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"From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned, in the Court where he daily sits to practise, from that moment the liberties of England are at an end."

—*Lord Erskine.*

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The Mortgagors Relief Bill.

The Prime Minister's Mortgagors Relief Bill at present before Parliament is a measure of very considerable importance to members of the legal profession. Whether a moratorium is necessary, or whether it is expedient, are questions about which there will always be a difference of opinion and it is not proposed to embark here upon any discussion of such questions; the purpose of the present article is simply to review the provisions of the particular measure now before the Legislature.

The Bill applies to all mortgages except (a) secutities for loans granted under the Repatriation Act, 1918, (b) mortgages executed after the passing of the Bill, and (c) any other mortgages or class or classes of mortgages from time to time exempted from its operation by the Governor-General by Order-in-Council. It does not exempt, as did our last moratorium measure, the Mortgages Final Extension Act, 1924, "trade mortgages"—i.e., mortgages securing to any bank, trading company or merchant the balance of a customer's current account. The definition of "mortgage" is a wide one and includes, in addition to ordinary mortgages and agreements to mortgage of land or chattels, any agreement whereby security for the performance of any contract is granted over land or chattels, and any instrument of security over any life insurance, endowment, or annuity policy, and also includes any agreement for the sale and purchase of land. The definition would not, however, seem to be wide enough to include hire-purchase agreements relating to chattels. The Governor-General may by Order-in-Council apply the provisions of the Act with the necessary modifications to all or to any class or classes of leases of land containing an optional or compulsory purchasing clause granted before the passing of the Bill. All the provisions of the Bill are to apply to the Crown.

The limitation of the rights of mortgagees is contained in clause 4 of the Bill which reads as follows:

> "4. It shall not be lawful for a mortgagee under a mortgage to which this Act applies or any other person—
> (a) To exercise any power of sale, rescission, or entry into possession conferred by any such mortgage or by statute; or
> (b) To issue or to be concerned in the issue of any process of execution against any property or any interest therein over which security is granted by any such mortgage in pursuance of any judgment, decree, or order of any Court in its civil jurisdiction obtained against the mortgagor in respect of any covenant, condition, or agreement expressed or implied in the mortgage, whether so obtained before or after the passing of this Act, or to continue or to be concerned in the continuance of any such process of execution, whether commenced before or after the commencement of this Act,
> otherwise than subject to and in accordance with the provisions of this Act."

It is to be observed that the Bill restrains only (1) the exercise of any power of sale, rescission, or entry into possession, and (2) the issue of execution against the mortgaged property in pursuance of any judgment obtained against the mortgagor in respect of the mortgage. It does not prevent a mortgagee from calling up the principal sum and obtaining judgment therefor, or prevent him from suing upon a breach of covenant or for interest; but any judgment so obtained can be enforced only against property of the mortgagor not subject to the mortgage.

The limitations imposed upon the rights of mortgagees by Clause 4 of the Bill are not, however, absolute. A mortgagee desiring to take any or the steps restrained by that clause is to give to the mortgagor notice in writing of his intention to do so. If the mortgagor does not within one calendar month after the giving of such notice apply to the Court for relief (stating his grounds) and serve a copy of his application on the mortgagee the latter may proceed unrestrained. If the mortgagor does so apply for relief the mortgagee cannot proceed until the application has been disposed of by the Court or otherwise than subject to the terms of the order of the Court. The Magistrate's Court is given jurisdiction in respect of mortgages where the principal moneys do not exceed £500.

In determining whether relief shall be granted the Court may take into consideration:

> "(a) The effect of the continuance of the mortgage upon the security thereby afforded to the mortgagee:
> (b) The inability of the mortgagor to redeem the property either from his own moneys or by borrowing at a reasonable rate of interest:
> (c) The conduct of the mortgagor in respect of any breaches by him of the covenants of the mortgage:
> (d) Any hardship that would be inflicted on the mortgagee by the continuance of the mortgage or upon the mortgagor by the enforcement thereof:
> (e) The extent to which any default by the mortgagor has been caused by any economic or financial conditions affecting trade or industry in New Zealand:
> (f) Whether any relief granted by the Court pursuant to this Act would be reasonably likely to enable the mortgagor having regard to his circumstances and the conditions mentioned in the last preceding paragraph, to meet his liabilities under the mortgage within such time as the Court deems reasonable."

Apparently, though the Bill does not clearly so provide, these considerations are not to be exclusive. If the Court is of opinion that relief should be granted it may, in its discretion, subject to such terms and conditions as it thinks fit to impose, order that the mortgagee shall not, before a date specified in such order, *being not later than twelve months after the date of the mortgagor's application for relief*, exercise the powers mentioned in Clause 4, save by leave of the Court where the mortgagor should commit a breach of the terms and conditions of the order. At any time before the date specified in the order the Court may extend the order to a date not later than twelve months after such specified date. Apparently, though the position is not made as clear as it might be, only one such extension can be granted.

The date of the commencement of the Bill and the date of its termination are to be fixed by Proclamation. It would be better, in our view, if the latter date were fixed definitely by the Bill itself.

Supreme Court

Herdman, J. February 23, 25; March 3, 1931.
Auckland.

AH CHUCK v. NEEDHAM.

Destitute Persons—Bastardy—Evidence—Evidence of Mother Bastardizing Child Born During Marriage—Presumption of Legitimacy of Child Born During Subsistence of Marriage—Not Rebutted by Evidence of Intimacy of Mother with Mongolian and of Mongolian Characteristics of Child—Evidence of Mother as to Paternity Not Admissible Where Illegitimacy Not Proved by Independent Evidence—Quaere as to Admissibility where Illegitimacy Established Independently.

Appeal by way of rehearing from an order made by Mr. F. K. Hunt, S.M., at Auckland, on 30th September, 1930, in which he adjudged the appellant, who was a Mongolian, to be the father of the illegitimate child of the respondent, E. E. Hedges—a married woman and a European—and ordered him to pay the sum of 10/- per week for its maintenance. Hedges was married to his wife on 29th May, 1918. During the year 1928 Mrs. Hedges was living with her husband and children at Robertson Road, Mangere. On 26th February, 1929, she gave birth to the child mentioned in the complaint. The birth of this child was registered by Hedges, the husband, on 23rd March, 1929. The appellant carried on the business of market gardening close to the house occupied by the Hedges and frequently visited their house in the absence of the husband. He was seen there on three occasions by a Mrs. Chrisp. Once when she was there he came into the house and in her presence he went up to Mrs. Hedges closely and put his hand on her shoulder using expressions of endearment. Later, the Hedges went to Onehunga to live. Mrs. Chrisp testified that the appellant visited the Hedges' house there, and she saw him once in the house after Mrs. Hedges gave birth to the child which was the subject of the present proceedings. Another witness, Mrs. King, stated that the appellant was on friendly terms with Mrs. Hedges and that on one occasion when she was ill in bed at Mangere he entered the house and came into the bedroom to ask her how she was. Mrs. Boakes, an aunt of Hedges, stated that her nephew was born of white parents and stated that she had seen the appellant at the house and had heard him use some offensive expressions when speaking to Mrs. Hedges. The midwife who was present at the birth of the child said that she had seen the appellant at Hedges' house at Mangere and that about three days after the birth of the child she saw him in the bedroom of Mrs. Hedges at Onehunga. He was looking at the child and said, "Nice baby, very nice baby." In her opinion the child displayed evidence of Chinese parentage. Dr. Abbott who was present at the birth of the child stated he was of opinion that the child was a half-caste, a cross between a Mongol and a Nordic. On 5th of August, 1929, six months after the child was born, Hedges instituted proceedings for divorce against his wife alleging that the appellant had committed adultery with her in the months of April, May, June, 1928, and on other dates. The Court found that the allegations contained in the petition had been proved and made a decree dissolving the marriage of Hedges with his wife.

Mrs. Hedges who was called by the complainant—a police constable—stated that she had intercourse with Ah Chuck on one occasion and that he was the father of her child. That evidence was objected to, but at the request of counsel it was admitted provisionally; it being left to the Court to determine whether or not such evidence could be lawfully received.

Tong for appellant.

Hubble for respondent.

HERDMAN, J., said that no matter how suspicious one might be about the appellant's intimacy with Mrs. Hedges it was indisputable that at or about the time the child was conceived Hedges and his wife had opportunities of access. They were living together as man and wife in the years 1928 and 1929. It, therefore, followed that as the child had been born during the subsistence of the marriage it was *prima facie* legitimate. In the circumstances proved in the present proceedings legitimacy was presumed. No proof of any kind was given that the husband did not have intercourse with his wife at the period of conception, so even if it had been proved that the woman had committed adultery with other men the husband must be deemed to be the father of the child. See **Gordon v. Gordon,** (1903) P. 141. The presumption of legitimacy was not, t was said, a presumption *juris et de jure*. It might be rebutted by "strong distinct satisfactory and conclusive" proof that such access did not take place between husband and wife as would be necessary to constitute the husband the father of the child: **Morris v. Davies,** 5 Cl. & F., per Lord Eldon, at p. 265. The husband and wife were living under one roof. They had had children before. There was no evidence of any kind which would justify him in concluding that the normal and natural human relations which had existed between husband and wife did not subsist in the case of Hedges and his wife when the child was conceived. It was open to the appellant to prove that it was a natural impossibility for the husband to be the father of the child. Proof might be given that intercourse between husband and wife was impossible, that husband and wife were so separated by distance that access could never have taken place. Again, proof might be given that Hedges was impotent and proof of impotence would suffice to bastardise the child. No such proof was given in the present case. Apart from the evidence given by Mrs. Hedges His Honour was invited to declare that, because a Chinese neighbour was an occasional visitor to the house of Hedges and appeared to be on intimate terms with Mrs. Hedges and that, because during wedlock a child was born to the woman which, it was said, exhibited certain physical characteristics that were associated with Mongolian people, His Honour must decide that the presumption of legitimacy had been destroyed. His Honour was not aware of any authority that went the length of deciding that those circumstances are sufficient to justify a finding of illegitimacy, and there was no accounting for the vagaries of nature. Dr. Abbott's opinion must, of course, be considered with respect. But sexual intercourse between husband and wife in the circumstances that existed in the present case was presumed and there was no evidence that it did not take place or that it could not have taken place. The rule on that subject laid down in the **Banbury Peerage Case** was discussed at length in **Morris v. Davies** (*cit. sup.*), at p. 254. As His Honour understood the opinion of the Judges expressed by the Lord Chief Justice in the case cited, they were emphatic that the presumption of legitimacy which arose when a child was born in wedlock could be met only by some kind of definite proof that sexual intercourse between husband and wife did not or could not take place at the time the woman conceived. Leaving out of account the evidence of Mrs. Hedges, could it be said that such proof existed in the present case? It was said that the evidence given about the physical characteristics which suggested Mongolian paternity constituted such proof. His Honour could not accept that argument. That evidence in His Honour's opinion was of no more value than was the evidence tendered in **Gordon's case** that a wife had committed adultery with a number of men.

