New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes"

Wolcum be ye that arn here,
Wolcum alle and mak good chere,
Wolcum alle another yere,
Wolcum, Yöl!
—*Sloane MSS, xv. Century.*

Vol. VII. Tuesday, December 22, 1931. No. 22

A Happy Christmas!

To the thoughtless, the above wish may seem out of harmony with the conditions of the world about us at the present time. We refuse, however, to be stampeded into the gloomy pessimism of those who, late and early, are endeavouring to entice us all to a belief that everything is bad in this worst of possible worlds. Only the other day, we observed an example of this twisted thinking. A close observer of commercial conditions stated that during the last few weeks trade had commenced to look up. "That means, of course, that trade is now on the flat of its back," was the rejoinder of one of the artificers of depression who was standing nearby. Such people not only lack ordinary vision, without which mankind could never rise beyond the muddy rut of the commonplace, but they fail also to read aright the lesson of history that teaches that mankind has ever triumphed over adversity whenever it has had the will to do so.

In the glow of charity and gladness with which human nature inevitably finds itself surrounded at the Christmas season, the traditions that we have inherited from all the Christian centuries urge us to rejoice and be glad. As Sir Walter Scott says:

"*England was Merrie England when*
Old Christmas brought his sports again.
'Twas Christmas broached the mightiest ale,
'Twas Christmas told the mightiest tale;
A Christmas gambol oft would cheer
The poor man's heart through half the year."

When Sir Walter wrote *Marmion*, from which these lines are quoted, England was passing through a period of most acute depression. He did not dwell upon that fact: he reminded his contemporaries that times of adversity and prosperity come and go in cycles, as every student of history knows. Now, in the light of the coming Yule-tide, we have an opportunity to approach the task of readjusting our own outlook that the prophets of pessimism have all but obscured for us. The fact that variations of national and world conditions do appear, should remind us that, if we are now passing through a period of depression, it follows logically that the heights are ahead and it is only a question of time before we commence to ascend their pleasing slopes. We remember the distress that followed the Napoleonic wars; but the world recovered. Later on, prosperity waned. The following resolution is not without interest:

> "Resolved: That the continuous and increasing depression of the manufacturing, commercial, and agricultural interests of this country, and the widespread distress of the working classes, are most alarming—manufacturers without a market, shipping without freight, capital without investment, trade without profit, and farmers struggling under a system of high rents, with prices falling as the means of consumption by the people fail; a working population rapidly increasing, and a daily decreasing demand for labour; union houses overflowing as workshops are deserted; corn laws to restrain importation, and inducing a starving people to regard the laws of their country with a deep sense of injustice."

That resolution was not passed this month or this year, however familiar its terms may be to 1931 ears: it was passed by the Common Council of the City of London in 1842. Later still, the expansive prosperity of the latter part of the century blotted out remembrance of those "hungry forties." Hard times have been faced before. Now, as in the past, as the result of the exercise of patience and cheery fortitude, we will eventually "come up smiling." It is not by persistence in gloom, that anyone will hasten the coming of brighter days.

It is, therefore, in no merely conventional phrase that we wish all our readers: "*A Happy Christmas.*" If the care-free jollities of other years cannot be as widespread as in time of yore, the coming vacation will benefit us all in proportion to our will to enjoy it. Holidays are medicine for the mind, as for the body. Moreover, the fact of Christmas is, in itself, a cause for gladness; and we refuse, for our part, to obscure its perpetual message and its meaning at the behest of those who bid us be melancholy because of transitory conditions. We hope that the whole of the profession will enjoy the coming holidays in the spirit invited by the old song of 1530:

"*Lett no man cum into this hall*
Grome, page, nor yet marshall,
But that sum sport he bryng withall;
For now ys the tyme of Chrystmass!

Yff that he say he can not sing,
Some oder sport then let him bring
That yt may please at thys festyng;
For now ys the tyme of Chrystmass!

Yff he say he can nowght do,
Then for my love aske hym no mo,
But to the stokkis lett hym go;
For now ys the tyme of Chrystmass!"

Surely, that is the spirit in which each of us should approach the coming vacation. To fail to do so, is to line oneself up with the kill-joys who, in 1644, placed any observance of Christmas under the ban of the law in England and in Scotland, which is a striking insight into the excesses into which pessimism can betray itself, and a finger-post to a danger to which some would lead us to-day. Macaulay tells us:

> "Christmas had been, from time immemorial, the season of joy and domestic affection, when families assembled, when children came home from school, when quarrels were made up, when carols were heard in every street, when every house was decorated with evergreens, and every table was loaded with good cheer. At that season all hearts not utterly destitute of kindness were enlarged and softened. . . . The spirit in which the holiday was kept was not unworthy of a Christian festival. The Long Parliament gave orders, in 1644, that the twenty-fifth of December should be strictly observed as a fast, and that all men should pass it in humbly bemoaning the national sin which they and their fathers had so often committed on that day by romping under the mistletoe, eating boar's head, and drinking ale flavoured with roasted apples. No public Act of the time seems to have irritated the common people more."

In pursuance of this Statute, the public crier paraded the streets before December 25, ringing his warning bell, and calling out: "No Christmas!" "No Christmas!" Tradesmen were compelled to keep their shops open on Christmas Day; markets were held under legal penalty for refusal; decorations (as with holly and ivy) were strictly proscribed; the holding of religious services on that day was punishable by fine or imprisonment; all feasting was penalised. The once Merrie England thus became for many years, until the Restoration, the only country in the world where the making of plum-pudding or the eating of a mince-pie was a crime against the law.

The lovers of the "old style" Christmas were exhorted to possess their souls in patience. But, in this case, patience was a nasty medicine: it was one thing to prescribe it, but quite another thing to take it. And, under Cromwell's iron rule, there were many sturdy English and Scots folk who dashed the mixture to the ground. For instance, we learn from the readiest chronicle to our hand:

> "Ipswich, Oxford, and Canterbury particularly distinguished themselves in defence of Christmas and Christmas pudding. As the people grew bold, the authorities waxed cautious, and, in their terror lest the rioting (for it grew to that) should spread to London, began to make concessions. A 'miscreant' (so they called him) found guilty of decorating his room with holly and ivy, was released by his captors and restored to liberty. The most important of the Christmas riots was that which set all Canterbury in an uproar in December, 1647. The rioters came off victorious, and the mayor had to seek safety in flight; the mob following, and, failing to catch him, burnt him in effigy in front of the house in which he had taken refuge. Then they elected a new mayor, took formal possession of the town, and released from prison all the 'evil-doers' who had been imprisoned for 'Christmas-sing.' Some thousands of Cromwell's soldiers had their hands full trying to restore order, and to reinstate the ejected mayor. For three whole days plum pudding was eaten openly, carols sung, and churches thronged; then the Puritans triumphed. But Canterbury had celebrated Christmas once again 'in the good old style,' and drew consolation from the fact."

Some years later, in 1657, the diarist, Evelyn (like Sir Walter Scott, a professional brother, by the way), recounts the manner of the enforcement of the law that abolished Christmas:

> "25 Dec. I went to London with my wife, to celebrate Christmas-day. Mr. Gunning preaching in Exeter-Chappell, on 7 Micah 2. Sermon ended, as he was giving us the holy sacrament, the chappell was surrounded with soldiers, and all the communicants and assembly surpriz'd and kept prisoners by them, some in the house, others carried away. It fell to my share to be confin'd to a room in the house. . . . In the afternoon came Col. Whaly, Goffe, and others, from Whitehall, to examine us one by one; some they committed to the Marshall, some to prison. When I came before them they took my name and abode, examin'd me why, contrarie to an ordinance made that none should any longer observe the superstitious time of the Nativity (so esteem'd by them) I durst offend. . . . With frivolous and ensnaring questions, and much threatening; and finding no colour to detain me, they dismissed me with much pity of my ignorance. These were men of high flight and above ordinances, and spake spiteful things of our Lord's Nativity. As we went up to receive the sacrament the miscreants held their musketts against us as if they would have shot us at the altar, but yet suffering us to finish the office of Communion, as perhaps not having instructions what to do in case they found us in that action. So I got home the next day, blessed be God."

We feel that those who would now distract us from the due celebration of the joys of Christmas because they wish our minds to dwell interminably upon present world conditions, are not far away in spirit from the framers of the extraordinary statute which was so harshly enforced in Cromwellian days. The remains of Christmas celebrations in England had to be rescued from the Puritans at the Restoration. They were rescued again from the Utilitarians by Dickens; and they may have to be rescued again from the modern prophets of woe who, if we do not have a care, would deny us participation in any Christmas happiness.

We feel that the hastening of a return to prosperous times is largely in our own hands: all depends upon the spirit in which we confront our difficulties. This was well expressed by the President of the Law Society in England at its recent meeting at Bournemouth. Mr. Martineau said to his brother Solicitors:

> "Do whatever you can to preserve your efficiency; be tactful in your charges, and above all, set up and fight for a new standard of help—help to the community, help to distressed brethren and clients, and help to everyone in difficulty. Whatever is going wrong, let us keep up a comradeship of laughter. Keep smiling all the time if you can, even if you are having your teeth out."

We should all approach the coming year with similar sentiments, and carry into it the Christmas spirit in which all men of goodwill participate. To drift towards pessimism, may lead us much farther than we reckon: the excesses of the "kill-joy" tendencies of the times to which we have referred are a ready example of what can happen if men give themselves up to gloom.

Consequently, we look forward to the coming year with the pleasurable feeling that indications all around us point to a return of more prosperous times, with increase of work and happier conditions for everyone. In terms of the healthy optimism expressed by the President of the English Law Society a few weeks ago, we join the members of the profession throughout the Dominion in respectfully wishing their Honours of the Supreme Court and of the Court of Arbitration, and the learned Magistrates in their own Courts, "A very Happy Christmas, a most pleasant vacation, and good health and cheer in 1932!"

To our readers, to those contributors who have assisted us all with their valued papers, and to the members of the profession generally, we extend similar good wishes, trusting that the coming holidays will refit them for the receipt of increasing work in the months to come,

> *"And flood with noontime splendour*
> *The whole of the coming year."*

Acts Coming into Force.

Of the past year's legislation the following Acts will come into force on January 1, 1932:

(a) **The Native Land Act, 1931, No. 31.**

(b) **The Native Purposes Act, 1931, No. 32** (except S. 115, giving power to a Maori Land Board, the Native Trustee, the East Coast Commissioner, and every other statutory trustee, to reduce, remit or extend time for payment of rent, which became operative on November 11, 1931.

(c) **The Law Practitioners Act, 1931, No. 46,** excepting S. 38: (rules in respect of admission of candidates as barristers or solicitors, which is deemed to have come into force on January 1, 1931).

All the above Acts are consolidating measures.

Supreme Court.

Blair, J. September 2; October 5, 1931.
Wellington.

RE CATHIE (DECEASED), GUARDIAN TRUST AND EXECUTORS CO. OF N.Z. LTD. v. CATHIE & ORS.

Will—Construction—Hotchpot—Death Duties—Bequest Out of Residuary Estate of Certain Pecuniary Legacies to Daughters and Certain Annuities Followed by Clause Directing that after Provision made for such Legacies and Annuities the Residue should be Divided Among Children (Named) in Equal Shares—Subsequent Direction that any Advances to Sons or Daughters should be Deducted from their Respective Expectant Shares—Codicil Bequeathing Fixed Sum to Each Child out of Residue after making Provision for the Pecuniary Legacies and Annuities—Such Sums to be "Fully Provided and Set Aside" Before Specific Bequests Thereinafter Contained Became Effective—Whether Widow's and Children's Shares Free of Deduction for Duty—Subsequent Bequests to Charities—Death Duties Act, 1921, S. 31.

