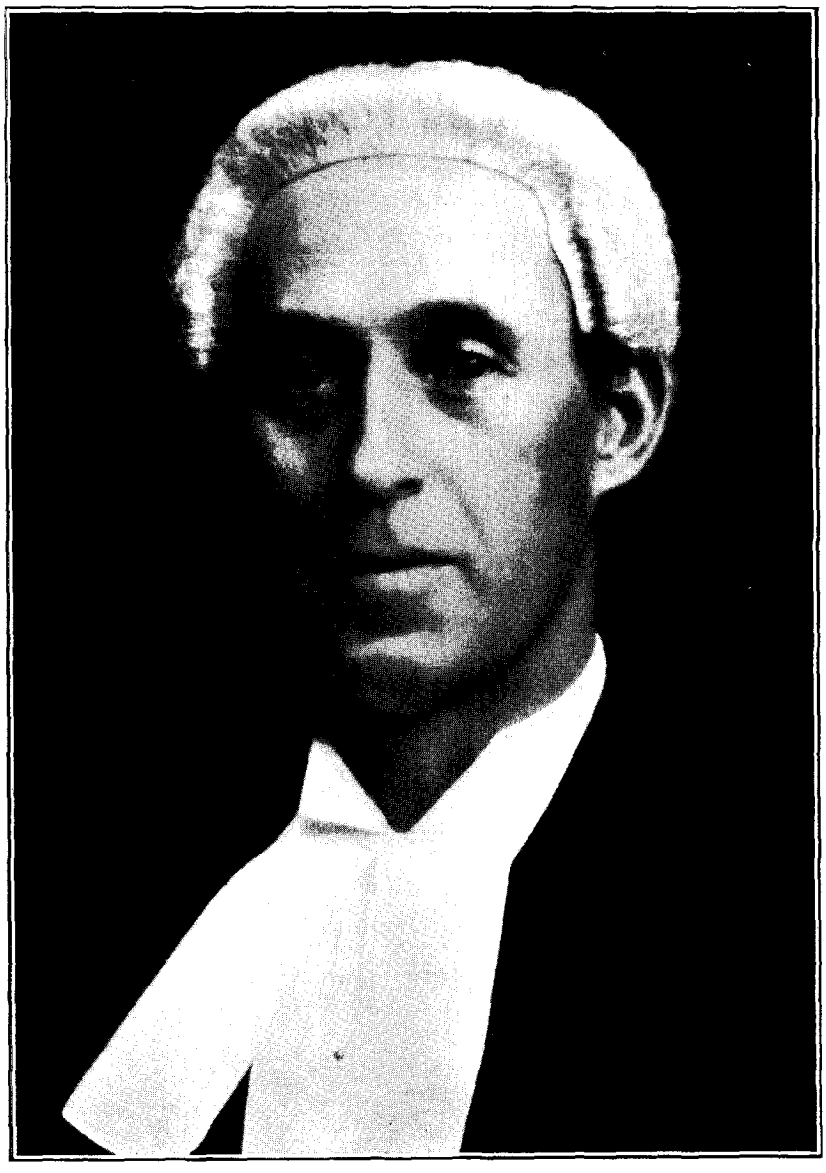

Photo by S. P. Andrew.

The Honourable Robert Kennedy,

Judge of the Supreme Court of New Zealand.

Dominion Status.

The Legal and Political Unity of the Empire.

A Lecture by MR. J. H. MORGAN, K.C.

We print below a condensed report of the first of a series of three "Rhodes" lectures delivered by Mr. J. H. Morgan, K.C., recently, at University College, London, on "The Legal and Political Unity of the Empire." Mr. Morgan's views have attracted considerable attention and caused some controversy among constitutional lawyers. Readers should bear in mind that the lecture was delivered before the commencement of this year's Imperial Conference.

"A few months ago an Imperial Committee of draftsmen, which might, with some accuracy, be described as a delegation of the Imperial Conference of 1926, sat, behind closed doors, in London to discuss how best to perform certain surgical operations, by Act of Parliament, upon the body politic of the Empire. Its recommendations, of which more in a moment, are, in some respects, drastic, not to say revolutionary.