His Honour next considered the question that was raised in the appeal: was the testimony of the mother of the child admissible to prove legitimacy or to prove paternity? Mr. Hubble, for the complainant, admitted the invincibility of the doctrine stated with so much weight and authority by Lord Mansfield in **Goodright's Case,** 2 Cowp. 591, and repeated in **Russell v. Russell,** (1924) A.C. 687: "The law of England is clear, that the declarations of a father or mother cannot be admitted to bastardise the issue born after marriage." Later, Lord Mansfield said that the father and mother "shall not be permitted to say after marriage that they had had no connection and therefore that the offspring is spurious." Again, coming to more recent times, there was the decision of Swift, J., in **Warren v. Warren,** (1925) P. 107, that "a wife's admission that she had committed adultery, even if accompanied by her belief that a child, subsequently born, was the result of the adultery, cannot bastardize the child without evidence of the non-access of the husband." It was claimed in the present case that illegitimacy was proved by evidence other than that given by Mrs. Hedges and that illegitimacy having been proved she could lawfully give testimony which would identify the father. To that His Honour replied that if Mrs. Hedges' evidence was withdrawn, the evidence remaining was insufficient to bastardize the child and that as Mrs. Hedges could not give proof that her child was spurious the case against the appellant must accordingly fail. It was, no doubt, true that Mrs. Hedges' evidence, if accepted, identified the father of her offspring but it also proclaimed her child to be a bastard. From that there was no escape and her evidence, in so far as it proved the child's illegitimacy, was clearly inadmissible. If the illegitimacy of the child had been established by independent testimony it might be that for purposes of affiliation the mother might be able to give evidence for the purpose of identifying the father, but, in view of the opinion that His Honour had formed that illegitimacy had not been proved, it was unnecessary for him to decide the point.

Appeal allowed.

Solicitor for appellant: **S. W. W. Tong,** Auckland.
Solicitors for respondent: **Meredith and Hubble,** Auckland.

Herdman, J. December 10, 11, 1930; February 12, 1931. Auckland.

AUCKLAND CITY CORPORATION v. GUARDIAN TRUST AND EXECUTORS CO. OF N.Z. LTD. AND OTHERS.

AUCKLAND CITY CORPORATION v. GLEESON AND ANOTHER.

Municipal Corporation—Betterment—Liability for Betterment Apportionable Among All Persons Interested in Lands Benefited According to Value of Respective Interests—Power of Compensation Court to Apportion Liability Between Lessor and Lessee Notwithstanding Covenant in Lease Throwing Whole Liability on Lessee—Statutory Definition of "Owner" Inconsistent with Context and Disregarded—Municipal Corporations Act, 1920, Ss. 2, 191, 193, 202, 203.

Cases stated for the opinion of the Court upon questions of law arising in connection with a dispute as to the payment of claims for betterment made by the Auckland City Council against the two sets of respondents in respect of the widening of a street known as Vulcan Lane. The Council had made claims for betterment against both sets of respondents, the claim in each case being £1,680. As to the property in which the Guardian Trust and Executors Company was interested the facts were as follows: On 12th September, 1884, one, J. T. Boylan, leased the land and premises known as the Occidental Hotel to Dennis Lynch for sixty years at a rental of £182 per annum. In due course the lessee's interest became vested in Mr. Oliver Nicholson, of Auckland, solicitor, and Mrs. Lynch as tenants in common who in turn sublet the property to Hancock & Co. Ltd., for 31 years. That sublease would expire on 1st November, 1933. The rent reserved by it was £546 per annum. The lease and the sublease contained covenants whereby the lessee and sublessee respectively covenanted to pay all rates taxes impositions and other charges and outgoings. Mr. J. T. Boylan was dead and the fee simple in remainder was vested in the Guardian Trust Co. The persons interested in that property were, therefore: The Guardian Trust Co. as freehold owners, Miss Boylan, Mr. Nicholson, and Mrs. Lynch as lessees and Hancock & Co. Ltd., as sublessees from Mr. Nicholson and Mrs. Lynch. The property in connection with which the other claim arose was owned by J. C. Gleeson and P. S. Gleeson and it was leased to Hancock and Co. Ltd. for £100 per annum, the lease expiring in November, 1932. This lease contained a covenant by the lessee to pay all rates taxes charges assessments and outgoings. A demand having been made for the payment of betterment in respect of those properties, the question arose as to who in law was obliged to satisfy that demand.

Stanton for claimant.
Richmond for Guardian Trust and Executors Co. Ltd.
West for A. Boylan.
Finlay for Lynch and Nicholson.
Rogerson for Hancock & Co. Ltd.
Towle for J. C. Gleeson and P. S. Gleeson.

HERDMAN, J., said that it was necessary to examine the first four subsections of S. 193 of the Municipal Corporations Act, 1920. His Honour quoted those subsections and said that subsection (1) provided that the "owner" should pay and the term "owner" was defined in S. 2 the following way: "In this Act, if not inconsistent with the context, 'owner' of any property means the person for the time being entitled to receive the rack-rent thereof, or who would be so entitled if the same were let to a tenant at a rack-rent." In **Stroud's Judicial Dictionary,** quoting from Blackstone's Commentaries, "rack-rent" was described as only a rent "of the full value of the tenement or near it." It was plain that an interpretation of S. 193 which was founded upon the definition of "owner" which appeared in S. 2 of the statute would produce consequences which would be just as ridiculous as they would be unjust, and it was equally plain that if the term "owner" meant the person or persons for the time being who had vested rights or interests in the land no injustice would be done, for they would be called upon to pay in proportion to the value of their respective interests. But it was contended by Mr. Richmond that inasmuch as the term "owner" had been defined in the statute, there could be no ambiguity; there, it was said, the matter ended. The word had been given a definite and fixed meaning, which was unalterable. His Honour said, however, that, without resorting to Parliament, it was possible to vary the meaning of a word by showing that the statutory definition given to it was inconsistent with the meaning of the context: **Maxwell on the Interpretation of Statutes,** 7th Ed., 29; **Strathern v. Padden,** (1926) S.C. (J.C.) 10. In passing His Honour pointed out that the term "owner" was used in S. 191 of the statute where provision was made for selling part of a street which the Council might not require. It might be sold to an owner of adjoining lands. If, then, the meaning of owner supplied by the interpretation clause in the statute was immutable it followed that a person to whom the freehold had been leased might become the purchaser whilst his landlord who owned the fee simple was debarred from a right of pre-emption. Under Ss. 202 and 203 of the Act, an owner of land might be compelled to fence land or fill up a hole. If an "owner" as used in those sections was to be ascertained by a reference to the definition of "owner" then, if land was let, the owner in fee simple might escape liability under those sections for he might not be entitled to the rack-rent. His Honour stated that in seeking for an interpretation of the word "owner" he had obtained no assistance from English text-books, but in America it would seem that the word was sometimes used in a statute as applying to anyone having an interest in the land. See **Words and Phrases Judicially Defined,** Vol. 6, 5139. In the present case if the language of the definition applied throughout S. 193 wherever the term "owner" was used, the result obtained was sufficient to establish between the definition and the context a striking inconsistency. If the person who for the time being was entitled to receive the rack-rent of the land was to pay for betterment in every case the Legislature had assumed that he alone benefited. The present case illustrated that that did not happen. The land benefited to the amount of £1,680 and, in the case of the Gleesons' property at any rate, the freehold-owner derived the advantage but it was said that he could not be made to pay. If the word "owner" was used in a comprehensive sense as including all persons who had an estate or interest in the land, then a meaning was given to the term which best harmonised with the subject of the enactment and with the object which it had in view.

The underlying principle of subsection (1) of S. 193 was undoubtedly that land which benefited by a work should pay for the benefit received. The increase in the value was the measure of the obligation and all those owning interests in the land which had been improved should share in the increased value. The first part of subsection (3) appeared to deal with a claim in respect of a specific piece of land in which several persons had interests. On the application of one of the persons interested the claim against those persons might be disposed of together. Then the subsection proceeded to provide for claims against owners of separate pieces of land in a street being heard together. In such a case there must be a consent in writing. The subsection finally provided that the Court should have power to apportion the amount awarded on account of betterment in any case in which there had been a joint hearing. From subsection (4) His Honour drew the inference that the legislature recognised that problems would arise in relation to separate interests in a specific piece of land, that different persons might own different interests and that it might become necessary to determine who in law owned an interest in respect of which a claim for betterment had been made. In subsection (6) too there was material from which an inference could be drawn that the expression "owner" must have some other meaning than that assigned to it by section 2. Subsection (6) gave an owner a right to pay the amount of his indebtedness by instalments extending over 20 years. But a person entitled to receive a rack rent might hold under a lease having but a few years to run; that was so in Gleesons' case at present under consideration. In such a case the lessee could not of course have 20 years within which to pay the claim, nor could he give a charge which would subsist for 20 years. Moreover, a charge over an interest which had not long to live might be of little value to the Council. Then, it was worth while noting that the words "estate" or "interest" were used in the subsection. It was difficult to believe that the legislature intended to load a lessee whose lease was fast reaching its termination with the whole burden of a betterment claim.

At the end of the statute in the fifth schedule there was supplied a form of claim for betterment or, as it was called, "claim for payment on account of betterment." That form if it were of any value for the purpose of interpretation would seem to indicate that the Council possessed, at any rate, a right against the owner in fee simple, but the words "or as the case may be" which were within brackets suggested that for the purposes of recovering betterment the Council might proceed against others having an interest in the land.

The origin of the present puzzling legislation was to be found in the Wellington City Betterment Act, 1900. In part that statute and S. 193 were word for word the same. The statute enabled the Council to claim against "the several owners of the respective lands," and S. 5 provided for claims for com-

pensation in respect of land in which several persons had " qualified or partial interests " being heard and determined together. That section was similar to subsection (3) of S. 193. The latter section spoke of claims against land " in which several persons have interest." In the Act of 1900 the term " owner " was not defined. In 1902 the Masterton Borough obtained a local Act providing for the recovery of betterment. The provisions contained in that statute were much the same as, if they were not identical with, those in the Wellington Act. In both statutes the form of claim in the schedule provided expressly for claims being made against a life tenant and a leaseholder in addition to the claim against the owner in fee simple. In the case of those statutes there could be little doubt about the liability of persons other than the owners of the freehold. The Acts provided for claims being made against the several owners of land but the term " owner " was not defined. Nevertheless, the inference to be drawn from the statutes considered as a whole was that the term " owner " and the expression " landowner " were to be treated as comprehensive expressions embracing all persons who had estates or interests in the parcel of land benefited by the work undertaken by the local authority. As a matter of fact the statutory definition of " owner " was in existence long before the right to recover for betterment was created.

In His Honour's opinion S. 193 of the Act of 1920 was in form and matter substantially a reproduction of the enactment under which the Wellington City Council and the Masterton Borough Council recovered betterment and an examination of those statutes had helped to shed some light upon the obscurities which were unfortunately present in S. 193. A careful consideration of S. 193 could leave no reader in doubt about the aim of the legislature when it enacted the section. It intended to impose upon certain lands an obligation to pay for the enhanced value given to them by improvements in the locality effected by the expenditure of public money. The only matter left in darkness was who should pay. Was it to be one person who had an interest in the benefited lands or all the persons interested ? His Honour had come to the conclusion that the latter view was the correct one and that the statutory definition of owner should in the special circumstances be disregarded. It followed, therefore, that unless some special contract effectively provided otherwise in the case of the Gleeson property, the freehold owners and their lessees would have to meet proportionately the demand of the Council and the same observation applied to the Boylan property.