Originating summons for the determination of certain questions arising in connection with the will and codicil of Charles Cathie, deceased. The deceased left a very substantial estate. His family comprise a widow and eleven children. By his will dated November 11, 1926, he gave his wife certain legacies and also a free house for life. The remainder of his estate he left in trust for sale and conversion and directed his trustees out of the proceeds to set apart sufficient to provide for an annuity to his wife and certain other relatives and to pay certain other annual payments. The will then provid0d: "and upon further trust out of my said residuary trust estate to pay to each of my daughters the sum of £100 on their attaining the age of 40 years or upon their marriage whichever event shall be earlier." After certain further provisions which were not material the will provided: "And I devise and bequeath my said residuary trust estate after my trustee shall have made provision thereout for the annuities and legacies heretofore provided for to my eleven children (naming them) in equal shares." Then followed provision for the issue of deceased children. On cesser of the annuities or other annual payments the annuity fund fell into residue and became distributable accordingly. The will concluded with the following clauses: "And I direct and declare that any advance or payments that I may have made or may hereafter make to or on account of any son or daughter of mine shall be treated as an offset to or payment on account of the expectant share of any such son or daughter of mine and that no interest whatever shall be charged or levied in respect of any such advance or payments And I direct and declare that my said trustee shall be justified in taking as a correct record of any such advances or payments the debit balances as shown against my respective sons or daughters or any of them in my ledger." In his lifetime the deceased made advances to some of his sons in the nature of gifts. As to some of his sons there were entries in deceased's ledger showing advances or loans without interest. There were five daughters, three of whom were married, and each married one was given £100 on marriage. The two unmarried daughters each received a gift of £100, one on attaining 40 and the other shortly before doing so. When the deceased made his will in November, 1926, all his married daughters had married and each of them had received £100 as a wedding gift. One of them was married only two months before the will was made. The two unmarried daughters received these gifts subsequent to the making of the will, one gift being made prior to the execution of the codicil (to be hereinafter mentioned) and the other subsequent thereto. In addition to the above the testator in his lifetime made other gifts or advances to his daughters. Every one of his children at some time or other in his or her lifetime was given the sum of £500. The total gifts or advances made by testator to all his children would reach several thousands of pounds. On October 1, 1929, subsequent to the making by him of all the gifts or advances to his children (except one gift of £100), the deceased made a codicil to his will altering the scheme of distribution of his estate. By the codicil he revoked three other codicils he had made. The codicil recites as follows: "And Whereas by my said Will I devised and bequeathed my residuary trust estate equally among my eleven children in my said Will named And Whereas I am desirous of limiting the share of each of my said children or of the children of any child of mine who may have died in my lifetime to the sum of Three thousand five hundred pounds each I Devise And Bequeath to each of my said children the sum of Three thousand five hundred pounds out of my residuary trust estate after my trustee shall have made provision thereout for the annuities and legacies provided for by my said Will And if any child of mine shall die in my lifetime leaving issue him or her surviving I Declare that such issue shall take equally between them the sum of Three thousand five hundred pounds which his or her parent would have taken had he or she survived me And I Declare that each of the Eleven sums of Three thousand five hundred pounds above referred to shall be fully provided for and set aside before any of the bequests hereinafter contained shall become effective." Then followed some alterations in small specific legacies to relatives. The codicil then devised and bequeathed the balance of "my residuary trust estate, after providing for and setting aside the said eleven sums of Three thousand five hundred pounds" upon trust to divide "such balance" of his residuary trust estate in eleven parts and pay one of such parts to eight named charities and three parts to a ninth charity. The principal questions asked in the originating summons, were the following: (a) Whether the £100 gifts to each daughter were destroyed by the testator's gifts to his daughters? (b) Whether the gifts in the codicil of £3,500 to each child was destructive of the legacy of £100 to each daughter as provided by the will? (c) Whether the hotchpot clause in the will was operative for the benefit of the charities mentioned in the codicil? (d) Whether the devise and bequest in favour of the widow and the bequests in favour of the children or any of them were free of legacy duty?

Held: Pecuniary legacies under will to daughters not adeemed by advances in testator's life-time. Hotchpot provision not applicable to pecuniary legacies to daughters under will nor to any legacies to children under codicil. Bequests not free of duty except where expressly so directed. Direction in codicil that legacies were to be "fully provided for and set aside" before payment of charitable bequests not a sufficient direction; nor was the empowering of the trustee to raise death duties by way of mortgage, a "direction" exonerating widow's and children's shares from death duties.

C. H. Treadwell for plaintiff.
Cornish for defendants C. W. Cathie and Ors.
Putnam for A. G. & R. McG. Cathie.
Hay for A. J. Cathie and ors.
Spratt for Baptist Union of New Zealand
J. S. Reed for Sudan United Mission.

BLAIR, J., said that as to the two first questions relating to the daughters' legacies of £100 each payable on attainment of 40 years of age or marriage whichever event should first happen, it was conceded by Mr. Spratt and Mr. Reid, who represented the charities, that the daughters' legacies were not adeemed. That admission appeared to His Honour to have been properly made. The question of ademption was one of intention in all cases. In the codicil the testator, after reciting that he had in his will equally divided his residuary estate and that he was desirous of "limiting" the share of each of his said children or their issue to the sum of £3,500 each, devised and bequeathed such sum out of his residuary trust estate after the trustee "shall have made provision thereout for the annuities and legacies provided for by my said will." Except in the case of one daughter, every one of them had received birthday or wedding gifts of £100 prior to the execution of the codicil, so that it might be taken that the £100 legacies to each daughter were intended to be in addition to any of deceased's lifetime gifts.

The deceased by his will gave certain legacies to his wife before creating the trust for sale and conversion which created the residuary estate. From the residuary estate deceased gave certain annuities. The only legacies in the will were those to the daughters of £100 each and one (also of £100) to a deceased brother. In the codicil that legacy of £100 was expressly revoked and a legacy of £100 to a cousin's son substituted. If the deceased had by the codicil intended to revoke the daughters' legacies the use of the plural "legacies" was inapt because there was only one legacy in the will if the daughters' legacies were treated as adeemed. Moreover, seeing that the deceased expressly revoked the only other legacy remaining other than daughters' legacies, the direction in the codicil to provide for legacies would in view of that revocation be meaningless, if it did not refer to the daughters' legacies.

The effect of applying the hotchpot clause in the will had the result of increasing the residue divisible among the charities by several thousands of pounds. Each of the children at one time or another during their lives received a gift or gifts totalling £500. Deceased gave each of them that sum. The hotchpot clause so far as eleven sums of £500—an aggregate of £5,500—were concerned would have been inoperative as between the children themselves because each got the same. But if the hotchpot clause was operative in favour of the charities then not only that £5,500 but various other gifts or advances by the testator to his children, some of them very substantial, would be deducted from the children's shares and increase the amount divisible among the charities. One son who was not physically strong received, over and above the £500 each child received, gifts or advances to the extent of £1,100, and another son, £1,500. In the case of the last-mentioned son he would receive from his father's estate only £1,500 if the hotchpot clause were operative in favour of the charities. Mr. Spratt acting on behalf of the charities conceded that the £500 each received was not liable to be brought into hotchpot and said that he would not have claimed that on the interpretation of the will alone. But it seemed to His Honour that to be consistent he must claim that the eleven £500 lifetime gifts were liable to be brought into hotchpot if such clause was operative notwithstanding the codicil. It was true that on the will alone it was immaterial whether, so far as concerned the eleven £500 gifts the clause was or was not applicable, because in the circumstances it made no difference to the children *inter se* whether the clause were or were not operative. It might be that some of the advances made by the testator were not gifts but mere loans without interest repayable at the testator's death, and as such it might be that the borrowers were liable to account to the estate. His Honour was not in the present proceedings concerned with that question because it was one of fact as between any child as to whom the estate might make a claim for repayment. His Honour was concerned not with pure debts to the estate, if there were any such by children of the testator, but with gifts or advances as to which the hotchpot clause if operative applied.

The clause appeared in a will which divided the whole of the residuary estate equally among eleven children. Its purpose was to effect an absolutely equal division among all the children. It spoke of "advances or payments" made or thereafter made by testator to any of his children, and required such to be treated as an offset to or payment on account of the expectant share of any child, no interest being chargeable. The codicil recited that the testator was desirous of "limiting" the share of each of his children or the children of any deceased child "to the sum of £3,500 each." Then immediately followed a specific devise or bequest "to each of my children the sum of Three thousand five hundred pounds out of my residuary trust estate" after provision had been made for the annuities and legacies in the will. The testator then repeated that the children of a deceased child should take equally between them "the sum of Three thousand five hundred pounds" which the parent would have taken had he or she survived the testator. If the hotchpot clause was to be treated as applicable to those £3,500 gifts, then in the case of one son his share would be only £1,500. The testator when he made the codicil had (with the exception of the sum of £100 to one daughter) made all the advances or gifts as to which the hotchpot clause would have been applicable and if he intended that all such were to be deducted for the benefit of the residuary charities the words he used were inapt. His direction to his trustee was to provide each child or deceased child's children *per stirpes* with £3,500 out of the residuary estate immediately after providing for the annuities and legacies. That direction is unqualified. Later in the codicil the testator provided for the devise or bequest to the charities and the words there used were apt only to eleven specific sums of £3,500. The testator said: "And I Devise and Bequeath the balance of my residuary estate after providing for and setting aside the said eleven sums of Three thousand five hundred pounds." Significance attached to the repetition of that express reference to eleven sums of £3,500. If the contention of the charities were upheld the £38,500 so directed to be provided would be reduced by something over £8,000. When dealing with the method of division amongst the charities the testator used the words "such balance" in reference to what would be left of his estate after the annuities, legacies, and eleven sums of £3,500 were provided for. That "balance" was the sum the charities were to divide and the contention of the charities involved interpreting that as the sum remaining after the annuities, the legacies, and the eleven sums of £3,500, each reduced as provided by the hotchpot clause, were provided for. It seemed to His Honour that a more reasonable construction and one more consonant with the testator's intentions was to treat the hotchpot clause as inapplicable and the gifts to the children of £3,500 as specific legacies unaffected by the hotchpot clause. That construction treated the hotchpot clause as applicable only to a situation which arose under the will itself but did not arise for the benefit of the charities under the codicil by reason of the radical alteration in the scheme of distribution provided by the later instrument.

It was said during the argument that the testator in his lifetime was a generous supporter of missions. Missions figured very prominently in the charities which benefited under the testator's will. It might be and probably was the case that the testator in his lifetime made gifts to missions or to some other of the charities mentioned in the codicil. The function of a hotchpot clause was to ensure equality and if it were in the present case made applicable to the children, the charities to the extent that they might have benefited in testator's lifetime were not called upon to bring previous benefits into hotchpot. It would be seen that from an examination of the will and codicil alone His Honour had arrived at the conclusion that the hotchpot clause was not applicable to the sons' and daughters' gifts under the codicil.

His Honour next examined the authorities quoted for the purpose of seeing whether they called for any modification in this view.

After referring to **Meinertzagen v. Walters,** 7 Ch. 670; **In re Heather, Pumfrey v. Fryer,** (1906) 2 Ch. 230; **In re Holmes,** 22 N.Z.L.R. 895 and **In re Cramond, Cole v. Cramond,** 31 N.Z. L.R. 1, His Honour said that he did not think that any of the authorities cited constrained him to come to any conclusion different from that to which he arrived on an examination of the will and codicil alone. His Honour stated that it was not necessary to answer the fourth and fifth questions in the summons. It might be that as to some of the children of testator a claim might be made that certain payments made by testator were really loans. If any such question should arise it would depend mainly on questions of fact and such questions could not be disposed of in originating summonses.