"Before attempting to deal with them, let us go back a bit. At the Imperial Conference of 1926 the late Lord Balfour produced a formula—duly adopted by the Conference—which purported to "define" and also to "describe" the existing relations between Great Britain and the self-governing Dominions. The generalisation contained in that formula may well be described as the major premiss from which the Committee of draftsmen, with a desparate attempt to apply logic to politics, have arrived, and were indeed instructed to arrive, at their conclusions. It is therefore so important that it must be cited in full. Here it is:—

> 'The group of self-governing communities composed of Great Britain and the Dominions, their position and mutual relation, may be *readily* defined. There are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in respect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.'

"Let us examine at the outset what the recommendations of this Committee are and what is likely to be the effect of their adoption—if adopted they be. Now the principal flaw in Lord Balfour's formula was, and still is, of course, the legislative supremacy of the Imperial Parliament. The Imperial Parliament has power—it has always had it—to legislate for the whole of the Empire. The constitutions of the great Dominions are themselves Acts of the Imperial Parliament. And if and when a statute of any one of those Dominions conflicts with a statute of the Imperial Parliament, by which I mean a statute expressly or by necessary intendment applying to them, the Dominion statute is to the extent, but only to the extent, of such conflict null and void. That is a legal axiom which hitherto has been unquestioned by any responsible lawyer—it has been laid down again and again by the judges of the Dominion Courts themselves and, indeed, nowhere more emphatically. It finds expression in the Colonial Laws Validity Act of 1865, but its expression therein is merely declaratory; that statute, in that respect, simply declared what had been law ever since the seventeenth century, in other words, ever since Parliament established once and for all the doctrine that its power was co-equal with that of the King, and, indeed, when exercised, superior to it.

"Now obviously, if you are determined to give statutory expression to the doctrine of equality of status as between Great Britain and the Dominions you must, —*if you can*!—extirpate, root and branch, this legal axiom—that the Imperial Parliament has bound, can bind, and will bind the Dominions by its legislation. As a matter of fact, although there are a number of Imperial statutes which bind the Dominions—the Act for abolishing the Slave Trade is an obvious example—the Imperial Parliament has of late years, even when passing admittedly Imperial Acts, in other words, Acts which, in so many words, extend generically to the whole of His Majesty's possessions, always excluded the great self-governing Dominions from their operation, leaving it to those Dominions to adopt the Act or not, and to adopt it with or without qualification. The Imperial Copyright Act—and Imperial it was—of 1911 and the Nationality and Naturalisation Act of 1914 are cases in point. Indeed, I can recall within the last twenty years only one Imperial statute of any importance in which the Imperial Parliament has legislated directly and indirectly for the self-governing Dominions. And it is the sort of exception that proves the rule. It was a statute known as the Official Secrets Act of 1911. But the amending statute of 1920, known by the same name, put an end to its application to the Dominions, and for a very good reason. More than that, not only has the Imperial Parliament, for something like a generation, ceased to legislate for the Dominions except on their own initiative or with their consent, but whenever or wherever the shoe of earlier Imperial statutes applying to them has pinched, the Imperial Parliament has repealed, or authorised them to repeal, the offending Statute.

"One might hazard the opinion that our constitutional practice might well have remained thus—but the Committee have recommended that now and from henceforth it shall be enacted by the Imperial Parliament that the Dominion legislature shall have a general power to repeal each and every Imperial Act remaining on our Statute Book. Let us consider exactly what this involves. First, let me take the Crown. Now it is common form that any Colony with a representative legislature may legislate as to the prerogative in so far as the internal exercise of that prerogative in the Colony is concerned—Colonial legislatures may, for example, abolish the Crown's immunity from being sued in the Courts of the local jurisdiction—they have done so in Australia and elsewhere; and, as the greater includes the less, they have also, very much to the advantage of litigants, abolished the prerogative of discovery. Not only is the existence of such prerogatives absolutely subject to the control of Colonial legislation, but so, of course, is their exercise. The Privy Council itself has been quite as emphatic in holding that principle of legislative autonomy of Colonial legislation as the Colonial Courts themselves—you will find an interesting example of the truth of that proposition in a very recent case in the Privy Council Reports, to wit, the *Commonwealth of Australia v. New South Wales*, wherein it was decided that the legislature of a self-governing Colony is supreme and no Act of the Executive Government—in other words, the Crown—in the Colony can fetter in any sense the future exercise of its legislature's powers. The one limitation imposed on Colonial legislation hitherto in this respect has been

