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"The Profession of the Law provides an unsurpassed mental training and discipline for character. It teaches men to avoid jealousy and to accept generously the successes of their rivals." —*Lord Reading*

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A New Compensation Court.

In our last issue, in this place, we discussed the present unsatisfactory means provided to deal with claims under the Workers' Compensation Act. It was shown that workers and employers suffer from the delays that are inseparable from the hearing by one tribunal of the whole of the Dominion's industrial matters and its settlement of all the compensation claims that require determination by the Court. We expressed the opinion, which has since proved to be the general one, that it is wholly undesirable that compensation actions should be exposed to any facilities for appeals, a conclusion that would be unavoidable if claims arising from accident to workers were removed to the Supreme Court for the attention of a number of different Judges. We left open for discussion by the profession and by the different interests involved, the nature of the remedy to be applied for obviating the present delays in the settlement of Workers' Compensation claims.

There was general agreement that the Arbitration Court, as at present constituted, is unable to deal with claims as promptly as is desirable. Thus, *The New Zealand Herald* in its leading columns expressed complete concurrence with the views expressed by THE NEW ZEALAND LAW JOURNAL as to the serious deficiency of the present system. It then went on to say:

> "Dilatory administration of justice inevitably produces a crop of anomalies and injuries, consequences that have been deplored by all authoritative observers. The uncertainty of obtaining a hearing in the Court in some circumstances compels injured workers to accept a settlement less generous than the tribunal might award; in others, and this appears to be the most serious effect, the disability of the claimant and the cost of compensation are aggravated by waiting for the Court's judgment. Neither employers nor workers can afford the waste of time, money and efficiency attributable to what Dr. Macky calls litigation neurosis, and it becomes a question whether delay in instituting reform is not false economy."

Also, in a leading article, the *Auckland Star* drew attention to what it termed "a serious fault in our compensation system." After quoting Mr. Justice Frazer's remarks in a case heard two weeks ago, in which the claimant had been injured in May, 1930, to the effect that the Court regretted as much as anyone the infrequency of its sittings and that "something ought to be done to overcome what really had become a scandal in the administration of justice," the *Star* proceeded:

> "This scandal is not new. Such complaints came before the Commission on Compensation that sat last year, and the Commission unanimously recommended that a separate Court to hear compensation cases be set up. . . . There is no doubt that the present arrangement produces injustice."

The *Dominion* (Wellington) is equally emphatic on the point. After quoting the remarks of Mr. Justice Frazer, it says editorially:

> "Something ought to be done to overcome what has really become a scandal in the administration of justice. This is a protest that the Government cannot very well ignore."

The *Dominion* is not sure of the remedy to be applied. It considers an additional Court quite out of the question at present, and a redistribution of the work the only alternative.

The insurance interests will welcome any change. The chief executive officer of one of the largest local companies, fortified with a knowledge of the general attitude of insurance corporations, commented on our recent article. He said he would always avoid litigation, if possible: under present conditions he would usually concede a few pounds to have a case settled out of Court, as the longer a case was postponed, the longer an injured man was likely to be off work. On the other hand, if settlement were not possible at any early stage, the claimant usually failed to recover until the Court concluded his case; it was clearly bad for him to become the victim of a medical wrangle, often to be followed by a legal one.

Opinion as to the necessity for a change, seems unanimous. The question remains as to the substitution of a better means of dealing with compensation work. As the term of the present nominated members of the Arbitration Court expires in March next, the present seems the opportune time for consideration of an alteration of the existing system to ensure the more expeditious settlement of compensation claims, without any reduction in the efficiency of administering justice in industrial matters. There appear to be two distinct views on this point. One prefers that a new Arbitration Court, a Judge and two assessors, be constituted to deal exclusively with the industrial work of the present arbitration-cum-compensation tribunal. It has been suggested, in this connection, that the judge of such a Court would, in time, graduate to the Compensation Court: he would thus be well versed in industrial conditions of a general nature before coming to deal with the complicated problems arising from Compensation litigation.

The other proposal is that a Compensation Court should take over the rapidly increasing burden of work under the Workers' Compensation Act. And here, it is suggested that the time of the Arbitration Court could be saved if, as in South Australia, a board met half-yearly to determine the minimum wage for the ensuing six months. Employers' and workers' interests would be represented by nominated members, and the Compensation Court judge would preside. Arising out of this suggestion, is another, namely, that, ancillary to the separate Compensation Court, a medical board be set up in each of the larger centres to examine claimants at the earliest possible moment, either at their request or by direction of the employers; to hear medical evidence, but to leave the quantum of compensation to the judge, sitting alone or with the assistance of independent assessors of eminent medical or surgical standing.

On another page, we have interesting contributions to the present discussion by Mr. H. P. Richmond and by Mr. P. J. O'Regan. Both of these gentlemen have had wide experience in compensation cases; consequently, their opinions derive great weight from that fact.

Before examining these proposals in detail, the present economic position demands that each should be considered in the light of its claims upon the national finances. On this point, *The New Zealand Herald*, speaking generally, says:

> "The cost of the Arbitration Court, overburdened with demands for its services, is apparently about £5,600 a year. Even if that expenditure had to be doubled, which need not be the case, the extra expense would almost certainly be far less than is now wasted by the aggravation of claims through the inability of the Court to deal with them promptly."

For the purposes of discussion, the figure named may be taken as substantially correct. Consequently, the retention of the Arbitration Court, with a new judge and two assessors, and the creation of a Compensation Court over which the present Judge would preside, would require the outlay of approximately another amount of £5,600. We say "approximately," because the lessened travelling by each of such Courts would not double the travelling expenses and allowances now expended under these headings.

The second proposal, that the Compensation Court judge should be the chairman of a Minimum Wages Board sitting twice a year, has much to commend it. From the financial aspect, a considerable saving would result. The salaries and allowances of the two assessors over a year would be reduced to their payment for the days on which their services would be required for the Wages Board. The total sum would be inconsiderable. That would leave the Judge's salary of £2,000 a year, and (say) an additional £500 yearly for his travelling expenses and allowances. The present staff of two could be reduced to one: a Judge's associate travelling with him would alone be necessary, and an official of the Department of Labour could combine with other duties the secretarial work of the Minimum Wages Board which would sit half-yearly only, and in Wellington.

From the economic point of view, the second proposal seems to merit attention. Its effectiveness can now be considered.

Is there any justification for the lay assessors in Compensation work? Opinion may differ on this issue; but it seems to be a well-founded argument against their retention that they cannot help the judge on the medical or legal issues involved in claims under the Workers Compensation Act: the short duration of their appointment does not enable them to gain any extent of experience in the complicated problems of the class of cases before them, wherein their opinion counts individually as equal to that of the experienced and trained Judge with whom they sit. On questions of fact they are likely rather to neutralise each other than to be of assistance; especially if they hold strong partisan views. Assessors have a place, and properly so, on the bench of a tribunal dealing solely with industrial matters, which is more legislative than judicial in its functions. On a Court purely judicial in its scope, such as a Court administering Workers' Compensation law, they are as out of place as they would be on the Supreme Court bench. The whole idea of elective membership of a purely judicial body is repugnant to British notions of the administration of justice. (The word "assessor" does not appear in the Act; the so-called assessors are "nominated members" of the Court, and the patent anomaly of their position is that, if anything should induce them to do it, they could combine to out-vote the Judge on any matter of fact or law; indeed, it would be possible for them to establish, with the Judge's dissentient voice counting for naught, some wholly new and fantastic principle of law).

The Minimum Wages Board has much in its favour. The Legislature could determine the industries to which its six-monthly determination of the minimum wage would apply. During the last thirty-seven years, the different employments, as set out in the Court awards, have become more or less standardised. There should be little difficulty in the Shops and Offices Act, the Factories Act, and the Shipping and Seamen Act, for example, to provide for matters covered by these standardised conditions. The only questions remaining would be the marginal rates to be paid to the specialised classes of workers, and any special conditions to be applied to any particular industry. These are appropriate subjects for conferences under the existing Labour Disputes Investigation Act. Such a system would be more elastic than the present one. It would enable irksome and restrictive conditions, many of which have been agreed upon by the interested parties, to be removed or modified in times of deflation and depression.

We trust that a consideration of the various opinions and proposals here collected, will convince the new Attorney-General and Minister of Finance, and the Minister of Labour, that the cause of national economy can be promoted and the settlement of compensation claims expedited by the severance of the industrial and compensation functions of the present Arbitration Court. All interests concerned are agreed that the now unavoidable and uneconomic delays are due to the overburdening of the existing Court. That this state of affairs should be speedily and effectively altered, is, undoubtedly, in the interests of the community at large.

The New Attorney-General.

The profession extends its congratulations to the Hon. Mr. Downie Stewart, of the legal firm of Messrs. Downie Stewart and Payne, Dunedin, on his again assuming office as Attorney-General and as Minister of Finance in the Coalition Cabinet. He is a recognised authority on financial questions, and he bears the country's confidence on assuming the most important office among the new Ministers.

The new Attorney-General was educated at the Otago Boys' High School and at Otago University, where he graduated as Bachelor of Laws in 1900, and was admitted to practice in March of that year. After a wide experience in municipal affairs, Mr. Stewart was elected Mayor of Dunedin in 1913. In the following year, he entered Parliament, where a distinguished career awaited him. In 1915, he went on active service, and attained the rank of Captain in the N.Z. Expeditionary Force. After two years of valuable work at the front, he was invalided home with acute rheumatism from which he has unfortunately not recovered. He entered the Cabinet in 1920 as Minister of Customs, and held various offices, including the Ministry of Finance, until 1928. He was Attorney-General for the first time in 1926.

The new Minister will have the ready co-operation of all members of the profession in all that he proposes for the country's welfare, just as he has their best wishes for the success of the heavy task he now undertakes.

Supreme Court

Myers, C.J. May 6; August 17, 1931. Blenheim.

RE CONNOLLY.

Bankruptcy—Choses in Action—Assignment—Chattels Transfer Act, 1924—Assignment After Fire But Before Adjustment of Loss of Part of Monies Payable Under a Fire Insurance Policy—Such Assignment a Valid Equitable Assignment Although Assignor Made Bankrupt Before Loss Adjusted—Not an "Assignment of Book or Other Debts"—Property Law Act, 1908, S. 46—Chattels Transfer Act, 1924, Ss. 2, 31.

Application by the Official Assignee to set aside an assignment or order upon the Sun Insurance Co. for the sum of £236 2s. 1d. given by certain bankrupts, L. J. Connolly and A. Connolly, to Clouston and Co. Ltd. in satisfaction of a debt. The premises of the bankrupts and the stock therein were destroyed by fire on 27th October, 1930. The premises were insured in the names of the bankrupts in the sum of £50 and the stock in the sum of £300. The assignment or order upon the Insurance Company for the payment of the sum of £236 2s. 1d. "part of the moneys now due or hereafter to become due from you the said Sun Insurance Co. to us under the policies of insurance issued by you over our stock-in-trade and store respectively recently destroyed by fire" was given by the bankrupts to Clouston & Co., on 9th December, 1930. Notice of that assignment was sent by or on behalf of Clouston & Co. Ltd. to the Insurance Company on 10th December, 1930, and the Insurance Company acknowledged the receipt thereof on 22nd December, 1930. The bankrupts filed their petition in bankruptcy on 10th February, 1931. On 11th March, 1931, the Official Assignee in Bankruptcy lodged formal proof of claim under the insurance policy, and on 29th April, the Insurance Company agreed to pay the sum of £325, being £50 in respect of the store premises and £275 in respect of the stock. The Official Assignee contended that the assignment or order was invalid and claimed the money on behalf of the creditors who had proved in the bankruptcy.

Scantlebury for Official Assignee.
Churchward for W. E. Clouston & Co. Ltd.