The sixth question in the summons asks whether the devise and bequest in the favour of testator's widow and the bequests in favour of testator's children or any of them were free of estate and succession duty. His Honour referred to Section 31 (2), (3) and (4) of the Death Duties Act, 1921, stating that the answer to the sixth question in the originating summons depended upon the question whether the will or codicil contained any directions as to payment of duty. The only provisions in the will directly referring to death duties were the following: (a) The annuity to testator's sister Jessie Cathie of £60 was made "free of all duties charges taxes and expenses whatever." (b) There was like provision as to the annuity of £52 for the testator's sister Elizabeth Elliott, except that taxes were not mentioned. (c) Power was conferred on the trustee to raise on mortgage of any part of the estate such sum or sums as might be necessary for the purpose of paying or discharging "such estate succession or other duty as may be assessed under the Death Duties Act." The codicil contains no reference to the subject of death duties. His Honour could not spell out of the clause empowering the trustee to raise death duties by way of mortgage a "direction" to pay death duties to the exoneration of the widow's and children's shares. The testator had in respect of certain annuities exempted them from duties, and significance attached to the fact that he had omitted so to do in the case of the widow's and children's shares. Mr. Cornish submitted that the provisions in the codicil requiring that the eleven sums of £3,500 "shall be fully provided for and set aside" before the charitable bequests became effective constituted a sufficient direction. His Honour did not think so. In **Jarman on Wills,** (7th Ed.) Vol. III, p. 1796, it was said "a gift of a 'clear' sum or annuity involves an exemption from legacy duty. But a legacy of a 'full' amount does not carry exemption from duty if the word "full' refers to other possible deductions."

In re Holmes, Deceased, Beetham v. Holmes, 32 N.Z.L.R. 577, decided that a life tenant was not liable for a share of estate duty but was liable for a share pf succession duty. The will did not contain the usual general directions to the trustee to pay "testamentary" expenses, so that **Caldwell v. Fleming,** (1927) N.Z.L.R. 145 had no application.

The questions in the originating summons were answered accordingly.

Solicitors for plaintiff: **Treadwell and Sons,** Wellington.

Solicitors for 1st and 2nd sets of defendants: **Fell and Putnam,** Wellington.

Solicitors for 3rd set of defendants: **Mazengarb, Hay and Macalister,** Wellington.

Solicitors for the Baptist Union: **Morison, Spratt and Morison,** Wellington.

Adams, J. September 11; 28, 1931.
Westport.

CONLON AND ANOR. v. THE BLACKWATER MINES LTD.

Workers Compensation—First Aid Fees—Claim by Doctor for "First Aid" Attendance on Worker—Employer Not Insured—Injured Persons Members of Medical Association and Entitled to Such Medical Attendances Free of Charge—Whether DoctorEntitled to Claim Fees from Employer Under an Agreement with Third Parties Providing that Doctor May Retain Fees Payable by Employer of an "Insured Worker"—Workers Compensation Act, 1922, Ss. 5 (10), 14 (2), 24.

Appeal on fact and law from a judgment of the Magistrate's Court at Reefton. The appellants were two medical practitioners practising in partnership in Reefton and surrounding districts. Dr. Wicken is also the medical attendant of the Inangahua Hospital patients and also of the members of the Waiuta Medical Association, his appointments to these two independent offices being under the terms of an agreement dated September 18, 1927. The term of the agreement expired in September, 1929, but it was alleged that the appellants had continued to act as medical attendants to the Hospital patients and the members of the Association on the old terms with certain additions which were not material. It appeared that for some years the respondent's liability for accidents to its workers was covered by a policy of insurance and that during that period the respondent paid to the appellants £1 in respect of each worker receiving first aid for injuries arising out of and in the course of his employment, but these payments were discontinued in June, 1930, when the respondent determined to carry its own accident risks. In June, 1931, the appellants made demand for £119 in respect of "first aid" attendances on workers during the preceding year which the respondent declined to pay. The action was brought to recover £119 in respect of such attendances.

Held: Dismissing appeal, Respondent Company not a party to the Agreement between the Hospital Board, the Miners' Association and the doctors. The moneys claimed were not "payable" by the workers nor had any liability been incurred by any worker or by the Association in respect of the medical services rendered. **McLaglan v. Blackball Coal Co. Ltd.** (1926) N.Z.L.R. 203 followed.

Patterson for appellants.
Morgan for respondent company.

ADAMS, J., said that the appellants contended that they were entitled to recover the above-mentioned sums under clause 14 of an agreement dated September 18, 1927, made between the Inangahua Hospital Board of the first part The Waiuta Miners Medical Association of the second part and Dr. Wicken of the third part. That clause read: "The said James Lewis Wicken shall have the right to charge and retain the usual first aid fees as defined by the Workers Compensation Act and payable by the employer of an insured worker." But the respondent company was not a party to that agreement, and there was no evidence that the workers in respect of whom the fees were claimed had been "insured workers" within the meaning of the term as used in the clause. In this connection, it must mean, His Honour thought, workers who were insured under some contract against liability for medical or surgical services incurred in respect of the accident which rendered the services necessary. Alternatively, counsel submitted that the appellants had the right of action given by subsection (2) of S. 24 of the Workers Compensation Act. That subsection, however, provided only that money payable under the Act in respect of the expenses of the medical or surgical attendance on an injured worker might be recovered in an action in the Magistrate's Court at the suit of that worker or of any person by whom the expenses had been incurred, or at the suit of any person entitled to receive any payment in respect of the attendance. It was not disputed that the appellants were paid for such attendances and services to the respondent's workers, who were all members of the Association and entitled to these services from the appellants without any charge under their contract with the Association. The moneys claimed were, therefore, not "payable" by the workers, and neither the workers nor anyone else incurred any liability in respect of the services rendered.

His Honour agreed with all that was said by Frazer, J., in **McLagan v. Blackball Coal Co. Ltd.** (1926) N.Z.L.R. 203, as to the construction of S. 5 subs. (10), and S. 14 subs. (2). As in that case, so in the present one, no liability for an ascertained sum had been incurred by any worker or by the Association for services of the appellants in relation to injuries, "first aid" or otherwise.

Appeal dismissed.

Solicitors for appellants: **Isaac Patterson**, Reefton.
Solicitor for respondent: **L. E. Morgan**, Reefton.

Herdman, J. September 16; 24, 1931.
Auckland.

WATTS v. KELLY.

Chattels Security—"Further Advances"—Whether Instrument Securing a Fixed Sum and Further Advances a Security for Interest and Rates Falling Due by Grantor to Grantee Under a Contract for the Sale and Purchase of Land—Chattels Transfer Act, 1924, Fifth Schedule.

Question of law arising in above-named action. Kelly, the defendant in the action, was to all intents and purposes the grantee under an instrument by way of security over certain stock which when it was executed secured the sum of £225 and "further advances." The security was given by a Mr. and Mrs. Denby. Watts, the plaintiff in the action, was the grantee of a second instrument by way of security executed by Mr. and Mrs. Denby which ranked after the security which Kelly possessed. Both instruments covered the same stock. One was a first mortgage, the other was a second mortgage. Kelly and the Denbys were also parties to an agreement dated November, 1926, for the sale and purchase of a farm property. In that contract the consideration for the purchase of the farm was stated to be £1,500 and there was a provision that the purchasers should pay interest on the purchase money. On April 17, 1930, the moneys secured by the instrument executed by the Denbys in favour of Kelly, were nearly all paid off. The Denbys say that but £12 was due and that that amount was tendered in settlement. Kelly contended that because his chattel security secured to him a certain sum and further advances he was entitled to recover under the instrument not only £12 but a further sum of £170 consisting of interest and rates which the Denbys should have paid under the contract for the sale and purchase of land. For the purpose of recovering these moneys he seized the stock covered by the instrument. The instrument which Watts held contained the following provision: "That the grantee shall be at liberty at any time to repay any existing or prior encumbrance or encumbrances over the said stock and obtain effective discharge or discharges thereof and any amount so paid and the costs and expenses incidental thereto shall be deemed to be a further advance hereunder."

Held: The amounts of interest and rates were payable under the contract for sale and purchase of the land, a contract having no relation to the chattel security and affected by a different consideration. The interest and rates amounting to £120 were, therefore, not "loans" or "advances" made in respect of the chattels security, but separate and independent debts.

Finlay for plaintiff.
West for defendant.

HERDMAN J., said that whether Kelly could recover under his instrument interest in arrear and rates unpaid which the Denbys had contracted to pay when they entered into the agreement to purchase their farm depended upon the meaning to be given to the phrase "further advances" which appeared in Kelly's security. In the Chattels Transfer Act, 1924, in the Fifth Schedule, certain so-called abbreviated expressions were defined. The words "further advances" were declared to mean "such further sum or sums of money as may be advanced or paid by the grantee to the grantor after the execution of this instrument, and include also such sums as may become owing by the grantor to the grantee during the continuance of this security for goods supplied, for bills and notes discounted and paid, and for other loans, credits, and advances that may during the continuance of this security be made by the grantee to or for the accommodation or at the request of the grantor." It was claimed that that definition of the words "further advances" entitled Kelly to retain out of the proceeds of the sale of stock a sum sufficient to discharge the debt of £170 due under the contract for the purchase of the farm. Those moneys were, it was said, "further advances." His Honour

had been unable to discover any justification for such a proposition. Those moneys were not "loans" nor were they "advances" under the chattel security. It was said that they were covered by the word "credits." But it seemed to His Honour that they had no relation to the security over stock. Overdue interest and unpaid rates no doubt were debts payable by the Denbys to Kelly. But the liability to pay those debts arise under a contract which had no relation to the stock security. Those moneys were not advances made on the strength of the stock mortgage. They were not credits given under the protection of the stock mortgage. The consideration provided for in one contract was not the same as the consideration fixed by the other contract. Kelly, who claimed that that interest and unpaid rates could be recovered under the instrument that he held, might as well claim that the purchase money of the farm could be recovered under the instrument. Could Kelly relying on the grantor's personal covenant in the instrument sue for the moneys payable to him under the separate and independent contract? His Honour did not think so. What did the parties intend should be secured by the instrument by way of security? The answer that occurred to His Honour's mind was "moneys advanced or credit given upon the strength of that instrument." His Honour failed to see upon what principle debts which arose under a separate and independent contract could be caught by it. His Honour accordingly held that the instrument by way of security executed in favour of Kelly did not secure under the head of "further advance" arrears of interest and rates payable by the Denbys under the contract for the sale and purchase of the farm.

Solicitor for plaintiff: **G. P. Finlay,** Auckland, agent for **R. S. Carden,** Paeroa.

Solicitors for defendant: **Jackson, Russell, Tunks and West,** agents for **Buchanan and Purnell,** Thames.

Herdman, J. August 31, September 1; 10, 1931. Auckland.

IN RE WALLIS (DECEASED): MORRIS v. PUBLIC TRUSTEE.

Will—Inalienable Annuity—Direction to Hold Sum and Accumulations of Income Upon Trust to Apply the same in the Purchase of an Annuity with Gift Over if Prospective Annuitant Died Within Ten Years—Survival of Annuitant—Not Perpetual Annuity—Terminable at Death of Annuitant—Inalienable Life Annuities Act, 1910, S. 21.

This was an originating summons for the determination of the question whether certain provisions in the will of the testator, W. W. Wallis, created a perpetual annuity or whether such provisions created an annuity for life, which was by virtue of the provisions of the Inalienable Life Annuities Act, 1910, rendered inalienable. The relevant provisions of the will were as follows: "I direct my said trustees to invest the sum of four hundred (£400) pounds and any accumulations of income arising therefrom from time to time for a period of ten years and at the expiration of the period of ten years to hold the said sum of Four hundred (£400) pounds together with all accumulations of interest upon trust to apply the same in the purchase of an annuity for my daughter Amy Ruby Morris and in the event of my said daughter Amy Ruby Morris dying before the expiration of the said term of ten years upon trust to pay and divide the said sum of Four hundred (£400) pounds together with all accumulations of interest up to the date of such death among all my children in equal shares." To his other four daughters the testator gave pecuniary legacies and the residue of his estate was divided equally between two sons. The testator died on or about December 6, 1919.