It was argued that certain covenants contained in the deeds to which Hancock & Co. Ltd. was a party made them alone responsible for the payment of sums claimed by the Council. After quoting the covenants in the respective leases and subleases whereby the lessee or sublessee covenanted to pay all rates taxes charges assessments and other outgoings, His Honour said that he had no doubt that the covenants that he had cited as between the parties to the deeds decisively fixed the incidence of the claims for betterment, unless the operation of those covenants could be over-ridden by anything contained in S. 193 of the Municipal Corporations Act, 1920. But Mr. Rogerson, who represented Hancock and Co. Ltd., submitted that, not withstanding the covenants contained in the documents referred to which *prima facie* imposed a clear and definite obligation upon Hancock & Co. Ltd. to accept responsibility for the Council's claim, the company had still a statutory right under subsection (3) of S. 193 to apply to the Court to exercise the power conferred upon it to apportion the liability for betterment. For that proposition reliance was placed upon a number of English decisions of which **Monk v. Arnold,** (1902) 1 K.B. 761 was an example. In that case the Factory and Workshop Act, 1891, was under consideration. After referring to **Foa on Landlord and Tenant,** 6th Ed., 219, His Honour said that what he had to determine was whether there was within the four corners of S. 193 any provision which conferred upon a tenant who was *prima facie* bound by his covenant to pay the amount demanded for betterment a right to apply to have the demand apportioned. Subsection (3) was vague but it was plain, at any rate, that a party who was interested in land might make application that claims made against land in which he and others were interested might be heard and determined together and when the Court did that it was empowered to apportion the amount awarded on account of betterment. The obligation to pay was placed upon the owner of land and His Honour had decided that that term might comprehend more than one interested person. But it still remained to be decided whether a tenant who had bound himself by covenant was to be the only one to pay or whether on application made by an owner of an interest an apportionment might be made between the several interested owners notwithstanding the existence of the covenant ? It might be urged, of course, that in the English statute it was expressly stated that the owner should pay ; but in New Zealand, too, the " owner " whatever that expression might mean was obliged to pay. Then again, in England an express right was given to exact contribution from a tenant. In one case, **Monro v. Lord Burghclere,** (1918) 1 K.B. 291, the tenant was ordered to bear the whole burden of the expense incurred. But again, it was in His Honour's opinion undoubted that the Court had under S. 193 power to divide the burden. It might be that the reference to apportionment in subsection (3) related to claims against owners of distinct pieces of land, but it seemed to His Honour to be equally certain that it related to claims in respect of a specific piece of land in which several persons had interests. Against each owner of distinct pieces of land, separate claims would be made and the Court's duty would be to decide how much each individually should pay. By agreement the claims might be heard together but separate awards would be made in respect of each separate claim. However, whatever might happen in the case of claims against owners of separate pieces of land, it was at any rate certain that in the case of several persons owning distinct interests in one piece of land an apportionment would be necessary. His Honour, therefore, thought that in New Zealand S. 193 should be given the same construction as had been given to the legislation which was considered in **Horner v. Franklyn,** (1905) 1 K.B. 479 ; **Stuckey v. Hooke,** (1906) 2 K.B. 20 ; **Monro v. Burghclere,** (1918) 1 K.B. 291 and in **Monk v. Arnold,** (1902) 1 K.B. 761, in which Lord Alverstone on p. 765 said that it was obviously just and right that the County Court Judge should have jurisdiction to determine how the amount which had been expended should be apportioned. The view that Channell, J., took was that the legislature gave the County Court " power over the contract " which had been entered into between the landlord and the tenant. His Honour said that he had examined **Lowther v. Clifford,** (1927) 1 K.B. 130, and had not been able to get any assistance from it. It was not disputed in the present case that the lessees would, apart from legislation, be bound under the covenants to pay. It was because the legislature had taken power over the contract that the lessee's obligations had in His Honour's judgment been modified. Having given S. 193 his best consideration, His Honour felt obliged to decide, there being a definite resemblance in principle between the legislation in England and part of S. 193, that the Compensation Court had power on the application of any party to the claim made in respect of the Boylan property to order that all the claims made against the persons interested in that property should be heard together and to apportion the liability for betterment. The claims were at present embodied in one document but if an application by a party for a joint hearing was necessary it was not, His Honour thought, too late to make the order. Those observations applied also to claims made in respect of the Gleeson property. His Honour answered the questions put in the cases stated accordingly.

Solicitors for claimant : **Stanton, Johnstone and Spence,** Auckland.

Solicitor for Guardian Trust and Executors Co. Ltd. : **J. P. Kavanagh,** Auckland.

Solicitors for A. Boylan : **Jackson, Russell, Tunks and West,** Auckland.

Solicitors for Lynch, Nicholson, and Hancock & Co. Ltd. : **Nicholson, Gribbin, Rogerson and Nicholson,** Auckland.

Solicitors for J. C. Gleeson and P. S. Gleeson : **Towle and Cooper,** Auckland.

Myers, C.J.
Blair, J.

February 4 ; 6, 1931.
Wellington.

COLEMAN v. HOGG (No. 2.)

Negligence—Magistrate's Court—Leave to Appeal to Court of Appeal—Collision—Bylaw—Effect of Breach of Municipal Bylaw—Proper Question Upon Which to Grant Leave to Appeal to Court of Appeal—Facts of Case Fatal to Appeal Even if Question Wrongly Decided by Supreme Court—Leave Refused—Judicature Act, 1908, S. 67.

Motion under S. 67 of the Judicature Act, 1908, for leave to appeal to the Court of Appeal from the judgment of Blair, J., reported *ante* p. 21.

Macassey for respondent in support of motion.
Cooke for appellant contra.

MYERS, C.J., after stating the facts and referring to the observations of the Magistrate and of Blair, J., as to the effect of a breach of the bylaw, said that Blair, J., disagreed with the Magistrate's view and held that the breach of the bylaw was in itself in the circumstances of the case *prima facie* proof of negligence on the part of the respondent. If the appeal had turned upon that point alone His Honour would have been prepared to say that leave to appeal to the Court of Appeal should be granted. The point was one of importance and His Honour expressly guarded himself from expressing an opinion upon it without further consideration.

But even assuming in the respondent's favour that that point was incorrectly decided it was clear that he was not entitled to an order granting him leave to carry the case to the Court of Appeal. The point to which His Honour had already referred was really unnecessary to the decision because Blair, J. expressly found against the respondent on a matter of fact which necessarily concluded the case against him; he found that the respondent's driver should have seen the appellant's car before he said that he saw it and that had a proper look-out been kept the respondent's driver could and should have avoided the accident. That at all events seemed to His Honour to be the effect of Blair, J.'s finding. That being so, it would seem to follow that both parties were negligent and that the negligence of each was of such a nature as to prevent either from recovering damages against the other. During the argument His Honour intimated to Mr. Macassey his interpretation of Blair, J.'s judgment on that aspect of the case and Mr. Macassey frankly and properly admitted that if that was the position he could not press his application even if he could satisfy their Honours that Blair, J. was wrong in holding that the respondent's speed of 15 miles per hour was, in view of the bylaw, in itself *prima facie* evidence of negligence.

The application must, therefore, be dismissed. Mr. Justice Blair authorised His Honour to say that he concurred in the result.

Motion dismissed.

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

Solicitors for respondent: **Menteath, Ward, Macassey and Evans-Scott,** Wellington.

Reed, J. January 25; 28, 1931.
Wanganui.

ANSLEY v. ANSLEY.

Divorce—Petition on Ground of Separation Order Continuing in Full Force for not less than Three Years—Defence that Separation Due to Wrongful Act or Conduct of Petitioner—Separation Order Expressed to be Made on Ground that Wife a Destitute Person and Provision Made for her by Deed of Separation Inadequate—Grounds of Order Conclusive—No Wrongful Act or Conduct of Petitioner Disclosed in Separation Order or by Evidence—Decree *nisi* Granted—Destitute Persons Act, 1910, S. 17—Divorce and Matrimonial Causes Act, 1928, Ss. 10, 18.

Petition for a divorce upon ground that a separation order made in the Magistrate's Court on 25th July, 1927, had continued in full force for not less than three years. The respondent alleged that "the separation was due to the wrongful act or conduct of the petitioner." The parties were married on 30th December, 1925, at the ages of 58 and 57 respectively. Both had been previously married. In less than three months the respondent left her husband and returned to her home town—Wellington. Two months afterwards she took proceedings for maintenance which were compromised by a deed of separation dated 6th May, 1926. The evidence of the respondent showed that the differences leading to the separation were trivial, the principal complaint was of the supply of insufficient money. It was really a case of complete incompatibility of temper. The petitioner was, apparently, a dour narrow man, he was an ardent prohibitionist, a non-smoker, and penurious. The respondent appeared to have been of a more lively disposition. She discovered after marriage that he had been married several times before, and it was made a cause of complaint that she had not been told of that before marriage. Her attitude to a divorce was that she wanted to keep her husband tied though living at a distance. She did not want to be married again and she was trying to stop him. The deed of separation contained the usual recital of unhappy differences. The petitioner covenanted to pay his wife maintenance at the rate of £52 a year by equal monthly payments on the 6th day of each and every calendar month, the first payment to be made on 6th June following; and the respondent covenanted, *inter alia*, that she would not endeavour to compel the petitioner to allow her maintenance other than the said annual sum of £52. The payments were regularly made until June of the following year when, the petitioner being one week in arrear, (he stated due to the negligence of an agent) the respondent on 13th June laid a complaint in the Magistrate's Court in which she complained that she was the wife of the petitioner, that they entered into a deed of separation on 6th May, 1926, whereby they mutually agreed to live apart and the petitioner agreed to pay her £4 6s. 8d. per month for her maintenance; she further alleged that the petitioner had paid all maintenance accrued due under the said deed down to 6th May, 1927, that she was by reason of illness unable to work and was a destitute person within the meaning of the Destitute Persons Act, 1910, and that the maintenance paid and agreed to be paid by the petitioner towards her maintenance was inadequate for her maintenance. She, therefore, prayed for an order: (1) That she be no longer bound to cohabit with the petitioner. (2) That the petitioner be ordered to pay such sum towards her maintenance as the Court should think fit. (3) That the petitioner be ordered to pay the costs of the proceedings. The order of the Court, made on 25th July, 1927, repeated verbatim the recitals on the complaint which, by the order, the Magistrate specifically adjudged to be true, and upon that finding ordered payment for future maintenance of £1 10s. 0d. per week, followed by an order that the complainant "be no longer bound to cohabit with her husband."

