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"Law is, in my opinion, one of the finest and noblest of human sciences—a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together."

—Edmund Burke

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Reports of Judicial Proceedings.

In a recent contested divorce suit heard at Wellington in which relief was sought on the ground of adultery the Chief Justice exercised the powers conferred upon the Court by s. 55 of the Divorce and Matrimonial Causes Act, 1928, and made an order forbidding the publication of any report or account of the evidence in the case. That section provides as follows:

> "The Court, on the application of either the petitioner or the respondent, or at its discretion, if it thinks it proper in the interests of public morals, may hear and try any such suit or proceeding in Chambers; and may at all times in any suit or proceeding, whether heard and tried in Chambers or in open Court, make an order forbidding the publication of any report or account of the evidence or other proceedings therein, either as to the whole or any portion thereof; and the breach of any such order, or any colourable or attempted evasion thereof, may be dealt with as contempt of Court."

Wide though this statutory authority may be, it applies only to proceedings in divorce. Prurient and sordid details are not, however, by any means peculiar to such proceedings. Moreover, it is difficult to see how the public interest is enhanced by the publication of the evidence in divorce suits even though details of the type referred to be not a feature of the proceedings. Has not the time arrived for our Legislature to follow the example of England on this topic and pass legislation of wider and more general application?

The Judicial Proceedings (Regulation of Reports) Act, 1926, (Eng.) is a short statute making provision of two kinds. First, it is made unlawful to print or publish *in relation to any judicial proceedings* any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals. Secondly it is made unlawful to print or publish *in relation to any judicial proceedings in divorce* any particulars other than: (1) the names, addresses and occupations of the parties and witnesses; (2) a concise statement of the charges, defences and countercharges in support of which evidence has been given; (3) submissions on any point of law arising and the decision of the Court thereon; (4) the summing-up of the Judge and the finding of the jury (if any) and the judgment of the Court and observations made by the Judge in giving judgment. Publication in law reports or in any publication of a technical character intended for circulation among members of the legal or medical professions is, as one would of course expect, excepted from the prohibition. No prosecution for any offence under the Act is to be commenced by any person without the sanction of the Attorney-General.

The remarkable thing as regards the position in England is that legislation should have been so long in coming, and yet so readily accepted when formulated. Queen Victoria herself some seventy years ago brought the subject before Lord Campbell, the then Lord Chancellor; Lord Alverstone, Lord Chief Justice, in 1912 expressed the view that legislation should be attempted; and in 1925 Lord Darling, supported by Lord Merrivale and Sir Archibald Bodkin, made a strong move in that direction. Yet, despite the hesitation on the part of the powers that be that such delay would lead one to suppose existed, one finds the Bill carried in the English Parliament by an overwhelming majority. Sir John Simon, along with other leading lawyers, supported the measure. And now the measure has been in force for over four years and its operation, so far as we know, has been the subject of little real criticism. The number of divorces has undoubtedly increased since its passing, but it has to be remembered that other factors have conduced to this result, one of them being that divorce has been made easier in England in recent years. Even if it be the fact that fear of publicity deters some people from instituting divorce proceedings, it is surely doubtful whether this is in the best interests either of the parties themselves or of the public.

There is at present before our own Parliament a private member's Bill almost on all fours with the English Act of 1926, and, even in a Session concerned primarily with matters of urgent financial and economic importance, it demands attention: we refer to Mr. Fraser's Judicial Proceedings (Regulation of Reports) Bill. The measure differs from the English Act in only two respects of any real importance. In the first place, the restrictions as to matters which may be published in proceedings in divorce are made to apply also to proceedings for an affiliation order; this extension has much to commend it and should be acceptable to nearly all those who are in favour of the principle of the Bill. The second divergence from the English legislation is, however, in our view extremely undesirable. Mr. Fraser's Bill does not make the sanction of the Attorney-General a condition precedent to a prosecution for any offence. Unless such sanction is made necessary there is the gravest risk of reputable newspapers being exposed to unreasonable and vexatious prosecutions, for some persons will always be found who will take an exaggerated view of what are "indecent matter or details the publication of which would be calculated to injure public morals." Our contemporary the *Solicitors' Journal*, discussing the English Bill then before the House of Commons, said in its number of April 24th, 1926:

> "The opportunities, however, which the Bill might otherwise afford for the institution of unreasonable and vexatious prosecutions are taken away by the imposition of the condition precedent of obtaining the sanction of the Attorney-General."

In this respect conformity with the English legislation is absolutely necessary if the successful operation of the measure is to be secured.

In New Zealand we have a newspaper press for the most part of the highest standing and it is only seldom that real criticism can be directed, on the grounds here dealt with, to the published reports of judicial proceedings. Indeed, our leading dailies, so far as concerns divorce proceedings, seem lately to have adopted the policy of publishing little but the names of the parties and the result. There is, however, a class of publication which makes a feature of cases of any kind in which sordid details are predominant and it is because of that class of journal that legislation is necessary.

Court of Appeal.

Myers, C.J.
Herdman, J.
MacGregor, J.
Blair, J.
Kennedy, J.

July 3, 1931.
Wellington.

WELLINGTON BRICK CO. LTD. v. JANSEN.

Vendor and Purchaser—Repudiation by Purchaser—Remedies of Vendor—Default Clause Conferring Certain Powers on Vendor But Right to Sue for Damages Not Expressly Conferred—Vendor Suing for Specific Performance and in Alternative Damages—Claim for Specific Performance Abandoned at Hearing—Vendor Entitled to Damages Notwithstanding Clause—Common Law Rights Not Excluded by Clause Where Purchaser Repudiates Contract.

Vendor's action for (a) specific performance of a contract for sale of land and damages for delay in completion; (b) alternatively damages in substitution for specific performance or (c) alternatively damages for breach of contract as at common law. At the hearing before MacGregor, J., the vendor elected to be non-suited against certain defendants alleged to be the undisclosed principals of the defendant Jansen and moved for judgment for damages as at common law against the defendant Jansen who had filed no statement of defence. Clause 11 of the agreement for sale and purchase provided as follows: "If the purchaser shall make default in the due and punctual payment of any of the payments herein agreed to be paid and such default shall continue for the space of twenty-eight days or if he shall commit any breach in the observance or performance of any of the covenants conditions or agreements herein contained or implied and such default shall continue for the like period of twenty-eight days then the vendor shall be entitled immediately thereafter to exercise the following powers: (a) To rescind this agreement whereupon all moneys paid by the purchaser to the vendor shall be forfeited to the vendor as ascertained and liquidated damages and not by way of penalty and further the vendor shall be at liberty to resell the said land premises machinery and plant either as a whole or in separate parts either by public auction or by private contract and any deficiency in price if any upon such re-sale or attempted re-sale together with the costs of and incidental thereto shall be paid by the purchaser to the vendor by way of ascertained and liquidated damages; (b) To enforce specific performance of this agreement; (c) In case of default as aforesaid the vendor shall be at liberty to re-enter upon the said land and premises and sell the same together with the plant and machinery either in whole or in separate parts in all respects in accordance with the provisions for the sale of land by mortgagees by virtue of the provisions of the Land Transfer Act, 1915, or any amendment thereof but without waiting any time or giving any notice as provided by the said Act either by public auction or by private contract at such time and place and upon such terms and conditions and in such manner generally as the vendor shall think fit with power to withdraw the said property from such sale and the vendor may recover from the purchaser as ascertained and liquidated damages the deficiency if any arising on such re-sale together with all expenses of and preliminary to and attending any such re-sale and any previous unsuccessful attempt to re-sell and the purchaser so in default shall have no claim upon any increase in price made upon any such re-sale." MacGregor, J., removed the plaintiff's motion for judgment into the Court of Appeal.

James for plaintiff.
Luckie for defendant.

MYERS, C.J., in an oral judgment said that speaking for himself, he did not think the case presented any difficulty. It was, His Honour thought, indistinguishable from **Dee v. Montgomery,** (1927) N.Z.L.R. 628, and other cases of that class. Clause (11) of the Agreement did not in His Honour's opinion exclude the common law rights of the vendor, at all events where there had been repudiation or renunciation of the contract. In the present case it was admitted that at the time of the trial there were certain circumstances in existence, and there had been certain conduct on the part of the purchaser, from which it was competent for the Court to infer a repudiation or renunciation by him of the contract. In His Honour's opinion that was the only inference that could be reasonably drawn. Consequently, therefore, it was quite competent for the plaintiff at the trial to elect to take damages instead of specific performance. As to the principles upon which damages should be assessed it might or might not be necessary for the Court to express its views on that point. If it should be necessary the Court would do so in writing later, but, subject thereto, the proper course, His Honour thought, was to say that judgment must be for the plaintiff and that the case should be remitted to the Supreme Court to assess damages.

HERDMAN, J., said that he agreed with the observations of the Chief Justice. It would appear that a claim was brought against the defendant and two remedies were sought: (1) specific performance and, in the alternative, (2) damages at common law. In a contract for the sale and purchase of land special remedies might be expressly provided for particular breaches of the contract, but in the present case it would appear that the evidence went to show that the defendant had completely abandoned his rights under the contract. In such circumstances the plaintiff might proceed to take action for the recovery of damages at common law. His Honour therefore agreed that the case should be referred to the Supreme Court in order that the *quantum* of damages should be assessed.

MACGREGOR, J., agreed that the case should be remitted to the Supreme Court to assess damages.

BLAIR, J., said that he was under the impression that the plaintiff claimed to be able to retain his right to specific performance and also to recover damages at common law. That was not so. He admitted that if he elected to claim damages at common law that constituted an election to treat the contract as ended and he could not then ask for specific performance as well. To do so would be both approbating and reprobating the existence of the contract. When a plaintiff in an action for specific performance asked for damages in case specific performance could not be obtained that was a claim based upon a subsisting contract and was a different claim from one for damages at common law which treated the contract as determined by breach committed by the party in default. When he claimed damages at common law and accepted damages against one of several parties that precluded his right to claim against the others, either at common law or for specific performance. His Honour agreed that the case should be remitted to the Supreme Court to assess damages.

KENNEDY, J., agreed that the case should be remitted to the Supreme Court to assess damages.

Solicitors for plaintiff: **Foden and Thompson,** Wellington.
Solicitors for defendant: **Field, Luckie and Wiren,** Wellington.

Myers, C.J.
Herdman, J.
MacGregor, J.
Blair, J.
Kennedy, J.

June 30; July 17, 1931.
Wellington.

ANSLEY v. ANSLEY.

Divorce—Husband's Petition on Ground of Separation Order Continuing in Full Force for Not Less than Three Years—Actual Separation Before Separation Order—Defence that Separation Due to Wrongful Act or Conduct of Petitioner—Defence Not Proved Simply by Separation Order—Proof Required That Separation Itself Due to Wrongful Act or Conduct of Petitioner—Defence Not Proved on Facts—Decree Nisi Granted to Husband—Destitute Persons Act, 1910, Ss. 17, 18, 19, 23—Divorce and Matrimonial Causes Act, 1928, S. 10 (i) (j), 13, 18.

Appeal from a judgment of Reed, J., reported 7 N.Z.L.J. 37. The petition for divorce by the husband was founded upon a separation order under the Destitute Persons Act, 1910, made by Mr. J. S. Barton, S.M., at Wanganui on 25th July, 1927. The defence set up in the respondent's answer was that the separation order was brought about by the wrongful acts and conduct of the petitioner. It was proved at the trial that the parties in fact separated on or about 5th March, 1926, and that they entered into a deed of separation on 6th May, 1926, whereby, *inter alia*, the petitioner agreed to pay, and the respondent to accept, a certain weekly sum for the respondent's main-

tenance. The learned trial Judge had expressly found that the evidence did not prove to the satisfaction of the Court that the separation in fact between the parties was due to the wrongful acts or conduct of the petitioner. The petitioner's payments under the deed of separation were punctually made until 6th May, 1927, inclusive. The payment that should have been made on the 6th June, 1927, was not made owing, as it turned out, to no fault on the part of the petitioner, and the respondent on 13th June, 1927, lodged a complaint under the Destitute Persons Act, 1910. The respondent by her complaint alleged, firstly, the deed of separation, secondly that all maintenance accrued thereunder down to 6th May, 1927, had been paid, thirdly that the respondent was by reason of illness unable to work and was a destitute person within the meaning of the Act, and fourthly that the maintenance paid and agreed to be paid by the petitioner towards her maintenance was inadequate for that purpose. She therefore prayed for a separation order and a maintenance order. The Magistrate heard the complaint on 25th July and made an order reciting the facts set out in the respondent's complaint and that the parties had that day appeared before him; and the order proceeded, "And having heard the matter of the said complaint, and having regard to all the circumstances of the case, I do adjudge the same to be true and do order as follows:" He then ordered payment of an increased amount for maintenance and also ordered the respondent to pay costs. The order then further proceeded by way of separation order in the following terms: "And I do further order as follows: That the said Fanny Ansley be no longer bound to cohabit with her husband the said Frederick William Ansley." Reed, J., was satisfied that the case for the petitioner had been proved and that it had not been proved that the separation was due to the wrongful act or conduct of the petitioner and granted a decree *nisi* accordingly.