The will of testator contained the following provision: "I direct my said trustee to invest the sum of Four hundred (£400) pounds and any accumulation of income arising therefrom from time to time for a period of ten years and at the expiration of the period of ten years to hold the said sum of Four hundred (£400) pounds together with all accumulations of interest Upon Trust to apply the same in the purchase of an annuity for my daughter Amy Ruby Morris and in the event of my said daughter Amy Ruby Morris dying before the expiration of the said term of ten years Upon Trust to pay and divide the said sum of Four hundred (£400) pounds together with all accumulations of interest up to the date of such death among all my children in equal shares." To his other four daughters the testator gave pecuniary legacies and the residue of his estate was divided equally between two sons. The testator died on or about December 6, 1919. It was contended on behalf of the plaintiff that the provision in the will in favour of A. R. M. created a perpetual annuity, and, that, notwithstanding the provisions of Section 21 of the Inalienable Life Annuities Act, 1910, she was entitled to a cash payment of the sum mentioned in the will and certain accumulations of interest. Counsel for plaintiff also claimed that the annuity given to Mrs. Morris was a perpetual one, and that, therefore, it was unaffected by the provision of the statute.

Held: This was not a perpetual annuity, but was terminable at the death of the daughter and inalienable under the section of the Act quoted.

Glaister for plaintiff.

Johnstone for the Public Trustee.

HERDMAN, J., after quoting paragraphs (a) and (b) of section 21 of the Inalienable Life Annuities Act of 1910, said that such legislation had, no doubt, been passed to prevent annuitants from converting annuities devised to them by will into cash. Apart from the provisions contained in that statute, a direction to apply a definite sum of money in the purchase of a life annuity was regarded as a legacy of the sum. Unless and until the purchase was made, it was regarded as a legacy of the sum named in the will—see **Robbins v. Legge** (1907) 2 Ch. p. 11. If, under her father's will Mrs. Morris had acquired no more than a benefit derived from a sum of or amount of money invested in an annuity for her life, the legislation cited above applied. The Act declared that in such circumstances the money should be invested in an inalienable life annuity. Mrs. Morris could not have the corpus or any part of it unless the Court otherwise ordered. If, however, the annuity provided for her by the testator was what was termed a perpetual annuity the position might be different, the provisions contained in S. 21 might not apply. A consideration of the terms of the will convinced His Honour that the testator intended to do no more than provide his daughter with an income which would end with her life. His direction that in the event of Mrs. Morris dying before the expiration of the term of ten years, the sum of four hundred pounds with accumulations should be divided equally among all his children, afforded some indication that it was not the testator's intention to lock up those moneys for all time. If he had wished to create a perpetual annuity which, after the death of his daughter, might be enjoyed in perpetuity he could have done so by using appropriate language, but that, in His Honour's opinion, he had not done. He directed his trustee to apply certain moneys in the purchase of an annuity his notion being to provide this daughter, after the lapse of a certain period, with a certain income. There was nothing in the will from which an inference could be drawn that the annuity was to be operative beyond the life of Mrs. Morris. His Honour added that an annuity might be for the life of the annuitant or it might be perpetual or it might be for some period other than the life of the annuitant—see **Halsbury,** Vol. 24, p. 486. The general rule was that an annuity given by will to a person *simpliciter* without words of limitations was for life only. In **Blight v. Hartnoll,** (1881) 19 Ch. D. at p. 294, Fry, J., said: "As a general rul there can be no doubt that the gift of an annuity to A. is a gift of the annuity during the life of A. and nothing more." On the other hand, an annuity bequeathed to a person was perpetual where the words indicated its perpetual continuance after his death. That was what Fry, J., had to say on the subject in **Blight v. Hartnoll** (*supra*): "It is equally free from doubt that where the testator indicates the existence of the annuity without limit after death of the person named and therefore implies that it is to exist beyond the life of the annuitant there the annuity is presumed to be a perpetual annuity." His Honour could find no such indication in the present case. In the present instance there was no direction such as there was in **Kerr v. The Middlesex Hospital,** 42 E.R. 996, that part of the testator's estate should be devoted to purchasing as much British Funds as would yield an annuity of £100 nor, as was directed in **Ross v. Borer,** 70 E.R. 1143, that a purchase in Government securities should be made which would yield an annuity "to the amount of £50 a year." In the present case the trustees were directed to use a certain fund for the purpose of buying an annual income whatever that annual income might be, the inference being that when the annuitant died the benefits of the annuity would also terminate. The gift, therefore, came precisely within paragraph (a) of S. 21 of the Inalienable Life Annuities Act and must, unless the Court otherwise ordered, be invested in an inalienable life annuity. Judgment was accordingly for the defendant.

Solicitors for plaintiff: **Glaister and Ennor,** Auckland.

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

Herdman, J. September 22; October 7, 1931.
Auckland.

GROVE v. THE PUBLIC TRUSTEE AND OTHERS.

Mortgage—Memorandum of Variation—Novation—Transfer of Land Subject to Mortgage by Original Mortgagors to an Intermediate Transferee who Transferred same to Present Registered Proprietors—Memorandum of Variation Signed by Mortgagees, Present Proprietors, and Intermediate Transferee but not by Original Mortgagors—Whether Original Mortgagor Released—Nature of Liability of Intermediate Transferee by reason of his Execution of Memorandum—Whether Evidence of Transferee's Intention in Signing Memorandum Admissible—Land Transfer Act, 1915, S. 88—Property Law Act, 1908, S. 57.

On December 20, 1922, one Herbert Goodwin conveyed certain lands situated at Mount Albert to Beatrice Newall. These lands were subject to a mortgage when they were acquired by Mrs. Newall. In 1922, Mrs. Newall executed a second mortgage over her interest in the lands in favour of Goodwin to secure the repayment of an advance of £500 upon December 20, 1927, together with interest. On March 14, 1923, Goodwin assigned his interest in the deed of mortgage and in the moneys secured thereby to Messrs. Grove, the plaintiffs. By a deed of conveyance, dated January 9, 1924, Mrs. Newall conveyed this land, subject to the two mortgages, to Henry Almond who had since died and whose interests in the present proceedings were being protected by the Public Trustee. Next, there was a conveyance of the said land dated January 26, 1926, from Almond to J. E. A. Gates and his wife, the defendants in the present action. On November 16, 1927, the lands which were the subject matter of the foregoing instruments became subject to the provisions of the Land Transfer Act, 1915. The second mortgage given by Mrs. Newall matured on December 20, 1927, and it was not repaid. Just prior to December 20, 1927, Gates approached the Messrs. Groves, the mortgagees, and asked for an extension of the term of the mortgage. After certain negotiations had taken place a memorandum of variation, dated April 21, 1928, was executed by the Gates, by Almond and by the Groves, and in due course it was registered at the Land Transfer Office at Auckland. This memorandum of variation was as follows: "THE TERM OR CURRENCY of the annexed Deed of Mortgage registered in the Deeds Register Office at Auckland as No. 315951 IS HEREBY EXTENDED to the Twentieth day of December One thousand nine hundred and thirty the principal sum is HEREBY REDUCED to FOUR HUNDRED AND SEVENTY FIVE POUNDS and the rate of interest is HEREBY INCREASED to SEVEN POUNDS PER CENTUM PER ANNUM AND it is hereby declared and agreed that the Mortgagor shall pay to the Mortgagee the sum of Four pounds on each of the quarterly days appointed in the said Deed of Mortgage for the payment of interest in reduction of the principal sum of Four hundred and seventy five pounds and that the Mortgagor shall not sell, exchange or otherwise dispose of his estate or interest in the land described in the said Deed of Mortgage without the consent of the Mortgagee in writing first had and obtained." The question which arose for the consideration of the Court was whether Almond was under any liability in respect of the mortgage debt.

Held: Original Mortgagor no longer liable under Mortgage as result of the execution of the Memorandum of Variation by subsequent owners of the equity. Immediate transferee not released from liability as his execution of Memorandum not a bare consent, but an acceptance of liability as a surety under new contract of registered proprietors with mortgagees. Parol evidence of intermediate transferee in, admissible to reveal his intentions at time of execution Memorandum.

Richmond for plaintiff.

A. H. Johnstone for defendant.

HERDMAN, J., said that it would be noted that the Memorandum which was annexed to the mortgage deed did five things. It extended the currency of the mortgage deed executed by Mrs. Newall. It recorded the fact that the principal sum was reduced to £475. It increased the rate of interest. It provided for a reduction of the principal sum by £4 on each quarter day and finally by one of its terms the mortgagor was prohibited from selling or exchanging his land without the consent of the mortgagees. It would also be observed that Mrs. Newall was not a party to the memorandum of variation, that Mr. and Mrs. Gates signed as mortgagors, that the Groves signed as mortgagees and that Mr. Almond merely affixed his signature to the document. The memorandum did not state how or in what capacity he became a party to the transaction of which it was evidence.

The difficult matter for determination was Mr. Almond's legal position. Before the memorandum of variation was executed and registered there was no uncertainty about it. When Almond sold to Mr. and Mrs. Gates he ceased to have any estate or interest in the land. He was no longer the owner of the fee-simple. But he still remained a surety. That was conceded in the argument. He was bound under section 88 of the Land Transfer Act, if called upon by Mrs. Newall, to pay the principal sum and interest payable under the second mortgage given by Mrs. Newall to Goodwin. The legal effect of a memorandum of variation has been considered in a number of cases. In **Nelson Diocesan Trust Board v. Hamilton,** 1926, N.Z.L.R. 342, the Court of Appeal decided that when purchasers of an equity of redemption describing themselves as mortgagors without the knowledge or consent of the original mortgagor executed a memorandum of variation to which the mortgagees were a party, the original mortgagor was no longer liable to pay the mortgagee any moneys payable under the mortgage. In delivering the judgment of the Court, Sim, J., referred to **In re Goldstone's Mortgage,** 1916, N.Z.L.R. 489, and pointed out that the effect of a memorandum of variation was "to create a new contract compounded of the terms of the old and new instruments; and, further, that to make the new contract effective all such implications must be nade as were justified by the nature of the transaction." In the present case it was also decided that the consent of the mortgagors to the creation of the new contract, which had not been expressly given, was to be presumed. In **The Perpetual Trustees Estate and Agency Co. of N.Z. Ltd. v. Elworthy and Anr.,** 1926, N.Z.L.R. 621, decided shortly before the Nelson case, Sim, J. decided that when the transferee of an equity of redemption became a party to a memorandum of variation there must be implied a covenant on the part of the transferee to pay the principal and interest in terms of the new contract. In **The Public Trustee v. Nortleman,** 1928, G.L.R., page 216, the owners of and mortgaged their property to the Public Trustee to secure £6,000 and interest. Later, they transferred the lands to certain purchasers. Then the purchasers and the Public Trustee executed a memorandum of variation which was consented to by the mortgagors, they expressly agreeing that their liability under the covenants contained in the original mortgage was not to be affected. In the present instance it was plain that, as a result of the execution of the memorandum of variation, Mrs. Newall was no longer liable under the mortgage which she executed. Her consent was inferred upon the principle that a benefit conferred upon a man was presumed to be accepted by him until the contrary was proved: See **Nelson Diocesan Trust Board v. Hamilton** at p. 350. A direct consequence of the completion of the memorandum of variation was that the liability assumed by Mr. and Mrs. Gates was accepted by the mortgagees in substitution for that with which Mrs. Newall was burdened. But what about Almond? What inferences could His Honour draw from the memorandum of variation looked at in conjunction with the original mortgage? His Honour could certainly infer that Mrs. Newall acquiesced in the new state of affairs. She was no longer involved in any obligation to the mortgagees. She gained her freedom. That inference was to be deduced from the fact that she remained silent and derived a benefit. In the case of Almond, however, the position was different. He had not remained silent. He might have bargained for his release, but there was nothing in the document which showed that he did so. Unlike Mrs. Newall he had affixed his name to the document which created a new contract. Before the memorandum of variation was executed he was under contract to protect her. The mortgage had matured and Mrs. Newall could be called upon by the mortgagee to pay at any moment. She was the only person the mortgagee could call upon to satisfy his claim, and had she been required to find the moneys due under the mortgage, Almond in turn could have been called upon to re-imburse her. That was precisely how matters stood when the new contract was created. The mortgage having matured, Almond was face to face with an obligation to find the money to pay off the mortgage. For the purpose of interpreting that document His Honour thought that he was entitled to look at the surrounding circumstances. That principle was stated in **Phipson on Evidence,** 7th Ed. 592. When His Honour regared the surrounding cicumstances he found that the principal moneys were due. He found that the mortgagees were insisting upon repayment and that in the circumstances that existed Almond could be called upon to pay. It was not difficult to infer, therefore, that he would gain an advantage by a postponement of the debt and by reductions which the Gates would make. Then he signed the memorandum.