W. J. Treadwell and **Haggitt** for petitioner.
Pope for respondent.

REED, J., said that the defence that the separation was due to the wrongful act or conduct of the petitioner was a good ground of defence under S. 18 of the Divorce and Matrimonial Causes Act, 1928, the onus being cast upon the respondent of proving to the satisfaction of the Court that the separation was so due. The respondent relied: (1) on the separation order being in itself proof of a wrongful act or conduct; (2) on evidence of alleged wrongful conduct. In support of the first point the cases of **Lunn v. Lunn,** (1924) G.L.R. 157, and **McKenzie v. McKenzie,** (1925) N.Z.L.R. 303, were relied upon. With those decisions His Honour respectfully agreed. It followed from those cases that if a Magistrate made an order for separation between husband and wife and proceedings under S. 18 of the Divorce and Matrimonial Causes Act, 1928, were subsequently based upon that order, the finding by the Magistrate of the grounds, upon which he made the order, could not be enquired into in the Supreme Court, and bound the parties, and if such grounds showed a "wrongful act or conduct" on the part of the petitioner it constituted incontestible proof of such "wrongful act or conduct." The separation proceedings were, His Honour said, peculiar. There was no allegation of a breach of S. 17 of the Act, that was to say that the husband had failed or intended to fail to provide her with maintenance, but purported to be on the ground that she was a destitute person and that the provision made in the deed of separation (of which amount she had covenanted not to endeavour to secure an increase) was inadequate. Whether or not on those recitals the order for separation was bad could not be enquired into in the present proceedings. It must be taken as a valid order for separation. If it were held to be bad, proceedings for divorce could be based on the deed of separation of May, 1926, but so long as there was in existence the present order for separation no proceedings would lie under the deed: **Fairchild v. Fairchild,** (1924) N.Z.L.R. 279. It must be assumed that the order of the Court was valid, and that being so there was no wrongful act or conduct by the petitioner disclosed in the grounds upon which it was made.

It was contended by counsel for the respondent that the Court must assume that the order was made under S. 17 and that the Magistrate had found that the petitioner had failed to provide the respondent with adequate means of maintenance, and that that constituted a wrongful act or wrongful conduct. If the grounds upon which a petition for divorce was based were those set out in S. 10 (i) of the Divorce Act, namely—separation under an agreement which had been in full force and effect for three years—and the case was defended, the fact that the petitioner had failed to supply the respondent with reasonable maintenance was no defence unless the failure had been wilful and persistent: **Roxburgh v. Roxburgh,** (1930)

G.L.R. 34. On the other hand it was true that where the proceedings were based on a separation order under the Destitute Persons Act the finding of a bare failure to provide maintenance was an answer to the petition—**McKenzie v. McKenzie** (*sup.*)—but that was due to the impracticability of re-opening the Magistrate's Court proceedings to ascertain and determine whether such failure was or was not wilful. It could not be doubted that if it were permissible to show, and it was shown, that the failure to maintain had not been wilful, but was for some reason that could not fairly be held to be a wrongful act on the part of the petitioner, it would be no answer to the petition. There was nothing to prevent a Magistrate, in making an order for separation on the ground of failure to maintain, from finding and stating in the order that such failure was not due to any blameworthy act of the defendant and, parenthetically, it might be remarked, that in view of the decisions under the Divorce Act it might be a matter for consideration of the Legislature whether there might not be an amendment to the Destitute Persons Act requiring a Magistrate making an order for separation upon that particular ground to find, and state in the order, whether or not the failure to maintain was or was not a wilful act on the part of the defendant. In the present case the Magistrate had embodied in the order his findings as to the cause of the failure to maintain. Although the order, therefore, might have been made under S. 17, the stated reasons for doing so were before the Court, and those negatived any wrongful act or conduct on the part of the present petitioner. His Honour thought, therefore, that the order for separation afforded no evidence of any wrongful act or wrongful conduct.

His Honour next dealt with the question whether, on the parol evidence, it was shown that the separation was due to the wrongful acts or conduct of the petitioner, and held that upon the evidence it had not been proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner.

Decree *nisi*.

Solicitors for petitioner: **Treadwell, Gordon and Treadwell,** Wanganui.
Solicitors for respondent: **Perry, Perry and Pope,** Wellington.

Reed, J. February 16, 1931.
Nelson.

IN RE DUNCAN: NICHOLSON v. MUGGERIDGE.

Will—Vesting—Life Interest—Gift Over—Trust for Wife of Income and Such Portions of Capital as She Should From Time to Time Apply For to Trustee—Trust After Death of Widow for Children of such Portion of Income and Principal as Wife "Shall Not Then Have Received"—Application by Widow to Trustee for All Moneys in Hands—Moneys Not Paid—Death of Widow—Children of Testator and Not Estate of Widow Entitled to Moneys.

Originating summons for the interpretation of the will of James Duncan deceased. After giving all his real and personal property to his trustee upon trust for conversion the testator by his will directed his trustee to invest the same and to hold the same and the securities representing the same in trust "to pay to my wife the income and such portion or portions of the principal as she shall or may from time to time apply to my said trustee for and from and after her decease as to such portion or portions of the said income and principal as my said wife shall not then have received and the securities representing the same upon trust for all my children in equal shares share and share alike the respective shares of such children to be absolutely vested on my decease." There were eight children—four sons and four daughters. The widow of the testator died on 22nd January, 1930, and by her will left all her property to the four daughters. At the date of the widow's death a sum of approximately £300 was still in the hands of the trustee of the will of her deceased husband. In June, 1928, the widow had applied to the trustee for payment of the whole of the principal moneys which were in his hands but, for reasons which it is unnecessary here to set out, payment was refused. The daughters claimed that they were entitled to the whole of the moneys in the hands of the trustee at the date of the widow's death; the sons claimed that they were entitled to share equally with the daughters.

Nicholson for plaintiff.
Smith for defendant daughters.
Thorp for defendant sons.

REED, J., said that reading the will as it stood without reference to authority, which was the correct method of attempting to ascertain the intention of the testator from the words he had used, the will appeared to be perfectly plain. The testator gave the income to his wife, during her lifetime, but authorised her to apply for and receive from time to time such portions of the principal as she desired. On her death any of the principal or income that she had not received was to be equally divided amongst all their children. Those children took a vested interest at the death of testator in whatever amount was subsequently found to be still in the hands of the trustee at the death of the widow. For the daughters it was submitted: (1) That on the true construction of the will the fund vested absolutely in the widow on the death of the testator and the gift over was repugnant and void; (2) That on the facts the widow must be held to have in effect received the whole of the principal moneys and that they, therefore, formed a part of her estate disposable of by her will. As to the first submission it was of course clear law that, if a gift was made in terms to a person absolutely, that could only be reduced to a more limited interest by clear words cutting down the first estate: **Re Jones, Richards v. Jones,** (1898) 1 Ch. 438, 441. It was purely a question of construction. In the present will there was no absolute gift. The income was to be paid to the widow but only "such portion or portions of the principal as she shall or may from time to time apply to my said trustee for," with remainder over of such of the income and principal as had not been received by her. That gave the widow a life interest in the principal moneys with power of disposal during her lifetime but remainder over if she failed to dispose of it; not at all an unusual provision in a will. In the following cases the effect of the wording was similar and it was held that the gift over was not repugnant and void and that only a life estate was conferred: **Scott v. Josselyn,** 26 Beav. 174; **Pennock v. Pennock,** L.R. 13 Eq. 144; **In re Thomson's Estate,** 13 Ch.D. 144; 14 Ch. D. 263; and **Re Ryder, Burton v. Kearsley,** (1914) 1 Ch. 865. It was suggested that the fact that the provision that the children's shares should be "absolutely vested" on the testator's death created a difficulty, moreover that the gift over "expressly related to income and principal." It was argued that "there could be no gift over of the income." The absolute vesting was in a fund the amount of which could only be ascertained on the death of the widow. There was no difficulty in that. There could, of course, be no gift over of income if the widow had received it, but the will only provided for the gift over of income not received by her. That created no difficulty. As to the first point, therefore, His Honour accordingly held that the principal moneys did not vest absolutely in the widow and that the gift over was a good and valid bequest. It was further submitted on behalf of the daughters that, upon being applied for, the principal moneys vested in the widow and were part of her estate at her death. His Honour said that there was no ambiguity whatsoever in the will and that the testator had made a clear distinction in the course of less than half-a-dozen lines between "apply for" and "received." Had he intended the application to *ipso facto* vest the money he could have used the words "shall not then have applied for," instead of "shall not then have received." His Honour thought that the trust moneys in the solicitor's hands (including any income not paid over) were equally divisible amongst the children of the testator. The questions asked in the originating summons were answered accordingly.

Solicitors for plaintiff: **Easton and Nicholson,** Motueka.
Solicitor for daughters: **S. A. Smith,** Motueka.
Solicitor for sons: **C. W. Thorp,** Motueka.

Rules and Regulations.

Animals Protection and Game Act, 1921-22. Notice respecting native and imported game and statement showing birds which may be killed in each Acclimatization District. List of native game and absolutely protected birds.—Gazette No. 20, 12th March, 1931.

Post and Telegraph Act, 1928. Radio-telegraphic regulations. Amended charges for transmission of radio-telegrams.—Gazette No. 21, 19th March, 1931.

English Bar Council.

Extracts from Annual Statement.

The annual statement of the General Council of the English Bar deals with many matters of interest, as to some of which we reprint below extracts from the statement. No doubt, owing to the system of fusion generally prevailing in New Zealand, some of the Council's decisions on questions of etiquette do not apply in strictness here; nevertheless they are of considerable interest.

Lord Donoughmore's Committee on Powers of Ministers of the Crown.

The terms of reference were: "To consider the powers exercised by or under the direction of (or by persons or bodies especially appointed by) Ministers of the Crown by way of (*a*) delegated legislation and (*b*) judicial or quasi judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law."

The committee extended to the council an invitation to give evidence. On the 18th June the vice-chairman (Mr. E. A. Mitchell-Innes, C.B.E., K.C.), who had prepared the memorandum of evidence, attended by the secretary of the council, gave evidence before the committee. The evidence was after deliberation confined to subject (*b*) of the reference and is too long to print *in extenso*; a draft may be seen at the council's offices.

The summary, at the end of the principal suggestions submitted, is as follows:—

(i.) That, in cases of at least all other than purely administrative decisions, the applicant or person aggrieved should be entitled, on demand, to an oral hearing, which should be public, and at which the witnesses on both sides should give evidence and be subject to cross-examination.

(ii.) That the parties should have the right to be represented by counsel or solicitor.

(iii.) That those who inquire into the facts should decide the case.

(iv.) That all decisions should, on their face, state the reasons on which they are founded.

(v.) That the practice of publishing the reports of decisions should be extended.

(vi.) That, in all cases, departmental tribunals should possess the following powers: (*a*) To compel the attendance of witnesses; (*b*) to administer oaths; (*c*) to require the production of documents; (*d*) to state cases on questions of law for the opinion of the court.

(vii.) That, in all cases, an aggrieved person should have the right of appeal on questions of law to the High Court.

(viii.) That, in cases of importance, the aggrieved person should have a right of appeal on questions of fact to the High Court, subject to the permission of the Minister.

(ix.) That the procedure on appeal to the High Court should be simplified and the expenses restricted.

(x.) That judicial and quasi judicial duties should be performed by persons not members of the staff of a department.

Broadcasting Law Lectures.

The chairman of the British Broadcasting Corporation (Mr. J. H. Whitley) requested relaxation of the ruling of the Council on this matter which ruling appears in the A. S. 1928, p. 7. At a meeting at which the Attorney-General was present, after full discussion, the following was agreed to replace the previous ruling:—

> "A practising barrister may on the invitation of the British Broadcasting Corporation broadcast lectures on law, but must not allow the publication of his name or any photograph. A non-practising barrister may allow the publication of his name and, if he thinks fit, of his photograph."