MYERS, C.J., said that counsel for the Official Assignee admitted that the assignment, or order upon the Insurance Company could not be attacked as a fraudulent preference or as a transaction otherwise fraudulent or void under the bankruptcy law. Up to a point the facts of the case were very similar to those in **In re Thomas,** 29 N.Z.L.R. 510. The difference between the facts of the present case and those of **In re Thomas** was that in that case the adjustment was agreed upon before the bankruptcy of the assignor, while in the present case the adjustment was not agreed upon until after the bankruptcy. In **Welford and Otter-Barry's Fire Insurance** 2nd Ed. 232, the learned authors, dealing with the question of an assignment under the section of the Judicature Act (with which in New Zealand S. 46 of the Property Law Act, 1908, corresponds), said that where the assignment took place after loss, at a time when the loss had been admitted, and the amount payable had been ascertained, there was no doubt that such an assignment could be made since there was actually a debt in existence capable of being legally assigned. That was very much the same position as obtained in **In re Thomas** except only that there the amount payable had not been ascertained when the assignments were given but had been ascertained prior to the bankruptcy of Thomas, and Mr. Justice Cooper held that from the moment of such ascertainment or adjustment the liability of the Insurance Company became a debt payable *in praesenti*. The passage in **Welford and Otter-Barry** continued at p. 233 as follows: "Where, however, though the assignment is made after loss, the loss has not been admitted, or the sum payable ascertained, or where the assignment is made before loss, different considerations apply, for in this case there is no existing debt. If, therefore, the assignment purports to be an assignment of a specified sum it is not a good legal assignment. There is, however, an existing contract and although the contract cannot be assigned in its entirety the benefit of it is capable of being assigned in equity as a chose in action."

After some conflict of opinion in the English Courts it was held by P. O. Lawrence, J., in **In re Steel Wing Co. Ltd.,** (1921) 1 Ch. 349, where the previous decisions were discussed, that the assignment of part of a debt did not operate to pass the legal right to that portion of the debt as it was not an assignment within the section of the Judicature Act corresponding with S. 46 of the Property Law Act, 1908. Sim, J., referred to that case in **McPherson v. Andrew Lees Ltd.,** (1926) N.Z.L.R. 523, and the case was expressly followed by Ostler, J., in **In re Gleeson,** (1929) G.L.R. 100; **Foster v. Baker,** (1910) 2 K.B. 636, which was itself followed in **In re Steel Wing Co.,** was also followed in **Gleeson's** case. From what was said by Cooper, J., in **In re Thomas,** and from the passage in **Welford and Otter-Barry,** it followed that in the present case there was no actual existing debt at the commencement of the bankruptcy. A claim under the policy had, however, accrued to the bankrupts, and the Insurance Company was under a liability to pay a sum which required to be adjusted. That was the position as from the of the bankruptcy, 10th February, 1931. It was decided in **In re Steel Wing Co.** that, although the assignment of part of a debt did not operate to pass the legal right to that portion of the debt, such an assignment did operate in equity to transfer the part assigned and it constituted the assignee a creditor in equity of the original debtor. So, in the present case, it seemed to His Honour the assignment to Clouston & Co. Ltd. operated in equity as an assignment *pro tanto* of the chose in action assigned, and constituted Clouston & Co. Ltd. as assignee, upon notice to the Insurance Company, a creditor in equity of that company.

But the Official Assignee raised an objection based upon such authorities as **In re Irvine and Roulston,** (1919) N.Z.L.R 351, where Chapman, J., held that though there might be a present equitable assignment of a future debt which was not due the right of the assignee would be defeated by the bankruptcy of the assignor in respect of an act of bankruptcy which preceded the due date. That decision was explained by Salmond, J., in **Official Assignee of Palmer v. Sharpe,** (1921) N.Z.L.R. 460. The learned Judge in that case, after referring to **Ex parte Nichols,** 22 Ch. D. 782; **Ex parte Moss,** 14 Q.B.D. 310, and **In re Winefield,** N.Z.L.R. 3 S.C. 394, said that notwithstanding **Ex parte Nichols** it was settled that moneys already earned by the assignor, although not already due and payable to him, could be assigned by him, and that their assignment was not invalidated by his bankruptcy intervening before such moneys become due and payable. In the present case the right of the bankrupts accrued immediately upon the occurrence of the fire. There was nothing more to do except to give certain notices and prove the amount of their loss. The moneys, therefore, to which they were entitled had been, to use the language of the decided cases, though it was perhaps hardly appropriate to the case of fire, "actually earned" by the bankrupts, subject only to adjustment of the amount of the loss. The case was very much like that of an assignment of a claim to compensation for injurious affection to land which it was held in **Dawson v. Great Northern and City Railway,** (1905) 1 K.B. 260, would have been valid in equity if made prior to the Judicature Act: and it was further held that the compensation assigned was a legal chose in action within the meaning of that Act. His Honour thought, therefore, that the principle of such cases as **Ex parte Moss, In re Winefield** and **Off-Ass. of Palmer v. Sharpe** was applicable. Before concluding his observations on that point His Honour referred to a passage in **Warren's Choses in Action,** p. 248, where, citing **Ex parte Moss** and other cases, the learned author said: "Where the debtor previously to his bankruptcy has assigned his interest in a chose in action so as to pass to the assignee an equitable claim over the subject-matter at the time of the assignment, the law does not operate to vest any right thereto in the debtor's trustee in bankruptcy. Nor does it matter whether the right given to such assignee be exerciseable immediately or at some future time, wholly or partially, conditionally or unconditionally. The law looks to the whole transaction and the general effect and purport of the assignment." His Honour added also that, apart from **In re Thomas,** the nearest case that he had found was **In re Foster,** (1873) Ir. R. 7 Eq. 294. In that case, as in the present one, a certain document had been given by the assured after a fire but prior to ascertainment of the amount of the loss, and the assured then became bankrupt. It was held that upon the true construction of that document it did not amount to an assignment *pro tanto* of the proceeds of the policy. His Honour gathered, however, from the judgment that if the document could have been regarded as an assignment *pro tanto* of the proceeds of the policy, the Court would have taken the same view as His Honour took in the present case.

Mr. Scantlebury raised the question of the consideration for the assignment, but His Honour did not think that there was any substance in that point: the giving and acceptance of the assignment amounted, His Honour thought, to an accord and satisfaction. Mr. Scantlebury also contended that the assignment could be successfully impeached by the Official

Assignee by reason of non-registration under the Chattels Transfer Act, 1924. For that contention he necessarily relied upon S. 31 of the Act. But for that section the contention would be impossible, because S. 2 defining "Chattels" said that the word meant any person's property that could be completely transferred by delivery but did not include choses-in-action. S. 31, however, which was preceded by the title "Assignment of book or other debts," enacted that book or other debts should be deemed to be chattels situated in the place where the grantor of the instrument comprising them longest resided or carried on business during the period of six months next before the execution of the instrument. The question as to what was meant by the expression "book or other debts" in S. 31 had been on more than one occasion raised, but had never been decided. It was quite probable that the words "other debts" were words *ejusdem generis*, and referred only to debts in the nature of book debts, and that the words "book or other debts" meant, therefore, debts in the nature only of debts due to a trader or a person carrying on a trade or business. But that question it was not necessary in the present case to decide. It was sufficient to say that, whatever might be meant by "book or other debts" in S. 31, there was no actual existing debt at the time of the assignment, and that, therefore, the section did not apply.

The result was that, in His Honour's opinion, the assignment in favour of Clouston & Co. Ltd., was a good and valid assignment *pro tanto* of the proceeds of the policy, that such assignment was not affected by the bankruptcy, and that the company was entitled to the payment of the sum of £236 2s. 1d. out of the money's recovered from the Insurance Company.

Solicitor for Official Assignee: **C. B. Mills,** Blenheim.

Solicitors for Clouston & Co. Ltd.: **Burden, Churchward and Reid,** Blenheim.

Myers, C.J. August 21, 1931.
Wellington.

THE AUSTRALIAN PROVINCIAL ASSURANCE ASSN. LTD. v. HARMAN.

Insurance—Motor Vehicles Insurance (Third Party Risks) Act, 1928—Failure of Owner of Motor Car to Give Prompt Notice of Accident to Insurance Company—Such Company Entitled to Recover from Owner as a Debt All Damages and Party and Party Costs Paid to Third Party by Reason of Negligent Driving of Such Owner—Solicitor and Client Costs of Insurance Company Not Recoverable—Motor Vehicles Insurance (Third Party Risks Act, 1928, Ss. 11, 12.

Action by the plaintiff, an insurance company which had been nominated by the owner of a motor vehicle pursuant to the Motor Vehicles Insurance (Third Party Risks) Act, 1928, to recover from the owner of such vehicle the amount paid by it in respect of an action brought by a third party against such owner for damages caused by the negligent driving of such motor vehicle. Although the accident occurred on the 19th March, 1930, no notice of accident was given to the plaintiff and the plaintiff did not become aware of the accident until the 7th October, 1930.

O'Leary for plaintiff.

MYERS, C.J., delivering an oral judgment, said that it was clear that the plaintiff company was entitled to recover from the defendant the amount paid by it under the judgment of 6th December last. S. 11 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, made it plain that it was the duty of the defendant to see that prompt notice of the accident was given to the insurer, that is the plaintiff company. S. 11 did not use the words "prompt notice." It required that notice should be given forthwith after the accident or after the owner of the car which did the damage first became aware of the accident, but no doubt the word "forthwith" meant within a reasonable time, which was very much the same thing as "prompt." There was a very good reason why the duty should lie upon the owner of the car to give notice to the insurer. After all, the insurance company indemnified the owner, and it was the company's money that was at stake. Consequently it was only just that the company should have the earliest opportunity of investigating the claim and of preparing the defence, or, if it satisfied itself that the accident had arisen through the negligence of the insured, of endeavouring to settle the matter on reasonable terms. The Legislature had recognised the justice of that position and had in express terms required the insured motor car owner to give notice of the accident forthwith to the insurance company. It went further and said that if the owner failed to give any notice or otherwise failed to comply with the requirements of the section in respect of any matter the insurance company shall be entitled to recover from him as a debt due to it an amount equal to the total amount, including costs, paid by the insurance company in respect of any claim in relation to such matter. In the present case the defendant calmly ignored the obligation imposed upon him by the statute. The accident happened on March 19, and the insurance company did not become aware of the accident until October 7, and even then not from any notice given by the defendant owner of the car, because he did not condescend to give any notice at all. The information was received from quite another source. It was obvious that in the meantime the position of the insurance company might have been prejudiced. It was not in a position months afterwards to investigate the claim as it should have been investigated. Evidence might have been lost. Witnesses might have left Wellington and might even be out of the country. So that there might be a very real injury to the insurance company. But whether that were so or not, the statute said that if the motor car owner failed to perform his obligation, then although the insurance company had still to pay for the damage which had been caused by the negligence in the driving of the motor car, it might recover from the motor car owner the amount so paid. That was the position in the present case. The insurance company was entitled to judgment and to recover the amount of £478 12s. 0d. beint the amount of the judgment of the Court (including costs) in the action *Flitcroft v. Harman*, with costs according to scale. It claimed from the defendant not only the £478 12s. 0d., but also the further sum of £69 15s. 6d., being its own costs as between solicitor and client of defending the action brought by Flitcroft. That was not permissible. The only costs recoverable under S. 11 of the Act were the costs paid by the Company in respect of the claim; that did not include the company's own costs. Indeed S. 12 provided for the indemnity of the car-owner against costs of defending an action where the defence was undertaken by the insurance company.

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

Myers, C.J. June 15; August 22, 1931.
Napier.

TAYLOR v. VILES.

Municipal Corporation—Bylaws—"Borough Omnibus" Defined by Bylaw—"Motor Omnibus Service" as Defined by the Motor-omnibus Traffic Act, 1926—Service Car Carrying Passengers For Hire Between Place Within Borough and Place Outside Such Borough Not a "Borough Omnibus"—Bylaw Applicable Only to Vehicles Plying For Hire Between Places Within the Borough—Power of Such Borough to Impose License Fees on Such Service Cars—Motor-omnibus Traffic Act, 1926, S. 2—Motor-vehicles Act, 1924, S. 12—Amendment Act, 1927, S. 9.

Appeal from a conviction recorded at Napier upon an information laid under the Napier Borough Council Bylaws charging the appellant that on 5th August, 1930, at Napier, being the owner of a certain motor car licensed by the Napier Borough Council as a motor cab, he did ply for hire with such vehicle as a Borough omnibus, not being licensed so to ply.

The appellant was the holder of a motor cab license in respect of his car. He did not possess a license for a Borough omnibus. On 5th August, 1930, in accordance with his accustomed methods of business, he ran his motor car on various trips between Napier and Hastings, charging each passenger a separate fixed and uniform fare and leaving from a place other than a public stand. His motor cab license entitled him to carry four passengers exclusive of the driver. The termini of each journey

were Napier and Hastings. No passengers were taken to be carried from one point to another within the Borough of Napier.