From that fact His Honour was unable to conclude that his signature meant a bare consent. If his consent only was wanted he could have remained silent as Mrs. Newall did. If his signature did not import consent it must mean something else. What else could it mean? It could only mean that in some form he accepted responsibility. It was unfortunate that these short forms provided by the New Zealand Legislature left so much to one's imagination. But if to the skeleton provided by the statute be added the flesh which inference provided the Court really had under consideration an impressive looking document containing an expanded record of the rights and obligations of the parties. To that document Almond was himself a signatory. Had he followed the course taken by the mortgagors in Mortelson's case and expressly stated that he remained liable to pay the mortgage moneys, there would have been no difficulty in the present case. But, although there was only his signature, that, His Honour thought, was sufficient to show that he associated himself with the other parties to the document in the making of a new contract. His Honour was not entitled to pay heed to any evidence of statements made by Almond in which he revealed his intention. Anyway, in the present case there was no equivocation and it would seem that the rules relating to the interpretation of wills were not identical with those relating to the interpretation of contracts. But when His Honour looked at the surrounding circumstances and considered the vague document in that setting, he thought that the reasonable inference to draw was that Almond intended to accept under the new contract the responsibility which was his before the new contract was made. The only alternative was to hold that his attested signature was a nullity and that course His Honour did not feel justified in taking. By signing the memorandum, the legal position of Mr. and Mrs. Gates underwent a transformation. They were no longer sureties. They had become mortgagors and had assumed all the responsibilities of principal parties to a mortgage deed. If by executing the memorandum that change in their legal responsibilities had been effected, why should His Honour not decide that there was to be implied from the fact that Almond executed the memorandum an intention to continue under the new arrangement his obligation as a surety? His Honour had been unable to discover any satisfactory reason for not doing so. The purpose of the argument in the present case was to decide whether Almond's liability still subsisted. To that question His Honour's answer was in the affirmative and in his opinion Almond's liability was that of a surety.

Solicitors for the plaintiffs: **Milne and Meek,** Auckland.

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

Court of Arbitration.

Frazer, J. September 23, 1931
Wellington.

INSPECTOR OF AWARDS v. HANSFORD AND MILLS CONSTRUCTION CO. LTD. (In Liqdn.)

Industrial Award—Travelling Time and Fares—Whether Building Labourers and Carpenters *bona fide* Engaged on Job Entitled to Payment of Fares and Travelling Time Under "Suburban Work" Clause—Industrial Conciliation and Arbitration Act, 1928.

Two appeals from the determination of the Magistrate's Court at Wellington convicting the appellants, The Hansford and Mills Construction Co. Ltd., of offences under the New Zealand (except Marlborough) Carpenters' and Joiners' Award dated 31st March, 1930, and the Northern Wellington, Otago and Southland Bricklayers' Award dated 16th July, 1930, in that it failed to pay certain carpenters and bricklayers employed by it in the building of St. Patrick's College at Silverstream, which is situate more than 1½ miles from the City of Wellington, travelling time and the costs of their conveyance or to provide a conveyance for them. It appeared that the said builders and carpenters were all engaged on the site of the job by the foreman in charge there. The carpenters were paid 2/6 an hour (whereas the award rate was 2/3½ per hour) and the bricklayers 3/- an hour (whereas the award rate was 2/4½ per hour). The carpenters and builders were not permanent employees. Both appeals were by consent heard together.

Held: Interpretation of "suburban work" and of "country work" governed by the same principle, the deciding factor being whether workers are *bona fide* engaged at the suburban place where the work is to be performed, or elsewhere. The workers, being engaged *bona fide* at the suburban place where the work was to be performed, namely Silverstream, the provisions of the "suburban work" clause in the Awards under notice as to payment of fares and travelling allowances, did not apply. "The employer's shop" is the place where the workers covered by the clause are primarily employed.

W. Perry and O'Leary for appellant.
Inspector of Awards (J. H. Kinsman) in person.

FRAZER, J., said that the "suburban work" clauses in the Carpenters' and Bricklayers' Awards were, in all essentials identical, and did not differ materially from the clause considered by Mr. Justice Stringer in the interpretation of the Auckland Carpenters' and Joiners' Award, recorded in Book of Awards, Vol. XVIII, p. 293. The interpretation in question dealt primarily with the "country work" clause, but the Cour regarded both suburban work and country work as being govt erned by the same principle. The circumstances of the present case and of that considered by Mr. Justice Stringer were very similar, the work being sixteen miles from Wellington in one case, and eighteen miles from Auckland in the other. Mr. Justice Stringer said: "The definitions of 'suburban work' and 'country work' contained in the award were apparently prepared by the parties themselves, and were directed to meet the ordinary cases of builders carrying on business in a t own who from time to time sent their employees into the sub urbs or the country, as the case might be, in the usual course of business. No provision, however, was made for exceptional cases such as the present, where the employer's place of business is not in a town at all, but in a part of the country where he is carrying out a special work of considerable magnitude which incidentally involves the employment of some workers who are covered by the award. The definition of 'country work' was not intended to apply, and the language cannot reasonably be construed so as to apply, to such a case where the worker is not sent by his employer to a particular suburban or country place, but, finding work available for him in a particular localitn under terms and conditions of employment which are knowy or can be ascertained by him, voluntarily seeks for and accepts employment at such locality." The Court, in dealing with the appeal in the case of **Clements v. Auckland Branch of the Amalgamated Society of Carpenters' and Joiners' Industrial Union of Workers,** made it clear that an interpretation given of the suburban work clause of the Wellington Plasterers' Award (Book of Awards, Vol. 30, 671) was not of general application, but depended entirely on the unusual wording if the particular clause. The judgments recorded in the Book of Awards related principally to the "Country work" clauses of the awards; but, as stated by Mr. Justice Stringer, the governing principle was the same in the case of the "suburban work" clauses. The "country work" judgments made it clear that the deciding factor in determining whether country allowances were to be paid, was whether the workers were *bona fide* engaged at the place where the work was to be performed, or elsewhere. If the engagement was *bona fide* made on the job, the country allowances were not payable. Similarly, if workers were *bona fide* engaged on the job, as was the case here, in respect of work that may be regarded as suburban in nature, the provisions of the "suburban work" clause as to payment of fares and payment for travelling time did not apply. The view that that was the correct interpretation was strengthened by the introductory words—"work done elsewhere than at the shop of the employer"—which at least indicated that the employer's shop was the place at which workers covered by the clause were primarily engaged. The appeals were accordingly allowed.

MR. MONTEITH dissented from the opinion of the majority of the Court.

Solicitors for appellant: **Perry, Perry and Pope,** Wellington.

The following Christchurch practitioners were recently admitted as Barristers by His Honour Mr. Justice Adams: Mr. R. E. Booker (a member of the firm of Messrs. Meares, Williams and Holmes); Mr. P. D. Hall (of Messrs. Hall and Barrett) and Messrs. H. R. Sampson and A. S. Geddes, who are practising separately on their own account.

Liability of the Owner-Passenger.

A Holiday Consideration for Motorists.

By C. Stanley Brown, LL.B.

In these days of the family car, and particularly of the family camping tour, the question of the liability of an owner, riding as a passenger in his car, for the negligence of the driver, becomes one of considerable interest and importance.

The *locus classicus* on the subject is the case of *Samson v. Aitcheson* [1911] N.Z.L.R. 160, and (on appeal) 838, which was further carried to the Privy Council, [1912] A.C. 844. The Privy Council practically adopted the judgment of Williams, J., in the Supreme Court, declaring that he had laid down the law "with perfect accuracy." The decision is thus summarised in the English report:

> "Where the owner of a vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not of itself exclude his right and duty of control; and therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving."

It is obvious from this statement of the law that the liability is not absolute, but is limited in some way; but when one comes to enquire exactly where the line of limitation is fixed, the question becomes more difficult. In most instances of a general rule of liability subject to exceptions, the law in practice works itself out by a series of cases on either side of the line. The difficulty in the case is that all the modern reported decisions are on one side of the line: that is, against the unfortunate motor-owner. One inference at least may be drawn from this fact, namely, that while the law clearly recognises that the rule will yield to circumstances, the circumstances to which it will yield, whatever they may be, are of infrequent occurrence.

To determine the limits of any liability one must examine the principle on which it is based. Obviously this liability is not based merely on ownership; otherwise, it would apply equally in the owner's absence as in his presence. "Mere ownership of a vehicle cannot *per se* involve the owner in liability." (Roberts & Gibb, *Law of Collisions on Land*, p. 30). The liability in question is based on one circumstance—control. But it should be noted that this "control" is a legal conception, not a mechanical fact. No passenger, whether owner or not, can in fact have such "control" of a car, in a mechanical sense, as will enable him to avert an impending accident; and it is not for failing to do so that an owner is held liable when an accident happens. Almost without exception, motor accidents occur suddenly; the interval from the point of incipient danger to that of actual catastrophe is measured at the most in seconds. In that interval, it is very seldom possible for any other person than the driver to intervene, either by advice or action, to avert disaster. To attempt to do so, in fact, would only increase the danger, by causing confusion and excitement at the very moment when calm and rapid decision is imperative. The owner-passenger controls the driving of the car to this extent, that he can give general directions, and, if dissatisfied, he can order the driver to give up the wheel. The relationship either of master and servant or of principal and agent exists between owner and driver; and the owner as "*dominus*" is, therefore, held vicariously liable for the sins of the driver.

Of course, there may be cases in which an owner may be held directly liable, though not himself at the wheel. Thus if he hands over the driving to a person whom he knows to be incompetent, he should on principle be held directly responsible for any accident that results (cf. *Ricketts v. Tilling* [1915] 1 K.B. 644). The same rule will doubtless apply if he allows his car to go on the road in a defective condition, e.g., with defective brakes (see *British Columbia Electric Railway Co. Ltd. v. Leach* [1916] 1 A.C. 791); but only if he knows, or should have known, of the defect (*Phillips v. Britannia Hygienic Laundry Co.* [1923] 1 K.B. 539). In such circumstances, it is not a case of holding the owner liable for another person's negligence; he is simply made responsible for his own. His presence in the car would be an element in the matter only to this extent, that it would make it more difficult for him to plead innocent ignorance.

It now remains to consider possible exceptions from the general liability, in the light of the foregoing considerations.

(1) It is evident on both reason and authority that the general rule is ousted by a bailment of the car. "No doubt if the actual possession of the equipage has been given by the owner to a third person, that is to say, if there has been a bailment by the owner to a third person, the owner has given up his right of control" (per Williams, J., in *Samson's case*). In business affairs, and where payment is made for the hire, it is generally a simple matter to determine whether an article has been bailed or not; but in the personal and social relations usually connected with the use of motor-cars for pleasure, difficulty may often arise. Suppose, for example, A says to his friend B, "I don't want my car this afternoon; get some of your friends and go for a joyride." B invites C and D, and then finds that A himself is free to join them; he therefore invites A. May it not be that A travels in these circumstances as the guest of B, and not as "*dominus*," so that the responsibility for negligent driving by C or D would be on B as bailee? (cf. *Wheatley v. Patrick* [1837] 2 M. & W., 650). No doubt the law would look with suspicion on such a plea put forward to exonerate A, but it would seem that in a proper case he would be exonerated. On principle, one would say that in cases where what may be described as a "social bailment" is pleaded (a) the onus of proof would be heavily on the owner; (b) the real test question would be, Who had the right to determine who should drive? In a friendly party, however, it is most unlikely that this question would be present in anyone's mind, and it is not likely, therefore, to be satisfactorily answered in evidence. It would probably be necessary to go into further particulars, such as—Who invited the other passengers to join? Who determined the destination and route, and stopping-places, if any?