Pope for appellant.

W. J. Treadwell for respondent.

MYERS, C.J., said that he had no doubt that the Magistrate was entitled to make, and properly made, an order binding the petitioner to pay an increased amount for maintenance, having regard to the alleged altered circumstances of the respondent. But equally His Honour had no doubt that he ought not to have made a separation order. His Honour said that because of subsection (4) of S. 18 of the Destitute Persons Act, 1910. It might be stated in passing that that subsection was not referred to in the judgment of the Court below, and that in His Honour's view consideration by the Legislature of an amendment of the Act as suggested in such judgment was unnecessary. If one could look at the Magistrate's entry in his own writing in his Criminal Record Book, it was perfectly plain that a separation order should not have been made because it appeared therein that the separation order was made as prayed, "on the grounds appearing in Deed of Separation," and "on proof of a technical failure to maintain." His Honour did not see how a technical failure could amount to a failure "wilful and without reasonable cause." As a matter of fact the Minute in the Criminal Record Book was produced at the trial by the Clerk of the Court. His Honour did not see, however, that the Court of Appeal was entitled to look at the Minute. It could not, His Honour thought, in the present suit, go behind the actual order drawn up and signed by the Magistrate. If the separation order had not been made, clearly enough the petitioner would have been entitled to petition for a divorce after 6th May, 1929, founding his petition upon the deed of separation, which would have been in full force for not less than three years, and on that petition he would have been entitled to a decree on the learned Judge's findings of fact. That, however, he was now prevented from doing by reason of the fact that the separation order superseded the deed of separation: **Fairchild v. Fairchild,** (1924) N.Z.L.R. 276. In **Lunn v. Lunn,** (1924) G.L.R. 157, where in a separation order there was an express finding on the face of the order that the husband's failure to provide maintenance was wilful and without reasonable cause, Chapman, J., held that the Supreme Court could not go behind the order and that the Court must of necessity be satisfied thereby that there had been wrongful acts or conduct on the part of the husband; but there was no question of a separation other than that effected by the order. In a somewhat similar case, **McKenzie v. McKenzie,** (1925) N.Z.L.R. 303, where likewise there was no question of a separation other than that effected by the order, Sim, J., held that a separation "which took place *under the order* made by the Magistrate" must be regarded as having been due to the failure of the husband —obviously meaning the failure "wilful and without reasonable cause"—to provide the wife with adequate maintenance, and that such a failure was wrongful conduct within the statutory provision reproduced as S. 18 of the Divorce and Matrimonial Causes Act, 1928, and was, therefore, a bar to the husband's claim to have the marriage dissolved. In the present case the Magistrate did not expressly find in the order made by him on 25th July, 1927, that the petitioner's failure to provide adequate maintenance for the respondent was wilful and without reasonable cause. Nevertheless, seeing that he could make a separation order only upon that ground by reason of the provisions of S. 18 (4) of the Destitute Persons Act, 1910, and seeing that the Court was not entitled to look at the Minute in the Criminal Record Book, but only at the actual order, His Honour thought that the Court was bound in the circumstances to assume (notwithstanding the suggestion by Chapman, J., in **Lunn v. Lunn,** that, without the finding in the order itself that the failure was wilful and without reasonable cause, the order would be bad *ex facie*) that the Magistrate was not unaware of the provisions of that subsection, and that he must be regarded as having found as a fact that the matters recited in the order amounted in his opinion to a failure which was wilful and without reasonable cause, that finding being necessary to found his jurisdiction to make the order. On that assumption it well might be that he made an error in law, and that, had the order been appealed from, it must have been set aside, but it was not appealed from, and the Magistrate's error must be treated, His Honour thought, as an error in respect of matters within his jurisdiction. His Honour was quite conscious that all that assumption might be entirely wrong, but in the circumstances His Honour thought the Court was bound to make it, and it was the only way in which the making of the order, which had been acted upon for over three years by the parties, could be justified.

Assuming then, as His Honour thought the Court must assume, that the order was valid, it was plain from what His Honour had already said that a grave injustice would result to the petitioner unless S. 18 of the Divorce and Matrimonial Causes Act, 1928, could be construed in such a way as to overcome the apparent difficulty created by the decisions in **Lunn v. Lunn** (*sup.*) and **McKenzie v. McKenzie** (*sup.*). In His Honour's opinion the difficulty was only apparent and not real. What S. 18 said was that if upon the hearing of a petition praying for relief on the ground specified in paragraph (i) or paragraph (j) of S. 10 the respondent opposed the making of a decree, and it was proved to the satisfaction of the Court that the *separation* was due to the wrongful act or conduct of the petitioner, the Court should dismiss the petition. Those two subsections created as grounds of divorce: "(i) That the petitioner and respondent are parties to an agreement for separation, whether made by deed or other writing or verbally, and that such agreement is in full force and has been in full force for not less than three years. (j) That the petitioner and respondent are parties to a decree of judicial separation made in New Zealand, or to a separation order made by a Stipendiary Magistrate in New Zealand, and that such decree or order is in full force and has been in full force for not less than three years." In **Fairchild v. Fairchild** (*sup.*) Hosking, J. distinguished between the fact of separation and the decree, order, or deed, and he pointed out that where there was first a separation deed, and subsequently a separation order was made under the Destitute Persons Act, the footing on which the separation continued was changed. It was to be observed that by S. 18 of the Act of 1928 what was to be proved to the satisfaction of the Court was that the "separation"—the section did not say "decree or order," although those were the words used in paragraph (j) of S. 10—was due to the wrongful act or conduct of the petitioner. If "separation" meant necessarily, in the case of a separation order, the separation which took place under the order, then a husband could never, if his petition were opposed, obtain a decree of divorce on the ground that a separation order had been in full force for not less than three years, because under the Destitute Persons Act such an order could be made only against a husband and not against a wife. Furthermore there might be a separation by deed or agreement or verbally which had existed in fact for say ten years which would have entitled either party to petition for and obtain a decree of divorce. If after such period of ten years the wife's circumstances changed for the worse and she took proceedings under the Destitute Persons Act and obtained a separation order under circumstances which would justify such an order being made, the contention of the respondent was that the making of a separation order in such circumstances would prevent a husband obtaining a decree of divorce, even though he proved that the original and actual separation was not due to his own wrongful act or conduct but to his wife's. After all, all that a separation order effected was that the respondent was no longer bound to cohabit with her husband, with of course, the consequential results mentioned in S. 19 of the Destitute Persons Act, 1910. As a matter of fact an order was not required that the respondent should be no longer bound to cohabit with the petitioner because

that was already effected by the deed. If on the trial of a petition by a husband for divorce founded on a separation order under the Destitute Persons Act the order was proved without more, or if it were the fact that the separation order was made when the parties were living together, it seemed to His Honour that, if the petition were opposed, the question which arose under S. 18 of the Divorce and Matrimonial Causes Act, 1928, would be concluded, because clearly the separation would be the separation effected by the separation order. But what the section said was: "proved to the satisfaction of the Court that the *separation* was due to the wrongful act or conduct of the petitioner." His Honour thought that the natural meaning of "separation" there was the separation between the parties, that was to say the actual separation. If then it appeared on the hearing of a petition based upon a separation order that there was a separation in fact prior to the making of the separation order, in His Honour's opinion the Court was not bound to dismiss the petition unless it was proved to the satisfaction of the Court that such separation in fact was due to the wrongful acts or conduct of the petitioner. In His Honour's opinion, therefore, the appeal should be dismissed. His Honour added that the present case emphasised the serious consequences that resulted from a separation order, and the extreme care with which Magistrates should exercise their jurisdiction to make such orders.

HERDMAN, J., dissented.

MACGREGOR, J., delivered a separate judgment concurring.

BLAIR, J., dissented.

KENNEDY, J., delivered a separate judgment concurring.

Appeal dismissed.

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

Myers, C.J.
MacGregor, J.
Blair, J.
Kennedy, J.

July 6; 17, 1931.
Wellington.

SYME v. UNIVERSITY OF NEW ZEALAND.

Education—University—Taranaki Scholarships—Statute Requiring Scholarships to be Awarded on Results of Examination or in such other Manner as Senate of University Should Decide with Proviso that No Scholarship to be Awarded to a Candidate Unless he has Passed Examination with Credit or has otherwise Given Evidence of Possession of Sufficient Qualifications—University Empowered to Make Regulations—Regulation Requiring that Candidate should Obtain Credit in the Examination and be "Deemed Worthy" by Senate—Words "Deemed Worthy" Construed as Meaning Worthy from Point of View of Character—Regulation so Construed *intra vires—Aliter* **if Meaning Worthy Scholastically—N.Z. University Amendment Act, 1914, Ss. 17, 18.**

Action by the plaintiff claiming a declaration that he was entitled to a Taranaki Scholarship. The plaintiff was a scholar within the Taranaki Provincial District. He was a candidate for a Taranaki Scholarship at the Junior Scholarship Examination held by the University in 1929. He obtained credit in that examination. Certain Taranaki Scholarships were awarded as the result of that examination. The funds available were more than sufficient to provide for all the scholarships awarded. There was enough, and more than enough, to provide for a scholarship to the plaintiff as well as to two other scholars from the Taranaki District who were on the credit list above him but to whom, as well as the plaintiff himself, the Senate had refused to award scholarships. He claimed in the present action a declaration that he was entitled to the award of a Taranaki Scholarship tenable for three years, and an order that the Senate of the University should award him such scholarship.

Spratt and **Wilson** for plaintiff.
Cooke and **Christie** for defendant.

MYERS, C.J. (delivering the judgment of Myers, C.J., MacGregor and Kennedy, JJ.) said that by the University Endowment Act, 1868, certain lands in Taranaki and other parts of New Zealand were reserved for the endowment of such university institution or body corporate or collegiate as should by any Act of the General Assembly of New Zealand be declared to be the Colonial University for the endowment whereof the lands reserved were to be deemed to have been made. By the Taranaki Scholarships Act, 1905, the lands described in the Schedule thereto were thereby set apart as an endowment for providing scholarships under the Act, and it was declared that the provisions of the University Endowment Act, 1868, should not apply to the said lands; and so much of the Schedule to the last-mentioned Act and so much of S. 30 of the New Zealand University Act, 1874, as related to land in the Province of Taranaki were repealed. S. 3 of the Act of 1905 established scholarships to be called "Taranaki Scholarships" for the purpose of bringing higher education within the reach of deserving scholars within the Taranaki Provincial District. The same section prescribed certain provisions which were to apply to those scholarships. The Taranaki Scholarships Act, 1905, was repealed by the Education Act, 1908, which, however, reproduced in S. 79 and the following sections the provisions of the 1905 Act relating to those Scholarships. The Education Act, 1908, was repealed by the Education Act, 1914, and the provisions relating to the Taranaki Scholarships were with certain alterations transferred to the New Zealand University Amendment Act, 1914. Their Honours did not think that anything turned upon those alterations. The question that the Court had to determine depended upon the true construction of S. 17 and 18 of the Act of 1914. Those sections so far as they were material were as follows: "17. For the purpose of bringing higher education within the reach of deserving scholars within the Taranaki Provincial District (hereinafter called 'the district'), there are hereby established scholarships to be called 'Taranaki Scholarships,' and with respect thereto the following provisions shall apply: (a) One or more scholarships, as the funds will admit, shall be offered annually; (b) The scholarship shall be awarded on the results of the Junior Scholarship Examination of the University, or in such other manner as the Senate with the approval of the Minister of Education, decides; but no scholarship shall be awarded to a candidate unless he obtains credit in the examination, or has otherwise given evidence of the possession of sufficient qualifications." "18. The Senate may from time to time, with the approval of the Minister of Education, make regulations for the effectual carrying out of the objects of the last-preceding section."