Rogers for appellant.

Lusk for respondent.

MYERS, C.J., said that there was no dispute on the facts and apparently the whole argument before the learned Magistrate turned on the question of the validity of the Bylaws. In His Honour's view that question did not arise. The real point in the case turned upon the definition of "Borough Omnibus" in the Bylaw. So far as passenger motor vehicles were concerned the Bylaws provided for licenses in respect of three different kinds of vehicles. "Motor cab" was defined as meaning any motor vehicle not being a Borough omnibus plying for hire for the conveyance of passengers. "Motor coach" meant a motor vehicle not being a vehicle engaged in a motor omnibus service as defined by The Motor-omnibus Traffic Act, 1926, and not specially designed for the carriage of persons but plying for hire for that purpose. "Borough omnibus" meant any vehicle, other than a vehicle engaged in a "motor omnibus service" as defined by the Motor-omnibus Traffic Act, 1926, plying for hire for the conveyance of passengers at separate fares between specified termini. The only other definition to which it was necessary to refer was that of "Ply for Hire." Under that title the following appeared in the interpretation clause of the Bylaws: "A vehicle shall be deemed to be plied for hire if in fact it is kept or used for the business of carrying of passengers or of goods for hire or reward; the words 'plying for hire' shall have a corresponding meaning. Every vehicle plying for hire between places one of which is within the Borough shall be deemed to be plying for hire within the Borough."

The appellant's vehicle was clearly not a vehicle engaged in a motor-omnibus service as defined by the Motor-omnibus Traffic Act, 1926, because to come within the definition of "Motor-omnibus" in S. 2 of that Act the vehicle must be designed solely or principally for the carriage of persons exceeding seven in number inclusive of the driver, and the appellant's vehicle was not so designed. Nor did it come within the definition of "motor coach" in the Bylaws because to come within that definition a vehicle must be one not specially designed for the carriage of persons, and the appellant's motor car was specially designed for the carriage of passengers. The appellant's vehicle was one of the class of service car referred to by Ostler, J., in **Willcocks v. Hamilton Borough Council,** (1930) G.L.R. 10. It was not disputed that the vehicle plied for hire in both Napier and Hastings, and a bylaw made by the Napier Borough Council charging a license fee in respect of the vehicle could, therefore, properly be made under a subsection which was enacted by S. 9 of the Motor Vehicles Amendment Act, 1927, by way of addition to S. 12 of the Motor Vehicles Act, 1924. That subsection, which was enacted shortly after **Hodson's Pioneer Motor Service Ltd. v. Sayers,** (1927) N.Z.L.R. 655, was decided, was as follows: "(6) Where a motor-vehicle is plied regularly for hire between two terminal points situate within the districts of different local authorities such motor-vehicle shall be subject to such charges as may be lawfully made in respect of motor-vehicles plying for hire by each of the two local authorities within whose respective districts the terminal points are situate." The principal Act of 1924 required an annual license to be obtained in respect of a motor vehicle for which a prescribed fee had to be paid. And subsection (1) of S. 12 enacted that while any such license was in force the motor-vehicle to which it related might be used on any road or street in New Zealand. Nevertheless, the subsection already referred to, added by S. 12 of the Amendment Act of 1927, made it plain that in the case of a service car plying regularly for hire between two terminal points situated within the districts of different local authorities a license fee might be charged by each of these local authorities: and it explained the last sentence in the Bylaw definition of "ply for hire," namely "Every vehicle plying for hire between places one of which is within the Borough shall be deemed to be plying for hire within the Borough."

The question then was as to whether the course of business adopted by the appellant brought his vehicle within the Bylaw definition of "Borough omnibus." To describe as a "Borough omnibus" within and for the purposes of Borough A a vehicle which carried passengers from that Borough to Borough B several miles beyond the boundaries of Borough A and which did not carry any passengers from one point to another within Borough A would seem to His Honour to be a misnomer. Of course "Borough omnibus" might be defined by apt words in the Bylaws of Borough A in such a way as to include a vehicle so operated, and the question no doubt might then well arise as to the validity of the bylaw. But there could be no justification for straining the definition of "Borough omnibus" to include a vehicle which in its natural meaning it would not include. Indeed the proper course, unless clear language was used to the contrary was to restrict the expression to the kind of vehicle which one would naturally refer to as a Borough omnibus—that is to say an omnibus carrying passengers between termini which were both within the Borough. In His Honour's opinion, therefore, when the Bylaw said that "Borough omnibus" meant any vehicle (other than a vehicle engaged in a motor omnibus service as defined by the Motor-omnibus Traffic Act, 1926) plying for hire for the conveyance of passengers at separate rates between specified termini, and said no more than that, it must necessarily mean plying for hire for the conveyance of passengers at separate rates between specified termini within the Borough. Bylaw 928 required that in the case of a Borough omnibus the places or termini between which, and the route upon which, such omnibus was licensed to ply should be specified in the license. The Borough Council had no justification outside its own Borough, and His Honour thought that Bylaw 928 necessarily, therefore, referred again to places or termini and route within the Borough. That construction was assisted by the forms of license contained in the schedule; and of course the Bylaw and the Schedule must be read together. The Schedule contained three forms of motor vehicle license: (1) Motor cab license; (2) Motor van license, and (3) Borough omnibus or Motor Coach license. Form No. 3 read as follows: "*WHEREAS*.....of..... has made a requisition to the *Napier Borough Council* for a Borough Omnibus
Motor Coach Registered No.....to ply for hire (within the Borough of Napier between the termini endorsed hereon) or (between the Borough of Napier and.....) *pursuant and subject to the provision of the above Part*, the issue of which license has been duly authorised by the Council. Now therefore I, the Town Clerk of the said Council do hereby
Borough omnibus
license the said motor coach of which the said.....
Borough omnibus
is the owner as a motor coach to ply for hire and carry passengers (within the Borough of Napier, between the termini endorsed hereon) or (between the Borough of Napier and.....) and under and subject to the provisions thereof until the 31st day of July one thousand nine hundred and.....and no longer.

"Given under my hand at the office of the Napier Borough Council this.....day of.....192 ." It seemed to His Honour that the words in the first set of brackets "within the Borough of Napier between the termini endorsed hereon" in each case where they appeared were referable to a Borough omnibus license, while the words in the second set of brackets "between the Borough of Napier and....." were referable to a motor coach license. A Motor Coach was defined by the Motor-vehicles Act, 1924, as meaning a motor vehicle not specially designed for the carriage of persons but utilised for that purpose, and did not come within the definition of motor omnibus in either that Act or the Motor-omnibus Traffic Act, 1926. In the Act of 1924 "Motor-omnibus" was defined as a motor-vehicle designed solely or principally for the carriage of persons exceeding nine in number, while for the purposes of the Motor-omnibus Traffic Act, 1926, it was defined by S. 2 of that Act as a vehicle propelled by mechanical power, and designed solely or principally for the carriage of persons exceeding seven in number, inclusive of the driver. In giving evidence before the Magistrate the Borough Traffic Inspector said that a license had been issued to the appellant for a motor cab for four passengers not counting the driver, and he said that that was the only license that could be given under the Borough Bylaws in respect of the appellant's vehicle. That statement, in His Honour's opinion, was perfectly correct. The motor cab license (Form No. 1 in the Schedule) licensed the motor cab "to ply for hire and to carry.....passengers within the said Borough and between places beyond and within the said Borough." The appellant's vehicle was not a Borough omnibus but was a motor cab within the bylaw, that is to say a motor vehicle (not being a Borough omnibus) plying for hire for the conveyance of passengers; and it was in fact used to carry passengers between places beyond and within the Borough of Napier. Inasmuch as it was neither a Borough omnibus nor a motor coach it could only have been licensed (as in fact it was) as a motor cab. Its operations did not bring it within the definition of "Borough omnibus" because it did not ply for the conveyance of passengers between specified termini within the Borough. The appellant was, therefore, wrongly convicted and the conviction was directed to be set aside.

Appeal allowed.

Solicitors for appellant: **Rogers, Helleur and Le Pine,** Napier.
Solicitors for respondent: **Kennedy, Lusk and Morling,** Napier.

Blair, J. August 11; 28, 1931.
Wanganui.

THE CITY OF WANGANUI v. SYME.

Rating — Municipal Corporation — Exemption — Person Giving Notice to Corporation That Property Unoccupied During Whole of Rating Year and Applying for Exemption—Notice Sufficient —Not Necessary in Such Case to State When Premises Re-occupied—Notice Not Invalid Because Given Before Premises Reoccupied—Rating Act, 1925, S. 69.

Action by the plaintiff corporation to recover rates from the defendant. The plaintiff corporation levied rates on the basis of annual value for the rating year commencing on 1st April, 1930, and ending 31st March, 1931, upon a dwellinghouse of which the defendant was the "occupier." These premises, however, had been unoccupied during the whole rating year. On 19th January, 1931, the defendant through his solicitor applied to the plaintiff corporation for remission of half rates pursuant to S. 69 of the Rating Act, 1925. The application was in the words following: "On behalf of the owner I apply for the remission of half the current rates on the following property David Symes' property at No. 44 Somme Parade. This property has been unoccupied during the whole of this rating year."

The application was refused and the defendant then paid only half rates. The plaintiff corporation sued for the balance.

W. J. Treadwell for plaintiff.

Howie for defendant.

BLAIR, J., said that the City's objection to remission was based upon the contention that no proper notice had been given as required by S. 69 and that the requirements of the Section were not complied with. The action was admittedly a test one to obtain an interpretation of S. 69, the provisions of which His Honour quoted. The first question raised was that before half rates could be claimed the following essentials must be established: (a) There must be a period of vacancy either continuously or over several periods aggregating not less than six months in the particular rating year claimed for. In the present case the existence of continuous vacancy for the whole rating year was not disputed. (b) The unbroken period of not less than six months vacancy or the series of broken periods aggregating not less than six months' vacancy already mentioned must be followed in the rating year by a period of occupancy so as to create an "expiration" of the period of vacancy. That submission is based upon subsection (b) of S. 69, which required the notice claiming remission to be given within fourteen days after the period of vacancy had expired. Mr. Treadwell submitted that the words "after the expiration of such period," coupled also with the words "and on which it became occupied" in the concluding part if the subsection had the effect of preventing any claim for half rates unless the claimant could show that in the rating year the premises again became occupied after at least six months vacancy. In the present case it was admitted that the claimant's property was actually vacant for the whole of the rating year, and Mr. Treadwell claimed that because of that fact the period of fourteen days within which notice must be given had never come into existence for the reason that until there was a re-occupancy the fourteen day period could not come into existence. His Honour saw no difficulty in construing the section to give it a clear meaning so far as that point was concerned. His Honour read the words "within fourteen days after the expiration of such period" as meaning "at any time within fourteen days after there actually exists a complete period of vacancy of at least six months' duration, whether such complete period be continuous or be made up of several periods aggregating not less than six months." If, therefore, a property were vacant on, say, the 1st April, and it remained vacant for a continuous period of six months, the ratepayer, within fourteen days after the six months had elapsed could claim the remission and the fact that vacancy still continued at the time he gave his notice would not prevent his claiming the remission. Or the ratepayer could wait for seven or more months of continuous vacancy and still claim remission notwithstanding that the premises were still vacant at the time he gave his notice; in His Honour's opinion the ratepayer could, if he so chose, wait until there had been actually twelve months' vacancy and still claim the remission, provided, however, that he gave the requisite notice within fourteen days of the close of the rating year. But if a period of continuous vacancy of six or more months duration ended by reletting the premises then the fourteen day period within which notice must be given must be calculated from the date of re-occupancy.

In the case of broken periods of vacancy the position was different because the ratepayer if he desired to claim remission must given to the local authority particulars showing the commencing date and the ending date of each period of vacancy, and the aggregate of those periods must be at least six months within the rating year, and the ratepayer's notice must be given within fourteen days of the last period of vacancy immediately preceding the giving of his notice. The requirement that the dates of vacancy and re-occupancy were to be given had more particular application in the case of broken tenancies and the requirement of notice within fourteen days was to ensure that the local body was provided with the means of checking the dates if it so desired. If Mr. Treadwell's contention were sound that there must be a re-occupancy before the fourteen day period could exist then the absurd result would follow that premises vacant for the whole rating year could not obtain remission of half rates, while premises vacant for only half that period could do so. The words "such period" in subsection (b) must refer to such a period of vacancy as entitled the ratepayer to remission of half rates.