(2) A further ground is suggested by the same judgment, in which Williams, J., after remarking that the owner riding in his own vehicle "necessarily retains the power and the right of controlling the manner in which it is driven," adds "unless he . . . is shown by conclusive evidence to have in some way abandoned that right." It is evident, however, that exception on this ground must be sparingly allowed, otherwise it would open the door to virtual abrogation of the

rule. As Williams, J., remarks a little later, "The owner has a duty to control the driver." If, therefore, an owner were to say to his friend, "Jim, you take the wheel for the rest of the journey. Drive as you think fit, and if I should tell you later to hand the wheel back to me I authorise you now to take no notice,"—that would certainly be an abandonment of control; but would it exempt the owner from liability for Jim's negligence? It is submitted not, because it would be the abandonment of a duty. On principle, such abandonment should only be allowed legal effect where it is reasonably necessary. If, for example, finding himself becoming drowsy, the owner hands the wheel to his friend so that he may refresh himself by going to sleep, his action would be proper and reasonable, and there would be no reason in fact or law for holding the owner still in "control" of the car while asleep.

(3) A further type of case suggests itself, in which the owner has not abandoned the basic right of control, but has been dispossessed of it. An owner, for example, dissatisfied with the way in which his car is being handled, orders the driver to give up the wheel. The driver refuses; what can the owner do? Nothing. To attempt to displace the driver by force would be the height of folly; and in such circumstances, it is submitted, the owner would be neither in control nor, in reality, in possession, of his car. His position would be the same in effect as if he were being kidnapped in his own car. In that case, it would surely be fantastic to hold him responsible for the negligent driving of his captors.

Before leaving this subject, it is well to note that where the vicarious liability here dealt with is imposed on a married woman as owner of a car, her husband is not liable to be joined with her as for a tort on her part. The reason for this rule turns on the distinction between a common law tort of the wife (such as her own negligence), and a liability arising out of the ownership and control of her separate property (*Black v. Macfarlane*, [1931] N.Z.L.R., 112, 6 N.Z.L.J. 51).

Obituary.

Widespread regret has been expressed at the death of Mr. Frank E. Kelly, First Assistant Solicitor to the Public Trust Office, which occurred on November 28. The deceased joined the Civil Service in 1907, and, after a short period in the Audit Department, he transferred to the Department of Justice in which he served for five years in the Magistrate's Court, Wellington. He was then appointed an assistant solicitor in the Public Trust Office, and, in 1920, was promoted to the office he held at the time of his death. Mr. Kelly was educated at St. Patrick's College and Victoria University College, where he graduated LL.B. in 1911. He was generally regarded as a sound lawyer, with exceptional knowledge of trustee law and the law relating to wills and intestacies. On several occasions when he was appearing in the Supreme Court, he was congratulated by more than one of the Judges on his ability in "Chancery" matters. His death, at the comparatively early age of 43 years, is a loss to the profession and a cause of sorrow to his brother-officers in the Public Trust Office and to a wide circle of friends in the Dominion to whom he had endeared himself by his cheery disposition and his unassuming and obliging manner.

Some Recent Amendments.

To the Chattels Transfer Act.

The Chattels Transfer Amendment Act, 1931, came into force on November 9, 1931, and will be of interest to all members of the profession in connection with customary hire-purchase agreements and the preparation of instruments by way of security over stock and chattels. Short particulars are therefore given hereunder.

Ss. 2 and 3 have lengthy subsections and amend the law with reference to customary Hire-Purchase Agreements. They must be noted by all who handle these documents or who deal with claims against bankrupt or assigned estates, or administer estates under Part 4 of the Administration Act, 1908. The more important amendments include:

(a) By S. 2 (2) a finance corporation is deemed for all the purposes of Sec. 57 of the principal Act to be a "dealer." The contrary had been decided by the recent judgment of *General Motors Acceptance Corpn. v. The Traders Finance Corpn. Ltd.*, p. 207 *ante*.

(b) By S. 3 (3) the right is conferred on the Official Assignee or trustee under an assignment for the benefit of creditors upon payment or tender of all moneys unpaid under the hire-purchase agreement to take possession of the chattel as if it were the property of the hire-purchaser. This right, however, must be exercised within one month after the adjudication or the assignment for the benefit of creditors and applies only to chattels which are then in the possession of the hire-purchaser or have been in his possession within two months before the date of adjudication or assignment. The Section applies whether the hire-purchase agreement is executed before or after the passing of the amending Act.

Ss. 4 and 5 are of importance in connection with the preparation of chattel securities. S. 4 amends S. 24 of the principal Act by adding the following proviso:

"Provided that where an instrument by way of security over any chattels is therein expressed to be given as security for a loan to be expended, in whole or in part, in the purchase of those chattels, the grantor shall be deemed to have acquired the said chattels contemporaneously with the execution of the instrument."

It should be noted that the instrument *must state* that the loan will be so expended. The amendment now permits chattels to be purchased out of loan moneys and included in the security to the lender.

S. 5 amends S. 26 of the principal Act by adding the following para.:

"(c) Tractors, engines, machines, vehicles, implements, and farming plant of every description described in such instrument and used upon or in connection with any land or premises specified in the instrument."

An important effect of this amendment is that the defeasance clause (Chattels Transfer Act, 1924, S. 25) which formerly did not operate as regards stock, wool and crops (*vide* S. 26 (a)) will not hereafter operate by reason of sub-sec. (c) above as regards farming plant described in *future* instruments.

The Lawyers' Christmassing.

An Echo of Four Hundred Years Ago.

CHRISTMAS EVE, 1562. At the first course the Minstrells must sound their instruments, and go before: and the Steward and Marshall are next to follow together; and after them the Gentleman Sewer; and then cometh the meat. Those three Officers, are to make altogether three solemn Curtesies, at three several times, between the Skreen and the upper Table; beginning with the first, at the end of the Benchers' table; the second at the midst; and the third at the other end; and then standing by, the Sewer performeth his Office.

When the first table is set and served, the Stewards Table is next to be served. After him, the Masters table of the Revells. Then that of the Master of the Game. The high Constable-Marshall: Then the Lieutenant of the Tower: then the Utter-barristers table; and lastly the Clerks table: All which time the Musick must stand right above the Harthside, with the noise of their Musick; their faces direct towards the highest Table: and that done, to return into the Buttry, with their Musick sounding.

Dinner ended, the Musicians prepare to sing a Song, at the highest Table: which ceremony accomplished, then the Officers are to address themselves every one in his office, to avoid (clear) the Tables in a fair and decent manner, they beginning at the Clerks Table; thence proceed to the next; and thence to all the others till the highest table be solemnly avoided.

Then after a little repose, the persons at the highest Table arise, and prepare to Revells: in which time the Butlers and other Servitors with them, are to dine in the Library.

At night, before Supper, are Revells and Dancing; and so also after Supper, during the twelve days of Christmas. The antientest Master of the Revells, is after Dinner and Supper to sing a Caroll, or Song; and command other Gentlemen then there present, to sing with him and the Company, and so it is very decently performed.

* * * * *

A Repast at Dinner is—viii*d*.

* * * * *

Christmas Day. Service in the Church ended, the Gentlemen presently repair into the Hall, to Breakfast, with Brawn, Mustard, and Malmsey.

At Dinner . . . the first Course is served in, a fair and large Bores-head, upon a Silver Platter, with Minstrelsye.

A Repast at Dinner is xii*d*. which Strangers of worth are admitted to take in the Hall.

* * * * *

St. Stephans Day. This day the Sewer, Carver, and Cup-Bearer, are to serve as afore. After the first course served in, the Constable Marshall cometh into the Hall, arrayed with a fair rich and compleat Harneys, white and bright, and gilt; with a Nest of Fethers of all Colours upon his Crest or Helm, and a gilt Pole-Axe in his hand: to whom is associate the Lieutenant of the Tower, armed with a fair White Armour, a Nest of Fethers in his Helm, and a like Pole-Axe in his hand; and with them sixteen Trumpetters; four Drums and Fifes, going in rank before them; and with them attendeth four men in white Harneys, from the middle upwards, and Halberds in their hands, bearing on their shoulders the Tower; which persons, with the Drums, Trumpets and Musick go three times about the Fire. Then the Constable-Marshall, after two or three Curtesies made knceleth down before the Lord Chancellour; behind him the Lieutenant; and they kneeling, the Constable-Marshall pronounceth an Cration of a quarter of an hours length, thereby declaring the purpose of his coming; and that his purpose is to be admitted into his Lordships service.

The Lord Chancellour saith, He will take further advice therein.

Then the Constable-Marshall standing up, in submissive manner delivereth his naked Sword to the Steward; who giveth it to the Lord Chancellour: and thereupon the Lord Chancellour willeth the Marshall to place the Constable-Marshall in his Seat: and so he doth, with the Lieutenant also in his Seat or place. During this Ceremony the Tower is placed beneath the Fire.

Then cometh the Master of the Game apparalled in green Velvet; and the Ranger of the Forest also, in a green suit of Satten bearing in his hand a green Bow, and divers Arrows, with either of them a Hunting Horn about their Necks; blowing together three blasts of Venery, they pace round about the Fire three times. Then the Master of the Game maketh three Curtesies, as aforesaid; then the Master of the Game standeth up.

This Ceremony also performed, a Huntsman cometh into the Hall, with a Fox and a Purse-net; with a Cat, both bound at the end of a Staff; and with them nine or ten Couple of Hounds, with the blowing of Hunting-Hornes. And the Fox and Cat are by the Hounds set upon, and killed beneath the Fire. This sport finished, the Marshall placeth them in their several appointed places.

Then proceedeth the second Course: which done and served out the Common Serjeant delivereth a plausible speech to the Lord Chancellor. . . .

* * * * *

St. John's Day. About seven of the Clock in the Morning, the Lord of Misrule is abroad; and if he lack any Officer or attendant, he repaireth to their Chambers, and compelleth them to attend in person upon him after Service in the Church, to Breakfast, with Brawn Mustard and Malmsey. After Breakfast ended, his Lordships power is in suspence, untill his personall presence at night; and then his power is most potent.

If any offendor escape from the Lieutenant into the Buttry, and bring into the Hall a Manchet upon the point of a Knife, he is pardoned: For the Buttry in that Case is a Sanctuary.

—From the *Accompts* of the
Inner Temple, London.

A Christmas Wish.

May Santa Claus, this Christmas Eve,
Bring each Newspaper kaiser
A gift to make him wise enough
To wish that he were wiser.

New Zealand Law Society.

Proceedings of the Council.

A meeting of the Council of the New Zealand Law Society was held at Wellington on Tuesday, December 8, 1931, at 2.15 p.m.

The President (Mr. A. Gray, K.C.) occupied the chair.

The District Law Societies were represented as follows: Auckland: Messrs. W. H. Cunningham and E. S. Parry (Proxies); Canterbury: Mr. M. J. Gresson; Hamilton: Mr. N. S. Johnson; Hawke's Bay: Mr. E. F. Hadfield (Proxy); Nelson: Mr. C. H. Cheek; Otago: Mr. R. R. Aspinall; Southland: Mr. P. Levi; Taranaki: Mr. David Perry (Proxy); Wanganui: Mr. N. G. Armstrong; Wellington: Messrs. A. Gray, K.C., and H. E. Anderson.

An apology for his absence was received from Mr. A. M. Cousins, representing the Westland District Law Society.

The meeting was convened to consider and determine the action required to be taken in connection with the new *Regulations for the Auditing of Solicitors' Trust Accounts*, which came into force on the 5th November, 1931.

A memorandum on the subject had been prepared by Mr. H. E. Anderson, Chairman of the Audit Committee (consisting of representatives of the Council of the New Zealand Law Society and of the Council of the New Zealand Society of Accountants) which prepared the Regulations in conjunction with the Crown Law Office, and copies of that memorandum had been circulated to the various District Law Societies.

Trust Account Receipt Books: Mr. Anderson, at the request of the President, fully explained the position with regard to the tentative arrangement made by the Council's representatives on the Committee with Messrs. Butterworth & Co. (Aus.) Ltd. (subject to the approval of the Council) with regard to the preparation, supply, and registration of books of receipts for trust moneys required by the Regulations, as outlined in Mr. Anderson's memorandum.