The answer of the University to the plaintiff's claim was, in effect, that under a statute made by the Senate in 1924, with the approval of the Minister of Education, and as such statute was interpreted by the Senate, a scholarship would not be awarded to a candidate who obtained credit "unless from his position in the list he is deemed worthy of a scholarship." The actual statute of the University was not in those words. All that it said was that, "The scholarship shall be awarded on the results of the Entrance Scholarship examination of the University, but no scholarship shall be awarded to a candidate unless he obtains credit in the examination and is deemed worthy by the Council." The Senate, however, apparently by resolution, though the manner of its decision was not material, had interpreted the italicised words as meaning "unless from his position in the list he was deemed worthy of a scholarship." It was in reliance upon that interpretation that the Senate had refused to award a scholarship to the plaintiff.

It was necessary to add some observations with regard to the Junior Scholarship Examination. First of all scholarships were awarded to the ten candidates who obtain the highest aggregates of marks at the examination. Those Scholarships were called Junior University Scholarships. The next twenty on the list were awarded Scholarships which were called University National Scholarships. Then followed a list of those who were said to have passed with credit. Under the existing regulations or statutes of the Senate that list comprised those who had obtained two-thirds of the average marks of the fifteen candidates who were highest on the list. The statute provided "and those who have obtained this proportion of marks shall be deemed to have obtained credit." Then followed a list of the candidates who had not passed with credit but who had "qualified for a pass in the University Entrance Examination." As already stated, the plaintiff was one of those who passed with credit.

Before considering the interpretation of the relevant sections of the Act their Honours said, merely for the purpose of showing that they had not been overlooked, that the only two cases cited at the Bar were **In re Nettle's Charity,** L.R. 14 Eq. 434,

and **Rooke v. Dawson,** (1895) 1 Ch. 480. Neither of those cases involved a question of statutory interpretation, and both were, in their Honours' opinion, distinguishable. Anyhow the earlier case was, their Honours thought, against, rather than in favour of Mr. Cooke's contention. It was contended on behalf of the University that the regulation already referred to (according to the Senate's interpretation of it) was valid under S. 17 (b) of the New Zealand University Amendment Act, 1914, either under the words "The Scholarship shall be awarded on the results of the Junior Scholarship Examination of the University," or alternatively as constituting "another manner," decided by the Senate with the Minister's approval, in which the Scholarships should be awarded. In the opinion of their Honours that contention was unsound. The position might first be considered on the assumption that the Senate's interpretation of its own statute was correct. It was the duty of the Senate to offer annually one or more scholarships as the funds would admit. That meant, their Honours thought, that the scholarships would be offered prior to the examination. That course was not adopted, but Mr. Cooke conceded that it was immaterial in the present case because admittedly funds were available to provide not only for the scholarships that had actually been awarded but also for scholarships to the plaintiff and to the other two candidates who were in the same position as himself. If the contention of the University was correct certain extraordinary results would follow. The Senate would have the power to award the scholarships arbitrarily each year. The question as to whether a candidate who had passed with credit was or was not to be awarded a scholarship would depend upon the view that the Senate for the time being took each year of the position on the list upon which it would base its awards, and the statute might be given a different effect in successive years. The Senate might from time to time, with the approval of the Minister, alter the statute or regulation so as to bring it about that a candidate at the bottom of the credit list might be awarded a scholarship in preference to a candidate at the very top of the list. As their Honours understood his argument, Mr. Cooke went so far as to contend that the Senate, with the Minister's approval, might in prescribing "another manner," so provide as to enable it to award scholarships on the results of the Junior Scholarship Examination even to a candidate who failed to pass with credit. The University's contention seemed to their Honours to ignore the words in paragraph (b) of S. 17 "*or* in such *other* manner" and "or has *otherwise* given evidence of the possession of sufficient qualifications." Their Honours thought that the paragraph meant first of all that the scholarships should be awarded on the results of the Junior Scholarship Examination of the University, with the limitation that no scholarship should be awarded to a candidate unless he obtained credit in the examination. That prevented any candidate who merely qualified for a pass in the University Entrance Examination from being awarded a scholarship; and it gave a perfectly logical meaning to the words "shall be awarded on the *results* of the Junior Scholarship Examination." On that examination it was only the aggregate number of marks obtained by the candidate that counted and qualified him for his place on the list. The list itself according to the regulations or statutes of the University showed "the order of merit" of the candidate, and the order of merit depended upon the aggregate of marks obtained in all the subjects. The paragraph further meant, their Honours thought, that the Senate might, with the approval of the Minister, prescribe by regulation some manner other than and altogether distinct from the Junior Scholarship Examination as the manner in which the scholarships were to be awarded. It was to that alternative that, in t eir Honours opinion, the words "or has otherwise given evidence of the possession of sufficient qualifications" were referable; that was to say, the words "other manner" and "otherwise given evidence" altogether excluded the Junior Scholarship Examination as the test on the results of which the scholarships were to be awarded. If, therefore, the University statute was to be interpreted as the Senate had interpreted it, it would in their Honours' opinion be invalid, because plainly under S. 18 any regulation made for the effectual carrying out of the subjects of S. 17 must not be inconsistent with the provisions of that section and in their Honours' opinion the statute as so interpreted would be inconsistent therewith. In their Honours' opinion, however, the Senate had misinterpreted its statute. Its interpretation was built upon the foundation contended for by Mr. Cooke that the word "worthy" means worthy from the scholastic point of view. Their Honours did not agree. In their opinion, in the absence of any context necessitating a different result, the word must be construed in its primary sense as meaning worthy from the point of view of character. So construed their Honours saw no reason to doubt the validity of the statute.

It followed that in their opinion the plaintiff was entitled to the relief sought.

BLAIR, J., delivered a separate judgment, differing as to certain of the reasons for the judgment delivered by the Chief Justice, but concurring in the result.

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

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

Supreme Court

Reed, J. July 2; 15, 1931.
Wellington.

SARACEN SHOE CO. LTD. v. MINISTER OF CUSTOMS.

Revenue — Customs Duty — Ad Valorem — "Current Domestic Value"—Shoes Sold by Manufacturer in United States to Wholesaler in New Zealand—Claim to Deduct Wholesale Trade Discount in Computing Current Domestic Value—No Fixed Ordinary Course of Business Among Footwear Manufacturers in United States as to Discounts Allowed to Wholesalers—Particular Manufacturer Selling to Only One Wholesaler in United States—Price to Such Wholesaler Not Current Domestic Value—Price to Retailers in United States Current Domestic Value—Discount to New Zealand Wholesaler a Special Discount and Not Deductible in Computing Current Domestic Value—Customs Act, 1913, S. 114.

Originating summons to determine the meaning of certain words in S. 114 of The Customs Act, 1913, and its amendments, and to determine whether the discount, allowed by the manufacturer of certain goods to the defendant on such goods, was properly deductible for the purpose of assessing the *ad valorem* duty payable to the Customs thereon. The Mishawaka Company of the United States was the sole manufacturer of "Ball Brand" footwear, and the plaintiff company was *inter alia*, an importer and wholesale dealer in footwear, and had the exclusive right of sale in New Zealand of footwear of that brand. In the United States the Mishawaka Company, as to 90 per cent. of its output, sold to retailers; as to the remaining 10 per cent. it sold to a wholesaler (or "jobber" as it was termed in the Statement of Facts) named Dunham Brothers Company to which firm it allowed 14% trade discount off the price fixed by it from time to time as being the price to be charged to retail dealers throughout the United States. Quantity discounts were allowed to retailers, calculated on 12 monthly periods, varying from 5% on 3,000 dollars worth of footwear purchased, to 10% on 10,000 dollars worth or over. The Mishawaka Company allowed the plaintiff the same trade discount as allowed to Dunham Brothers Company, viz.: 14% off the price charged to retailers in the United States. The defendant contended that notwithstanding the price so charged the *ad valorem* duty must be calculated as if the price paid for the goods was at the rate charged to retailers in the home market.

Spratt and Wilson for plaintiff.
Solicitor-General (Fair, K.C.) for defendant.

REED, J., said that the plaintiff purchased more than 10,000 dollars worth a year, but more was involved than the 4% difference in the price, for the Collector of Customs had stipulated (as he was entitled to do under subsection 4 of S. 114) that the plaintiff company should in order to receive the benefit, for the purposes of assessment of duty, of the quantity discount applicable, either import the requisite quantity in one shipment or else import under a valid contract to take such quantity during a given year. That stipulation, the plaintiff company claimed was, under existing financial conditions, a hardship. However that point did not arise in the present proceedings, the sole question for determination being whether or not, by virtue of S. 114 of The Customs Act, 1913, and its amendments, the Collector of Customs was justified in refusing to allow the deduction of 14% in assessing the *ad valorem* duty. The question turned principally on the first subsection which, with the various amendments, read as follows: "When any duty is imposed on goods according to the value thereof or where for any other

reason the value of any goods is to be determined for the purposes of the Tariff such value shall be taken to be *the fair market value of such goods when sold for cash in the ordinary course of business for home consumption in the principal markets of the country from which the goods are exported at the time when they were so exported, with ten per centum added to such fair market value. Such fair market value is hereinafter in this Act referred to as the current domestic value.* Provided that where so indicated in the Tariff the current domestic value of any goods shall be ascertained by reference to their value at the port of export to New Zealand in lieu of their value in the principal markets of the country of export but otherwise in accordance with the provisions of this section." The question was as to the meaning of the words italicised as applied to the following circumstances. From the statements of facts placed before His Honour it clearly appeared (1) that the basis of prices on sales in the United States by manufacturers of footwear was the price charged to retailers, (2) that sales to jobbers represented only a comparatively small proportion of the sales by manufacturers, (3) that there was no universally recognised rate of per centage allowed to jobbers on the retailers' price, each manufacturer making his own terms, (4) restrictions and conditions in jobbers' contracts varied considerably. From that His Honour deduced that, as regards the general and ordinary course of business with jobbers, there was no general current domestic value on sales, as the discount allowed depended entirely on the conditions stipulations and restrictions in each individual contract. There being thus no fixed ordinary course of business in dealing with jobbers common to manufacturers of footwear in the home market, it became necessary to consider whether or not the course of business adopted by the Mishawaka Company could be said to establish or constitute a market as regards sales to jobbers. As already pointed out, that Company sold to only one jobber, Dunham Brothers Company, and the sales represented about 10% of its total output. That firm was given the exclusive right to sell to retailers within a defined territory, which extended over the whole of the New England States and New York City, with a total population of more than 14,000,000 people; its business was worth to the Mishawaka Company approximately 2,000,000 dollars a year, and it supplied some 5,000 retail dealers carrying on business within its defined territory. It undertook not to deal in competitive lines, without which undertaking it would not be supplied with goods or given the special discount of 14%. Those were very special circumstances met by special conditions. If sales to jobbers bore a substantial relationship to the general body of business of manufacturers of footwear in the United States, and there were recognised customary terms conditions and discounts His Honour could not doubt that prices charged would, within S. 114, constitute a market from which the value of goods imported could be determined. In such case there might well be more markets than one and the value would then fall to be determined according to the nature of the transaction, that is as to whether a sale was made to a retailer or a jobber. But in the present case, as His Honour had already pointed out, there could not be said to be any generally recognised market value attached to goods sold to jobbers, and the special arrangements made by the Mishawaka Company with its isolated case of one jobber could not in any sense be said to constitute a market. His Honour thought, therefore, that it was the price charged to retailers that constituted the fair market, or current domestic, value.