Divorce Legal Aid Bureau.

The attention of the council was drawn to a proposal that a panel consisting of six barristers and six solicitors should be formed to act for people of moderate means but not within the "poor persons" category at greatly reduced fees in divorce cases.

The council considered the matter in conjunction with members of the council of the Law Society, and thereupon issued the following notice which was screened in each Inn:

> "The attention of the Bar Council and the Law Society has been called to a notice in the press of the formation of a society which proposes to form a panel of barristers and solicitors who are put forward as willing to do a certain class of legal business at less than the usual remuneration. The Bar Council and the Law Society having jointly considered the matter are of opinion that the formation of such a panel is contrary to the practice of the Profession as directly offending against the rules against advertising."

Non-payment of Fees.

A barrister sought the advice of the council in this matter. The following letter was sent to him:

> "In reply to your enquiry, if attempts through the usual channels have failed to elicit overdue fees from a solicitor there is no objection to writing to him direct for them, unpleasant though that course undoubtedly is. The Law Society appear to have a settled rule that they will not take steps to enforce payment of fees to barristers unless it is proved that the lay client has paid money to the solicitor specifically for counsel's fees. For ultimate action, therefore, it appears necessary for the barrister to find out whether the lay client has paid counsel's fees to the solicitor before report to the Law Society is likely to be effective. The most effective method of doing this is to inquire on the point of the lay client. This course should not, however, be adopted until the solicitor has been informed that it is going to be adopted, and a reasonable time elapses in which the solicitor can forestall the procedure by payment of the overdue fees."

It was subsequently reported by the barrister that the matter had terminated satisfactorily.

Questions Relating to Professional Conduct and Practice.

The attention of the council has again been directed to numerous matters affecting the conduct and practice of the Profession, amongst which the following may be mentioned:

I.—Answers to Legal Questions in a Newspaper under non-de-plume "Barrister."

A barrister reported to the council that free legal advice was offered to its readers by a newspaper under the above non-de-plume. Upon enquiry it was found that though a barrister had previously supplied answers to such problems as were propounded he had given up the work because it might infringe the principles laid down by the council upon the subject.

Under these circumstances the newspaper consented to alter the non-de-plume in order to avoid the inference that a barrister still supplied the answers.

II.—Technical Journal and Barrister's Name.

A barrister who was an ex-inspector of taxes desired to know whether a paragraph in a new technical journal dealing with the subject of taxation might mention his name in order to introduce him as the reporter on tax questions.

The council decided that there was no objection as regards reference to his name and the statement that he was a barrister; but that there would be objection to his address appearing, or mention of "ex-inspector of taxes" in this context.

III.—Circulars.

(*a*) A barrister who is also a rating surveyor and valuer sent out circulars on letter paper on which he was described as "Rating Surveyor and Valuer, Barrister-at-law," inviting persons to employ him on appeals against their assessments.

The council considered it contrary to professional etiquette: (1) that a member of the Bar should also practise as a rating surveyor and valuer; (2) that he should have "barrister-at law" printed on his letter paper; and (3) that he should invite persons to employ his services.

Letters to the barrister having failed to obtain an answer the matter was reported to the Bench of his Inn.

(*b*) The chief constable of a county reported that a barrister had circularised in the United Kingdom and U.S.A. persons who felt themselves entitled to claim certain unclaimed moneys and estates. It appeared that the barrister offered to act for the claimants in the substantiation of their claims.

The council referred the matter to the Bench of the Inn of the barrister concerned for its consideration.

VI.—Stamp Objections.

Arising out of a question put to the council by a barrister it was decided that:—

> "It is unprofessional that a counsel should object to the admissibility of any document upon the ground that it is not, or is not sufficiently, stamped, unless such defect goes to the validity of the document. Counsel should not take part in any discussion that may arise in support of any objection taken on the ground aforesaid, unless invited to do so by the court."

The above ruling follows the previous ruling of the council in A.S. 1901-2, p. 5, except for substitution of the word "unprofessional" for "extremely undesirable."

The council further decided that the barrister was right in refusing a brief tendered with specific instructions to take a stamp objection.

VIII.—Wearing of Bar Robes for Public Advertisement.

Upon report to the council that a number of men dressed in barristers' wigs and gowns were parading a main London thoroughfare with boards advertising a play at a London theatre, the council communicated with the theatre in question, and received a courteous reply stating that it would at once refrain from the practice.

IX.—Medical Practice and Practice at the Bar.

A member of the medical profession in practice desired to know whether, after being called to the Bar, he might practise at the Bar while continuing his practice in the medical profession.

The council in reply quoted the principle (A.S. 1914, p. 18), that a practising barrister should not as a general rule carry on any other profession or business and decided that, whatever may be the exceptions to this general rule, the case under consideration would not be an exception to it.

XII.—Privy Council Retainers After Taking Silk.

A K.C. asked whether, in a number of pending appeals to the Privy Council in which he had been retained as a junior before taking silk, it would be in accordance with etiquette for him to draw the cases and, in cases in which he had already advised, to hold a brief as a junior at the hearing of the appeals. Some of the retainers were general and some special.

The Council replied:—

> "That there is no objection to the barrister drawing cases in appeals which were pending when he took silk, and further that in the cases where he has advised he is entitled to a brief on the appeal."

Admission in New South Wales.

First Case Under Reciprocal Agreement with New Zealand.

The first admission of a New Zealand solicitor in New South Wales under the reciprocal agreement recently completed between New Zealand and that State was made on the 13th inst., when Mr. H. L. S. Havyatt was admitted at Sydney by the Chief Justice (Hon. Sir Philip Street).

Mr. F. S. Boyce, late Attorney-General, with Mr. M'William, the well-known blind barrister of Sydney, and a native of New Zealand, appeared for Mr. Havyatt. Mr. Boyce stated that he was the instigator of the movement which led to the agreement under which he was the first one admitted to practise in either country. The New Zealand Attorney-General, Sir Thomas Sidey, and the New Zealand Law Society had been closely associated with the movement.

His Honour the Chief Justice, in congratulating Mr. Havyatt, expressed gratification that such an arrangement had been made.

Australian Notes.

WILFRED BLACKET, K.C.

Mr. H. L. S. Havyatt of New Zealand, who has been managing clerk to an eminent firm of solicitors in Sydney for some years past, was conditionally admitted as a solicitor on his Dominion qualification by the Supreme Court, Sydney, and received special welcome from the Bench and the legal profession, for he was the first to take advantage of the recently-arranged reciprocity. I do remember one New Zealand barrister, Hugh Lusk, to wit, who forty years ago was called to our Bar, but this was by virtue of his English qualification. His fame here rests mainly upon his defences in some desperate cases. He thrice defended Louisa Collins on charges of having poisoned one or other of her late husbands. Three times the juries disagreed, but on the fourth occasion it was, in the picturesque language of our Junior Bar, "a case of 'good-night, nurse,'" and she, in the quaint phrase of the historians, "expiated her crime on the scaffold." Another of his regular customers was "Dr." Hood who was tried frequently for manslaughtering his patients. He derived his *materia medica* in the treatment of cancer from Isaiah 38, 21, and accordingly applied poultices of figs as a cure for cancer. His patients seem to have believed in this treatment up to the date of their death, and like the early Christian martyrs they died for their faith.

Duffy v. Duffy, Sydney, was a hard case in which Mr. Justice Halse Rogers refused to lay down bad law. Duffy, the husband, in the days when he and his wife had "two hearts that beat as one," bought a house for their happy home and took a conveyance in their joint names. Later on, Mrs. Duffy acted in such an improper manner that her husband obtained a decree *nisi* on proof of her adultery. Then he applied to the Court under the Married Women's Property Act asking for an order terminating the joint tenancy and vesting the property in him. His Honour, with great reluctance, held that he could do nothing for the applicant except refuse his application and order him to pay costs. "On the evidence," he said, "it was clear that this was an advancement by the husband in favour of the wife, and there was no ground upon which he could say that the joint tenancy created by the gift should now be terminated, and the property vested in the husband." He thought that the New South Wales Parliament, in the exercise of such wisdom as it has, should consider an amendment of the law.

"Forcible entry" as a misdemeanour has not been heard of for many years past, but in Sydney, recently, the Richard II Statute of 1378 was invoked against Miss Margaret Moore who had let an upstairs room to Mr. O'Shea and because he would not pay the rent or vacate the room, had pushed the door open and compelled complainant's wife and child to depart hence without delay. The Magistrate, without deciding whether an upstairs room was included in "lands and tenements," held that there was not sufficient evidence that the entry was accompanied by "fear and terror" as required by the Statute, and so dismissed the charge.

In contrast with this revival of the antique, Judge Curlewis, on the same day that *O'Shea's case* was heard, made an order that a witness required in his Court should be notified by broadcasting on all A and B stations, to attend as soon as possible. Judge Edwards who is sometimes almost colloquial in his expressions issued a somewhat different order recently. "Tell the witness," he said, "that if he is not here at two o'clock I'll send a 'John Hop' after him." Another very modern invention was mentioned in *Paddison's case* (*infra.*) in the Jury Courts. It was a machine received by the local police from Scotland Yard, and it was declared to be absolutely infallible in its life work of detecting forgeries. It was brought along to Court, but as there is no one here who knows how to work it, and as it was rumoured that the only man in England who ever thought he could work it is dead, the issues of forgery in the case will have to be determined by the jury in the good old way.

Paddison v. E.S. and A.C. Bank is a very remarkable case. The plaintiff is a real estate agent in a fairly large way of business, his transactions in three years amounting to about £100,000. At one time Mr. Hay was his manager, and later on a Mr. Hartley, and for a time he was in England Mr. Hay conducting the business in his absence. Some time after his return he asserts that he found out that forgeries amounting to £15,150 had been debited to his account, some of these while he was here and some while he was in England. Thereupon he presented a cheque of £15,150 for cash, and upon its dishonour made a sort of Dutch auction of the business by presenting 152 others each one £100 less than the preceding one and the Bank took his bid when he got down to £350. His action, therefore, is in 153 counts and, as photographs of each of the cheques magnified to 50 times the original size are littered about the Bar table, and Bench, and jury box, a stranger looking on might think that the judge and jury were choosing a new pattern of wall-paper for the Court. The case will probably last for some weeks. Mr. Paddison does not seem to have much luck with his bank accounts for he is suing three other banks for £1,000, £1,450, and £22,000 on similar assertions of forgery.

The Flour Acquisition Act recently passed in New South Wales is of so revolutionary a character that it possibly may be tested in the High Court. It provides that all flour as and when produced shall vest in the King, and that a Committee appointed by the Government shall determine the price to be paid for it to the millers, and shall also fix the price at which it is to be sold to the bakers and others, and the price at which bread is to be sold to consumers. The profit realised on the resale of the flour is intended to go to the farmers. This, of course, is nationalisation of flour and it may well be a question whether this is a law for the "good government" of the State within the meaning of the Constitution. The Act might just as well have vested all private property in the King and thus have completed the change from a free Constitution to administration under Soviet rule. A power to tax the owners of property and a power to restrain their use of property are a part of the Constitution, but these powers are a guarantee to the owners of private property of their ownership. Can we legally change our form of Government from private ownership to nationalisation—from the Union Jack to the red flag—without amendment of our Constitution? No one yet seems to have been troubled by the menace of this Act: the Opposition gave the Government some assistance in putting it through the Assembly, and the Council rushed it through all stages without any divisions, but, apart from the constitutional aspect of the matter, it seems

to me an appalling calamity that the Communists who control the Lang Government should now have absolute control of the supply of bread to the people.