The next point taken by Mr. Treadwell was that the notice given by the defendant's solicitor was bad because it did not give the "dates on which such house or building became vacant and unoccupied, and on which it again became occupied." All those particulars must, of course, be given in the case of broken periods, because otherwise the Council would not have the necessary particulars with which to check the claim for remission, and a notice which did not supply such particulars would be bad. But in the case of premises still unoccupied at the time of giving notice it was obvious that particulars of the date when the premises had become re-occupied could not be given. That latter requirement obviously referred to premises which had become re-occupied so as to enable the Council to verify the fact that the notice was given within fourteen days of re-occupation. In the notice given to the Council in the present case it was made plain that the premises had been unoccupied during the whole of the rating year, and that could only mean for the period commencing from 1st April, 1930, down to the date of the letter. The Council, therefore, got full particulars of the period of vacancy upon which the claim to remission was based, and it was admitted that that statement was correct. It was clear, therefore, that the Council could not succeed in its claim for the balance of the rates.

Solicitor for plaintiff: **W. J. Treadwell,** City Solicitor, Wanganui.

Solicitor for defendant: **R. A. Howie,** Wanganui.

Herdman, J. August 24; September 2, 1931.
Auckland.

MANAKAU BEACH ESTATES LTD. v. WATHEW.

Vendor and Purchaser—Specific Performance—Defect in Title —Rescission—Purchaser Refusing to Pay Balance of Purchase Money Under Agreement for Sale and Purchase Upon Ground that Land Sold Subject to a Statutory Prohibition Against Subdivision of Which He Had No Notice—Such Statutory Restriction a Defect in Title—No Mutuality—Specific Performance Refused—Land Act, 1924, Ss. 16, 17.

On March 23, 1927, the defendant agreed to purchase from the plaintiff a small section of land for £185, the sum of £10 to be paid as a deposit, the sum of £10 within three months of the date of the contract, a further sum of £10 within six months of the date of contract, and the balance within three years. The deposit and two instalments of the purchase money together with interest were paid by the defendant in conformity with the contract. No formal transfer of the land purchased had ever been effected and it would appear that no search of the title to the land was made by the defendant's solicitor until March of the present year. The defendant was entitled to possession of his section as from March 15, 1927, but there was no proof that he ever actually occupied it. The date fixed for the com-

pletion of the contract was 23rd March, 1930. During 1930, the defendant failed to pay the balance of the purchase price and on 26th November of that year through his solicitor he made an offer to complete by making a payment of £150 but the offer was rejected. The defendant afterwards refused to perform the contract, advancing as a reason for his refusal an alleged defect in the plaintiff's title to the land in that the land was subject to the statutory restrictions against subdivision contained in Ss. 16 and 17 of The Land Act, 1924. There was no evidence to show that the purchaser was aware, before March 16, 1931, of these statutory restrictions. The defendant having failed to pay the balance of purchase money, the plaintiff sued for specific performance or in the alternative for the balance of the purchase money.

Rose for the plaintiff.
Duggan for the defendant.

HERDMAN J., said that the section which the defendant agreed to purchase was part of a piece of land which had been subdivided as a "town" within the meaning of Ss. 16 and 17 of the Land Act, 1924. His Honour quoted subsections 1 and 2 of S. 16. When land was subdivided for sale or lease or other disposition as a "town"—which under the Land Act meant a parcel of land outside a borough or town district divided into areas for building purposes—certain conditions were imposed by law. A plan must be provided. Roads were to be laid off in a particular way and every subdivision must have a frontage of not less than 40 feet. In the present instance a subdivisional plan was prepared and the section which the defendant purchased had a frontage of 60 feet to a road called Wairoa Road. That legislation related peculiarly to towns as defined by the Land Act. It did not apply to lands within a borough or a city. The disability which the restriction relating to frontage created persisted except in special cases and unless the Minister sanctioned a departure from the provision prescribing a minimum frontage. The section stated that in any subsequent subdivision of the said land the limits of frontage prescribed should not be reduced. His Honour did not think that the legislation contemplated a fresh subdivision of the whole of the land originally subdivided. The object of the section was to prohibit persons who had purchased under the original subdivisional scheme from resubdividing into allotments which because of their diminutiveness would result in the creation of congested conditions and a state of affairs which would be inimical to public health and comfort.

In the present case the purchaser of the land which was the subject-matter of the contract, if he completed the contract, took it subject to the statutory restriction. He could not except in special cases and with the approval of the Minister subdivide in such a way as would leave frontages of less than 40 feet. He could not for instance subdivide his section in that town so as to provide for small sections upon which shops could be erected. When the agreement for the sale of the land was entered into the certificate of title then in existence contained no notification of the fact that the provisions contained in Ss. 16 and 17 of the Land Act applied to that land, but on April 11, 1927, a new title was issued upon which was recorded a memorial that the land was affected by those provisions. His Honour understood that that memorial was entered upon the Register by the District Land Registrar not because the law required such a record to be made but for the convenience of his office. In the statement of facts agreed upon there was nothing to show that the defendant when he bought saw any plan or was aware in any way that the land which he proposed to buy was subject to any restriction which distinguished it from land held under an ordinary unencumbered fee-simple title. It was admitted that the defendant had not prior to March 16, 1931, actual notice of the memorial recorded on the new title which showed that Ss. 16 and 17 applied to the land affected by the agreement, and there was nothing in the evidence to indicate that before that date he was aware of the statutory prohibition against subdivision. The defendant appeared to have acted without the help of a solicitor until some time in 1930.

Under his contract the defendant was entitled to have his land free from encumbrances, but the document executed by the parties contains no provision which required him to accept the disability created by Ss. 16 and 17 of the Land Act nor did it refer to those sections in any way. **McDonald v. Wake,** (1919) G.L.R. 106; **Schollum v. Francis,** (1930) N.Z.L.R. p. 504 and **Rayner v. The King,** (1930) N.Z.L.R. 454, were cases in which it was held that the defendants were justified in refusing to accept titles when, by reason of the existence of special legislation, the rights of purchasers to dispose of their properties were substantially restricted. It would seem, therefore, that the mere existence of legislation of that character did not affect a purchaser of land in circumstances like the present with notice of its effect. In the case of **McDonald v. Wake** (*sup.*) the market for the sale of the particular piece of land which was the subject matter of the contract had by legislation been limited artificially. The purchaser engaged to buy property which was affected by a serious embargo and that was held to be such a defect as justified a refusal to perform the contract. In the present case no such artificial limitation of market had been prescribed. But one of the rights which a landholder usually enjoyed—a right to subdivide his land—had been limited and so a purchaser took his land with his rights of ownership to that extent restricted. After referring to **Halsbury's Laws of England,** Vol. 25, p. 303, and **Barraud v. Archer,** 2 Sim. 433, 9 L.T. Ch. 173, His Honour said that the purchaser's complaint in the present case was that his rights of ownership were restricted by the statute just as the rights of the Crown in Rayner's case would have been limited definitely and seriously had the purchase been completed. The kind of title that the plaintiff possessed, as a title, was no doubt perfectly good. It would suit a purchaser who had no thought of subdividing. But in the present case what kind of a title was the purchaser led to expect? He probably knew that he was buying a section within a town and he would expect to get a section with a right to dispose of part of it if he pleased. It was plain from the evidence that when he executed the contract to purchase the land he was unaware of the restriction created by Ss. 16 and 17 of the Land Act. He stipulated for a title free from encumbrances and he would expect to get a property which was subject to no restrictions other than those which ordinarily attached to fee-simple land which was sold. His Honour had pointed out that in Rayner's case the land which was the subject-matter of the contract was subject to a statutory restriction and that was so too in **McDonald v. Wake.** In **Moss v. The Perpetual Trustees Co.,** (1923) N.Z.L.R. 264, a statutory restriction played a part but in point of fact the vendor was unable to convey the whole of the land which the plaintiff had agreed to buy. In the present case His Honour thought that he was bound to decide that there was an absence of mutuality. The vendor proposed to deliver a title of one kind. The purchaser expected a title of another kind. The purchaser was not getting what he expected to get, for such a restriction as was created by the section in the Land Act was not a matter which was necessarily incidental to the plaintiff's tenure of the property. For all the purchaser knew to the contrary the restrictions relating to frontage might have been removed by the Minister. It seemed to His Honour that the course taken by Cooper, J., in **McDonald v. Wake** should be followed in the present case. The land bought might or might not have been subject to a restriction about frontage just as in the case referred to the title to the land might or might not have been an ordinary fee-simple title which conferred upon the owner a complete and unrestricted power of disposition. If a purchaser discovered that he had unwittingly agreed to buy land which he could only dispose of in a limited market instead of land which he could alienate in any way that he pleased he would have good cause for complaint and so, it seemed to His Honour, would the purchaser in the present case when he found that he was to be tendered land with a prohibition against subdivision. Had the land in the present case been 10 acres in area having a frontage of 200 feet instead of 60 feet there would have been no doubt about the defendant's justification for repudiation. The fact that the property was a small one and that the sum involved is not large could not be allowed to count against defendant.

In opposing a claim for specific performance it was not always necessary to prove as much as would be required if the party complaining were suing for rescision—See **Spencer Bower on Actionable Non-Disclosure,** 215; In **Re Banister (1879)** 12 C.D. 131 C.A., per Jessel, M.R., at p. 142. In the present case there was enough before His Honour to show that the property was subject to a disability which could not be said to be immaterial. In the facts stated His Honour could find nothing to warrant the belief that the defendant had notice of the defect in the title to the property until proceedings were commenced against him in the Magistrate's Court, and His Honour was not aware that he was under any obligation to search until the time for completion arrived. He appeared to have repudiated the purchase as soon as he discovered that he was not getting what he had bargained to buy. What took place between the date of purchase up to the date the defendant's solicitor assumed control was rather obscure, but from the material available His Honour had not been able to discover proof of act or circumstance which would oblige the defendant to accept the title that the plaintiff was in a position to offer him.

Judgment for the defendant.

Solicitors for plaintiff: **Messrs. Jackson, Russell, Tunks and West.**
Solicitor for defendant: **R. H. Duggan.**

Reed, J. August 24; September —, 1931.
Napier.

NAPIER RETURNED SOLDIERS' ASSOCIATION AND OTHERS v. Y.M.C.A. AND THE SALVATION ARMY.

Trust—Interpretation—Administration—Scheme—Trust for Payment of Certain Monies to Two Charitable Institutions in Equal Shares "For the Benefit of Parents and Widows and Families of Hawke's Bay Soldiers"—Widows and Parents Only of Soldiers who Enlisted and were Carried Overseas Entitled to Benefit of Trust—Trustees Accumulating Principal and Interest of Trust Monies and Postponing Distribution on Ground that other Trust Funds for Relief of Returned Soldiers were Available—Wide Discretionary Powers Implied by Trust Terms—Postponement of Distribution Not a Breach of Trust—Duty to Exhaust Capital and Interest of Fund Within Eight or Ten Years—Refusal of Court to Direct a Scheme on Ground That a Scheme Would Interfere with the Wide Discretion Reposed in the Trustees and Tend to Defeat the Intention of Testator.

Originating summons brought by the various Returned Soldiers' Associations in the Provincial District of Hawke's Bay against the defendants the Young Men's Christian Association and the Salvation Army, for the interpretation of a certain Deed of Trust, and for orders relative to the administration of such Trust. The Attorney-General submitted to the order of the Court. In a Deed Poll declaring a trust and dated 1st May, 1918, occurred the following clause: "and distributing the surplus by payment thereof to the extent of nine thousand pounds to The Young Men's Christian Association Wellington and The Salvation Army Wellington in equal shares for the benefit of parents widows and families of Hawkes Bay Soldiers . . . ." The Deed as first executed contained the word "returned" before "soldiers" but the insertion of that word "returned" was a clerical error in the engrossment of the Deed.