The special allowance, of 14% on such retail price, made to the plaintiff company, came, His Honour thought, within subsection (2) of S. 114 which (eliminating irrelevant words) provided: "No deduction of any kind shall be allowed from the current domestic value of such goods because of any special . . . . discount, or because of any special arrangement concerning the export of the goods, or the exclusive right to the sale thereof within certain territorial limits . . . ., or on account of any other consideration by which a special reduction in price has been, or might be, allowed." Several authorities were cited by counsel but on a question of construction those were of little assistance. The plaintiff's counsel based his case on there being two markets: one for jobbers and one for retailers and submitted that the principal market qualitatively, although admittedly not quantitatively, was the jobber's and that accordingly the price charged to jobbers was the "value" within the section. As His Honour had shown there was no regular price charged to jobbers and, therefore, it could not be rightly said that there was any established market value of goods where a jobber was the purchaser. The definition of "market value" adopted by the Supreme Court of the United States in **Cliquot's Champagne**, 3 Wallace's Reports 114, 125, 142, and again in **Muser v. Magone**, 155 U.S. Reports 240, 249, was helpful. It was as follows: "The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade." The information placed before His Honour as to the conditions of trade with jobbers did not show any market within that definition. In His Honour's opinion on the true construction of S. 114 the discount of 14% mentioned in the Statement of Facts was not to be deducted from the price charged by the manufacturer to the retail dealer in order to ascertain the "fair market value" before assessing customs duty on the importation of the goods in question, and His Honour answered the second question accordingly. His Honour was not prepared to answer the first question which asked for the meaning of the section generally.

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

Solicitors for defendant: **Crown Law Office**, Wellington.

Smith, J. June 17, 18; July 18, 1931. Auckland.

ABBOTT v. L. D. NATHAN & CO. LTD.

Licensing—Landlord and Tenant—Surrender—Loan by Company to Purchaser of Hotel—Loan Secured by Second Mortgage—Lease of Hotel by Mortgagor to Company Followed by Sublease from Company to Mortgagor with Provision that Rent Under Sublease Not Payable in Event of Mortgagor Purchasing All Liquor Consumed on Premises from Company—Company Requiring Payment of Large Sum as Consideration for Surrender of Lease—Such Sum Not a Premium for Consent of Landlord to Assignment Transfer or Sublease of Premises—Licensing Act, 1908, Ss. 177, 178, 179.

Action by the plaintiffs against the defendant company claiming accounts under a mortgage given by the plaintiffs to the company dated 6th June, 1916. The claim for account involved (*inter alia*) a sum of £1,000, and the case is reported on this point only. The circumstances with regard to the sum of £1,000 were as follows: In 1914 the plaintiff W. G. Abbott proposed to purchase an hotel at Ohaupo and for that purpose entered into an arrangement whereby in consideration of the defendant advancing him the sum of £2,000 to assist him to purchase the freehold of the Ohaupo Hotel the plaintiff agreed to repay the amount on demand and in the meantime to allow the defendant interest at 7 per cent. on any unpaid balance, and agreed also to exercise the option which he held from J. Teddy for the purchase of the said hotel property. Under that option the purchase price of the whole property was £6,500 and the stock and furniture was to be taken at valuation in the usual manner. The sum of £3,000 was to be paid to Mr. Teddy in cash and the balance to remain on mortgage at six per cent. per annum to be paid off by instalments of from £400 to £500 per annum. It was further agreed between the plaintiff and the defendant that the sum of £1,000 should be returned in the event of no license being carried at the first poll. By way of security he undertook to execute in favour of the defendant a second mortgage over the hotel property, a bill of sale over the contents, and to give a second mortgage over a separate property at Pukekohe. The plaintiff also undertook to execute in favour of the defendant a lease of the hotel for a period of ten years from the date of completion of the transaction confining the trade to the defendant for the whole period. It was agreed that documents embodying the arrangement should be drawn up in a form to be approved by the defendant's solicitors. The transaction was carried out in the following manner: (a) The plaintiff acquired the freehold of the Ohaupo Hotel from Teddy. A first mortgage securing £4,000, the balance of the purchase money, was given to Teddy; and a bill of sale over the stock and furniture and a second mortgage over the land of the hotel and of certain additional land was executed in favour of the defendant company to secure the sum of £2,000 and further advances. (b) On 14th May, 1914, the plaintiff executed a memorandum of lease of the land subject to the mortgages to the defendant for a period of 10 years from the 14th May, 1914, at a rental of 10/- per annum if demanded, provided however that in the event of the licensed premises being closed as a result of a poll or election or from any cause not arising from any act or default of the lessee then the lease should after the expiration

of 14 days thereafter determine as if by effluxion of time. The lease negatived all implied covenants as against the defendant company. On the same day, the defendant company executed in favour of the plaintiff a sublease of the said Ohaupo Hotel for a term commencing on 14th May, 1914, and ending on 11th May, 1924, at a weekly rental of £20 payable on the Monday of each and every week during the said term. That sublease contained a clause (clause 15) to the effect that the plaintiff had the right privilege and option to purchase specified liquors at stated prices from the defendant company and that if he did so in each and every week of the said term then (but not otherwise) the plaintiff should be entitled on the Monday of each and every week to an allowance in account of or the payment of £20. The result of the arrangement was that although the rent continued to be payable weekly according to the terms of the lease the plaintiff was under no obligation to make any such payment if he had purchased his liquors as specified during the week, because such amount would be allowed in his favour. Early in 1915, the plaintiff sold the hotel to Messrs. Young & Speight of Wellington. A letter dated 22nd April, 1915, was written by the plaintiff to the defendant company asking for a release of the trade tie, with the result that the company agreed to release the tie for £1,000. The plaintiff paid the defendant company £1,000 and in consideration thereof the defendant company surrendered the lease from the plaintiff to itself. The sublease from the defendant was likewise surrendered. It was contended that it was unlawful for the defendant company to demand £1,000 for the surrender of the lease and the plaintiff sought to recover this sum.

Sullivan for plaintiffs.

McVeagh and **Finlay** for defendant.

SMITH, J., said that the consent of Teddy the first mortgagee and of the defendant company as second mortgagee had been given to the head lease. Teddy's consent provided that the consent should not operate and should be deemed never to have been given if at any time thereafter the demised premises were sold under the power of sale contained in the mortgage when the lease should become void and at once determine. The defendant company's consent was to the same effect and was expressed to depend on the exercise of the power of sale not only under Teddy's mortgage but under the second mortgage to the defendant company. Whatever were the exact effect of such consents, their existence was relevant for the purpose of determining, according to the intention of the parties, whether the mortgage transaction was in law separate and apart from the leasing transaction. Under the terms of the initial arrangement set out above, the leasing transaction was not expressed to be part of the security for the advance and the form in which the transaction was carried out showed, His Honour thought, that the Court ought to consider that the right to redeem under either or both of the mortgages was in no way restricted by the provisions of the sublease. The mortgagors would have been entitled to a discharge of the mortgage to the defendant company upon repayment of the principal moneys and further advances owing by them under the mortgage and the mortgagees could not have refused to accept those moneys. As was said by Lord Parker in **Kreglinger v. New Patagonia Meat, etc. Coy.** (1914) A.C. 25, with reference to an equitable rule or maxim relating to mortgages: "The only possible way of deciding whether a transaction is a mortgage within any such rule or maxim is by reference to the intention of the parties." In his evidence, the plaintiff said: "I knew that if I ever sold the Ohaupo Hotel I would have to get rid of the trade restriction: that I was not merely getting rid of the mortgage. I knew certainly that there was a trade restriction on the hotel." It was clear then that the leasing transaction must be regarded as separate and apart from the mortgage transaction. There was nothing in the case to show that the collateral advantage created for the mortgagee by the sublease was unfair and unconscionable; or in the nature of a penalty clogging the equity of redemption; or inconsistent with and repugnant to the contractual and equitable right to redeem the mortgage. In His Honour's opinion, the collateral advantage of the sublease was well within the protection afforded to mortgagees by **Kreglinger's case** (*sup.*) and the **Onehunga Sawmilling Coy. v. O.A. of King,** 34 N.Z.L.R. 257.

It was contended, however, by counsel for the plaintiff that the transaction was rendered void by S. 178 of the Licensing Act, 1908. His Honour thought that Mr. McVeagh was right when he submitted that the principles of interpretation which should be applied in considering the section were those laid down by Lord Coke in **Heyden's case,** 3 Co. Rep. 7b; 76 E.R. 638, **Hawkins v. Gathercole,** 6 De G.M. & G. 23, 43, and **Christie v. Hastie and Ors.,** (1921) N.Z.L.R. 1, at p. 9. With regard to the first question, the common law did not appear to have been relied upon at any time to prevent an owner or landlord from requiring a payment where he had the power of withholding his consent to any assignment sublease or transfer of land or property the subject of a lease. See **Woodfall on Landlord and Tenant,** 22nd Ed., 836. What then was the mischief for which the common law did not provide and which that section was intended to remedy? In His Honour's opinion the answer was indicated by the word "consent" used with the words "assignment, sublease or transfer." The Section was aimed at preventing an owner or landlord from exacting a payment in respect of a transaction to which his consent was necessary in order to prevent him from asserting rights which were to continue after that transaction had been completed to the detriment of some party to that transaction. A typical case would be, of course, the demand of a payment for the consent of a landlord to the assignment of a lease which contained provisions against assignment without the consent of the landlord. It was an abuse of this kind of power of granting or withholding "consent" which the Section was intended to remedy. The remedy provided was briefly that it was made unlawful for the owner or landlord to demand or recover such a payment and secondly that any moneys so paid might be recovered as a debt by the person paying the same. A further extension of the remedy was provided by S. 179 which provided that the consent to the assignment or transfer therein referred to should not be arbitrarily or unreasonably refused, and that any question relative thereto should be decided by a Judge of the Supreme Court. Where a landlord surrendered his proprietary right under a lease of licensed premises in order to put an end to his rights thereunder, he was not in the ordinary meaning of language being asked to give his consent to any assignment sublease or transfer of a lease of the licensed premises. He was on the contrary surrendering his own proprietary rights in such a way as to obviate the need for any such consent. His Honour thought, therefore, that the transaction in question in the present case was not within the mischief of S. 178.

Counsel for the plaintiffs contended further that the documents showed that the whole transaction was a mere device for the purpose of evading S. 178 and that the Court ought to regard the transaction in such a way as to bring it within S. 178. No doubt the transaction might be regarded as extraordinary. The sublessee owned the freehold. He had to pay the outgoings upon the mortgages. But in order to carry on a licensed house upon the land he entered into a particular leasing transaction which was in form and according to the intention of the parties separate and apart from the mortgage transaction. He gave a lease at 10/- per annum, if demanded, to the defendant who subleased to him at £20 per week but he had no need to pay the £20 per week if he bought the alcoholic liquors specified in the sublease from the defendant. It was entirely at the plaintiff's option whether he bought the liquors from the defendant or not. If he did not, he was bound to pay the £20 per week. That clause was good in law and did not amount to a trade tie within S. 177 of the Licensing Act, 1908: **Capt. Cook Brewery Ltd. v. Ryan,** (1919) N.Z.L.R. 595. The transaction could not in His Honour's opinion be said to have been fraudulent in any way. On the contrary it represented, as His Honour understood the matter, a well-known conveyancing device. The documents stood unimpeached and His Honour's view was that the legal relationships of the parties must be dealt with accordingly. His Honour accordingly concluded that it was not unlawful for the defendant to demand £1,000 for the surrender of a lease at 10/- per annum with an unexpired term of approximately nine years and the consequent surrender of a sublease securing to the defendant either £20 per week or the purchase of alcoholic liquor from the defendant exclusively. His Honour thought, therefore, that the plaintiff was not entitled to recover the sum of £1,000 as claimed by him. Having regard to that conclusion, it was not necessary for His Honour to consider whether the Statute of Limitations, 21 Jac. I c. 16 sec. 3, applied to a claim under Section 178.

Judgment for the defendant company accordingly.

Solicitor for plaintiffs: **J. J. Sullivan,** Auckland.

Solicitors for defendant: **Russell, McVeagh and Macky,** Auckland.

Recent figures submitted to Parliament in Australia show that the total number of practitioners struck off the rolls during the last two years was 20, out of about 3,600 practising in the Commonwealth.

Land Transfer Act.

Equitable and Unregistered Instruments.

By H. F. von Haast, M.A., LL.B.

(Continued from p. 181.)

Voluntary Unregistered Instruments.

Conflict of Authorities. (Ctd.)