that those legislatures, although invested with large constitutional powers (one may, in fact, say since the case of *Macaulay v. the King*, with almost unlimited constitutional powers) whereby they might, for example, exclude their second Chambers, if any, from all voice in legislation even to the extent of abolishing them altogether, could not exclude the Crown as a factor in legislation—such, at any rate, was the view of Mr. Justice Isaacs (as he then was) in the case of *Taylor v. Attorney-General of Queensland*, and that distinguished Judge has often been almost uncannily in the right.

"I have hinted that there is a stupendous paradox involved in the whole scheme of this elaborate renunciation of the supremacy of the Imperial Parliament. It seems to have escaped the logicians of the doctrine of equality of status altogether. That paradox is this. It is a fundamental principle of our constitutional law, admirably enforced by Dicey, that the Imperial Parliament can never divest itself of its sovereignty. It is characteristic of the ingenuousness —or was it disingenuousness ?—of the Report of 1926 that the Imperial Parliament is throughout evasively described as the Parliament at Westminister. *E pur si muove !* And yet it remains, and always will remain, the Imperial Parliament.

"There are only two ways in which the formula of complete equality of status between the Dominion legislatures and our own can be translated into law. One would be by an Act declaring their independence—in other words, such an Act as terminated the sovereignty of the Crown over the American Colonies, and thereby, calling all the world to witness, recognised them as foreign States. The other, almost equally revolutionary, would be to destroy the potent legal principle of the unity and indivisibility of the Crown, if not the ubiquity of the King, in his Dominions, by constituting the Dominions separate Kingdoms with separate "Crowns" united merely by a dynastic tie. What the consequences—and they are sufficiently serious—of such an "incorporation," to use an apt word of Macaulay's applied to just such a situation as this, would be, how disintegrating they would become to the international unity of the Empire, how utterly destructive of our existence in war, how perilous to our diplomacy in peace, I endeavoured to point out in an earlier lecture on Dominion status. To such results does the fatal logic of equality of status lead us. The Imperial Parliament can only be disinherited of its sovereignty, in other words, its supremacy, by investing the Parliaments of the Dominions with a sovereignty equally Imperial. You will then have seven Empires instead of one. Those publicists untutored in law, and, I suspect, contemptuous of it as only those who are disabled by ignorance of it can be, who talk with almost wearisome iteration of the "sovereign independence," the "national status" of the Dominions, will certainly then have made good their destructive speculation. But it will, to adapt the words of Burke, be a poor compensation to feel that, while they had triumphed in a dispute, we had lost an Empire."

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

—Mr. Gilbert Frankau.

Australian Notes.

Wilfred Blacket, K.C.

I wrote (*ante* p. 11) as to the practice followed in New South Wales of requiring a King's Counsel to obtain the King's license dispensing with his services in respect of any criminal case in which he was briefed for the defence. Recently, at a meeting of Kings Counsel convened by the Solicitor-General, Weigall, K.C., the practice was discussed and considered and it was resolved that in future it should not be deemed necessary to obtain a license. This decision has not yet been formally approved by the Judges, but there is no doubt that they will accept the decision of the Silks as it has the approval of the Governor, represented in this matter by his Solicitor-General.