On 4th September, 1928, £1,500 was paid by the trustees under the trust deed to the Young Men's Christian Association, and £1,500 to the Salvation Army, and, on 15th January, 1931, a further sum of £1,000 to each of those bodies. From time to time further moneys would be paid over until each has received £4,500 in accordance with the terms of the Trust Deed. In certain rather remote contingencies the amount might be larger. The plaintiffs complained as to the manner in which these trusts had been administered by the respective bodies. The Salvation Army had placed the money received in a separate trust account and it was earning 4 per cent. interest, and none of the money, either of principal or interest, had been spent in furtherance of the Trust. The Young Men's Christian Association appointed special trustees to administer the Trust, and the principal moneys were invested in Inscribed Stock yielding 5½ per cent. Prior to inquiries being instituted in April on behalf of the plaintiffs a part—some £60—of the interest earned was expended in assisting some children of Hawkes Bay soldiers, and since that date further amounts of interest had been expended. That the Trust was not being administered is the main complaint made by the plaintiffs, but it was also charged against them that neither of the bodies communicated the fact that the trust existed to those who might benefit by it.

Mason and Harker for plaintiffs.
Grant for The Young Men's Christian Association.
Lusk for the Salvat on Army.

REED, J., said that the insertion of the word "returned" was a clerical error in the engrossment of the Deed, and that if necessary an order might be had for the rectification of the Deed by erasing the word: **Att.-Gen. v. Williams,** 33 N.Z.L.R. 913. The question then to be considered was as to the meaning of the words "for the benefit of parents widows and families of Hawkes Bay Soldiers." Fortunately all the parties were in accord as to the meaning that should be attached to these words, and, upon the evidence with regard to such terms as were ambiguous, His Honour thought that the intentions of the donor were clearly manifested. His Honour, therefore, ordered and declared: 1. That the general intention sufficiently appeared that the benefit should be limited to necessitous or deserving cases. 2. That "Hawkes Bay Soldiers" meant soldiers enlisted in Hawkes Bay in the Great War of 1914-1918 who actually left New Zealand to take part in the War and were carried overseas to that end, whether or not such soldiers actually reached the front or were engaged in actual fighting. 3. That "Widows" means widows of such soldiers whether married before, during, or after the war, and regardless of whether or not the widow resided in Hawkes Bay. 4. That "parents" meant the parents of a Hawkes Bay Soldier irrespective as to whether the soldier was living or dead, or as to whether or not the parents resided in Hawkes Bay. 5. That "families" meant the wife and children of a Hawkes Bay Soldier irrespective of whether the recipients of the benefit resided in Hawkes Bay or not. His Honour next reviewed the facts, adding that he thought that the defendants should have come to the Court, within a reasonable time after receiving the first instalment on 4th September, 1928, to obtain an order defining the class of beneficiaries to which the trust applied, and also for directions as to the manner in which the trust should be carried out. But in view of the wide discretionary power implied by the terms of the trust His Honour could not say that there was anything improper in postponing the distribution of the funds. It was submitted on their behalf that it would be wise even now to conserve the funds—at all events the capital moneys. There were at present being administered in the Hawkes Bay district for the relief of returned soldiers, trusts involving very large sums of money, compared to which the sum with which the Court was concerned in the present case was a very small matter. However, as was pointed out on behalf of the plaintiffs, useful assistance might be given at the present time in financially helping in the education of the children of soldiers, and that claims for that type of assistance must diminish from year to year; further, widows and families of soldiers needing immediate assistance had at least an equal claim to share in the benefits of the trust as those who might come after. His Honour would remind the defendants that there was no indication in the terms of the Trust Deed that they were to deal only with the interest of the capital moneys; both corpus and income had to be expended in carrying out the trust. That did not mean that immediately they received a sum of money they must expend it; it must be dealt with judiciously and carefully and with discretion, but no distinction, with the object of conserving the fund, should be made between capital and income. They should, His Honour thought, contemplate the exhaustion of the fund in a period of say 8 to 10 years.

Turning next to the terms of the order asked for by the plaintiffs, the important question was as to whether the defendants should each be required to formulate a scheme for the distribution of the trust moneys. A scheme should be directed where the instrument creating the trust was insufficient or indefinite, or it was necessary to apply the *cy-pres* doctrine, or there were no trustees, or there had been a misapplication of the trust moneys, or, generally, where the trust was of such a nature that it was expedient to regulate its administration. That general statement was not exhaustive of the circumstances in which the Court of Chancery had directed a scheme, nor were the instances above given independent of circumstances; for example, in **Walsh v. Gladstone,** 1 Phillips 290, although the sole trustee died in the lifetime of the testator, no scheme was ordered as the Court was satisfied of the respectability and permanent character of the recipient named—an old established Roman Catholic College—and ordered the fund to be paid over to the President thereof. The legacy to the deceased trustee was "to be applied to the use of" the named college. That case was followed in **In the Goods of M'Auliffe,** L.R. (1895) P. 290. The question, therefore, as to whether or not a scheme should be ordered was in the discretion of the Court on a review of the terms of the trust and all the circumstances. The grounds upon which it was submitted that a scheme should be ordered in the present case were: (1) Improper conduct of the defendant trustees; (2) the fact that other trusts in the interests of Hawkes Bay Soldiers were being administered, and the administration of the present trust should be co-ordinated to prevent over-lapping; (3) that those having a claim to participate were widely scattered throughout the whole district and that without a scheme such persons would not be able to properly place their claims before the trustees. As to the first of those grounds His Honour was not prepared to accede to the contention that there had been such improper conduct as to warrant the Court in evidencing a want of confidence in the proper administration of the trust by requiring a hard and fast scheme to be submitted. His Honour had already said that the defendants should have come to the Court earlier for directions, but His Honour looked upon their failure to do so purely as an error of judgment due no doubt to the fact that *ex facie* they had an unrestricted discretion in the administration. As to the other grounds, in His Honour's opinion if a formal scheme were insisted upon the wide discretion conferred upon the defendants by the donor would lose elasticity and defeat his manifest intention. The wishes of the donor were a primary consideration. His Honour understood from statements at the Bar that the various associations for the relief of soldiers in the district were in existence when the trust deed was executed, yet the donor passed them over in favour

of the two defendant bodies. Those bodies were experienced in the relief of distress and their respective organisations enabled them to make the fullest enquiries; it was, therefore, highly probable that the donor deliberately chose them to administer his bounty with a view to eliminating as far as possible the rigid formalities necessarily incidental to the administration of large funds. The fund in the present case was not large and it would be mischievous and wasteful to require it to be distributed in any rigid and arbitrary manner proportionately throughout the wide district covered. The trustees were not required to benefit every member of the class and there must be implied a wide discretion. Without in any way limiting that discretion it might be suggested that over-lapping should be avoided by reasonable co-operation between the defendant bodies and with the plaintiffs and that provision should be made for the consideration of the claim of persons residing in isolated districts. His Honour had no reason to doubt that the trust would be faithfully and carefully administered and His Honour thought, therefore, that a scheme was not necessary, and, moreover, would unduly hamper the satisfactory administration of the trust. His Honour thought, however, that the plaintiffs, as representing a large proportion of returned soldiers, were entitled to information from time to time as to how the trust was being administered, and that, therefore, the defendants should periodically file audited accounts in this Court. There would be an order that each of the defendants should annually, as at 31st March of each year during which the trust should exist, as soon as conveniently might be after that date but not later than 30th April in each year, commencing in 1932, file in the Court audited accounts showing the administration of the trust during the preceding year. Leave reserved for any of the parties to apply as there shall be occasion.

Solicitors for the plaintiffs: **Mason and Dunn,** Napier.

Solicitors for the Y.M.C.A.: **Luke, Cunningham and Clere,** Wellington.

Solicitors for the Salvation Army: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Court of Arbitration.

Frazer, J. September 10; 17, 1931. Wellington.

SKONE AND OTHERS v. HYDE.

Workers' Compensation—"Arising Out of" Employment—Locality Risk—Hotel Employees Required to Sleep on Premises Injured While Escaping from Fire on Such Premises—Such Employees Exposed to Special Risk of Injury From Fire Breaking Out in Such Premises—Risk Not Common to all Mankind—Accident Arising Out of and in the Course of the Employment—Workers Compensation Act, 1922, S. 3

Claims for compensation by there persons in respect of injuries by accident received by them as a result of a fire by which the Panama Hotel, in Wellington, in which they were employed, was destroyed. By consent, the three cases were heard together. There was no dispute regarding the facts. All three plaintiffs were workers on the staff of the Panama Hotel, a two-storied wooden building. By the conditions of their employment, they were required to sleep in the hotel building, and their bedrooms were on the upper floor. In the early morning of 21st May, 1931, the hotel was destroyed by fire, and the plaintiffs suffered injuries in making their escape from the burning building. In the case of the plaintiff R. Jones, she was entitled, if her claim succeeded to full compensation to September 10, 1931, and for six months afterwards; in the case of the plaintiff M. Park, she was entitled, if her claim succeeded to full compensation to September 10, 1931, and for two months afterwards; and in the case of the plaintiff G. M. Skone, he was entitled, if his claim succeeded to full compensation to June 15, 1931. The only question for the Court was that of the liability of the defendant to pay compensation.

P. J. O'Regan for plaintiff.

H. F. O'Leary for defendant.

FRAZER, J., delivering the judgment of the Court, said that the accident admittedly arose in the course of the plaintiffs' employment, but it was disputed that it arose out of their employment. The counsel for the defendant argued that though the accident resulted from the fire, it did not arise out of the plaintiffs' employment. He submitted three propositions: 1. For an accident to arise out of the employment, the accident must be due to a risk of the employment itself, as distinguished from a risk that would operate whether the claimant were so employed or not; 2. If an accident were caused by something unconnected with the employment, it did not arise out of the employment; and 3. The words "out of the employment" necessarily involved the idea that the accident arose out of a risk incidental to the employment. Counsel contended that there must be proof of a special risk in respect of fire, before it could be said that injury through fire arose out of the employment of a worker. Fire, however, was a risk of a general nature, to which everybody, whether employed or not, was subject.

It was necessary, His Honour stated, in dealing with cases in which a risk of a general nature was involved, to bear in mind the words of Lord Parmoor in **Simpson or Thom v. Sinclair,** 10 B.W.C.C., 220: "The fact that the risk may be common to all mankind does not disentitle the workman to compensation if in the particular case it arose out of the employment." In **Dennis v. White,** 10 B.W.C.C., 280, Lord Finlay, L.C., said: "There are of course, cases in which it is necessary to enquire whether the nature of the employment specially exposes a workman to a risk of a general nature. In the case of lightning, it is very material to enquire whether the work involves special exposure to the danger of being so struck, as in the case of employment upon a steeple or elevated scaffolding. In the case of injury by a bomb thrown from hostile aircraft, the fact that the workman was engaged on work in a building brilliantly lighted, so as to attract the notice of the enemy crews, might be most material as showing that the injury by the bomb was one that arises out of the employment. In the case of sunstroke or frostbite, it is material to show that the work involves special exposure to the heat or the cold." The Lord Chancellor went on to say that when a workman was sent out into the street on his master's business, his employment necessarily involved exposure to the risks of the streets, and that injury from such a cause arose out of his employment, even though other people were equally exposed to those risks. He quoted with approval a number of dicta to the effect that a risk might be incidental to a particular employment, even though it were common to all mankind. In particular he quoted a paragraph from the judgment of Buckley, J., in **Pierce v. Provident Clothing and Supply Co.,** 4 B.W.C.C. 242, which was referred to by Lord Strathclyde in **Bett v. Hughes,** 8 B.W.C.C., 362: "The question whether the accident was the result of a risk to which all mankind are more or less exposed is, in my opinion, not an exhaustive test of the question whether or not the accident arises out of the employment. The words "out of" necessarily involve the idea that the accident arises out of a risk incidental to the employment. An accident arises out of an employment where it results from a risk incidental to the employment, as distinguished from a risk to all mankind, although the risk incidental to the employment may include a risk common to all mankind." The risk of being injured by fire was, His Honour said, a risk that was common to all mankind, for comparatively few buildings were fire-proof. In the cases of the three workers in question, however, the risk was incidental to their employment. It was a condition of their employment, that they should sleep on the upper floor of the Panama Hotel; and they were there, in pursuance of their contracts of service, at the time that the building caught fire. But for their contracts of service, they would have had no right to be where they were, and no reason for being there. To say that the risk of being injured by fire was a risk that was common to all mankind, and that accordingly workers who were injured by a fire breaking out in a building where their duty to their employers required them to be were not entitled to recover compensation, involved a confusion of thought. The true view was that their employment exposed them to the special risk of being injured by a fire that broke out in that particular building. The cases of the three workers come under the heading of what had been called "location risk" cases, of which **Simpson or Thom v. Sinclair** was the leading case.