In re Skinner, (1894) 6 Q.L.J. 68, S, being the registered proprietor of lands under the Act, executed a will whereby he devised the lands. Later he executed a memorandum of transfer without consideration in favour of his son, which remained in a drawer in the testator's house unregistered. The will was not revoked, and after the testator's death, the transfer was lodged for registration. Before the transfer was registered the trustees of the will lodged a caveat forbidding the registration of the transfer. It was held that the will spoke from the death of the testator, and the gift not being registered was incomplete, and the trustees were held to be entitled to registration in priority to the son. But the Full Court of Queensland in *O'Regan v. Commissioner of Stamp Duties*, (1921) St. R.Q. 283, at p. 290, said that *Re Skinner* could not be considered as of any authority on the questions therein referred to, and if it could be, dissented from it as being contrary to present day decisions and to the provisions of the Real Property Acts. The question in *O'Regan's case* was whether transfers by way of gift executed at a time more than, and registered at a time less than, two years before the donor's death were dispositions made by the deceased donor less than two years before his death and, therefore, to be deemed to confer a succession and to be liable for duty. It was held that each transfer was a disposition made by the donor more than two years before his death and did not confer a succession and that the transfer (with delivery) was the final act of the transferor and not the registration. *Hogg*, they said, had evidently relied on Griffiths, C.J.'s remarks in *Anning v. Anning*, (1907) 4 C.L.R. 1049, at p. 1061, in reference to that part of the donor's estate, which consisted of a debt secured by a mortgage on land under the Act, the transfer of which mortgage was by deed of gift and not by the proper statutory registered instrument. Griffith, C.J., therefore said: "The donor did not do all that was necessary on his part to confer a perfect title on the donees, and the deed of gift is therefore 'ineffectual.'" He had not before him the case of the execution of a proper registrable form of transfer of mortgage; in which event the donor would have done all that was necessary on his part as soon as he had executed the transfer, the obligation of registration being on the donee. The Court in *O'Regan's case*, however, said that the learned author had overlooked the dictum of Griffith, C.J., in direct conflict with and contradictory of the author's proposition that "pending registration, the transaction, if voluntary, may be treated as an imperfect gift and revocable." The Court adopted the statement of the law in that dictum in *Anning v. Anning* at p. 1057: "The question arises . . . . whether the donor did everything which, according to the nature of the property, was necessary to be done in order to transfer the property, and make the gift binding upon himself. I think that the words "necessary to be done" as used by Turner, L.J., in *Milroy v. Lord*, (1834), 3 My. & K. 36, mean *necessary to be done by the donor*. . . . . In the case of a gift of land held under the Acts regulating the transfer of land by registration, I think that a gift would be complete on execution of the instrument of transfer and delivery of it to the donee. If, however, *anything remains to be done by the donor*, in the absence of which the donee cannot establish his title to the property as against a third person, the gift is imperfect, and, in the absence of consideration, the Court will not aid the donee as against the donor. But if all that remains to be done can be done by the donee himself, so that he does not need the assistance of the Court, the gift is I think, complete." The judgment of Real and Lukin, JJ., in *O'Regan's case*, continues: "In the case of each of these transfers, the dictum of Griffith, C.J. directly, and the tests for determining whether a gift is complete suggested by these cases, indirectly establish that each of these transfers was a perfect and complete gift, enabling each of the transferees to become, as each of them did, in fact, shortly after become, the duly registered proprietor independently of any further act of the donor. "These gifts, then, being perfect and complete as between the donor and the donee, the donor could take no action to cancel or revoke such transfer, for where a gift is complete, a donor cannot compel a donee to give it up." The Court then considered whether the dispositions by the transfers were "effectual" before registration owing to the words of the act: "No instrument shall be effectual to pass any interest, etc., until registration." These words they said (at p. 295) "cannot be taken to mean that no instrument shall have any effect whatever," but to mean "No instrument shall have power to confer an unquestionable and indefeasible title, etc., until registered." It does not affect, as between the transferor and transferee, equitable or statutory rights, interests, or claims arising out of transactions between the registered proprietor and the unregistered transferee, so long as the interests of persons acting and dealing on the faith of the entries in the register with the registered proprietor are not unduly prejudiced.

McCawley, J., concurring, considered that "the date of these instruments purporting, as they do, to operate as immediate transfers, and constituting (with delivery) the final act of the transferor, can more fittingly be regarded as the date of making the substantial disposition of the property than can registration an act, not of the transferor at all, but one over the time of which he had no control, an act of the State, at the instance of the transferees."

Unregistered Interests and Charging Orders.

Three New Zealand cases make it clear that a charging order binds land subject to the equities subsisting at the time, and will, therefore, be removed to enable the registration of a transfer or a mortgage, which was executed prior to the making of the order.

In *re Mutual Benefit Society*, (1887), 5 N.Z.L.R. S.C. 293, and *In re Beattie*, (1887) 5 N.Z.L.R. S.C. 342, the unregistered instrument was a transfer, in *Butler v. Nicol* (1923) N.Z.L.R. 1339, it was a mortgage. "The purchaser from the sheriff in fact only buys a charge upon the judgment debtor's interest in the land, and that charge is clearly subject to any earlier equitable or legal charge": Stringer, J., in the last case, citing *National Bank v. Morrow*, 13 V.L.R. 2. And as Wil-

liams, J., pointed out *In re Beattie* the charging order was there still under the control of the Court which might interfere at the instance of any person prejudicially affected and cancel the registration, but "had the property been sold and got into the hands of an innocent purchaser, who had registered, then no doubt the case would have been different."

It must be noticed that in no one of the three cases had the holder of the unregistered instrument lodged a caveat to protect his interest, a fact that was relied upon in argument but in vain.

Addendum.

There should be added to the authorities cited on the priority of conflicting equitable rights the recent case of *Lapin v. Abigail*, 1930, 44 C.L.R. 166, as it illustrates the different points of view of the Australian Judges. The registered proprietors by transfers, absolute in form and expressed to be made in consideration of a money payment, transferred the land to the nominee of a creditor as security for the debt and the transferee was registered as proprietor. The creditor, without the knowledge or consent of the transferors, who had lodged no caveat, raised a loan for himself upon the security of the land and caused his nominee as the registered proprietor to execute a registrable mortgage over the land in favour of the lender. The lender did not register his mortgage, and he did not, before taking it, search the register, ascertain that the title was free of caveats, or see the contents of the transfers.

It was held by Knox, C.J., Isaacs and Dixon JJ. that the unregistered security of the lender did not take priority of the transferors' equitable right to redeem, as :

(1) Both were equitable rights and the earlier in time prevailed unless its priority was lost.

(2) Its priority was not impaired by the transferors parting with the legal estate and causing the party who gave the unregistered mortgage to be registered as proprietor of the land, because possession of the legal estate can be no ground for assuming that the legal estate is not subject to equitable rights in others.

(3) Its priority was not lost by the transferors' failure to caveat or by the statement of the consideration in the transfers, because the lender did not act upon the faith of the title being free of caveats or of the contents of the transfers.

On the other hand Gavan Duffy and Starke, JJ., held that the registered proprietors, the transferors, were bound by the natural consequences of their act in arming the transferee with the power to go into the world (under false colours) as the absolute owner of the lands and thus execute transfers or mortgages of the lands to other persons and they ought, therefore to be postponed to the equitable rights of the lender. The point to be investigated was whether the conduct of the person having the first equitable interest was responsible for the success of the fraud of the person holding himself out as the unencumbered owner of the property.

Suggested Overhaul of Act.

While within the scope of this series of articles the writer has not been able to deal with every matter that arises in the unregistered and largely unchartered region, or to discuss such questions as are dealt with other than sketchily, the writer has said enough to show what a large and debateable area is still left incompletely covered either by legislation or by final judicial interpretation and in many cases how conflicting the decisions are.

What do the "learned authors" say on the question of amendment ? Hogg thinks that the Land Transfer Act of the Dominions contains provisions which might well be the subject of amendment and that "one of the points on which it is desirable that the Statute Law should be made clear is the effect of unregistered instruments, a matter which is dealt with only in a negative way by the existing statutes, but has been the subject of considerable judicial exposition." The necessity for dealing with this field by legislation in New Zealand is exemplified by Hosking, J.'s opinion expressed in *Taylor v. Commissioner of Stamp Duties* (*sup.*) that the effect of the most frequent of unregistered instruments, viz., an agreement for the sale and purchase of land, is still undetermined. Should so important a contract be left to the protection afforded by a caveat or be recorded upon the register as an encumbrance ? Kerr was informed by the Registrar-General of South Australia that in that State no less than 103 or more Acts of Parliament cast duties upon the Registrar-General. He points out the danger of this line of legislative conduct and advocates that all legislation in any way affecting land under the Act should be by way of amendment of that Act, as the present method of legislation is productive of anomalies.

Readers of these articles will probably agree that they disclose many points that should be made clear by legislation and others that require amendment of the law. The effect of the decision, for instance, in *Staples and Co. v. Corby* (*sup.*) might well be considered with a view to legislation affording protection to that class of interests to which the decision denied it. In this connection one recalls the legislation enacted in consequence of the decision in *Wellington and Manawatu Railway Company Ltd. v. The Registrar-General*, (1899) 18 N.Z.L.R. 250, in which it was held that a fencing covenant in a transfer ought not to be noted on the certificate of title and that the Registrar would have been justified in refusing to register the transfer until the covenant had been deleted. But in 1904 the legislature enacted what is now section 7 of the Fencing Act, 1908.

The time is ripe for a general consideration of the Land Transfer Act by our District Land Registrars and District Law Societies in the first instance and, after their deliberations, for a final consideration by a small expert committee representing say the New Zealand Law Society, the Registrar-General and District Land Registrars with a view to overhauling the Act, and framing for submission to the Legislature a draft Bill embodying such alterations in and additions to the Act as past experience of its administration, doubts caused by judicial decisions, and modern conditions show to be necessary. We are the first Dominion to make it compulsory to bring all land under the Act and we should, therefore, endeavour—before all conveyancing becomes Land Transfer—to make our Act as perfect as possible and a model for other Dominions.

"It is often the Judge's own fault if he does not get the assistance which he should have from the Bar."
—Lord Macmillan.

London Letter.

Temple, London.
17th June, 1931.

My Dear N.Z.,

I write on the last fringe of a heat wave, which has left us all painfully aware of the coming to the end of our tether, as we ourselves come to the end of another legal year and have to face up to all the arrears accumulated since last October, a sorry multitude so far as concerns actions in our King's Bench Division. I sometimes wonder if the Powers that be, in the K.B.D. do not, on purpose, maintain their arrearage, or at least refrain from too industrious an effort to eliminate it, in order to strengthen their case for the strengthening of the King's Bench by the appointment of the two additional Judges, whom the law authorises but whose appointment requires authority, *ad hoc* and on each occasion of a vacancy arising in this, so to speak, supplemental list, expressly from Parliament ? I dare say no more upon this subject ; as you will know, I am disposed in these letters to say too much ; I only confess to entertaining wonders in this regard, knowing, or supposing that I know, the persistence of the Authorities, under review, in getting their own way against all obstacles. But let my wonder at least be accurately defined and properly understood ; I do not for a moment suggest any " ca' canny " about our Puisne Judges and their Chief, any going slow about their business in order that their numbers may be increased. I feel very far from that, and am of the school which argues strenuously that if His Majesty's Judges would be less insistent, upon always having a full day's work provided for them and insured by anticipating the risk of cases being settled or withdrawn or coming to untimely ends when tried, then His Majesty's litigants, in this country at any rate, would obtain justice not only more expeditiously, in the end, but a good deal more economically. It requires but a little ill-luck, or combination of vicissitudes of a minor order, to cause the parties and witnesses and legal men, concerned in an action, to pay two or three visits to the High Court, Strand, London, to have their case heard but, in the result, to sit all day listening to other cases being heard. The reason of this is largely, " principally " I do not hesitate to say, the putting of cases in the Day's List with no real hope of being reached but with a sole view to avoid risk of the Judge being left, early in the day, with his listed work finished. Put a Judge's cost at £5,000 a year and give him (long days on Circuit included) 200 working days, the cost to the Nation of having a Judge idle for half a day is, unless my arithmetic has decayed, £12 and ten shillings. To have a case, especially a case from the country, put unnecessarily in the list for a day costs individuals of the nation, in the aggregate and on the average, at least £50. And surely it is not unreasonable to say that, for the purposes of this argument, there should be no distinction between the nation and the individuals which compose it, inasmuch as cheap and expeditious justice is a matter of value, inevitably felt if not always directly felt, to every individual of the nation.