To the case of *Ex parte Turnbull*, and its decision that liquor supplied to members from the stock of liquor owned by the members of the Redfern Bowling Club upon payment by them, was not "sold" within the meaning of the Liquor Act, I referred *ante* p. 155. Recently, however, the police found three members of the same Club drinking at its bar on a Sunday morning, and thereupon prosecuted Mr. Turnbull, the secretary, for having "supplied" liquor to the aforesaid three persons. The magistrate convicted, and the defendant applied for a prohibition, on the ground that there had been no "supply" of liquor, but merely a handing over of a part of their property to the members in question. The Full Court did not accept this contention, Street, C.J., in his judgment stating: "It seems to me to be quite immaterial that the liquor supplied to these three men was part of the stock which belonged to them in common with other members of the club. The only question is, was it supplied to them ? I know no other word in the English language than the word 'supply' to describe what took place." This decision followed *Symes v. Stewart*, 28 C.L.R. 386. It was also held in the matter of hours of trading and other restrictions on sale and supply, that in place of the words "hotel premises," and "licensee" in the Act, the words "club premises" and "secretary" should be read into the relevant sections in the case of club licenses. The decision is of far-reaching consequence, and may possibly diminish the popularity of bowls as a pastime for the Sabbath Day.

The Walker divorce case in Adelaide lasted thirty days and is said to have been worth £6,000 to members of the legal profession, and witnesses, but the only matter of present importance is that Sir George Murray, C.J., in dealing with the evidence relating to two of the parties said: "Young girls are allowed so much freedom nowadays that the same inferences cannot be drawn from their conduct as would have been drawn a few years ago. They are permitted to smoke, to drink, and to go to theatres and travel abroad unattended. They may drive a motor car, dance in public halls, and bathe in the sea with men young or old, scantily attired, and their social equals think none the worse of them. Is a Court of justice to hold that these fashions are evidence of immorality ? In my opinion it is impossible, however great the danger to morals may be." Regarding these wise words, I want to make three comments. One is that His Honour, in using the phrase "scantily attired" expressed himself with magnificient moderation; another is that in referring

to their "social equals," His Honour probably only intended to include the other young persons who smoke and drink and wear scanty attire. The third comment is that our Judges seem to keep well abreast of the times. This was shown in an earlier letter by my mention of the fact that four Judges of the Supreme Court Bench of New South Wales had solemnly decided that proof that a man had been seen kissing a girl is not evidence to prove that he is engaged to her.

Mr. Archibald, a resident of Cabramatta, (N.S.W.) sued the local Council, in Equity, to restrain a repetition of certain negligent acts done by its officers in connection with a night soil depot, and also asked for an injunction to restrain the Council from using the land as a depot, alleging that, as it was in the neighbourhood of his property, such use was detrimental to him. He obtained an injunction against the repetition of negligent acts, but as the Court refused to restrain the Council from using the depot, he appealed to the Full Court. He failed in his appeal, the Court holding that as there was statutory power to establish such a depot, this power was intended to be exercised for the public benefit, even though some detriment to neighbouring residents would necessarily follow. In delivering the opinion of the Court, Mr. Justice Ferguson said that he could not "draw the inference that the intention of the Legislature in conferring powers under the Local Government Act concerning the situation of any depot was that they should be exercised only as far as it was possible to do so without interfering with the common law rights of individuals. No doubt it was an interference with a man's common law right to create a nuisance to his detriment on adjoining land, but it was equally an interference to prevent him from burying his own night soil on his own land. It appeared that the intention of the Legislature was that these private rights should be subordinated to the public interest where questions of public health and safety were concerned; that it meant to invest the council with very wide powers for the purpose of dealing with such questions; and that the authority of the council to exercise these powers limited as it was by the Minister's right of veto, and by the necessity of complying with the ordinances made by the Governor, was not subject to any further limitation arising out of individual common law rights."