In that case, a girl was employed by a fish-curer to kipper herrings in a shed. While she was at her work, an adjoining brick wall that was in course of erection fell on and brought down the roof of the shed in which she was working. The House of Lords held that she was entitled to recover compensation in respect of the incapacity caused by the injuries she received through the collapse of the shed. Viscount Haldane said that the accident obviously arose in the course of the girl's employment, but that two contentions had been put forward as the meaning of the words "out of the employment." His Lordship went on to say: "According to one of them, the

language used is satisfied if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment. Once establish this, and it is said that no further causal connection need be sought. I think that this interpretation is too vague. It would cover the case of a farm labourer struck by lightning while walking across a field on the farm on which he was employed. Yet he might just as readily have been struck while walking elsewhere off the farm. A further condition seems to be required; the condition that the injury should have arisen, not merely by reason of presence in a particular spot at a particular time, but because of some special circumstance attending the employment of the workman there. His duty may have occasioned his being near a tree which attracted the lightning, or being under a roof which for some reason fell in. According to the other contention, a still fuller and more definite casual connection than this is essential. Unless, it is argued, the accident was due to something the man was doing in the course of his employment or was exposed to as a special danger by the nature of his employment, the conditions required by the statute are not fulfilled. . . . The foundation of the argument is that the mere fact of a man being, by reason of the locality of his employment, in the place where an accident happens to him, does not distinguish his case from that of mankind generally if the accident is one, such as a stroke by lightning, which might have happened to him as readily in some other spot as in the one where he was employed. In order that the accident may be truly said to have arisen out of the employment, it is argued that the character of the employment must be shown to have actively contributed to its occurrence.

"There are no doubt many kinds of accident which do not in any sense arise out of the employment. There may be no reason why such accidents should happen to a man in one situation rather than to a man in another, and it may, therefore, be impossible to pronounce truly that they are so connected with the employment as to have arisen out of it. But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment. The question really turns on the character of the causation through the employment which is required by the words "arising out of." Now, it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If, therefore, the statute when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer, as a condition of his liability, and treats him rather as in a position analagous to that of a mere insurer, the question becomes a simple one. Has the accident happened because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event—the mere fall of the roof—and there need be no other connection between what happened and the nature of the work in which the injured person was engaged."

In the course of his judgment in the same case, Lord Shaw said that his view of the statute was that the expression "arising out of the employment" was not confined to the mere nature of the employment. He considered that it applied to the employment as such—to its nature, its conditions, its obligations and its incidents. "If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply."

Those words exactly fitted the present cases. Though the risk of being injured by fire was in a sense common to all mankind, it was a condition of the plaintiffs' employment, and an obligation that they undertook as part of their contracts of service, that they should sleep on the upper floor of the Panama Hotel on the night of May 20-21; and their sleeping there, instead of in some other building, or in some other part of the Panama Hotel building, exposed them to the special danger to which they were subjected. It was not a peril that might fall on the public at large, such as a stroke of lightning, or an explosion of an enemy bomb, but it was a peril attached to the particular location in which by the obligation of their service the plaintiffs were placed. It was, of course, settled law that a worker injured by lightning, or by the explosion of an enemy bomb, or by a fire caused by an enemy bomb, was not entitled recover compensation unless it could be shown that the circumstances of his employment exposed him to a greater risk than that run by persons not so employed, or not so employed under the same conditions. It had been decided that if a bricklayer employed in an exposed position on a high scaffolding was struck by lightning, he met with an injury by accident arising out of his employment, because of the greater danger to which his position exposed him; but the accident did not arise out of the employment if he was struck while in a place that involved no special danger, **Andrew v. Failsworth Industrial Society** (1904) 2 K.B., 32. In the cases of **Cooper v. North Eastern Railway Co.,** 9 B.W.C.C. 129, and **Alcock v. Rogers,** 11 B.W.C.C., 149, workers were injured by the explosion of enemy shells or bombs while they were in the course of their employment; but, because they failed to show that, by reason of their work, they were exposed to any greater danger than that to which other persons in the locality were exposed, it was held that their injuries were not caused by accident arising out of the employment. In **Bird v. Keep,** 11 B.W.C.C., 133, it was held that a messenger whose duties required him to be in an oil and colour warehouse at a time when it was set on fire by an enemy bomb, and who was suffocated by the dense smoke and fumes given off by the burning contents of the building, was killed by accident arising out of his employment, because of the special and additional risk of the fire and suffocation to which he was exposed, and to which ordinary members of the public were not exposed, by reason of the fact that if the building in question, with its highly inflammable contents, were struck by a bomb, there was a greater risk of fire breaking out. In **Knyvett v. Wilkinson Bros. Ltd.,** 11 B.W.C.C., 50, reference was made to an unreported decision of the House of Lords in the case of **Smith v. Palmer's Shipbuilding Co.,** in which it was held that the circumstance of a workman having to work at night in a shed with a glass roof exposed him to a special risk of injury through a bomb being dropped on the place where he was working.

It had been necessary to summarise a number of the more important cases dealing with accidents caused by natural forces and enemy action, in order to make clear the distinction between the risk from perils to which a whole community was subject, and the special risk from those perils to which workers in a particular building or place were sometimes exposed. There was a further distinction to be made between the risk of being injured through fire caused by lightning, enemy bombs, or some similar cause, attacking a building that was not specially exposed to danger, and the risk of being injured through an ordinary fire breaking out in a building, without any general cause of an extraneous nature. In the latter case, the risk was special and peculiar to the persons in that building; and though, in a sense, the risk of fire was a common and ever-present risk to dwellers in buildings, yet in the case of a fire breaking out in a particular building from a cause that did not equally endanger all other buildings in the city or locality, the risk of being injured through that fire was not a risk that was common "to all mankind" or to other persons in the city or locality: it was a special risk to which only the persons in the particular building were exposed. It was impossible to distinguish a case of personal injury caused by such a fire to a worker whose duty necessitated his being in the burning building at the time it caught fire from a "location-risk" case such as that exemplified in **Simpson or Thom v. Sinclair.**

Subject to what had been already said, the three propositions advanced by counsel for the defendant might be accepted as correctly stating the law. The risk to which the plaintiffs were subjected would not have operated but for their employment, the accident was caused by something connected with their employment, and it arose out of a risk incidental to their employment. Accordingly their cases come within the rules to be deduced from the three propositions. It was a matter of interest that, with the exception of an English County Court judgment in 1908, there were no reported decisions in cases of personal injury by accident through fire breaking out in a building, apart from cases in which the fire was caused by enemy action. It had, therefore, been thought desirable that the matter of liability should be fully considered and the reasons for the Court's opinion given in detail.

Judgment for each plaintiff for compensation.

Solicitors for plaintiffs: **P. J. O'Regan and Son,** Wellington.

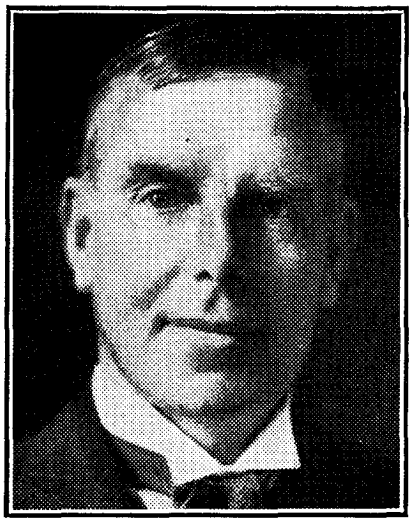
Solicitors for defendant: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

The Attorney-General's Message

TO THE LEGAL PROFESSION.

Attorney-General's Office,
Wellington, 24th September, 1931.

The Editor of the LAW JOURNAL has asked me, as the Journal goes to Press, to contribute a brief message to the legal profession of New Zealand. In the few minutes available, I have no time to prepare a considered message dealing with many large issues. But I take the opportunity of saying that the profession has an important part to play in the difficult crisis through which the country is passing. Many questions affecting the relation of debtor and creditor, mortgagor and mortgagee, and similar problems, are being forced on us by the heavy fall in the National income. The issues involved are far-reaching. There is no class in the community which is as well able as the legal profession is to guage the reactions and repercussions that may arise from interference with contracts whether by way of moratorium, statutory reductions of interest or such legislation as the Mortgagors Relief Act. The opinion of lawyers is of great value in deciding such a question, for example, as to whether private adjustments of loans and interest charges are likely to be more equitable and satisfactory than the results arrived at by legal machinery which must work, more or less, according to fixed rules. I wish, therefore, to thank those members of the profession who forwarded to the Inter-Party Committee of Parliament their views on these and similar questions. In one case, all the leading lawyers in one City joined together to express their considered opinion on the various proposals that are being put forward.



Hon. W. Downie Stewart.

But in the wider sphere of general legislation it is of the greatest value if the Law Societies will watch and pass their opinion on Bills before Parliament. In recent years I have often seen Bills which had far-reaching consequences passed by Parliament without any indication from the Law Societies as to how they were likely, from a lawyer's point of view, to affect the interests of the public. It is impossible for individual legal members of the House to make an exhaustive study of every Bill and keep pace with their other work.

I hope, therefore, that in so far as it is not already done, a systematic study of proposed legislation will be made by some one on behalf of the legal profession.

With these few words, I wish the members of the legal profession all prosperity and good fortune.

Wm Downie Stewart

Attorney-General.

Sir Thomas Sidey

The retiring Attorney-General (Sir Thomas Sidey) during his term of office has earned our respect and gratitude for the very helpful manner in which he has received all suggestions made to him by the Council of the New Zealand Law Society in the interests of the profession. His address at the Legal Conference in Auckland last year will not be forgotten. On that occasion, the President of the New Zealand Law Society, Mr. A. Gray, K.C., added to the thanks expressed by Mr. C. H. Treadwell to Sir Thomas for his address. Mr. Gray recalled the good fortune of the profession in having a number of distinguished Attorney-Generals, notably, the late Sir Robert Stout, the late Sir John Findlay, and Sir Francis Bell. Sir Thomas Sidey, he added, had shown that he was quite desirous of following in their footsteps, and his help given to the profession was greatly appreciated. Last year, Sir Thomas ably represented New Zealand in the discussion of legal and constitutional matters at the Imperial Conference, his high sense of public duty prompting him to bear his own expenses of travel to the Mother Country. He now retires from office with a notable record of public service, and the profession will all join in wishing him many happy years in which to continue his well-doing in the Dominion's interests.

Bench and Bar.

It is very gratifying to see His Honour Mr. Justice Ostler taking his place on the Bench at the present sitting of the Court of Appeal. His Honour has been laid aside by illness for many months, and his recent voyage to the islands of the Pacific has, we learn, resulted in great improvement in health. Everyone is happy to welcome him back to duty.

Mr. J. P. M. Bertram was recently admitted as a Barrister and Solicitor by Mr. Justice MacGregor, on the motion of Mr. Hunter Brown.

Mr. Walter G. Wakelin, of the office of Messrs. Brandon, Ward and Hislop, and formerly of Blenheim, was recently admitted as a Solicitor by Mr. Justice Reed, on the application of Mr. T. C. A. Hislop.

Mr. James Park, Crown Prosecutor for Westland, died somewhat suddenly at Hokitika, on August 31. The deceased was born at Lyttleton, in 1854, and, after being educated privately, attended the University of Otago. He was articled to Messrs. Joyce and Adams, in 1879, and was admitted by the late Mr. Justice (afterwards Sir Joshua) Williams in 1883. He commenced practice at Hokitika soon afterwards, and remained there until his death. He had held the appointment of Crown Prosecutor for a long period, and interested himself widely in the public life of the district. Some years ago he was joined in partnership by Mr. J. A. Murdoch. The late Mr. Park was married three times, and his widow and family of one daughter and four sons survive him. He will be greatly missed in Westland, where his long residence of nearly half a century had made him a familiar figure to three generations of West Coasters.

A Permanent Medical Board.*

For Determining Workers' Injuries.

By H. P. Richmond, B.A., LL.B.