The Non-Jury list is a good example, and it is displaying its tendencies at this very moment. It has the habit of dodging in and out of the day's work : on a Monday there will be no " Judge Alone " sitting ; on a Tuesday there may be three of them, taking Non-jury cases ; and on a Wednesday the exigencies of Circuit may reassert themselves, various Assizes may simultaneously call for their Judges, and there may be no more Non-jury cases tried for a week . . . . save for this, that a Circuit Judge may, upon the following Friday, be left with a full day to spare between one Assize town and another, and it may be deemed wise and proper not to let him rest but to keep him occupied, and to do this by putting the next 3 (say) of Non-jury cases, awaiting trial, in the Day's List for his entertainment or employment. The foregoing is no unfair example of how things go ; they have gone somewhat that way this very week, and a Non-jury case of my own has waited upon the events ; a case turning upon *Noah's* rights, *In re the Ark* and the yielding up of its possession, so far as I can say from the date of its origin and having regard to the fact that I have got up the brief so many times in vain, I have now refused to look at it for the present series of false starts. Well, then, given events of the foregoing nature, it is not only likely but practically certain that at least the personnel, involved in at least two cases awaiting trial, have assembled in the Strand on two occasions in vain, and are still not heard and still have no notion when they will be heard. If, or rather when, this recurs at a later stage in the term (as recur it certainly will) it may be added that the only advantage the disappointed personnel will have derived from their various journeys to London and their tedious and idle waitings there, is the knowledge that their case will not trouble them again for three months, at any rate, since it certainly will not be heard before October !

All this might be avoided, if our Judiciary would but resign itself to the likelihood, and not infrequent actuality, of being left with an idle day ; but our Judiciary will do nothing of the sort, and when you get the individual Judge to himself on Circuit, where no limitations of time apply and there is no fashion of rising at four, he invariably becomes less willing to face an idle moment than ever, and will sometime keep himself at work, quite unnecessarily, till late in the evening so that there shall be no question of his not earning his salary or of his costing the country an unnecessary penny. No ; that is not the suggestion nor even the wonder. The possible notion is this, that even as the wish is often father to the thought, so also, in this example, may not the intense desire to have those two additional K.B.D. Judges provided by a State which makes good money out of its administration of Justice, be part explanation of the inability to arrange matters so, without the two additional Judges, that at least some diminution of arrears is shown and at worst no increase is felt in days when all know that litigation must be, and undoubtedly is, in some degree of abeyance if not actually in some state of decline ? Well ; I have said I would say no more about it ; and here have I been, for the last paragraph or two, saying no more about it.

I regard the death of Henry Maddocks, K.C., as a genuine disaster for the Bar, and for all. He was, as I must have told you before now, since I have seen it and known it all the twenty years or more of my call, the British Bull Dog *par excellence* in manhood as well as advocacy. Had he been of fighting age, I am certain he would have fought in the Great War and I suspect he would, by his sheer gift of getting his teeth into a thing and worrying it (most intelligently and with as much success as could be), have hastened to expedite its end. In stature small, in mien

quite unaffected, in method pugilistic and persistent, and in personality altogether likeable—though I doubt if any of us ever quite knew we liked him, or how much we liked him, till he was gone—Maddocks was meant to be a legal figure of our own generation, solely and wholly the production of our own generation, too; deriving no style from imitation of a previous age, showing no more legal profundity than is consistent with the looser habits of our idler days, but yet being a thoroughly reliable advocate not likely to compromise a case which had any life in it nor to spoil a delicate case by overfighting it; and all the while being an admirable lawyer, to all common law intents and purposes, Maddocks was a little sturdy, inconspicuously kind and generous and happy and humourous character familiar to all. He should have gone up upon the Bench; it is a misfortune for the King's Bench of our day (in very many ways and upon the whole the ideal, I often venture to think, of what a King's Bench should be) that there should have been a Maddocks, but Maddocks should not have been one of its Judges. He would have frightened the young men out of their lives, in prospect, instantly to comfort and exhilarate them when they got into their stride and found the truth of him; he would have been a pleasure to his peers, who would never have got from him nor ever had need to ask, any undue latitude. Do I speak as if I had some private acquaintance with him, some interested motive for thus appraising him? Such is not the case; I was led by him once, only; have fought him on perhaps three occasions (*David vs. Goliath*, three times heard but not with the biblical result by any means always); and, in his capacity of Recorder of Birmingham, I have appeared before him on an occasion or two, to be allured by his naturalness (how excellent a thing is ability, when its exposition is without pose and natural!) and to admire the strength and boldness of his handling, of a sad case gently and of a bad case severely. I think the loss of Maddocks is the greatest we have yet incurred, so far as concerns the generation of which we are, be we of its beginning or of its middle or of its latter days.

The appointment of my friend Alfred Hildesley, a lesser but also a very likeable King's Counsel, to be a Judge of the County Courts of Circuit 33 (Essex and Suffolk) has an interest exceeding the importance attaching to the man, if I may say so without offence; and I think I may, since the general importance results from the fact that the particular importance of the man was by no means non-existent, at the Bar. The name of Konstam, K.C., is probably known to you, with regard to Income Tax and Rating matters; and as a personal matter this distinguished, but too often inaudible, eminent friend of mine was once the senior partner (where partnerships may not be) of Hildersley. No derogatory suggestion is made; I mean that the two, sharing the chambers, worked very much hand in hand, as is proper they should, and, had partnerships been a permissable thing at the Bar, partners in a firm never to be dissolved, save by death, undoubtedly they would have been. Konstam took silk long enough ago; Hildersley, increasing in practice as Junior, elected to take Silk in 1929. Two Silks in one set of chambers is always an arrangement of questionable expediency; and, there being two clerks (I believe) equally deserving, it fell out that Hildersley with his new rank embarked at about that time upon new chambers. And within two years, he becomes a County Court Judge.

That it is a benefit for the corps of Judges of County Courts, no sensible man will deny; and I doubt if any man will be found to be insensible in this matter. Slow, and sure, and surrounding, by a truly judicial build of face and body, the noticeable glasses he wears, Hildesley is even more than expectedly appropriate for judicial functions of detail. That it is a benefit for any man, in these precarious days, to see fixed a certain £1,500 a year, increased by bonuses we non-civil servants know not of and secured by the prospect of some, if not much, pension, ultimately, cannot be seriously argued. But . . . . ? "Hildesley?" we said, "Has taken a County Court Judgeship? Are you sure you're not mixing him up with someone else? Well . . . . ! No, nothing . . . . No reason on earth why he shouldn't. But tell me, ought I to write and congratulate him, or ought I not? You see; I know him rather well. . . . . " There it is, and that's the truth of it. The knowing ones were not surprised; and can any of you gentlemen tell me how the knowing ones, the few really knowing ones of this world, know? My friend in the Inner Temple Library, stout and bacchantic-looking philosopher, told me he had his suspicions: there is a shelf of non-legal books, on a ledge, which you come across just as you leave the Library after looking up a point; it has all sorts of books upon it, associated with lawyers rather than dealing with the law; when a man's practice is urgent, he never gives that ledge a passing look; still less does he while away twenty minutes or so, picking out a book and glancing it through, under the very nose of the Librarian, opposite whose official desk this unofficial ledge is. It is easy to know how the Librarian knows, given you appreciate the keenness of his eye and the workaday usefulness of his intelligence. But how do the others know, or become knowing, and be found genuinely knowing, when any real test of knowingness arises? How could they tell that Hildesley, whom I know to have been in good promise (especially having regard to his asset of specialism, a very special asset these days), was in such practice that . . . . well, that he would take a County Court Judgeship?

I leave you with the speculation, for I have no doubt whatever there is an exact analogy in your affairs in New Zealand; and, what is more, that each one of you, who is good enough to read these Letters through, is thinking of it (as applied to himself) as I write. I have only to add, for your confusion or enlightenment, that, as to these County Court Judgeships and for all the invidious suggestions my observations foregoing imply, they are when they become vacant, competed for (surreptitiously, it may be, but vigorously) by a dozen Juniors, said (and by themselves, amongst others) to be in excellent practice and prospect, and by a score of Silks who will be the first to condole, contemptuously almost, with the competitor who wins.

And may I interpolate a personal explanation, in this context, which applies to so many of us. A professional brother, even a possible professional client in Privy Council matters, coming from Singapore to London on leave was surprised to look me up in the telephone directory and find I was still practising. "But they told me you had taken a Recordership?" said he. And so indeed I had; or at least such I have in the past been lucky enough to receive, over the Sign Manual and with the (theoretically) large criminal, and appeal, jurisdiction it involves. But, Sirs, these Recorderships often are limited to the confines of a geographical area containing no more than 10,000 souls,

as is mine; and the stipend of them, dating back to different days from these, often is no more than £40 a year; and the occupation afforded may not amount to one full working day in a year, if one's area is crimeless and contented by decisions of lower tribunals. . . . . So that we hundred Recorders of this country, of the majority of whom I am typical in attributes above-mentioned, have not given up the Bar for the Bench!

The difference between Lord Darling, sitting as Judge at first instance, and Lord Justice Scrutton, sitting in appeal upon the decision at first instance, does not appear to me to have any very striking importance, since Lord Darling was only doing the work as a temporary expedient and neither of their Lordships have personalities of special affection among the Bar. That both are distinguished gentlemen, as well in their careers as in their pastimes (Lord Justice Scrutton is a music-lover of distinct genius) and therein have everything to recommend them, you may accept as a fact and without question. But neither have a manner nor an attitude which should produce, or has produced, that intimate feeling of professional regard existing in most other instances, be the regard affectionate (as it is for the most part) or antagonistic (as is occasionally the case).

Of the proceedings as to Lord Kyslant you may expect some note from me; but the matter is *sub judice* and I feel a restraint. The measure of absenteeism, adopted by Sirs John Simon and Patrick Hastings, has no personal element about it, as the lay public has been inclined wrongly to apprehend. Whether it is a manoeuvre, and if so whether it is likely to be a successful manoeuvre; or whether it was done at the dictation of exigency rather than of expediency, are questions upon which, as yet, we express no opinion, not at least in writing. Of the individualities of both King's Counsel I have already said enough to make you familiar with them, I expect.

Of all more or less recent events, the case of the Bishop of Birmingham is to me the most interesting. I hear much of the inner matters from the Diocese in which I hold judicial office; but I hesitate to plague you with our ecclesiastical differences, the more so as we determinedly abhor and eschew them in the Diocese of Lichfield, where we are very happy as to our authorities and our effective men. You will find full comment, at page 388 of the current (English) *Law Journal*, and to this, as summarising the matter in the way in which you would, doubtless, have it summarised, I recommend your attention.

I had meant to furnish you, in these Letters, with some full comment upon the Australian cause, impending, and already mentioned upon an application for Special Leave to Appeal to the Judicial Committee of the Privy Council: *Trethowan and Another vs. Peden and Others*. But I have ventured to think, upon closer acquaintance, that this is a matter of such import to you, and to all loyally and legally-minded persons concerned in matters of Constitution, that I am making a more regular article of it, for submission to your learned Editor. With no more ado, therefore, I am,

Yours ever,
INNER TEMPLAR.

"A good advocate should be an optimist."
—"*Justice of the Peace.*"

Australian Notes.

WILFRED BLACKET, K.C.