A long discussion on the subject then ensued, and the question was debated whether or not the printing and issue of receipt-books could be undertaken and controlled more advantageously and more cheaply by the District Law Societies; but although the members of the Council were not all agreed that the proposal to have the work undertaken and controlled by a central authority in Wellington was the most reasonable way of dealing with the matter, it was eventually agreed that control in Wellington was the best and most advantageous course to adopt, and that it would be desirable to follow out the scheme as proposed for one year.

It was accordingly resolved as follows:

"That the scheme outlined in Mr. Anderson's memorandum be approved, and that a contract upon the lines of that memorandum be entered into with Messrs. Butterworth & Co. (Aus.) Ltd., Wellington, as the delegate of the New Zealand Law Society, for the period of one year, subject to a provision that upon the determination of the contract all records necessary for the continuation of the scheme by the New Zealand Law Society, or its delegate, be handed over to the New Zealand Law Society."

The Audit Committee Thanked: The Council at the same time placed on record its appreciation of the work and services rendered by members of the Audit Committee of solicitors and accountants in connection with the preparation of the Audit Regulations, and for negotiating the tentative arrangement with Messrs. Butterworth & Co. as agent for the New Zealand Law Society in connection with the printing, checking, and circulation of receipt-books; and that a cordial vote of thanks be accorded to the members of the Committee accordingly.

A vote of thanks was also accorded to Mr. J. M. Tudhope of the Crown Law Office for the valuable assistance given by him to the Committee in connection with the preparation of the Regulations.

Approval of Auditors: The Council considered a question raised regarding the method of approval by the Councils of the District Law Societies of auditors, as provided by Regulation No. 1, and resolved as follows:

"That no public accountant appointed under Regulation No. 9 to act as an auditor for a solicitor or firm of solicitors is entitled to act as such auditor until his name has been approved by the Council of the Law Society of the district in which such solicitor or firm practises; and that in the event of the Council of a District Society not giving its approval of an auditor under Regulation No. 1, reasons for withholding its approval should not be given."

"That a copy of the foregoing resolution be communicated to the Council of each District Law Society accordingly."

Halsbury's Laws of England: "Replacement of Volumes" Edition: A letter was received from the Taranaki District Law Society enclosing a copy of a communication from that Society to the Council of each District Law Society relative to the publication of this work. Correspondence on the same subject had previously taken place with the Canterbury District Law Society and the Otago District Law Society.

Upon the position as reached in that correspondence being explained by the President, it was resolved as follows:

"(1) That the Secretary of the New Zealand Law Society write to Messrs. Butterworth & Co. (Aus.) Ltd., Wellington, asking them to state for what period the publishers intend to carry on the issue of annual supplements to the existing complete set of Halsbury; and also informing them that consideration of the communication of the Taranaki District Law Society will be held over pending receipt of their reply.

"(2) That a copy of the foregoing resolution and of Messrs. Butterworth & Co.'s reply, when received, be forwarded to each District Law Society."

Lawyers in the New Parliament.

A Gain of One Member.

The following members of the profession were successful in the recent Parliamentary elections: Messrs. W. P. Endean (who achieved the largest majority in the Dominion), Parnell; H. G. R. Mason, Auckland Suburbs; F. W. Schramm, Auckland East; W. J. Broadfoot, Waitomo; W. E. Barnard, Napier; W. H. Field, Otaki; Hon. Sir Apirana Ngata (Eastern Maori); Hon. W. Downie Stewart, Attorney-General, Dunedin West; Sir Charles Statham, Dunedin Central; and Mr. W. A. Bodkin, Central Otago. This shows an increase of one lawyer (Mr. F. W. Schramm) on the last Parliamentary personnel, with no losses.

Illegal Opinions.

In re Santa Claus.

By IULIUS.

Advice is sought as to the legality or otherwise of the gift scheme which Santa Claus has had in operation for some years past. The facts submitted are that on December 25, in each year, the children of the world pretend to their parents to believe that a white-whiskered gentleman—even the modern child conceding that once a year Daddy may be a gentleman—comes immaculate from a sooty chimney and deposits gifts in stockings previously suspended in that behalf; that these pseudo-anonymous gifts are supplemented by gifts of loud ties and cigars from wives to husbands, of fur coats and doormats from husbands to wives, and of greeting cards from lawyers, telegraph-messengers and dustmen.

It may be stated emphatically that these gifts do not constitute a breach of The Trading Coupons Act, 1931, No. 28: no prizes are offered to husbands who smoke their wives' cigars—there is not even the compensation of their being redeemable for cash—and Daddy will have broken all the children's mechanical toys long before April 30, 1932. Nor does The Family Protection Act, 1908, No. 60, extend to these gift schemes; that Act unfortunately, allows only for improving the gifts made by the dead, not for improving the gifts of those still living whose taste is dead.

But there are dangers in these, as in all gifts: the mere suggestion, for example, of gifts of chocolate to a golf champion may be actionable (see *Tolley v. Fry* (1931) A.C. 555); but chocolates or even minties might with safety be given to the average lawyer golfer with his facility in getting out of bad lies. Then there is the question of bribery. Take Members of Parliament for instance—(not that anybody really wants to take any of them)—an offer of, say, intelligence and foresight to the average M.P. would be met by instant rejection; his supply of party catchwords and parrot phrases makes for so much easier thinking. At the same time, although the Statute enacted in New Zealand in 1878 and intituled "An Act to Provide for the Purity of Parliament" has long since been repealed, the theory of the thing is still the same. And political theories, which were tuppence coloured during the election, are by now five a penny. It cannot be agreed that *Davies v. Mann* ((1842) 1 10 M. & W. 546), is in any way relevant to the consideration of gifts to politicians: in that case the *causa sine qua non* was a donkey.

There might also be the danger of a charge of attempted bribery in the proposal of an eminent Police Court lawyer (so he says) to present to the head office of the Newspaper Proprietors' Association an Epstein statue, which, being incomprehensible anyhow, he proposes to call, "Justice: a Midnight Study of a Blind Journalist." Not that bribery is always a crime; a husband's bribery of his wife is frequently justifiable, and, indeed, may be necessary in self-defence.

Finally, the rule in *Coggs v. Bernard* ((1703) 1 Salk. 26; 1 Smith L.C., 11th Ed. 173) must be borne in mind by the man who proposes to entrust to Santa Claus the carriage of a gift to himself; should Santa Claus's chariot be overturned by another's negligence and the gift destroyed, no action would lie. It will probably be safer, therefore, if you carry home the bottle yourself.

Judges and Press.

Comment in Court of Appeal

We take the following extract from the *Evening Post* (Wellington) of December 4, *ipsissima verba:*

"The attitude of certain newspapers in failing to publish his statement issued recently on the subject of the non-publication of the names of counsel in reports of Court proceedings was commented upon by Sir Michael Myers, Chief Justice, at the hearing of the Coats appeal in the Court of Appeal to-day.

"His Honour's comment was in reply to a suggestion made by second counsel for Coats* that the Court perhaps might think it desirable to make some observations on the question of the taking of statements from accused and other people which might be of use in other quarters.

"'What is the use of making a statement unless the Court is assisted by the Press?' asked the Chief Justice. His Honour said he might have been correct or not, but, nevertheless, he had had a statement made in Court upon a matter he thought, rightly or wrongly, was of public interest. It was published in the two daily newspapers in Wellington and no doubt telegraphed right throughout the country, but other newspapers chose to ignore it. 'Now, what is the use of Judges making observations on matters of public interest if their statements, which are made in the belief that they are in the public interest, are ignored by the Press?

"'What is the use,' added his Honour, 'of a Judge making any statement in regard to the constitution of a Court of Criminal Appeal? I don't suppose any notice would be taken of it.'"

Comment would be superfluous!

Bench and Bar.

We are delighted to learn as our printing-press is running on this issue, that His Majesty the King has been pleased to appoint to his Privy Council the Hon. Sir Michael Myers, K.C.M.G., K.C., Chief Justice of New Zealand. With the profession at large, we offer respectful congratulations to the Rt. Hon. gentleman. We all hope that he will be afforded an opportunity of displaying his eminent legal attainments in the Council's Judicial Committee. Sir Michael would then be the first native-born New Zealander to sit as a member of that august Board.

The Attorney-General (Hon. W. Downie Stewart) has left (on 15th inst.) for Honolulu, where, in his capacity as Minister of Customs, he will confer with the Canadian Customs Minister and officials.

Mr. J. Stanton, Auckland's City Solicitor, of the firm of Messrs. Stanton, Johnstone and Spence, has sufficiently recovered from his recent severe illness to be able to attend his office for some hours daily. He has the profession's best wishes for a speedy return to complete health.

The practice of Messrs. Kinmont, Reeves and Edmondston, New Plymouth, has been taken over by Mr. St. Ledger H. Reeves who will continue the same under his own name.

* Which being interpreted signifies Mr. H. J. V. James, Mr. C. A. L. Treadwell being senior counsel for Coats.

A Press Boycott.

Of Eighty-six Years Ago.

It is not uninteresting to notice in relation to the boycotting of counsel by the Press that, in 1845, Sergeant Talfourd was subject to the same treatment. His offence was the moving of a motion in the Bar mess on the Oxford Circuit to the effect that, to keep the members of the Bar free from taint, no barrister should report cases for the London *Times*.

It is refreshing in these days of softness to read the language in which the action of the *Times* was reprobated. The *Law Magazine* thus adverted to the topic :

" Our readers will learn with surprise that Mr. Serjeant Talfourd has become the object of a system of cowardly malignity of which it is almost as difficult to discover the cause as to appreciate the baseness."

Further on in regard to the *Times*, the same article says :

" We never remember a more unanimous feeling of disgust. Of the *Times* as a Journal, of its leading proprietor and of those who control its political conduct, we speak not ; for it is utterly impossible that any men of ordinary sagacity could have recourse to a system of attack so certain to entail contempt on its perpetrators."

May I conclude with a sentence from the *Law Times* on the subject ; the words may have a closer relation to our case than we perhaps think :

" The *Times* is famous for a keen sense of its own interest. If its managers could hear, as we do, with what feelings their dirty doings in this matter are received by the Profession to whose support it is so largely indebted they would yield to expediency what they deny to justice. Though the spirit of the gentleman does not appear to influence them, the spirit of the tradesman must tell them that such a proceeding as we have described and denounced will be as unprofitable as it is dishonourable."

—" ARALUEN."

Irresponsibilities.

Notwithstanding the right of free speech, and the Magna Charta and all that, the freedom of the Press to-day seems to be almost as precarious as in the days when its conscientious scribes were pilloried and had their noses slit for what now seem to have been venial indiscretions, for in this twentieth century there seems to be an ominous tightening of control over that once-powerful organisation. For some time past we have not been allowed, for the good of our souls no doubt, to be told anything about a totalisator dividend, and now it seems that our newspapers are constrained to resort to cumbersome circumlocutory paraphraseology when recording the humiliating circumstance that a solicitor was heard to raise his voice in a court. In a few years' time when the ban is still further tightened, our press will be still further embarrassed by the necessity of recording such an everyday occurrence as a concert, a yacht race or a sermon somewhat in these terms :

A recital given in the Town Hall last evening by a distinguished visiting vocalist was largely attended. The singer gave an inspiring rendition of the bejewelled aria from Goethe's well known opera so ably set to music by Gounod

or

The fifth race for the much coveted cup which takes its name from a naval hero of the Great War was sailed in fair weather, and was won by the boat symbolising the idea of Irish maidenhood, closely followed by the namesake of the Duchess of York's elder daughter

or

The preacher, a local divine, who took his text from a well known work of a biblical nature.

* * * * *

I feel that a few notes of this kind would not be complete without a brief review of some recent publications. In this connection, for light, bright and snappy reading for the holidays I warmly commend to all a copy of the English Statutes which should find a place in everyone's holiday kit. Space does not permit more than a brief reference to some of the outstanding features of the 1930 Volume.