The death of Dr. E. M. Brissenden, K.C., of the New South Wales Bar, has taken from us our wittiest and best-beloved comrade. He was the unofficial leader of our Bar and had obtained the honour of M.B.E. in the Great War. I have formerly mentioned two or three instances of his wit, and may now add some others. He was conversing with two or three friends at a club one evening when a man joined their gathering and, taking charge of the conversation, laid down the law as to many matters with much vehemence. Then he departed, and "Briss." asked: "Who was that very positive person?" and was told that it was "Mr. Quin," "Oh yes," said Briss., "I ought to have known him at once for I heard all about him at school—he is *Non est dubium quin.*" In Equity, he was once opposed to a junior who was stating a more than doubtful argument in a very confusing way, and Mr. Justice Harvey said: "But I think in your argument, Mr. Stuffgown, you are putting the cart before the horse." "That is so that my learned friend may be able to back out of it easily, your Honour," observed Dr. Brissenden. At the Western Front he was at one time Claims Officer and had to deal with a claim for some timber taken by the Australians. With customary care, he investigated the facts and law of the matter and reported to G.H.Q. that the timber was under shell-fire when taken and that as the Code Napoleon stated that in the case of goods taken without the owner's consent the value must be assessed as at the time when they were taken, he found against the claim. G.H.Q. sent the papers back with a minute stating that the timber must have been of some value, and that he should have inquiry made and report obtained. And thereupon Briss. sent all the papers for "inquiry and report" to the "O.C. H.M. Marines Newfoundland."

The result of the General Election in New South Wales, on October 25th, gives cause for some reasonable apprehension of evil things to come for it was in truth a victory for the Communists who now control the Labour Party in that State and dictate its actions. On the day that the Lang Ministry was sworn in a deputation demanded a new Arbitration Act, and the immediate removal of Mr. Justice Street, and Mr. Justice Cantor, whose decisions have sometimes been adverse to Labour litigants, and the appointment of Mr. Justice Piddington to sit alone in the exercise of industrial jurisdiction. Other demands are that all fines imposed upon strikers for crimes of violence during the timber strike, and the coal strike, should be refunded, and all other penalties remitted, and that there should be an immediate enquiry to ascertain whether the eighty constables who prevented 5,000 rioters, who wanted to kill the non-unionists at Rothbury Mine, from achieving their purpose "used any unnecessary violence." It may safely be assumed that all these things will be done and performed, but they are merely introductory to more serious actions that shall follow.

"F.E." and the County Court Judge.

"Outlaw" in the *Law Journal* recounts a new story, vouched for to him by an eye-witness, of Lord Birkenhead and the County Court.

"There was in London a County Court judge under whose tyranny solicitors and members of the Bar had suffered for many years. This judge never hesitated to express his poor opinion of the advocacy of those who appeared before him, he would interrupt on all occasions, relevant or irrelevant, and humble the advocate in the presence of his client. A firm of solicitors who had endured this tyranny for many years briefed F. E. Smith for the plaintiff in a jury case, in the hope that a blow might be struck for freedom. He had hardly begun the opening of his case to the jury when the judge intervened by asking him if it was really necessary to go into all these details; whereupon F.E., with deliberate and unhurried insolence, demanded: "How dare you interfere when I am addressing the jury?" Further encounters took place in a Court packed with keen observers of the fray; and it was soon obvious that the Judge was not doing well. Finally Smith advised the jury not to pay any attention to anything which might fall from the lips of the old man (or old woman) on the Bench; whereat the Judge cried out that Mr. Smith was abominably rude. 'There are two classes of persons,' said F.E., 'who may be so described; those who deliberately intend to be rude; and those who are rude because they cannot help it. I belong to the former class; your Honour to the latter.'"

Crime and Punishment.

Some English Decisions.