There is an aspect of compensation cases that relates to the practical question whether the existing method of disposing of them is the best. I am aware that a Royal Commission has sat and made a report, and, therefore, it is temerity itself to make fresh suggestions. If the Royal Commission's report were made effective, we should have presumably more frequent sittings at which claims might be decided. I believe there is a part the medical profession could play, in which we should have little to do. We know that one of the great difficulties in compensation cases arises from the long time that often elapses between the accident and the hearing of the claim. This is by no means only a matter of the intervals between sittings of the Court. It often arises from delay by the worker in commencing or prosecuting his claim. Evidence of extreme value as to the real condition of the worker at the moment of the alleged accident is often lost. Heart strain cases are a good instance of this.

A constantly increasing factor in compensation cases is "compensation neurasthenia" due in part to the worker's subconscious or realised desire to present the gravity of his condition in as telling an aspect as may be. He will not take up work, and nurses his fears and his worries. He is actuated by a fear, often quite an honest fear, lest he somehow, by working, weaken or diminish his claim.

It has occurred to me that there might be a permanent medical board in each considerable centre before which injured workers could be examined without delay. Possibly one permanent medical assessor might be sufficient for the purpose. If such a board existed, it would give, not only to workers, *but to employers*, the right to bring accident cases forthwith before it. Where an employer desires to have the amount of possible or of admitted liability fixed, and is prepared to pay the costs of a medical assessment of the extent of injury, it is only just that the employer should have the right.

Such a board could sit as an open Court and, after due enquiry into the history of the accident, and, after hearing medical evidence if desired, state the position of the worker in medical terms, leaving questions of law for determination by a Judge. It might be necessary for the medical board to see a worker several times, but always it would seek, in the interests of both parties, to state with promptitude when a worker was fit to resume work. Such a board, being judicial in its functions and expert in its knowledge, could deal efficiently with evidence before it. Much of such evidence must necessarily be controversial, particularly in regard to that prophetic art known, I believe, by the blessed name of prognosis. The board's pronouncement on such medical aspects as the extent of injury, the loss of capacity for work, and the time at which work could be resumed, could be promptly secured and would on those aspects be final.

Years of experience on the Arbitration Court bench may well give to a Judge a working knowledge of medical matters, but in the nature of things it must often be the case that a Judge has no such knowledge. The duties of the Judge would be greatly lightened by the existence of a medical board and there would be no possible necessity for associating the Judge with two assessors. This would make for economy. The Judge would deal with general questions of fact and would have the board's report before him. On these he would assess compensation. In the majority of cases there would be no need to proceed further than the findings of the medical board. The assessment of compensation would usually be settled without Court proceedings.

The suggestion for a medical board is thrown out for criticism. I am inclined to think it workable, and, if it is, I believe its saving to both workers and employers would much exceed its cost. As an alternative it might be sufficient, with the proposed more frequent sittings of the Court, to have a permanent medical assessor, or two assessors,—a surgeon and a physician—in each centre who would sit with the Judge in lieu of the two existing lay assessors. This position should properly be regarded as one of such high trust and honour that it would be undertaken by acknowledged leaders in the medical profession from a sense of duty that outweighed purely financial considerations.

The suggested right to an employer to bring a worker before a board or court without waiting for the worker to take action would be, I believe, of real value.

I see one great blot on the scheme of a medical board. There will be less litigation and we lawyers will be at a loss for some fees! Quoting from Knocker on *Accidents in their Medico-Legal Aspect*, I find him saying: "Companies insuring against accidents do not fight on legal points one per cent. of the cases in which a claim is made." On enquiry, I find the New Zealand experience is much the same: I had not thought it would be quite as bad as that, but having started out in an atmosphere of high ideals and public service it seems one must go on with it, even if it is professional "hari kari" to leave to a medical board all those delightful depths and shallows of anatomy and surgery through which we lawyers now try to steer our client's barque as through uncharted seas.

* This was part of an address given by Mr. Richmond to the Auckland Division of the British Medical Association last year before he had any knowledge of the views expressed by Dr, Keith Macky and other medical men on the subject.

Motors and Litigation.

In these hard times when so many of the profession suffer unactionable damage to their incomes, the motor vehicle proceeds on its misdirected way to provide employment for those who assist in the administration of the law. What many of us would do if the motor-vehicle ceased to be driven negligently or contrary to the form of the statute, &c.; if it ceased to mount pavements and such like; or if it took out a prohibition order against itself to abstain from damage to property or person or to its brother (or is it sister ?) automobile—one does not care to think. An utterly law-abiding populace would be our utter ruin, saving and excepting, of course, those good conveyancers who profit by the savings and exceptions of the maker of home-made wills and so forth.

Necessity for Compensation Court.

Relieved of Industrial Jurisdiction.

By P. J. O'Regan.

I read with interest the timely leading article in the last issue of the Journal, and Dr. Keith Macky's comprehensive discussion of the dangers of delay in the settlement of compansation claims. In the main, I am in complete agreement.

I have long since concluded that the Court of Arbitration should be relieved of its jurisdiction in industrial disputes, to enable it to devote its whole time to cases under the Workers' Compansation Act. By this means, Court would be able to dispose of cases with much greater expedition, and the delay inseparable from the present system would be avoided.

It is my own experience that delay is most injurious to injured men; and I agree that a prompt settlement would expedite recovery in many cases.

From every point of view, promptitude in disposing of compensation cases is desirable; but I can see no way of achieving that object unless the Court of Arbitration is to be relieved of the duty of dealing with industrial cases.

Hints on Conveyancing.

As a New Zealand Examiner Learns Them.

The following valuable suggestions have actually been taken by an examiner of the New Zealand University from the answers to one of the papers set for the LL.B. and Law Professional examination:

A Saving of Time and Nerve-strain: "Recitations in a deed twenty years old are taken as correct."

Overcoming a Missing Owner: "The registered proprietor should file a declaration of loss and be issued with a new Certificate of Title."

How to begin, and continue, with a Marriage Settlement: "This Deed made the.....day of.....19.... Between A.B. of &c. (intended husband) and C.D. of &c. (intended wife) and X and Y of Wellington Solicitors (hereinafter called "the Trustees") which expression shall be deemed to include the said X and Y and each of them and their successors in business."

The Student as a Will Draftsman: "Clients usually ask for a very simple Will, but as a rule they may be very simply stimulated by suggestions until a Will of considerable length is required."

The Ultimate Search: "A Solicitor cannot safely take a title without searching the Registrar. If he does not, complications might set in."

On being told of these "howlers," another of our examiners supplied this gem from a Practice paper:

Judicial Experience: "The judge then sums up. He does this so that he may give the jury the benefit of his experience in shifting evidence."

Incidence of Death Duties.

Life Tenant and Remainderman.

By S. I. Goodall, LL.M.

In these days of heavy death duties, estates with small incomes, and assets not readily convertible into money, the incidence of estate and succession duties calls for more than usual care on the part of the personal representative and, by-the-bye, often causes chagrin on the part of the life tenant. The lay trustee and even the accountant, always a little baffled by a legal conundrum, find frequently the appropriate apportionment of duties among annuitant, life tenant, remainderman, and residuary beneficiary, more than ordinarily puzzling.

Apparently, in the past keeping of accounts by many executors and trustees, the fact that life tenant and remainderman under the will have often borne the relationship of parent and child has obliterated the very real conflict of interest in this regard. To hold the scales of justice between the conflicting claims of those successively entitled, has always exercised the judicial mind; and the incidence of death duties is no exception.

Apportionment of duties as between successors is governed by Section 31 of the Death Duties Act, 1921, and by two Appeal and Full Court cases respectively interpreting that Section, namely, *In Re Holmes deceased, Beetham v. Holmes,* (1912) 32 N.Z.L.R. 577, and *Caldwell v. Fleming,* (1927) N.Z.L.R. 145.

The section enacts (*inter alia*) that succession duty shall be payable by the personal representatives of a deceased in respect of a remainderman's interest and out of his succession; and yet the remainderman, having only a future interest, is not liable for the amount of his succession duty until his interest falls into possession, i.e., on the death of the life tenant or prior determination of the life tenancy: Death Duties Act, 1921, Sec. 31 (5).

The general rules regarding payment of estate and succession duties (both of which are included in the term "death duties") may be summed up:

1. As to the incidence of estate and succession duties, the terms of the will are paramount. Death Duties Act, 1921, Section 31 (2).

2. Estate duty is imposed on the general estate of a deceased, and, in the absence of a specific direction (in the will) to the contrary, is payable out of the corpus of the estate. *In re Holmes* (*sup.*).

3. Subject to any such direction as between successors, estate duty is payable by them *pro rata* out of their successions: Section 31 (4); *In re Holmes* (*sup.*).

4. Notwithstanding, a life tenant is not liable to pay any part of the estate duty out of his or her interest (because payment out of the corpus has already in effect reduced the income of the life tenant). *Ibid*; *Caldwell v. Fleming* (*sup.*).

Succession duty (subject to any such direction) is payable out of the successor's interest: Section 31 (3). Therefore (subject as above):

1. The succession duty on the life tenant's interest is paid out of his or her income during the first and subsequent years, if necessary, with interest thereon. *Ibid.*

2. The succession duty on the remainderman's interest is paid out of the corpus of the fund *Ibid.*

3. This has the unfortunate result of reducing the life tenant's income and he or she has a right of indemnity against the property in the remainder and his or her personal representatives will (on the life tenant's death) have a right of indemnity against the remainderman.

4. For the protection of this indemnity the life tenant can obtain a charging order in the Supreme Court: Section 31 (3) to (11).

In the books of account, then, the accountant finds he must open up a death duties account wherein he makes debit entries of all estate and succession duties paid by the executors, who must pay the duties first and adjust claims afterwards. The items of estate duty in the absence of any direction to the contrary, will thence be transferred *pro rata* to accounts of the several successions, the settled fund, the annuity, the specific devise or bequest (if any), and the residuary estate,—each bearing its proportion; but not the life tenant's income account, for that income has already been in effect reduced by due payment of the corpus of the settled fund of its proportion of the estate duty. *Caldwell v. Fleming* (*sup.*).

So, again, the items of succession duties in like absence of any direction to the contrary, will thence be transferred, each to be paid out of the succession in respect of which it is payable. The annuitant, the specific devisee or legatee, and the residuary beneficiary, again have each their accounts debited with the appropriate succession duty; but in respect of the settled fund the difficulty occurs. Succession duty is charged upon the life tenant's interest in the settled fund according to the expectation of life. Conversely, succession duty is charged upon the remainderman's interest in the same settled fund expectant upon the death of the life tenant according to the present worth or present value only of such interest in remainder.

The amount of the succession duty on the life tenant's interest will accordingly (in the like absence of any direction in the will to the contrary) require to be transferred to a personal account of the life tenant. To this same account will be credited from time to time the income from the settled fund. The income will set off the duty and interest thereon if necessary, unless the same be earlier paid by the life tenant, and the balance of income over duty and interest thereon will be payable to the life tenant.

The amount of the succession duty on the remainderman's interest in remainder in the settled fund has likewise to be duly paid by the personal representative, and in the like absence of a direction to the contrary is paid out of the corpus of the settled fund, with a resultant loss to the life tenant: *Caldwell v. Fleming* (*sup.*). The amount of the last-mentioned succession duty should then be transferred to a personal account of the remainderman; with this proviso: that as the successor to a future interest he is not liable for such duty until his interest falls into possession. The remainderman must be debited from year to year with interest upon the balance of his account for the time being, and the annual interest be credited to what may be called the life tenant's income, suspense account. The balance of this last-mentioned account cannot be paid out during the life tenant's lifetime as no funds are available; it becomes an asset in his estate and passes on his death to his personal representatives, the amount being meantime a charge on the interest in remainder in the settled fund.

It remains to point out that the right of indemnity of the life tenant may be supported by a charge granted by the Supreme Court on application by originating summons. The building up of an asset in his estate, however, may be poor consolation to a life tenant who is in the meantime deprived of part of the income which the testator intended him to have.

The anomalous results of this section of the Death Duties Act serve to remind the practitioner of the necessity of drawing the attention of an intending testator to these matters and of making in the will such a "direction to the contrary." Few testators leaving life interests in their estate or in a settled fund, are aware of the results of failure to make such a direction; and still fewer would fail to appreciate the necessity therefor.