The Reservoirs (Safety Provisions) Act, 1930 : Here is an instance of the State's paternal solicitude for His Majesty's subjects. The Act deals exhaustively with the precautions to be taken when a reservoir is built, the levels to which it may be filled, the inspections which must be made, the conditions that may be prescribed, and so on, so that it is simply impossible for a drop of water to escape.

Just imagine what would have happened if that Act had been passed 62 years ago ! We should have had no Rylands and Fletcher—stout heroes whose names your infant suckling at the breast of Jurisprudence learns first to lisp—the indefatigable Mr. Smith would have lacked the spiciest of his Leading Cases, Mr. Mews would have got no further than a first edition, Mr. Broome would never have invented his famous " *sic utere tuo*," in fact the whole law of Torts would have come down to us about the size of a tuppenny tram table !

The Isle of Man Customs Act, 1930 : Here is a book belied by a most perniciously misleading title. One turns eagerly through its pages expecting to learn how the Deemsters, the Court of Tynwald, the House of Keys and other hoary institutions and archaic usages described in language " quaint and olden " of this queer historic corner of Celtic conservatism are to be venerated and preserved—only to be confronted with a schedule of duties on tea, spirits and tobacco !

The Transit of Animals Amendment Order, 1930 : Another racy little enactment this, which the Justices of Torrington brought into publicity (*Nethaway v. Brewer* (1931) 2 K.B. 459) by their naive ruling that a cattle dealer who brought a lorry full of live stock from one place to another and immediately returned, was not making " consecutive journeys between the same two points," Avory J., however, swiftly descended upon them.

I have not space for further reference to these little gems of terse and breezy literature that are to be found in these exhilarating volumes, than to commend them as light holiday cheer.

—R. J.

A Forensic Freak.

R. Colonna Close*

By Wilfred Blacket, K.C.

Australia once was a free country: New South Wales always was a freak country for it has produced the weirdest murderers ever destined to grace the gallows, and to defend them, and possibly speed them on their way, some of the strangest forensic performers that ever wore a wig. Of forensic performers, the most extraordinary of all our oddities was R. Colonna Close. We did not really "produce" him, for he was not "station-bred," and did not come here until he had spent many years, and done many things in the Northern Hemisphere. According to his own statements, no affidavits in support having been filed,—he was of princely lineage, and of great and heroic achievement in many lands, and if the latter statement was correct, his record here would go to illustrate the swiftness and ease with which one may descend from the sublime to the ridiculous.

Fame, or rather notoriety, came to him in Australia first in Melbourne. An essay on Warren Hastings appeared under his name in the *Federal Australian*. It really was an excellent essay: the only matter of criticism of its contents being that Lord Macaulay had written it long before it was written by R. Colonna Close. The latter writer of the essay was mightily proud of his performance. "Does not this show," he said, "that I possess the most marvellous memory ever given to man by the Great Good Lord God Almighty? When I sat down to write that essay I, without the smallest strain and quite involuntarily reproduced, word for word, Macaulay's essay, although it was twenty-five years and two months since I had read it! Truly I ought ever to be grateful to the Almighty for such a gift of memory as that!" But even so he had to refund the £5 5s. 0d. paid him for his literary effort, or feat of memory, whichever it may more properly be called.

On coming to Sydney, he hired a suburban Town Hall and widely advertised a lecture to be delivered by him on "The Political Situation." Most of the lecture was of and concerning the genius of R. Colonna Close. One statement of it I do well remember. "Now, gentlemen," he said, "I am going to tell you something that no one in this vast assemblage of intellectual persons has ever before heard of or even suspected. I am going to tell you what a 'theory' is. A 'theory,' gentlemen, is a vast and fortuitous agglomeration of luminous and humanising experiences." It was a good house, and some of the audience stood two hours of this kind of stuff, but it had cost nothing to go in, and there was no charge on going out, and so, long before the oration had ended, nearly all his hearers had escaped and were engaged in drinking the health of our legislators for their action in allowing the pubs. to remain open till 11 o'clock.

Later, he was a candidate for Randwick at a General Election. The vital issue then was "one man one vote," but he did better than that for he was one man with eleven votes. He had a Committee of 95 persons, and it would seem that ten of them voted for him.

His only other adventure in public affairs that I can recall was at a later period. He met me as he was returning from an interview with Sir Henry Parkes, Premier. "Ah, ha," he said, "I fear that Sir Henry is not a man who ought to be trusted by the citizens. I had informed him some time ago that briefs were but few and the fees inadequate and that I should be glad of appointment to some further office commensurate with my attainments and qualifications, and this morning he sent for me and stated that he was now able to offer me a position as one of the statutory trustees of Field of Mars Cemetery. And I quite naturally asked: 'And what are the emoluments of this office, Sir Henry?' He replied that there were not any, and so I had to say that I feared that the overwhelming pressure of my practice and my duty to my clients would prevent my acceptance of the position."

In fairness to Colonna I should state that I possibly may be prejudiced against him for he "wiped my eye" on one occasion. I had defended in a case at Murrurundi and the jury disagreed. Colonna had the brief at next Sessions and obtained an acquittal.

"My dear young friend," he said on his return to Sydney, "I fear that you greatly erred in your conduct of the case for you merely set up an *alibi* for the accused,

* Mr. Blacket's contribution is an example of the entertaining interest that "Recollections" provide: when will some New Zealand counsel provide similar anecdotes of the Bar?

A Christmas Fantasy.

L'INTROIT

When Good King Wenceslas looks out
On the legal Yule Vacation,
He rubs his eyes in wide surprise
To see such wild elation.

LA FANTAISIE

Judicial boys play with their toys—
Just hear their joyful squealing—
The Chief sits by with kindly eye
And quashes all appealing.
There's Justice Blair with ruffled hair
With Hornby trucks and puff-puff;
While Ostler J. just casts away
With feathers, flies and such stuff.
Sir Alexander sails his boat
By Rotoiti's borders,
While Reed J. R. goes forth to war
And leaden soldiers murders.
There's Adams, J., who reads all day
His tales of Prince and beggar,
His ears beguiled with bagpipes wild
Of the Hon'rable MacGregor.
The puisniest pair fill loud the air
From dewy morn to nightfall:
See Kennedy and Smith, JJ.,
Enjoy their game of patball.

L'ENVOI

Let Good King Wenceslas look out
And fill this Long Vacation
For Judges and for lawyers too
With happy recreation. —*J. H.*

but I, besides doing that, made a searching analysis of the evidence in the course of my two hours oration, and thereby conclusively proved an *alibi* for the girl, and demonstrated to the absolute satisfaction of the jury that at the time of the occurrence the prosecutrix was sitting at home with her mother."

His boasted knowledge of all the world outside Australia was not always sufficient for his needs on this Continent. In one case a question arose regarding some fleeces and a remark made by Colonna caused some gentle merriment in Court. He turned angrily on the Crown Prosecutor and said: "My learned friend need not laugh for I can assure him and assure the Court that I have bred and handled my own flocks in Russia, and in Spain and Patagonia, and that I know as much as any man in England and much more than any man in Australia about *sheeps' hair.*" Similarly when "brumbies"—wild horses—had been mentioned in evidence he asked a witness: "Now I want you to tell the Court who these Brumbies were—I presume that they were some individuals whom the proprietor of the station permitted to reside in the back paddock." (Loud laughter in Court). In like manner he "fell in" when he fiercely asked a witness who had referred to a "crab hole"—a depression formed on level land by percolating flood waters—whether on his oath he would swear it "was not a lobster hole." But no such errors or incidents ever disturbed his self-complacency. Maybe other people did not hold him in excessive esteem, but his own esteem of himself was sufficient to raise the general average to a very high standard.

Mr. Justice Owen neither loved nor spared him. "I cannot understand," said His Honour on one occasion, "why such a ridiculous application was ever made." "Well I can assure your Honour that I personally advised in this matter," said Colonna. "Then I can understand it," was the retort; "application dismissed with costs."

It was *Cor.* Owen J. too that as juror interrupted Colonna's address for the defence after it had gone on for two hours and threatened to last a week, by asking: "Your Honour are we obliged to listen to all this wretched rot?" and the Judge sadly said: "Yes, gentlemen, you are—and so am I," and he bowed his head, covered his face with his hands, and seemed to be weeping bitterly.

The forensic event of Colonna's lifetime was by him intended to be his argument on appeal in the notorious case of R. v. Dean. He came into Court with a cart-load of books and assured their Honours that his argument would have to extend over three days. He started, and after some introductory and grandiloquent verbal flourishes went on to say: "I propose to prove, your Honours by indisputable logic and as the basis of all my subsequent argument this twofold proposition, —that the thing that is not, cannot be the thing that is; and that the thing that is, cannot be the thing that is not." He made a dramatic pause to allow the "twofold proposition" to sink, and Sir William Owen slowly and quietly said: "Unless you desire Mr. Colonna Close to convince yourself of the truth of that twofold proposition it will be quite unnecessary to argue it to the Court." That was a shell in the engine-room: Colonna never got going again after that and the case ended in time for early lunch.

His especial pride of oration was in his perorations. Here is one that is typical of his style: "And now, gentlemen of the jury, having done in the sight of Heaven, and of this Supreme Court, all that mortal man can do for a fellow mortal, I leave my client, gentlemen of the jury, in your hands, and in the hands of the great good Lord God Almighty, and in the hands of His Honour the Chief Justice of the State of New South Wales." Sir F. M. Darley, C.J., bit his lip till the blood came but took no action. Still when he was sentencing the prisoner to ten years' penal servitude it is quite probable that he regretted his inability to do something of the same kind for the prisoner's counsel. It was in this case that Colonna started his address by saying: "The Crown case is a skeleton, and I will prove to you, gentlemen, that it is a skeleton for I will prove that it has neither blood, body, nor bones." "It must be the India-rubber Man," suggested Arthur Dawson, Crown Prosecutor.

Another peroration at Bathurst Assizes was probably his finest imaginative effort. He said, "Ah, gentlemen, in my mind's eye there is a pathetic, a peaceful scene: Methinks I see an aged mother sitting in front of a vine-embowered cottage on the white chalk cliffs of Albion, quite near the place, gentlemen, where I myself have so often stayed. Her Bible is on her knees: her aged consort, her husband, gentlemen, is beside her. They sit hand-in-hand and their gaze is towards the sea for they look for the swelling sails of the ship that shall bring home for the Christmas season their sailor son who has spent long years in this great Australian Continent in honest endeavour to win wealth for his aged parents. Gentlemen, that sailor son is now in that dock. It will be for you to say whether your verdict shall set him free, and enable him to spend a happy Christmas with his aged and God-fearing parents." The jurors, some of whom knew the prisoner as one who had followed the trade and artifice of cattle-stealing in the Bathurst district from his youth up, were greatly astonished at "the sailor son" business, but the eloquence of Colonna did not sway them and they promptly convicted. Then Judge Docker took up the parable and said: "It has been stated on your behalf, prisoner, that your aged mother waits for you in a vine-embowered cottage on the white chalk cliffs of Albion, but that is not quite correct for she is still engaged in serving in Bathurst Gaol the sentence of twelve months which I awarded to her in June last. Her 'aged consort' is also serving a five years' sentence for cattle stealing, in that Gaol, and therefore your counsel will be glad to know that you will spend the Christmas season with your parents, or at least will be doing hard labour in the same Gaol."

New Books and Publications.

Yearly Supreme Court Practice, 1932, 2 vols. (Butterworth & Co. (Pub.) Ltd.) Price 47/6.

Notable British Trials—Trial of James Stewart. Edited by D. N. Mackay. (Butterworth & Co. (Pub.) Ltd.) Price 9/6.

Annual Practice, 1932. (Sweet & Maxwell Ltd.) Price 47/-.

A.B.C. Guide to Practice, 1932. (Sweet & Maxwell Ltd.) Price 13/6.

Motorists and the Law. By B. K. Parry, M.A. Foreword by Sir Herbert Austin. (Chas. Griffen & Son). Price 6/6.