The Court of Criminal Appeal in England has endeavoured, since its constitution, to secure some sort of standardisation of sentences for particular offences and has endeavoured from time to time to lay down, so far, of course, as it is desirable or indeed possible to do so, principles on which sentences should be based. The English Criminal Appeal Reports contain a storehouse of decisions on this matter no counterpart of which is found, except here and there, in our own law reports. No doubt, as Mr. Justice Herdman recently pointed out at Auckland, these decisions are not binding upon our Courts; but, nevertheless, they are not without value. Some of the English cases are reviewed in an interesting article in the *Law Journal* of August 16th, which, by permission, we reprint below:

The Court of Criminal Appeal has frequently laid down that "in passing sentence, regard must be had to the intrinsic nature of the offence proved." This ruling was once again repeated by the Lord Chief Justice in *Rex v. Williams*, at the session of the Court on July 28. In this case a man convicted of stealing a pair of boots and attempting to steal a suit of clothes was sentenced to three years' penal servitude. He had a bad record, but the Court reduced his sentence to one of twelve months' imprisonment with hard labour, warning him at the same time that this was the last occasion on which he could expect leniency. For it has been held that, as a last extremity, where an offence is continually repeated immediately after release, the Court has no alternative but to treat the repetition as an aggravation of the offence and to pass sentence accordingly (*Rex v. Connor*, [1913] 9 C.A.R. 131). Apart from this, it has been pointed out that "if very severe sentences are imposed for small crimes, it leaves no heavier sentences for graver crimes": *per* Coleridge, J., in *Rex v. Edwards*, [1910] 5 C.A.R. 229. A series of petty thefts can never be so harmful to the community as blackmail or robbery with violence; and it is clearly proper that the law should distinguish between such crimes by meting out different treatment to the offenders in these cases. One of the reasons for the creation of the Court of Criminal Appeal was the hope that it might assist in framing general principles for the administration of criminal justice (see *per* Darling, J., in *Rex v. Woodman*, [1909] 2 C.A.R. 67); and there is no doubt that the doctrine that regard must be had to the intrinsic nature of the offence is now a well-established rule of law.

The short time during which the Court has been in existence makes it difficult to discern with certainty any other general principles. But an examination of some of the reported decisions is not without interest.

Thus, it seems tolerably well established that the prevalence of a particular crime in a locality will justify an exemplary sentence: *Rex v. Green*, [1912] 7 C.A.R. 225; *Rex v. Pomfret*, [1924] 18 C.A.R. 17. In considering a prisoner's general attitude should he be rewarded if his conduct is useful, whatever be the motive, or should he only be rewarded where his "useful" conduct has proceeded from repentance? Thus in *Rex v. James*, [1913] 9 C.A.R. at 144, Darling, J., said:

> "He deserves the term of seven years imposed, but the Court reduces it to three, for he betrayed the thieves; it is expedient that they should be persuaded not to trust one another, that there should not be 'honour among thieves.'"

On the other hand, the Lord Chief Justice has stated in *Rex v. O'Dare*, [1927] 20 C.A.R. at 80:

> "There is no rule of law or practice that a co-prisoner giving evidence against others should receive a shorter sentence for his public services. Perhaps in special circumstances, *e.g.*, where there were signs of repentance, those services might be taken into account, but such an inducement must not be held out a rule."

The question really is whether the community is strong enough to dispense with the "services" of criminals and only to reward action proceeding from honourable motives. The latter view would seem to be more likely to prevail (see *Rex v. Davies*, [1912] 7 C.A.R. 254; *Rex v. Porter*, [1913] 9 C.A.R. 213; *Rex v. Bell*, [1919] 14 C.A.R. 36).

Finally, what effect should a prisoner's social status have on his sentence? Should it be taken into consideration in mitigating his sentence on the ground that the prisoner will necessarily find prison life less tolerable than one more humbly situated? Or should the prisoner's position be regarded as an aggravation of his crime? The Court of Criminal Appeal has not been required to investigate this difficult problem on many occasions, and cannot be said to have laid down any general principle. However, the following remarks from Channell, J.'s judgment in *Rex v. Cargill*, [1913] 8 C.A.R. at 231, offer an interesting solution:

> "It is very desirable, if possible, to pass a sentence on a man in a good position exactly the same as a man in a different position; it is true that the sentence is harder, but the offence is correspondingly greater; the man ought to know better, and the way of meeting that is to give exactly the same sentence; the sentence is worse, but, by reason of the prisoner's position, the offence is worse."

There are clearly cases when such a rule cannot properly be applied, but it is undoubtedly one that is both used and of use in dealing with the majority of serious crimes.