In drawing such a provision for insertion in a will, the draftsman will recollect that the words "testamentary expenses" in such case include estate duty but not succession duty (*In re Holmes, sup.*) and the words "death duties" may include both estate and succession duties, *Macklow v. Hesketh and others*, (1927) G.L.R. 143.

In adapting English precedents to New Zealand conditions, care should accordingly be taken to ensure, where such is the testator's intention, that duties of both kinds are included in the provision. The following clause, based on that given in the *Encyclopaedia of Forms*, Second Edition, Vol. XVIII, p. 685, No. 106, covers funeral and testamentary expenses and succession duties, and applies to all gifts under the will:

> "I DECLARE that the estate duty all succession duties and other duties (if any) and funeral and testamentary expenses payable on my death in respect of all the estate both real and personal hereinbefore disposed of shall be paid out of my residuary estate in exoneration of the other respective property comprised in the several successions hereunder."

A New "Running Down" Case.

Aeroplane and Fishing-Boat

Apparently the aeroplane is beginning to show promise of providing the Courts with a type of "running down" case that even Mr. Terrell has not taken into consideration. The pioneer is Flight-Officer W. B. J. Sharpe, who, at a court-martial in Belfast recently, was charged with negligently flying an aeroplane so as to strike a fishing-boat on Lough Neagh, and with having manoeuvred his aircraft in a manner likely to cause accident. He was acquitted on the second charge by the Court, but decision on the other charge was reserved. This is probably the first "running-down" of a fishing-boat by an aeroplane, though pedestrians and property on land have suffered injury from a similar agency. The risk from the negligently-driven aeroplane is as yet inconsiderable in this country, but, as private planes and owner-drivers increase, it may in time have a substantial effect on the amount of litigation.

London Letter.

Temple, London.
10th August, 1931.

My Dear N.Z.,

The State of the Lists. The New South Wales Constitutional Appeal still remains pending; I see you already have read of it, in its course in Australia, in an earlier number of the JOURNAL; but even so, just so soon as I can get hold of the transcript, I mean to develop for you the argument, on Petition for Special Leave to Appeal, in a later article. Otherwise, the state of our lists, as we closed down a fortnight or so ago, was much as before: Appellate Courts well up to their work, Courts of First Instance, especially in the K.B.D., miles behind theirs. With the Chancery Division lists I am less familiar; a recent bout before Farwell, J., son of the old man, gives me to suppose that the Judges there must be fairly abreast of their work, as our idea of abreastitude goes on the other and nowadays more dilatory side. Farwell, J., it may be mentioned in passing, showed himself to be an admirable Judge, though I have hopes, next term, of demonstrating (by the usual means) that his judgment was wrong in this instance.

Leader of the Bar Retires. I am not deaf to legal matters, but more than any of them there interests me, at the moment, the personal matter of the retirement from the Bar of Sir Thomas Hughes, K.C., leader of the Chancery Bar and, I should have said, leader in permanence of the whole Bar. Of his admirable leadership it is not necessary here to speak; the General Council of the Bar may corporately be given the credit of its successes and its defaults in managing our affairs. Of his acumen as an equity lawyer I know little enough; but of his personality I suggest your appreciation, inasmuch as if there is any good to be said of the typical English Barrister, Hughes most admirably typified the English Bar at its less startling and more solid and sound moments. Be sure to see some portrait of him, before he is lost in the oblivion of retirement; his face will remind you of all which you consider most modest and yet most humourous, most sensible and least pretentious, in the lawyer of the day. Perhaps I have a special reason to like him; but I doubt if I am misled by this. In 1912 I was playing golf on a Common, and inadvertantently used expressions to my partner which resulted in my becoming engaged to be married. On the Common was also a newly-erected building, inhabited by a gentleman who made it his business to buy and develop sites at inconvenient spots, so that he might be rewarded for undeveloping them or discontinuing development. But this time he had gone too far, and he had built his ugly house without reckoning on the need of approaching it by a roadway. By the Common, also dwelt a Solicitor, representative of the local feeling, and, as my partner's father was locally much respected by all, I received as a further result of my impulsive conversations, a Case or Opinion of Counsel, asking as to the law applicable to rights of way and injunctions in such circumstances. The papers were marked "One Guinea," and I got married on that guinea, which, by the time we had finished the action, came to about £256, I believe, including clerk's fees. And we won the case, before Joyce, J., partly upon our merits, partly upon the superb character of the original Opinion, and partly because Hughes, K.C., who led me, was so admirably at home with the Judge, while Younger, K.C., who led for the Defence, seemed to infuriate him at every point. The case lasted ten days; ten imperturbable days, so far as my leader was concerned: suave, accomplished, easy-going, eminently respectable, and always genial and genuine. He left me to make the final speech; what I may have said, goodness alone knows; I have only a recollection of a subdued buzz going in my head, as, in the Court the last spasms of the altercations continued between Lord Blanesburgh, as he now is, and the famous Joyce, J. I think the story, for all its egoism, is worth telling, in the context; for those were during the most palmy days of the principal activity of Hughes, K.C., and the picture of him, confronting the white-haired, squirearchical and his-bark-is-worse-than-his-bite Joyce, J., in opposition to the brilliant and incessantly bubbling Younger, K.C., has probably the most historical importance and truth, so far as their distinguished personality is concerned.

By the way, you may not have seen a rather happy interview, in our London *Evening News* with Sir Thomas Hughes, upon his retirement. Sir Thomas admirably challenges the contention that we produce no great lights at the Bar these days; and his answer is authorative and in a way convincing. It will interest you to know that he instances, in his observations for the Defence, Simon, Wilfred Greene (as eminent in scholarship as in forensic attainment) Stewart Bevan and Norman Birkett.

Sir John Simon, K.C. The outstanding event, incident, development and tendency of the current period of legal affairs, if not national affairs, may be briefly indicated in three words: Sir John Simon. Hitherto famous as a brilliant advocate and a somewhat disappointing politician, a whimsical character, he has recently developed into something so significant that nothing can be satisfactory unless he takes a leading part in it. Indian crises, airship disasters, upheaval and re-settlement of politicial parties: in all these we have recently seen him; not grasping but by common consent made to take, a leading, if not the paramount, part. "Paramount" suggests a wild idea: even this critical period in the history of the Films might take a turn for the better, in our regard, if Sir John could be featured in it. I need not retail to you the numerous occasions of late, in which the name has appeared at the head of the list; I need only add that which possibly you do not recall, though I have before told you: in the midst of all his absorbing, intellectual activities, which are such these days as might fully engage the whole powers of half-a-dozen giants, he yet has time to be Treasurer of the Inner Temple, and, as all agree, to devote to that function such activity and successful activity as equal, if it does not surpass, the best record of his predecessors in that office. This, then is a most remarkable man: more remarkable at his second appearance on our professional earth, than at his first; and more vital and mentally vivacious after his farewell to the Bar, then he was before it.

A High Court Judge, amongst his warmest admirers, has told me (specifically for communication to you in this letter) that, in his not uninformed view, the greatness and success of Simon may be very largely, if not altogether, attributed to the fact (less as the *causa causans* than as the *sine qua non*) that he has a perfectly miraculous constitution, "such" said my informative Lord, "that he has never eaten anything in his life which he has not digested in ten minutes!

Yours ever, INNER TEMPLAR.

Canterbury's Annual Golf Match.

The Law Society President Entertains.

On September 15, members of the legal profession in Canterbury were the guests of the President of the Canterbury Law Society, Mr. H. C. D. van Asch, and Mrs. van Asche, at the Shirley Links, when the annual golf match for the W. J. Hunter Cup was played. The winner was Mr. R. L. Ronaldson, of Messrs. Hunter and Ronaldson, with the good score of 83–10–73, Mr. L. A. Dougall being runner-up with 78–4–74. Former winners were Mr. E. J. Corcoran (1925), Mr. A. T. Donnelly (1926), Mr. D. E. Wanklyn (1927), Mr. T. A. Wilson (1928), Mr. G. W. S. Smithson (1929) and Mr. C. A. Stringer (1930).

After the match, the players, their wives, and members of the profession, were entertained at tea at the golf-house by Mr. and Mrs. van Asch. Mr. van Asch then thanked Mr. Hunter for giving the cup for annual competition, and congratulated this year's winner. Mrs. van Asch then presented the cup to Mr. Ronaldson, and a miniature cup to Mrs. K. Gresson, winner of the ladies' putting contest. Among the guests were Mrs. A. S. Adams, Mr. Justice and Mrs. Kennedy, and Messrs. H. A. Young, S.M., and H. P. Lawry, S.M.

The *Press*, in describing the happy gathering, was not restrained from brightly remarking: "Long before noon, play began, and all day learned counsel were to be seen addressing their balls on the tees, examining and cross-examining their lies—earthy, not oral;—searching in the creek, pleading, forcibly, with their balls in the bunkers, and reading the local rules and regulations, from which they knew there was no right of appeal."

Bills Before Parliament.

Companies Empowering Amendment. (Mr. Smith). In an Explanatory Memorandum it is pointed out that by the Companies Empowering Act, 1924, provision is made for the issue by companies registered under the Companies Act, 1908, of what are known in the Empowering Act as "labour shares." The so-called "labour shares" have no nominal value and they are not part of the company's capital. Whatever benefits they confer on their holders are voluntarily conferred by the company's memorandum or articles of association. These benefits may be a defined share in the assets of the company, or a voice in its management, or both such advantages. The objects of the present Bill are (1) to enable a company to issue labour shares without the necessity of altering its memorandum of association, and (2) to repeal section 4 of the Act, which requires the Court of Arbitration to inquire into the merits of any scheme for the issue of labour shares. The issue of labour shares is not an alternative to any other benefits that the workers may be entitled to claim, but is something over and above any other rights. The reference to the Court can therefore serve no useful purpose, and the only effect of the section now proposed to be repealed is to tend to discourage companies from taking steps towards the issue of "labour shares" to their employees.—Cl. 3. Consequential amendments S. 2 of the 1924 Act.—Cl. 4. Repeal of S. 4 of same.

Defence Amendment. (Hon. Mr. Cobbe). Cl. 2. Provisions as to transfer from Territorial Force to Reserve of members of Territorial Force on June 1 of year of attainment of age of 35.—S. 5 of Defence Amendment Act, 1920; and S. 9 of Amendment Act, 1915, repealed.

Native Land. (Hon. Sir Apirana Ngata). Clauses 1–63:, Consolidating all existing legislation affecting Native Land but (Cl. 564) not applying in part to any Native reserve, or land subject to the East Coast Native Trust Lands Act, 1902; and (Cl. 565) excepting the provisions of any of the following enactments, or of any amendments thereof: The Native Reserves Act, 1882: The Westland and Nelson Native Reserves Act, 1887: The West Coast Settlement Reserves Act, 1892: The Mangatu No. 1 Empowering Act, 1893: The Kapiti Island Public Reserve Act, 1897: The East Coast Native Trust Lands Act, 1902: The Fencing Act, 1908: The Mining Act, 1926: The Noxious Weeds Act, 1928; and this Act, in its application to any land which is subject to any of those enactments, to be read subject to the provisions of that enactment.

Rules and Regulations.

Discharged Soldiers' Settlement Act, 1915. Amended Regulations.—Gazette No. 64, September 3, 1931.

Fisheries Act, 1908. Regulations for trout, perch and tench fishing in the Auckland, South Canterbury and Wellington Acclimatization Districts.—Gazette No. 64, September 3, 1931.

Fisheries Act, 1908. Amended regulations for Trout, Perch or Tench fishing in the Southland Acclimatization District.—Gazette No. 66, September 10, 1931.

Fisheries Act, 1908. Order-in-Council revoking regulations as to licenses to fish for Atlantic Salmon (Salmo Salar) in the Southland Acclimatization District and making others in lieu thereof.—Gazette No. 66, September 10. 1931.

Hawke's Bay Earthquake Act, 1931. Regulations making provision regarding the contributions to be levied by the Waipawa Hospital Board from contributory Local Authorities for the year 1931-32.—Gazette No. 61, August 20, 1931.

Inspection of Machinery Act, 1928. General Regulations relating to examinations for certificates under the Act.—Gazette No. 64, September 3, 1931.

Naval Defence Act, 1913. Amendments to the Regulations for the government and payment of the N.Z. Division of the Royal Navy.—Gazette No. 64, September 3, 1931.

Post and Telegraph Act, 1928. Amended Postal Note Regulations. Gazette No. 61, August 20, 1931.