The Arbitration Bill now before the Legislative Council of N.S.W. makes astounding amendment of the law. Absolute preference is to be given to financial members of the unions which are to be given registration, but seven other unions of large membership and originally formed by loyal or voluntary workers are to be abolished. Conciliation Committees each having as chairman a nominee of the Government are to have uncontrolled power to fix wages and conditions, and are empowered to determine the extent of their own jurisdiction. Formerly the arbitral jurisdiction was limited to £750, but now there is no limit, so a conciliation committee could make an award for general managers of banks, insurance companies and other similar institutions, and this without application by them. Commercial travellers, canvassers, and other outworkers, and men supplying timber for mines, railways or other works, are included as employees. Contract and piece work, and all bonuses and gratuities are declared illegal. Claims on account of wages may be sued upon and arrears for six years ordered to be paid, with imprisonment in default. Mr. Justice Piddington is to sit alone as Commissioner and determine the basic wage and all matters brought before him, and his decisions are absolutely final, and not subject to review in any Court. Mr. Justice Street and Mr. Justice Cantor who now sit with him have failed to qualify for the good conduct prize and are cast adrift. One cannot regard this political atrocity as anything less than an instalment of Soviet rule. It is the price that the Communists require for their continued support of John Lang and must be so regarded.

Mr. Lamaro, Minister of Justice in New South Wales, whose performances are mentioned in my notes in Vol. VI, pp. 368 and 383, seems now to have extended his jurisdiction. At Wollongong some Communists, without obtaining leave in that behalf, made procession through the streets. The local Council prosecuted a number of them, and they were severally fined and ordered to pay costs. Mr. Lamaro in his ordinary course at once remitted all the fines and the Council then proceeded to make levy for their costs, but the officers refused to perform their duty as the Minister of Justice had ordered that process should not be enforced. I make no comment, and in this respect greatly differ from the members of Wollongong Council.

The Legislative Council (N.S.W.) case, *Trethowan and Ors. v. Peden and Ors.* mentioned Vol. VI p. 383,—where by obvious error *ultra* appears instead of *intra vires*—has been affirmed by three judges to two on appeal to the High Court, and against that decision appeal to the Privy Council is to be made. The result of the majority decision is somewhat remarkable for it concedes to the State Parliament by virtue of the Colonial Laws Validity Act the power to fetter subsequent Parliaments in the exercise of their legislative powers, and this, it is admitted, could not be done by the Imperial Parliament. In view of the pending appeal it is not necessary to consider closely the judgments given.

"One of the most serious duties of an Attorney-General is that of maintaining the standards of honour and of professional conduct which every member of the Bar ought to observe." —Sir John Simon, K.C.

New Zealand Law Society.

Annual Meeting.

The Annual Meeting of the Council of the New Zealand Law Society was held on Friday, the 20th March, 1931, in the Supreme Court Buildings, Wellington.

The following gentlemen were in attendance as representatives of District Law Societies in the Dominion :—

Messrs. A. H. Johnstone and R. P. Towle (Auckland)
Mr. M. J. Gresson (Canterbury)
Mr. C. A. L. Treadwell (Gisborne)
Mr. N. Johnson (Hamilton)
Mr. H. B. Lusk (Hawke's Bay)
Mr. H. F. Johnston, K.C. (Marlborough)
Mr. W. H. Cunningham (Nelson)
Mr. H. H. Cornish (Otago)
Mr. P. Levi (Southland)
Mr. G. M. Spence (Taranaki)
Mr. N. G. Armstrong (Wanganui)
Mr. A. M. Cousins (Westland)
Messrs. A. Gray, K.C., C. H. Treadwell and H. E. Anderson (Wellington).

The Report and Balance Sheet of the Society for the year ended 31st December, 1930, which had been printed and circulated were adopted.

The following appointments of officers were made for the current year :

President : Mr. A. Gray, K.C. (re-elected)
Vice-President : Mr. C. H. Treadwell (re-elected)
Treasurer : Mr. P. Levi (re-elected)
Auditors : Messrs. Clarke, Menzies, Griffin & Ross (re-elected).

The Council considered several matters of interest to the profession. Amongst the subjects the following were dealt with :

Hawke's Bay Earthquake.—Correspondence was received relating to the recent earthquake disaster in Hawke's Bay, and the following resolutions were passed :

(1) The Council of the New Zealand Law Society desires to express to the practitioners in Hawke's Bay its sincere sympathy with them in the misfortunes which have befallen them as the result of the recent earthquake, and to assure them that the Council will gladly render such assistance as is within its power to enable them to reinstate themselves in their practices.

(2) The Council recommends to all District Law Societies that such contributions as they may see fit to make out of their funds to the Hawke's Bay Earthquake Relief Fund be paid directly to the Hawke's Bay Law Society for administration by that Society ; and that it be a further recommendation that they arrange for private subscriptions from their members in addition, such contributions to be applied in the same manner.

In this connection it was mentioned that the New Zealand Law Society had made a donation of £250 to the Prime Minister's Relief Fund and that some District Law Societies had also made donations and some others intended to subscribe to that fund.

The Council approved a suggestion that each practitioner's office in the Dominion should be asked to supply to a central organisation a memorandum giving brief particulars of any registered deed or instrument

affecting land in the Hawke's Bay registration district and held by such office, and that the suggestion be brought under the notice of each District Law Society with a view to assisting in the reconstruction of the records of the Deeds and Land Transfer Offices destroyed by the earthquake and subsequent fire.

Statements to Police in "Running Down" Cases.—A committee which had been set up by the Council furnished a report with reference to making available to parties concerned in "running down" and other motor-vehicle cases, statements collected by the police from witnesses. The report was to the effect that the Commissioner of Police had expressed his willingness that any party desiring it should be supplied with the names and addresses of witnesses interviewed by the police, and that whenever a witness desired to do so he should be allowed to refresh his memory by perusing his own statement; also that in certain cases, such as where a considerable lapse of time had taken place, a witness, if he made a request, would be provided with a copy of his statement.

Reciprocity of Admission: Queensland.—Reference was made to the arrangements made for reciprocity of admission of New South Wales solicitors to practise in New Zealand and of New Zealand solicitors to practise in New South Wales, under which a New Zealand solicitor had recently been admitted in New South Wales; and correspondence between the Attorney-General of Queensland and the Attorney-General of New Zealand on the subject of reciprocity between Queensland and New Zealand was read and considered. It was resolved to inform the Attorney-General that the Council approved of a reciprocal arrangement being made with Queensland upon the same conditions as had recently been arranged with New South Wales.

Evidence in Motor-Vehicle Prosecutions.—The attention of the Council had recently been drawn to the difficulty frequently experienced by practitioners in dealing with the defence of proceedings under the Motor Vehicles Act, by reason of the fact that the hearing often takes place in a town nowhere near the residence of the defendant or of a material witness, and that there is no machinery available for the taking of evidence in such cases in the place where the defendant or the witness resides.

It was resolved to bring the matter under the notice of the Attorney-General with a request that he would consider the desirableness of legislating in the direction of making provision for taking such evidence in the same way as the evidence of witnesses at a distance may be taken in the Magistrate's Court in civil cases or in proceedings under the Destitute Persons Act, and so obviate the expense of bringing such witnesses to the Court of hearing.

Council of Legal Education.—The Council resolved to recommend for submission (through the Attorney-General) to His Excellency the Governor-General the names of Mr. Phineas Levi, M.A., Wellington, and Mr. Alexander Howat Johnstone, B.A., LL.B., Auckland, for appointment as the representatives of the New Zealand Law Society upon the Council of Legal Education constituted by "The New Zealand University Amendment Act, 1930."

Rules Committee.—The Council also resolved to recommend to the Honourable the Chief Justice the names of Mr. Alexander Gray, K.C., Wellington, Mr. Wilfred Joseph Sim, Christchurch, and Professor Henry Havelock Cornish, Wellington, for appointment as the representatives of the New Zealand Law Society on the Rules Committee established by "The Judicature Amendment Act, 1930."

Solicitors' Fidelity Guarantee Fund.—Reference was made to the Rules recently made by the Council prescribing the mode and form of making claims against the Solicitors' Fidelity Guarantee Fund established under "The Law Practitioners Amendment Act, 1929," and it was resolved that additional rules be prepared under subsection (d) of Section 24 of that Act prescribing the duties of accountants appointed to conduct an examination of any solicitor's accounts pursuant to Section 23 of the Act, and prescribing the duties of the solicitor or solicitors concerned in relation thereto, and the circumstances in which such solicitor or solicitors may be required to pay the cost of such examination.

Audit Regulations.—The matter of certain proposed amendments of the Regulations regarding the audit of solicitors' Trust Accounts which had been under consideration by representatives of the Councils of the New Zealand Law Society and of the New Zealand Accountants' Society, together with a number of additions recently put forward, was discussed at some length and finally was referred to a special committee for consideration.

Next Issue of Journal.

Owing to the intervention of the Easter vacation no issue of this Journal will be published on April 14th. The next issue will appear on April 28th and will be a double number.

Fidelity Guarantee Fund.

England Follows New Zealand's Lead.

England is as a rule slow to follow the lead given by the Dominions in law reform. She took a long time to allow prisoners to give evidence in their own defence. The salutary principles of the Testator's Family Protection Act have not yet found recognition by the Imperial Parliament. But the lead that New Zealand gave by the Law Practitioners' Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929, in establishing a guarantee fund for reimbursing persons who suffer loss by the theft of a solicitor has been promptly followed at Home. Two bills for the establishment of a similar fund in England were introduced at the end of last year and judging by the support they received in the House of Commons, it seems likely that the Select Committee to which they were referred will formulate an agreed measure which can become law this year.

The Solicitors Bill presented by Sir Dennis Herbert requires all solicitors to be members of the Law Society, and enables that Society to make and enforce rules of professional conduct and to establish a fund for the relief of persons suffering loss through the default of Solicitors. The Solicitors (Clients' Accounts) Bill presented by Sir Assheton Pownall requires every practising solicitor to pay his clients' moneys, and those moneys only, into a clients' account which shall be maintained at least equal to the moneys held on account of his clients, to keep proper books of account, to produce every year to the Law Society a certificate by a qualified accountant that his clients' account is in order. It further provides that no solicitor shall have his annual practising certificate issued to him unless he produces a clean certificate from such accountant or obtains from the Discipline Committee of the Society an order dispensing with the production of such certificate under special circumstances.

Copies of these bills and the Hansard report of the debate in the House of Commons upon Sir A. Pownall's bill have been received by the Secretary of the New Zealand Law Society from the English Law Society.