John Lang, who attained office by means of Communist Control of the Labour unions, and John Garden, official head of the Communists, have lately become unpopular with the hot-headed section of revolutionaries because they were too moderate in their methods, and an effort was made to "deal with" Garden and his chief supporters. Heads and chairs were broken and Garden himself escaped with much difficulty. He described his assailants as "Thugs" but did not say in what respect they differed from other Communists. Then Lang with evident desire to win back the loving regard of these extremists announced that no man in the Government Service would be paid more than £500 a year and a Bill has been passed in the Assembly to enact this threat. Judges—even those of the Supreme Court—are included, but members of Parliament are still to receive their £750 p.a., and Ministers are to be paid at the existing rate. Their Honours of the Supreme Court Bench had aforetime offered to accept a reduction of 22½ per cent. and as they are liable to heavy income taxation this would appear to have been a very generous concession. Now they send a dignified protest stating the exceptional nature of their office and the constitutional safeguards of their independence by their appointment *quamdiu*, and also referring to the fact that their salaries have stood at the present rate since 1854, and have been made liable to taxation, and that their pensions have been reduced. Mr. Justice Piddington also sends a strong protest. As President of the Industrial Commission he is paid £3,000 and is to receive that amount yearly for seven years under the amending Arbitration Bill now before the House, although he will be over 70 years of age at the end of the period. If the reduction is made he will have to pay considerably more in tax on last year's salary than he will in this year receive as salary. Of course the whole scheme is an adaptation of the Communistic theories of equality. It is another milestone on the road to Soviet control.

In Victoria the Supreme Court Judges in a letter which has not been made public offered to make a certain reduction, but this offer was not accepted and they are included in the general reduction permitted by the Financial Emergency Act. The Governor-General, Sir Isaac Isaacs is returning £1,400 of the salary and pension he now receives, and Sir Philip Game refunds 20 per cent of his salary of £5,000.

I have in earlier letters mentioned the Wheat Acquisition Act which gives the sole control of flour and of bread to the Government and have pointed to the danger of giving such a right to the Communisit. The first notable use of its provisions was revealed this week when it became known that one Alfred Shadler has been given a monopoly of the supply of bread required for the dole coupons. This purpose will require an enormous quantity of bread per week, and Mr. Shadler naively states that he is not able yet to say what price he is to pay for the bread.

One more ghastly item about New South Wales is the complaint made by solicitors that moneys paid by them as directed into Supreme Court Funds are absorbed by Consolidated Revenue and are not available when lawfully demanded.

Mr. Justice Macrossan of Queensland was recently subjected to some annoyance. Mr. Michael Daley is alleged to have said to Mr. Michael Sullivan, solicitor, at a well attended election meeting: "Your uncle robbed the Irish Club of £2,000 by falsifying the books and you stood behind him and helped him to do it" and thereupon Mr. Sullivan sued Mr. Daly for slander. The "uncle" referred to is Mr. MacGroarty, the Queensland Attorney-General, and His Honour being well acquainted with him, at a meeting of the Irish Association said that Mr. MacGroarty was a friend of his and and honourable man and this and other remarks were reported in the daily papers. Thereafter the action being in the list for hearing by Macrossan, J., Mr. Watson for the defendant applied to have the case sent over to the next sittings, and for that application there seems to have been some good reason. His Honour admitting his commendation of plaintiff's uncle seemed not to see any reason why he should not hear the case. "Do you want to get some other Judge to try the case who is of opinion that Mr. MacGroarty is a dishonourable man, and who is not a friend of his?" he asked. To which Mr. Watson, acting with very commendable restraint, replied: "I would like the trial to come before some other Judge so that the defendant may be satisfied." His Honour perhaps somewhat rudely said that Mr. Watson had "got a lot to learn about the practice of his profession. . . . . You want me to hold that I am not fitted to be a Judge." He dismissed the application with costs, but said he would be very glad if some other Judge would take the case for him. One may venture to hope that this may be arranged "so that the defendant may be satisfied."

An interesting point was raised in the High Court upon application for leave to appeal made by J. S. Kilminster, the Sun Newspapers Ltd., being the defendant. He had been employed by the defendant company under an agreement that provided for "reasonable notice" of termination of the contract. During the currency of the agreement a Federal award was made and this provided for two months' notice on either side in case of employment such as that of the plaintiff. The defendant company terminated upon two months' notice: the plaintiff then sued claiming that he was entitled to the "reasonable notice" stipulated in the contract. Upon demurrer it was held that the provision in the award as to notice must prevail. Leave to appeal was granted.

The Hon. W. P. Crockett, M.L.C., Victoria, in June, 1927, signed a guarantee making himself liable for £500 and interest in default of payment by the principal. He remained a member of the Council for some twelve months after that and until his term had expired. On the 30th July last upon the hearing of an action based upon the guarantee, the defence relied upon was that he was not sane at the time the document was signed. He had been an honorary Minister during part of that period, and the Attorney-General of that time was one of the witnesses called to support the defence, the substance of their testimoney being that the honourable gentleman was not taken seriously in the Council, but was left there because he was "not doing any harm." Other evidence was that he had borrowed £1 from each of two friends but later on forgot that he owed them anything—an omission that probably might be met by a plea setting up ancient custom. Judge Foster presiding found for the plaintiff and in so doing was probably influenced by the fact that the honourable members had regularly attended at the House and "always voted at his party's call."

Lewis v. Smith's Weekly in the Supreme Court, Melbourne, was a curious case. One Harry Cohen had, as stated in the newspaper, complained to a member of its staff that Henry Lewis had pestered him until he had bought 92 rings that he did not want, and had no use for and it was suggested in the newspaper paragraph that Lewis must have hypnotised the gentleman named Cohen. Thereupon Lewis sued Smith's Weekly. Substantially the question considered by the jury was whether Mr. Cohen was really as silly in the matter of buying rings as he had alleged himself to be. The jury's verdict was in favour of Lewis for £250.

"The Hobb's Millions" is the latest Australian financial sensation. They are, of course, in Chancery, and it is thought that if they can be brought here the great Australian national industry of borrowing some more money somewhere may cease for quite a little while. One line of descendants paved the way to their claim by proving the will of one Robert Hobbs who died in 1839. It had been in the offices of Sydney lawyers for more than 80 years, and due proof of the signatures was given. Some time ago shares in the "Page Millions" Syndicate were sold in three States but although the shareholders were much encouraged for some time they ultimately realised the truth of the saying that "going to law is a poor way of making money." In another case the persons interested sent a man to England to collect evidence and he on his return brought such good news that they celebrated the occasion in true British fashion by giving him a banquet. It is a pity to have to add that a few days later they prosecuted him for giving them false information; but these proceedings were abandoned. Some time ago it was definitely stated in one of our papers that the funds to credit of estates in Chancery only amounted to £276,000, but whether that statement was true this alleged writer knoweth not.

In the Estate of J. H. Chambers, Sydney, was an application for administration *cum testamento annexo* under somewhat peculiar circumstances. The deceased after enlisting in 1915 executed a "soldier's will" in favour of Louisa Burn. On his return from the war he told her to destroy the will as it was "no good now." She did not do so until some years later, and in the meantime he had made a will in her favour, but as this was only signed by one witness it was, of course, invalid. Harvey, C.J. in Eq., was satisfied that the "soldier's will" was duly executed, and that there was no valid revocation because it had not been destroyed in his presence. The grant was, therefore, made as prayed. The affidavit in this matter was delightfully phrased for it stated that the lady had for some years been the "*de facto* wife" of the deceased. Reminds one of the kindly actor who collected some money in aid of the "widowette" of a deceased comrade, and reminds one of the attorney who explained to the court that he could not call the defendant's wife for she was "embonpoint" and not able to travel. Such kindly courtesies and euphemisms do so much to smooth the rugged ways of life.

Melbourne Courts have recently produced some small but interesting incidents. At Footscray the P.M. dismissed a charge of serving liquor in prohibited hours because the prosecution did not bring along any sample of the beer that men were sworn to have been drinking

and he refused to assume that it was beer. Apparently he thought that Footscray policemen don't know beer when they see and smell it. In *Bois v. Hore* at the County Court the plaintiff had a verdict for the amount he had paid for a violoncello bought on approval. He was a member of an orchestra and had said that a 'cello to be of any use for his work must have a loud tone. As to the one in question one witness said that when played at the interval at the picture show it could not be heard when the ladies in the audience were talking and eating chocolates. The violinist of the trio said that he could not hear the 'cello when he was playing nine feet away, and so the defendant has to take back his 'cello and return the £150 paid by the plaintiff. In Mrs. Margaret Porter's case an order had been made against her under the Factories Act for £100 for arrears of wages due to a barman, the alternative in accordance with that Act being levy and distress. As the amount had not been paid or recovered, proceedings were taken under the Justices Act and notwithstanding the contention that levy and distress is the only remedy the magistrate, while granting an adjournment for one week to enable the settlement of another matter by the defendant, said that he would then order payment at the rate of £4 a month with three months imprisonment in default. Another case is of sentimental rather than legal interest. Mr. Crout, a carpenter who had been out of work for several months, employed one James, who said he had been out of work since 1929 and out of food for some time, to do a small job for him, and gave him some money on account. James, who later on stated that he could drink 12 pints of beer without any decrease in his mental powers, had some beer, started work, fell from the verandah where he was working to the footpath, and went to the Trades Hall. The result was that Crout was charged with having employed James without having obtained a policy of insurance against accident to him. There was necessarily an order against him which of course will have the effect of preventing the casual employment of other men whose necessities make appeal to the charitable.

Ante p. 138 there is a reference to the various forms of oath taken by Chinese witnesses. In Victoria the Court interpreter some years ago, like many other Chinese, had a very keen sense of humour. When administering the wax match form of oath to a witness he would closely watch the burning match and prolong the words of adjuration until the flame had come to the finger and thumb of the witness, who would then fling down the match and shake his hand violently, and say "Oh hellee" in a loud tone of voice. The witness was then regarded as having been well and duly sworn.

In Queensland a wine seller was fined £100 for sending a false return of income. It was stated that for sixteen years past he had only included half his income in his return and this seems to have been regarded as an astonishing thing in Queensland.

Lord Bramwell probably holds the record for the shortest summing up. At the conclusion of a case he asked the defendant's counsel if he intended to call a certain witness.

"I do not, my lord," was the reply. The Judge gave a long low whistle of surprise, and turning to the jury said simply: "Gentlemen, consider your verdict."

Cost of Litigation.

Reports of English Bar Council and Law Society.

The Reports of the Bar Council and the Council of the Law Society on the recommendations for simplifying litigation made by a Committee of the London Chamber of Commerce have now been published.

The Bar Council Report deals with the cost of evidence, the two-thirds rule as to junior counsel's fees, and the improvement of procedure. Facts are the basis for the application of law, and usually the ascertainment of the facts is the most expensive part of an action. The Chamber hoped to diminish this expense by dispensing with strict proof of documents, unless formally challenged, and by admitting unsworn statements. The Bar Council agree on the first point, but as to the second they insist that statements, if allowed, must be by affidavit. As to the two-thirds rule, the Bar Council are unwilling to give up what is a valuable protection to junior counsel, but suggest a concession where the leader's fee exceeds 150 guineas, to be set off by more liberal fees in the early stages of the litigation. As to procedure, the main points in the Bar Council's recommendations are:—(1) The more extensive use of specially endorsed writs followed by summary judgment; (2) the delivery of pleadings without any summons for directions; and (3) liberty to apply after the pleadings are closed for directions as to trial, further particulars, and generally as the parties require. The Bar Council agree with the suggestion of the Chamber of Commerce that dates should be fixed for trials in witness actions. The principle, they say, should be that the Courts are for the convenience of the public, and the waste of judicial time which will result is preferable to parties and witnesses being needlessly kept waiting. There are other points dealt with by the Bar Council, but it is opposed to any extension of the limits of County Court jurisdiction, and it has arrived at no final opinion as to appeals to the House of Lords.

The Report of the Council of the Law Society is not so wide in its scope, and deals only with expenses of evidence, with counsel's fees, and with solicitor's profit-charges. As to evidence, it is considered that there has been a tendency of recent years to overload cases, and the suggestion is made that the Judges might meet this by being more ready to give definite directions to the Taxing Master to disallow the costs of unnecessary evidence. The substantive recommendation of the Council of the Law Society is that, after the pleadings have been closed, there should be a preliminary hearing before the Court or a Judge to define the points at issue and indicate the evidence to be adduced. As to counsel's fees, it is objected that these have been unduly increased of recent years and that refresher fees are sometimes too high. The Council consider that the two-thirds rule, as a hard and fast rule, should not be maintained. As to solicitors' profit-charges, they consider that these are only a small percentage of the total costs of litigation, and are by no means excessive.

"Truth of testimony is essential to the right administration of justice."

MR. JUSTICE MCCARDIE.