It will be seen from the foregoing examples that a beginning has been made in building up from particular cases general principles on which sentences should be based. It is probably not possible, and would seem certainly undesirable, that the law should attain any great rigidity in this respect. But the analogy between the origin of the common law from particular cases and the present work of the Court of Criminal Appeal in the revision of sentences is attractive. This mode of procedure appears more adapted to our genius than the laying down of a fixed and elaborate code of penal law. The reforms in the criminal law in the nineteenth century swept away the archaisms and anomalies with which it had become encumbered; but left a very wide field for the exercise of the judge's discretion in inflicting punishment. The work begun by the Court of Criminal Appeal is to see that that discretion is not "arbitrary, vague, and fanciful, but legal and regular" (Lord Mansfield, C.J., in *Rex v. Wilkes*, [1770] 4 Burr. 2539); in other words, they will ensure that the discretion is a "judicial discretion."

"Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes."

—Lord Halsbury.

Forensic Fables.

THE IDLE APPRENTICE AND THE INDUSTRIOUS DITTO.

Two Apprentices to the Law Shared Chambers together. The One was Idle; the Other was Industrious. The Latter Rose Early, Abstained from Strong Drink and Tobacco, Read the Law Reports, Attended Debating Societies, and Held Briefs for his Learned Friends. The Former Stayed in Bed till Mid-day, Arrived at Chambers at One, Lunched from Two to Four, Borrowed Sums of Money from his Acquaintances, Consumed Considerable Quantities of Alcohol between his Abundant Meals, and Devoted his

Spare Time to Studying the Sporting Papers and Sporting Winners. The Industrious Apprentice was Ultimately Rewarded for his Virtuous Conduct. After Twenty-Three Years of Unrequited Toil, he Attracted the Favourable Notice of a Silk, who Gave him a Room and a Hundred a Year for Noting his Briefs. Far Different was the Fate of the Idle Apprentice. He Made Friends with a Moneyed Person, Got into Polite Society, Married a Charming Wife, and is now the Managing Director of the Amalgamated Continental & Asiatic Tea, Rubber, Tin & Indigo Syndicate, Limited, with an Annual Salary of Twelve Thousand Pounds.

MORAL: *Work Hard.*

Rules and Regulations.

Explosive and Dangerous Goods Act, 1908: Amendments to Regulations re fireworks.—Gazette No. 74, 30th October, 1930.

Motor-vehicles Act, 1924: Motor-vehicle (Supplementary) Regulations; Motor Omnibus (Constructional) Regulations.—Gazette No. 78, 6th November, 1930.

Samoa Act, 1921: Samoa Treasury Regulations, 1930; New Zealand Reparation Estates Amendment Order (No. 2) 1930.—Gazette No. 78, 6th November, 1930.

"Flabbergasted."

Lord Justice Scrutton on Counsel's Conduct in the Lower Court.

In the recent case of *Navy, Army and Air Force Institutes v. Lindsey*, 23 B.W.C.C. 172, counsel for the appellant told the Court of Appeal that he was so "flabbergasted" when the award in the County Court was given without an opportunity for him to address the Court or call evidence that he acquiesced in what was being done, and did not ask the Judge to postpone his decision until he had been heard. Scrutton, L.J., in the Court of appeal was strong in his condemnation: he said:

"I think the Court of Appeal—and I rather agree with counsel in this—is frequently in a difficulty in not having fully in its mind the atmosphere of a County Court. We, in this Court, have lots of time, and, I hope, a good deal of patience, and we have the assistance in every case of competent counsel. A County Court judge has a very long list; in many cases he has no assistance at all and has to try to find out from incompetent people what they are quarrelling about, because generally the thing that they think they are quarrelling about is quite irrelevant to the actual proceedings which are before the Court. He has to work at a pace which in this Court would not be a satisfactory pace. I quite appreciate that, in those circumstances, the judge may sometimes express a hasty and forcible conclusion which, if proper steps were taken, he could reconsider; but I am quite clear on this, that it is the duty of counsel, however they may be lacking in courage, however "flabbergasted" they may get when something unexpected happens, to take the necessary steps to bring to the attention of the County Court Judge the fact that they are making a submission to him on which he should rule, with the result that if he rules wrongly he may be questioned in a higher Court; and it is not enough for counsel, thinking that the most diplomatic way of dealing with the matter is to agree with the view of the learned judge expressed at the time in the hope that he will ultimately come to a decision in their favour, not to take an objection. The lack of courage in putting an objection to the judge before his face cannot be got over by courage in coming behind his back and making statements in the Court of Appeal. As a general rule in the County Court, if you desire to question a decision of the judge, you must take the proper steps to bring to his attention the fact that you are asking for a ruling which you may question. Unfortunately, there has been a difference of opinion—a very regrettable difference of opinion—between counsel as to what happened in the County Court. There ought never to be a difference of opinion between counsel on a question of fact: it is their duty to the Court to express accurately to the Court what happened—there being no doubt as to what did happen. In this case we have heard both counsel who were in Court, and they do not entirely agree—they agree on some points—as to what happened. . . . . It is no use doing as I think was done in this case, saying: 'I am very pleased to have a direction from your Honour as to the points to which you think the evidence should be addressed'; the evidence should be formally tendered. . . . . If the judge rejects that evidence he should

be asked to take a note. That would bring to his attention the question that here was a matter on which his ruling in law was invited with a view to questioning it. But if, instead of taking any step of that sort, one merely acquiesces in his suggestion because one does not want (to use a colloquial expression) to 'put up the back' of the judge by disagreeing with him, counsel who take that diplomatic line for fear of offending the judge must not afterwards, when there is no fear of offending the judge, come and say to the Court of Appeal: 'The judge was wrong.' They must question the proceeding in the proper place. . . . . The second and last point on which it is questioned is that it is said that the counsel for the applicant had no opportunity of addressing, and was not allowed to address, the Court. . . . . Mr. Berryman is of opinion that he did; Mr. Reuben is of opinion that he did not. In my view, the matter should have been raised by counsel rising to address the Court and saying, 'Your Honour has not yet heard me'; and if counsel—he says because he was 'flabbergasted'—does not get up and ask to address the Court I can see no reason why that should be taken here as a ground for setting aside the award. For these reasons I am of opinion that this appeal fails. I only desire to say generally to counsel practising in the County Court that if they wish to take points of this sort they must formally raise them before the judge, and they must not mind if the judge gets angry with them; they are there to put the case of their clients before judges whether judges are angry or not, and if they have not the courage to do it to the judge's face they must not come and do it behind his back."

New Books and Publications.

A.B.C. Guide to Practice, 1931. By Davis and Boland. (Sweet & Maxwell Ltd). Price 12s. 6d.

Arbitration in England and Germany. By Dr. Rudolf Kahn. (Sweet & Maxwell Ltd.). Price 4s.

Road Traffic Act, 1930. By E. Gilbert Woodward. Preface by R. A. Glen. (Eyre & Spottiswoode). Price 19s.

Patents, Designs and Trade Marks. Second Edition. 1930. By H. Fletcher Moulton and J. H. Evans-Jackson. (Butterworth & Co. (Pub.) Ltd.). Price 24s.

The Trial of Captain Kidd. (Notable British Trials Series). Edited by Graham Brooks. (Butterworth & Co. (Aus.) Ltd.). Price 9s.

Phipson on Evidence. Seventh Edition. By Roland Burrows, M.A., LL.D., assisted by C. M. Cahn. (Sweet & Maxwell Ltd.). Thick Edition, 47s.; Thin Edition, 50s.

The World, The House and The Bar. By Rt. Hon, Sir Ellis Hume-Williams, Bart., K.B.C., K.C. (John Murray). Price 12s. 6d.

Manual of Modern Mining Law and Practice. By P. Gordon Bamber, Assoc. M.I. Min. E., and J. J. Clare Hunt. (Sweet & Maxwell Ltd.). Price 29s.