The speeches on the latter bill, the second reading of which was moved by Sir John Withers, were remarkable for their unanimous approval of the bill and theie testimony to the honesty and skill with which the grear bulk of the 15,000 solicitors in England who handlt during the year immense sums of money transact the business of their clients, the dishonest exceptions being few and far between. But it was pointed out that from time to time there appeared to be epidemic outbursts, which seemed to involve more solicitors, which brought the average up to very considerable figures and excited the public. The profession was not apathetic, but it was difficult to get agreement on any positive scheme. It was pointed out that a general origin of frauds on the part of solicitors was lax book-keeping and the mixing of clients' moneys with the solicitor's own moneys, which caused him to be optimistic as regards his finances at any particular time and which led him at first without any criminal intent to misapply his clients' moneys, the result being that, as this money had to be made good, the defalcations become more serious and finally lead to a catastrophe.

A *rara avis* in the debate was a Welshman, Mr. Rhys Davies, a layman who had never been the client of any solicitor and hoped to retain that reputation throughout his life, and who was warned by a following speaker, a member of the Law Society, that the self-congratulations of many a man on never having had to consult a doctor had often been the prelude to a dangerous if not a fatal illness.

Another feature of the debate was the heary welcome given to the new Solicitor-General, Sir Stafford Cripps, son of Lord Parmoor, who made his maiden speech and pointed out that the fuller jurisdiction given to the Discipline Committee of the Law Society by the Act of 1919 had been so exercised that during the preceding year, out of twelve appeals to the Court from the decisions of the Committee, eleven had failed and that in one case only had there been a revision of the sentence—" a very fine record as regards discipline."

In view of this record there would seem to be every reason for the Legislature here in return taking a leaf out of the English book, and giving definite disciplinary powers to the New Zealand Law Society on the lines of those now possessed by the English Saciety.

Bench and Bar.

The firm of Weston & Billing, New Plymouth, has been dissolved by mutual consent. Messrs. C. H. Weston, G. Ball, F. S. Grayling and H. S. T. Weston will practise in partnership at New Plymouth under the firm name of Weston, Ball and Grayling. Mr. H. R. Billing will practise on his own account in Upper Brougham Street, New Plymouth.

Mr. W. C. Hewitt has commenced practice at Papakura.

Recent admissions to the profession at Auckland include Mr. J. K. Lusk (barrister and solicitor) and Messrs. H. E. Beeche and G. S. Meredith (solicitors).

Recent admissions at Wellington include Mr. J. B. Yaldwyn (barrister) and Mr. G. R. Wylie (barrister and solicitor).

New Zealand Statutes.

Mr. J. Christie, Parliamentary Law Draftsman, is at present in London consulting with Messrs. Butterworth and Company regarding the Consolidated Reprint of the N.Z. Statutes which was authorised by the Government last year. His work completed, Mr. Christie is to leave London on April 10th.

All of the volumes of the Consolidated Statutes of 1908 are now out of print as are also a number of the sessional of the volumes. The arrangement made by the Government with Butterworths is for the publication of an annotated edition of the Public General Acts now in force with all the amendments incorporated in their appropriate places. The actual printing of the work will be done by the Government Printer, Wellington.

Executors' Remuneration.

Observations of Mr. Justice Blair as to Duties of Public Trustee and Solicitors.

Observations of great importance to the public and to the profession as regards the duties of the Public Trust Office and of solicitors in the matter of the acceptance of the office of executor, and particularly as regards the duty to advise clients as to the expense which the estate will incur, have been made recently by Mr. Justice Blair in the Supreme Court.

The observations were made on a motion by the Public Trustee for an order under S. 13 (1) of the Public Trust Office Act, 1908, for the consent of the Court to the appointment of the Public Trustee as executor of the will of one William John Anderson, deceased, and for probate accordingly. The testator by his will had appointed his widow sole executrix and left the whole estate to her. The gross value of the estate approximated £9750. The application was supported by an appointment on a printed form signed by the widow.

S. 13 (1) of the Public Trust Act, 1908, reads as follows:

"*With the consent of the Supreme Court or a Judge thereof—*

(a) Executors, whether appointed before or after the coming into operation of this Act, may, unless expressly prohibited, before or after taking out probate, appoint the Public Trustee sole executor; and

(b) Administrators, with or without a will annexed, whether appointed before or after the coming into operation of this Act, may, unless expressly prohibited, appoint the Public Trustee sole administrator."

His Honour Mr. Justice Blair, after referring to this section, said: "The Act does not give any indication as to the grounds upon which consent should be given or refused. It is obvious that the section does not call for any enquiry as to the integrity of the Public Trustee. Such an enquiry would naturally be made if a private person were being appointed. But as the Court's consent is required and such consent is necessary notwithstanding that the executor himself consents, it follows that something more than mere consent by the nominated executor is necessary.

"In the majority of cases within Section 13 the executor appointed by the will is not a beneficiary under it, and he being unwilling or unable to act desires to appoint the Public Trustee in his place. The form used by the Public Trustee does not give reason for the desire to change. As the deceased has expressed his confidence in his nominated executor I think that the Court in all cases should have supplied to it either on the form signed by the nominated executor or in the affidavits filed with the motion details of the reason offered for the desire to change.

"In the present case the whole estate goes to the widow and she is sole executrix. No explanation was offered on the papers as to why she wanted the Public Trustee appointed, and it naturally occurred to me as requiring explanation why she wanted to change when by so doing she became liable to pay substantial commission to the Public Trustee.

"According to the Amending Regulations under The Public Trust Office Act, 1908, as gazetted in 1905 (Volume III p. 3193) the commission which the Public Trustee is entitled to charge on the gross capital realised is: 2½% on the first £5,000, 1½% on the next £5,000, 1% on the next £15,000 and ¾% on all in excess of £25,000. Where, however, without the necessity for realisation the property is delivered to the beneficiary in kind or is brought into hotchpot the commission payable to the Public Trustee is 1¼% up to £5,000 and ¾% on the property over that value up to £10,000. On all in excess of £10,000 the commission payable is ½%. This commission is payable on such value as the Public Trustee himself may fix. Commission on realisation of property subject to mortgages is calculated on the value of the property without deducting the mortgages. Provision is made in the Regulations of 1923 (Volume II, p. 2254) authorising the Public Trustee to reduce any of the charges 'to meet the special circumstances of any estate.' The word 'estate' is misprinted 'estatee,' but this is an obvious printer's error.

"The deceased's estate is of a gross estimated value of approximately £9,750, and the commission payable to the Public Trustee if he had to realise the whole estate would amount to about £192. If he merely took out probate and completed the stamp accounts and then delivered the property to the widow in its present form of investment the commission he could demand for this service would be about £97. In the event of portion only of the estate being realised and the remainder delivered to the widow in kind then the Public Trustee's commission if claimed at schedule rates would be an amount between the two figures of £97 and £192.

"As the whole estate was given to the widow and she was appointed sole executrix I deemed it necessary to make further enquiry into the matter. At my direction the widow, accompanied by the solicitor for the Public Trustee, attended at my Chambers for examination. I ascertained from her that she did not appreciate that the document she had signed meant the substitution of the Public Trustee for herself as executrix, she being under the impression that the Public Trustee was attending merely to all legal work involved. She had not been made aware of the amount of commission which the Public Trustee according to the Regulations was entitled to charge, nor had she been informed as to the comparative cost of getting the work done by her own solicitor as compared with the cost by way of commission payable to the Public Trustee. The assets in the estate were of a simple nature comprising an insurance policy and certain investments. Accordingly I deferred making the order asked for until the widow had had time to consider the position and make enquiries as to the comparative cost of the alternative courses open to her. The widow has now communicated to the Registrar the fact that she has accepted an offer by the Public Trustee to complete the whole administration at a cost of £20 and disbursements. This arrangement being in my opinion fair to the widow I have made the order asked for.

"As similar applications will no doubt arise it will I think be convenient if I indicate my opinion as to the matter which should be brought before the Court in applications under Section 13 of the Public Trust Office Act, 1908. It is the duty of the Court to be vigilant in protecting the interests of widows and children, or

other beneficiaries, and the Court should in the first place be satisfied that the change of executors will not result in greater cost of administration than that incurred if the work were carried out by the nominated executor. Where an ordinary personal executor is not a beneficiary and is exercising his rights under Section 13 the extent of the estate's liability to the Public Trustee for commission when compared with the commission which a private executor could be awarded by the Court may not be an important consideration, depending of course upon the circumstances. There may also be cases where the executor was selected by the testator by reason of special qualifications for the handling of the testator's estate, and it would then be for the Court to enquire whether the change is advantageous to the estate or otherwise desirable. It is obvious that no rule can now be laid down to meet all cases. But in all cases like the present where there is a sole beneficiary appointed executor I think that when the executor wants to substitute the Public Trustee the Court should be satisfied that the fullest disclosure has been made by the Public Trustee to such executor of his or her rights, and like disclosure of the extent of the liability of the estate to pay commission to the Public Trustee, with comparative figures as to the cost if attended to by the sole beneficiary himself or herself. It is not the duty of the Public Trustee merely because work is offered to him to accept it. His functions are fiduciary and the Office was erected for the public benefit and not for the purpose of making a profit at the expense of beneficiaries in estates. In all cases the interests of the beneficiaries should be the paramount consideration. If upon a comparison of the respective costs of administration by the Public Trustee and by the nominated executor the cost were in the latter case less it would be the duty of the Public Trustee to make this fact plain and refuse to accept the business unless he were prepared so to reduce his commission as to make the change beneficial to the estate.

" Owing to the fact that it is only in the case of the Public Trustee that the law provides for probate being granted to a person not nominated in a will, it is not possible to use an apt illustration comparing the respective duties of the Public Trustee and a solicitor in such cases. The nearest illustration would be the suppositious case of a man going to a solicitor to make a will leaving everything to his wife. If in such a case the solicitor prepared a will appointing himself executor I would want to know why the will was so drawn. Unless it was shown that there was some very special reason why someone other than the sole beneficiary was appointed executor I would, if executor's commission were applied for, take steps to ensure that no profit was obtained from the executorship. I would look upon it as improper conduct on the part of such solicitor to advise the appointment of himself unless it was shown that such appointment was advantageous to the estate. The duty of the Public Trustee when advising upon the making of a will is certainly as high as that of a solicitor. In the case of executors (other than the Public Trustee) the question of allowance of executor's commission and the amount thereof is in the hands of this Court and receives strict supervision. In the case of the Public Trustee he is bound only by the Regulations and this Court has no voice as to the amount of his commission. It is not uncommon for applications for probate of wills to come before the Court where all the estate is left to an adult sole beneficiary and the Public Trustee is appointed executor. The Public Trustee advertises that he is prepared to make wills gratuitously where he is appointed the executor. Such an advertisement can create a false impression in the minds of ignorant people because the advertisement does not make it plain that the Public Trustee obtains his remuneration for such so-called gratuitous service from the commission he is paid for the administration of the estate. I have little doubt that solicitors would undertake to prepare wills gratuitously upon the same condition, and rely for their remuneration for preparing the will upon the commission to which executors are entitled under Section 20 of the Administration Act. Once the Public Trustee is appointed executor he alone, within the wide limits provided by the regulations, is the judge as to the amount he is entitled to charge the estate for commission. In the case of an ordinary executor the only commission he can obtain is what this Court allows him ' for his pains and trouble as is just and reasonable.'