Bench and Bar.

Mr. J. J. Moloney, of Napier, is taking over Mr. A. L. Black's practice at Westport.

Mr. J. H. Ralfe, of Tauranga, has commenced practice at Nelson.

Mr. M. Maurice Smith, of Woodville, is leaving New Zealand next month to join in partnership with Messrs. C. J. Wray & Co., London.

Mr. N. H. Rawson, of Ngaruawahia, has joined the firm of Smith & McSherry, of Pahiatua and Woodville. Mr. Rawson will have charge of the firm's Woodville Branch.

Mr. R. A. Potter has taken over Mr. P. H. Basley's practice at Rotorua.

Mr. G. S. Branthwaite, late of the firm of Purnell and Branthwaite, is practising on his own account at Christchurch.

Mr. J. C. Miller has commenced practice at Inglewood.

Owing to the demands of his practice Mr. H. J. V. James, Barrister, of Wellington, has resigned the Editorship of the Journal.

Mr. James has been Editor of the Journal since May, 1928, and relinquishes his editorship with this issue. It is with regret that the publishers lose his services.

New Zealand Statutes.

Consolidated Reprint.

The Reprint of Statutes Bill, the purport of which is to authorise the Courts to accept the Consolidated Reprint as a correct statement of the Law unless it can be proved to the contrary, has been passed by Parliament.

We are given to understand the work is well forward and there is now a reasonable prospect of the volumes being available to practitioners about the middle of 1932.

Canterbury College Law Students' Society.

At a meeting of the Canterbury College Law Students' Society held on the 20th ult., Mr. A. S. Taylor, Dean of the Faculty, presented two prizes won during the last November examinations. The first was the Canterbury Law Society's Gold Medal presented to the best student graduating LL.B. This was won by Mr. J. L. Robson of the Public Trust Office. The other was the Butterworth Prize in Law awarded to the student gaining the highest marks in Torts. This was presented to Mr. J. T. Watts of the staff of Messrs. J. J. Dougall, Son & Hutchison.

Bills Before Parliament.

Building Construction. (Rt. Hon. Mr. Forbes). "Building" defined. Every alteration to a building which tends or may tend to reduce its resistance to earthquake deemed to be a substantial alteration for purposes of Act. Governor-General may by Order-in-Council exclude structures of any specified class or classes from operation of Act if in his opinion application of Act to such structures not required in public interest. Governor-General may in like manner declare that structures of any specified class or classes, not being "buildings" as defined by Act, shall be deemed to be buildings for purposes of Act.—Cl. 2. Buildings not to be erected or substantially altered without permit from local authority, such permit not to be issued except in conformity to any regulations or by-laws in force under this Act in district of local authority. Nothing in Act to limit powers conferred on local authorities independently of this Act in relation to building and other permits.—Cl. 3. Local authorities may make by-laws as to building construction. Copies of such by-laws to be sent to Minister of Public Works who may disallow same in whole or part by notice published in Gazette. —Cl. 4. Minister may require local authority to make or alter by-laws.—Cl. 5. Governor-General may by Order-in-Council make model by-laws for purposes of this Act.—Cl. 6. Minister may require submission of plans and other particulars of buildings when application made for building permit— Cl. 7. Persons appointed by Minister or local authority to have power of entry on land and buildings for purposes of inspection.—Cl. 8. Local authorities to obtain services of qualified technical adviser.—Cl. 9. Local authority may by arrangement with Minister obtain services of qualified officers of Public Works Department to perform duties under this Act.—Cl. 10. Local authority or Minister may appoint clerk of works to supervise erection or alteration of building if owner fails to do so or appoints person unacceptable to local authority. Salary, etc., of such appointee may be recovered from owner as debt due. Local authority may require applicant for permit to deposit or find security for estimated amount payable to clerk of works in connection with erection, etc., of building.—Cl. 11. Local authority may require demolition or alteration of building erected or work done in contravention of Act. If owner fails to comply, Magistrate may order demolition. Owner failing to comply with order liable to fine of £50.—Cl. 12. Special fees, based on cost of work, imposed in respect of building-permits to provide funds for investigations in relation to building-designs.—Cl. 13. Penalty for offences under Act a fine of £100 and in case of continuing offences a further fine of £25 for each day during which offence continues.—Cl. 14. Governor-General may by Order-in-Council make regulations under Act.—Cl. 15. S. 41 Finance Act 1931 (No. 2) repealed. —Cl. 16.

Trading Coupons. (Hon. Mr. de la Perrelle). "Trading coupon" includes any coupon, stamp, token, cover, package, document, or other thing issued for delivery either directly or indirectly, to the user of any goods which, by itself or with any other trading coupon or trading coupons, or with any other act or thing, entitles or purports to entitle the holder thereof to receive in respect of the purchase of such goods any discount or other gift, allowance, concession or benefit of any kind whatsoever.—Cl. 2. Every person guilty of offence who not being the manufacturer, packer, importer, distributor, or seller, of any goods, issues, after passing of this Act, any trading coupon in connection with the sale or purchase of such goods.—Cl. 3. Redemption of trading-coupons limited to 30th April, 1932. Trading coupons not to be redeemed after that date except for money.—Cl. 4. Every person guilty of offence who redeems any trading-coupon issued in contravention of S. 3 hereof, or redeems any trading coupon otherwise than in conformity with S. 4 hereof.—Cl. 5. Penalty for offences fine of £200.—Cl. 6. No prosecution without consent of Minister of Industries and Commerce.—Cl. 7. Trading-stamps Prohibition and Discount-stamps Issue Act, 1908 repealed.—Cl. 8.

Divorce and Matrimonial Causes Amendment. (Mr. Mason). S. 10 of principal Divorce and Matrimonial Causes Act 1928 amended by substituting "four" for "seven" in paragraph (f).—Cl. 2. Discretion of Court in certain cases where petition based on separation. In such cases Court not to be precluded from enquiry into cause of separation by any recital, order, judgment, etc. S. 18 of Divorce and Matrimonial Causes Act 1928 amended.—Cl. 3.

Honey Local-Marketing Board. (MR. JORDAN). "Producer" means person owning twenty or more hives of bees and includes adult son or daughter of producer working on parent's farm for keep and pocket-money only.—Cl. 2. Governor-General may, when requested by petition of not less than one hundred producers, declare a day for a poll to be taken of producers on question whether Local-marketing Board shall be constituted in relation to honey. If more than two-thirds of votes polled are in favour of a Board, Governor-General shall constitute board and appoint day for poll for election of representatives. Voting to be compulsory and conducted on system of preferential voting or proportional representation as prescribed. Where Board appointed, Governor-General may by proclamation declare all honey divested from producers and vested in Board. Provision for dissolution of Board after poll.—Cl. 3. After application of Act to honey, Governor-General to appoint Local-marketing Board. Procedure thereof.—Cl. 4. Board not to use funds for political purposes or become affiliated with any political party.—Cl. 5. General powers of Boards as to contracts, etc.—Cl. 6. Marketing powers of Board.—Cl. 7. Honey to be delivered by producers to Board as directed. Penalty for breach fine of £100. Board may exempt from provisions of section.—Cl. 8. Honey delivered to Board to be accompanied by certificate of quality from State grading-officer.—Cl. 9. Board empowered to dispose of honey tendered.—Cl. 10. Board not to refuse honey of prescribed quality tendered. Payments for honey.—Cl. 11. Board to issue certificate to producer after honey received.—Cl. 12. Avoiding of contracts relating to sale of honey for delivery in New Zealand upon notification by Board.—Cl. 13. Board not to be subject to legal proceedings in relation to person claiming honey or any charge in respect of it.—Cl. 14. Notice to be given by producer to Board of any bill of sale, etc., over honey.—Cl. 15. Board not to be subject to action for damages if making payment in good faith and without negligence.—Cl. 16. Protection of Board against actions.—Cl. 17. No action against His Majesty or Minister for loss sustained by passing of Act or anything done or purporting to be done thereunder.—Cl. 18. Board to keep accounts.—Cl. 19. Board may make levy with prior approval of Governor-General. Application of levy in payment of: (a) Administrative expenses; (b) Payment of advances made to Board; (c) (with consent of majority of poll of producers) in advertising honey; (d) Insuring against pests, fire, flood, etc.; (e) Co-operating with Department of Agriculture.—Cl. 20. Producers to furnish returns.—Cl. 21. Official information may be published or broadcasted.—Cl. 22. Recovery of moneys payable under Act. Penalties for offences.—Cl. 23. Offences.—Cl. 24. Legal proceedings.—Cl. 25. Governor-General may make regulations to carry out objects of Act.—Cl. 26.

New Zealand Institute of Architects Amendment.—(MR. WRIGHT). S. 27 of New Zealand Institute of Architects Act 1913 amended. —Cl. 2. S. 8 repealed.—Cl. 3 Qualifications for registration as member of Institute.—Cl. 4.

Painters and Decorators Health Protection. (MR. JORDAN). Use of lead in paints forbidden.—Cl. 3. Employer to provide sanitary conveniences.—Cl. 4. Governor-General empowered to make regulations necessary to give full force and effect to Act.—Cl. 5. Penalty for breach £50.—Cl. 6.

Painters and Decorators Registration. (MR. JORDAN). Painters and Decorators Registration Board established.—Cl. 3. Appointment of Board.—Cl. 4. To be a body corporate. Cl. 5. Making of contracts by Board.—Cl. 6. First meeting of Board and election of chairman.—Cl. 7. Subsequent meetings.—Cl. 8. Functions of Board.—Cl. 9. Registrar to be appointed.—Cl. 10. Registrar to keep register of persons registered under Act.—Cl. 11. Qualification of applicants for registration.—Cl. 12. Application for registration.—Cl. 13. Penalty for wrongfully procuring registration £50.—Cl. 14. No person to be registered unless at least 18 years old and of good character and reputation.—Cl. 15. Certificates of registration.—Cl. 16. Annual fee.—Cl. 17. Cancellation of registration.—Cl. 18. Appeals from decision of Board.—Cl. 19. Penalty for improper use of words, etc., implying registration.—Cl. 20. Penalty for employing unregistered person.—Cl. 21. Penalty for unregistered person engaging in painting and decorating.—Cl. 22. Application of funds and expenses of administration.—Cl. 23. Power to make regulations by Order-in-Council.—Cl. 24.

Local Bills.

Auckland Harbour Board and Other Local Bodies Empowering. (MR. PARRY).

Christchurch District Drainage Amendment. (MR. HOWARD).

Christchurch Estuary and Rivers Conservancy. (MR. MCCOMBS).

New Books and Publications.

Blackwell's Law of Public and Company Meetings. Seventh Edition. By A. W. Nicholls, M.A., B.L., and P. J. Sykes, M.A. (Butterworth & Co. (Pub.) Ltd.). Price 7/6d.

Company Law. By Alfred F. Topham, LL.M., K.C. Eighth Edition. (Butterworth & Co. (Pub.) Ltd.). Price 9/6d.

Road Traffic Law. By F. L. Jones, LL.B., M.P. (Sweet & Maxwell Ltd.). Price 25/-.

Smith's Law of Master and Servant. Eighth Edition. By C. M. Knowles. (Sweet & Maxwell Ltd.). Price 31/-.

Butterworth's Workmen's Compensation Cases. Vol. 23. (Butterworth & Co. (Pub.) Ltd.). Price 33/6.

Justices Notebook. By the late Knox Wigram, J.P. Twelfth Edition. By Sir John Edwin Mitchell, J.P., and J. Smith. (Stevens & Sons Ltd.). Price 16/-.

Benjamin on Sale. Seventh Edition. By Judge Kennedy, K.C. (Sweet & Maxwell Ltd.). Price 74/-.

Sweet and Maxwell's Legal Bibliography. Compiled by L. F. Maxwell. Vol. 2, 1651-1800. (Sweet & Maxwell Ltd.). Price 12/6.

Marine Insurance. By William Gow. Sixth Edition. (MacMillan & Co.). Price 11/-.

Nullity of Marriage. By F. J. Sheed, B.A., LL.B. (The Roman Rota and the Law of England). (Sheed and Ward). Price 3/-.

Law of Negotiable Instruments. By F. Raleigh Batt, LL.M. (Longmans Green). Price 6/6.