" I have been informed by the solicitor for the Public Trust Office that in all cases the Public Trustee in fixing the commission he charges in any estate takes into consideration the extent of the work involved in his administration and does not always charge the full scale rates authorised by the Regulations to the Public Trust Office Act. It is satisfactory to know that this is so, but nevertheless the fact that the Public Trust Office for the purpose of attracting business advertises that it will gratuitously advise persons as to the making of wills and will make wills gratuitously places the Office in this position, that it has a substantial financial interest in giving such advice and obtaining the execution of such wills, and this financial interest conflicts with its fiduciary duty to testators asking advice upon the momentous question of their testamentary dispositions to their dependants and those to whom a moral duty exists.

" This application was one where, due to a similar conflict of interest, it became the duty of this Court to see that the change of executor did not result in expense to the estate."

New regulations made in England as to Poor Prisoners' Defence fix the fees payable to solicitors and counsel assigned. The fee of a solicitor under a defence certificate is fixed at £3 3s. 0d., but if the presiding Judge pronounces the case of exceptional length or difficulty this fee may be increased to £6. Counsel assigned under a defence certificate receive £3 5s. 6d. or, where it is certified that the interests of justice demand two counsel, £5 10s. 0d. to the leader and £3 5s. 6d. to the junior. Where the case is pronounced by the presiding Judge to be exceptional these fees may be increased, the maximum being £16 5s. 0d. and £11 respectively.

" No inquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together. The use of cases is for the propositions of law they contain ; and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case."

—Lord Finlay in *Craig v. Glasgow Corporation*, (1919) S.C. (H.L.) 1.

Wellington Law Students' Society.

Address by His Honour the Chief Justice.

On Friday, 20th inst., His Honour the Chief Justice addressed a combined meeting of members of the Wellington Law Students' Society and of the Victoria University College Law Faculty Club, at Victoria University College. Mr. R. J. Reardon, president of the latter Society, occupied the chair. Among those present were Mr. A. Fair, K.C. (Solicitor-General), Mr. H. F. Johnston, K.C., Mr. H. E. Anderson (President of the Wellington District Law Society). Mr. P. Levi (Chairman of the Victoria University College Council), Professor Gould (Chairman of the Professorial Board), Professor H. H. Cornish, and Messrs. W. H. Cunningham, S. Eichelbaum, J. O'Shea, and F. C. Spratt.

Apologies for absence were received from Professor J. Adamson (Dean of the Law Faculty) and Mr. M. F. Luckie. Sir Michael Myers presented the prizes in Law for the previous year. The Chief Justice's Prize for the Law of Property and Contract went to G. Cain, and Messrs. Butterworth & Co.'s Prize for Roman Law to R. J. Reardon.

His Honour the Chief Justice said that he hoped that his listeners would not think he liked giving addresses of the kind. He did not. He intensely disliked them; but his view was that there was a duty cast on the leaders of the profession to assist the younger members and those looking forward to entering the profession. That duty had been recognised at all times by the leaders of the profession in New Zealand.

In the course of discussion of a variety of matters His Honour said that a very important question was whether there would be room in the profession for all the men coming forward. So far as solicitors were concerned, there was land transfer work, which was not so remunerative as it used to be, as there was competition in the lending department and others. The Public Trust Office, he knew, could not be popular with the legal profession, but it had to be recognised that it served certain useful purposes. It had proved a good institution, but as to whether or not it should indulge in all the activities in which it indulged now, and in which it competed with the legal profession, it would be improper for him to express an opinion, and he did not mean to do so. He mentioned it because these were matters every man should consider on entering the profession. Parents should not make a son a barrister and solicitor without considering the aptitude of the boy, as unless he had a special aptitude it was no use his entering the legal profession nowadays.

The main qualities required in a lawyer were strict probity and efficiency. The profession of the law was a hard taskmistress. It was no use taking up law unless the student was prepared to work, and work hard. He did not mean that the young man should be always working; what he meant was that if the young lawyer or student intended to succeed he should make his profession and his professional work his first and his last consideration. Knowledge of the principles of law came first. When they were assimilated the young lawyer could look for his authorities.

Referring to the necessity for efficiency, Sir Michael Myers said that the system of articles which obtained in the old days no doubt had its merits, but it also had its demerits. At present, as he understood the position, most of the students were engaged in office work during the day and took lectures either early in the morning or in the evening. The practical work in the office, after all, ought to be as useful as articles, but if a young man was entering the profession he was very handicapped if he was engaged in an office in some occupation other than law and entered the profession without any knowledge of the practical work. The best course for a young man to enter into the law was to obtain employment in a law office during the day and learn the practical work, so that when he passed his examinations he was fit to conduct a practice on his own account.

In New Zealand the two branches of the profession were amalgamated to a certain extent. In England the branches were entirely separate. There had been a good deal of controversy in recent years in England as to whether the two professions should not be amalgamated. It was not of very much use to prophesy but he ventured to prophesy that amalgamation in England was just as unlikely as the separation of the professions in New Zealand. He was not expressing any opinion as to whether separation in New Zealand would not be a good thing, but it was not feasible. In England most of the business of the Bar was centralised in London; in Australia it was centralised in Sydney, Melbourne, and a few large cities. In New Zealand there were only four substantial cities, each of which would object to any centralisation in any of the others, but there were a number of circuit towns, with the result that there was a tendency all the time to decentralise. Separation in New Zealand was therefore impossible, except to the extent that there was room for a limited number of the leaders of the professions to practise at the Bar alone. There was room for such in Wellington and Auckland, but whether that was so in the South Island he could not say. He hoped himself there would always be a limited number of men in New Zealand who would practise at the Bar alone, because it was a good thing for the Bar and the profession as well. It gave the profession a kind of leadership which otherwise it would not possess.

He had heard it said that there was room in New Zealand for specialisation. In London there were a number of different branches of legal work, e.g.: Parliamentary work, criminal law, company law, general commercial work, insurance, shipping, divorce, revenue, and chancery work—each of which afforded ample scope for a number of men to specialise. Some of them did immensely well in their particular branches. Could any member of his audience tell him a single one of those branches in which there was room in New Zealand at the present time for one person, let alone several, to specialise? There was not a single one at present. There might be if the whole of the work were centralised in Wellington, but that would never be. Specialisation was out of the question at the present time, and would be for a considerable time to come.

Sir Michael Myers then went on to give his audience a number of hints to serve them in active practice:

"Don't indulge in what is popularly called, I think, 'eye-wash.' I am compelled to say that, and I am glad to say it, because I saw a report of an address given, not in Wellington, by a member of the profession to students, in which he told them that to be successful at the Bar it was necessary to indulge in, to use his own expression, a certain amount of 'eye-wash.' But if he thinks that that kind of stuff goes down nowadays he is greatly mistaken. It does not go down with juries. It used to go down in the old days, but not now, and does not go down with judges. (Laughter). Frankness and candour can be much more successfully used, in my opinion. . . . . Don't go in for too much rhetoric and eloquence. . . . . Don't mislead the Court intentionally. The man who does that loses the confidence of the Court, and the confidence of the Court is a very valuable asset to counsel. . . . . Don't insult or offend a witness. Put on the lowest basis, a witness is always a possible future client. It is never necessary to insult or offend. It can do no good, and it can only do harm. Don't hesitate to apologise at once. . . . . Don't ask questions in cross-examination unless you are sure that the answer will be in your favour. . . . Don't be discouraged if you lose an occasional case or two, or half-a-dozen running. My experience is that wins and losses come in cycles. It is no use worrying. Just go on, and in all probability before long you will have a cycle of winning cases. . . . . The interest of your client of the moment must be your first and only consideration, consistent, of course, with your respect for the traditions and ethics of the profession. . . . .

"One of the traditions of the profession is that the Bench is entitled to courtesy from the Bar, and the Bar is entitled to the same courtesy from the Bench. The courtesy must be mutual if the business of the Court is to be consistent with the ideals of the profession. Remember this: the Bench is always desirous of helping the young practitioner, and especially the young practitioner who knows his work and is honestly trying to do it properly."

As to addresses to the Court and the right of reply, Sir Michael said that he did not give a "thank you" for the reply, for a good opening address, backed up by evidence, not exaggerated, would probably result in having the jury with them before the other man had started. "If you don't get the jury at an early stage, the probability is that you will never get them at all." There was also as much human nature in judges as in other classes of men.

His Honour concluded by expressing himself in favour of the retention of the wig and gown, although they had been dispensed with in America. To his mind the wig and gown should form part of the ritual as it were, indicating the dignity of the Court and what was meant by the majesty of the law.

A resolution of thanks to Sir Michael Myers for his address was moved by Mr. Hurley, President of the Wellington Law Students' Society, and carried by acclamation.

New Books and Publications.

Law of Savings Banks, Government Annuities and National Savings Certificates. By John Y. Watt. Second Edition. (Butterworth & Co. (Pub.) Ltd.). Price 52/6.

Brewing Trade Review. Licensing Law Reports, 1930. (Butterworth & Co. (Pub.) Ltd.). Price 10/6.

Webb's Valuation of Real Property. Fifth Edition. 1931. (Crossby Lockwood). Price 25/-.

Some Persons Unknown. An account of scientific detection. By Henry F. R. Rhodes. (John Murray). 7/6.

Annual County Court Practice, 1931. (Sweet & Maxwell Ltd.). Price 46/-.

Studies of the International Academy of Comparative Law. Sources of Positive Law. No. 2. Part I. (Sweet & Maxwell Ltd.). Price 8/6.

The Development of Local Government. By W. A. Robson, Ph.D., LL.D. (Allen & Unwin). Price 16/-.

Archbold's Criminal Pleading. Twenty-eight Edition. By R. E. Ross. (Sweet & Maxwell Ltd.). Price 61/-.

Constitution of Japan. By N. Matsunami. (Maruza & Co.). (Sweet & Maxwell Ltd.). Price 29/6.

Law Notes Year Book, 1931. By Gibson and Weldon. (Law Notes). Price 9/6.

Essays in Jurisprudence or the Common Law. By Arthur L. Goodhart, M.A., LL.M. (Cambridge Press). Price 19/-.

Paterson's Licensing Acts, 1931. Cloth. Medium Edition. (Butterworth & Co. (Pub.) Ltd.). Price 22/6.

Wurtzburg's Building Societies. Sixth Edition. By G. W. Knowles. (Stevens & Sons Ltd.). Price 24/-.

Cases on International Law. Vol. 1, Peace. By Pitt Cobbett, M.A., D.C.L. Fifth Edition. By F. T. Grey, M.A. (Sweet & Maxwell Ltd.). Price 21/-.

A Practical Guide to Investment. By F. W. H. Caudwell, B.A. (Effingham Wilson). Price 9/-.

"We all forget, and the older we get the more we forget; and Roche, J., forgot that he had given a decision on a very similar clause three years before."

Scrutton, L.J., in *William Jacks and Co. v. Palmer's Shipbuilding and Iron Co. Ltd.*, 34 Com. Cas. 107, at p. 118.

MESSRS. MOSS & SPENCE, Barristers and Solicitors, New Plymouth, have opened a branch office at Inglewood. The resident partner of the firm at Inglewood is MR. CYRIL WINFIELD, LL.B., formerly Managing Clerk for Messrs. Christensen & Stanford, Solicitors, Marton. The practice at Inglewood will be carried on under the style of "MOSS, SPENCE AND WINFIELD."