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"Coke's Commentary on Littleton, the 'Institutes of the Law of England,' may be studied with advantage, not only by lawyers, but by all who wish to be acquainted with the formation of our polity, and with the manners and customs prevailing in England in times gone by."
—Lord Campbell.

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Concerning Legal Education.

Progress often consists in retracing one's steps. Consequently, it is of interest when considering the question of legal education to look back in order to ascertain if the jurists of olden time have anything to teach us. In this regard, it is instructive to recall the system of study for aspirants to the Bar put forward by Sir Edward Coke in the spacious days of Queen Elizabeth and the early Stuarts. It will be remembered that he stood at the parting of the ways between the old system of the Common Law and the new law—the law as modified by the Statute of Uses, the Statute of Wills (1540), the Statute of Frauds, the destruction of the feudal tenure and the discarding of notoriety of conveyance by livery of seisin. He was a counsel in *Shelley's case*, and his part in laying the foundations of our modern law was outstanding.

The *Institutes of the Law of England* were written for law students, for Coke was deeply interested in developing a rational system of study for the legal profession. He would wish, he said, "our student to be a compleat lawyer." Frequently, he who "took particular delight in styling himself 'Lord Chief Justice of England,'" offered encouragement and advice as to the manner and method of acquiring legal education. Lord Campbell, in his *Lives of the Chief Justices of England*, gives us a colourful picture of Coke's own preparation for the Bar. After leaving Cambridge, he began his legal studies at Clifford's Inn where for two years he was engaged in obtaining a detailed knowledge of procedure. Then, in 1578, he was admitted as a student of the Inner Temple:

> "Every morning he rose at three—in the winter season lighting his own fire. He read Bracton, Littleton, the Year Books and the folio abridgements of law till the courts met at eight. He then went by water to Westminster and heard cases argued till twelve, when pleas ceased for dinner. After a short repast in the Inner Temple Hall, he attended 'readings' or lectures in the afternoon, and then resumed his private studies till five or supper time. This meal being ended, the moots took place when difficult questions of law were proposed and discussed—if the weather was fine, in the garden by the riverside; if it rained, in the covered walks near the Temple Church. Finally he shut himself up in his chamber and worked at his common place book, in which he inserted, under the proper heads, all the legal information he had collected during the day. When nine o'clock struck, he retired to bed; that he might have an equal portion of sleep before and after midnight. The Globe and other theatres were rising into repute, but he never would appear at any of them, nor would he indulge in any such unprofitable reading as the poems of Lord Surrey or Spencer." (I, 245).

It will be observed that such a programme afforded opportunity for the exercise of both deductive and inductive methods.

The student, afterwards become the Judge, applies the benefit of his experience when he advises the aspirant to the law, as follows:

> "And I would advise our student, that when he shall be enabled and armed to set upon the yeare bookes, or reports of law, that he be furnished with all the whole course of the law, that when he heareth a case vouched and applyed either in Westminster-Hall, (where it is necessary for him to be a diligent hearer and observer of law), or at readings or other exercises of learning, he may finde out and read the case so vouched; for that will both fasten it in his memory, and be to him as good as an exposition of that case. But that must not hinder his timely and orderly reading, which (all excuses set apart) he must bind himselfe unto; for there be two things to be avoyded by him, as enemies to learning, *praepostera lectio*, and *praepropera praxis*." (70a).

He goes on to say:

> "Our student shall observe, that the knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding. He that reacheth deepest, he seeth the amiable and admirable secrets of the law, wherein I assure you, the sages of the law in former times have had the deepest reach. And as the bucket in the depth is easily drawne to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawne up but with a great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, so long as he keepe himselfe in his owne proper element." (71 a.)

In his closing chapter of the first part of the *Institutes*, Coke sums up his theory of legal education:

> "*Ratio est anima legis*; for then are we said to know the law, when we apprehend the reason of the law; that is, when we bring the reason of the law so to our owne reason, that we perfectly understand it as our owne; and then, and never before, we have such an excellent and inseparable properite and ownership therein, as wee can neither lose it, nor any man take it from us, and will direct us (the learning of the law is so chained together) in many other cases. But if by your studie and industrie you make not the reason of the law your owne, it is not possible for you long to retaine it in your memorie. And wel doth our author couple arguments and reason together, *Quia argumenta ignota et obscura ad lucem rationis pro erunt et reddunt splendida*, and therefore *argumentori et ratiocinari* are many times taken for one." (394 b.)

And, lastly, he says:

> "There is nothing herein but may either open some windowes of the law, to let in more light to the student by diligent search to see the secrets of the law, or to move him to doubt, and withall to inable him to inquire and learne of the sages, what the law, together with the true reason thereof, in these cases is: or lastly, upon consideration had of our old bookes, lawes, and records (which are full of venerable dignitie and antiquitie) to finde out where any alteration hath beene, upon what ground the law hath beene since changed; knowing for certaine that the law is unknowen to him that knoweth not the reason thereof, and that the knowne certaintie of the law is the safetie of all."

So, Coke displays his understanding of the difficulties attendant upon the study of the law, the purpose and scope of that study, and his theory of the best method of legal education. There is little of our present means of imparting the education necessary for a well-trained lawyer which cannot be found in substance in the clearly expressed thought we have indicated. We think that when the ultimate standards of legal education have been determined in this Dominion, they will be found largely to conform to those set up by Sir Edward Coke; so much has he written and so well and so logically has he covered the entire subject.

Full Court.

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

March 10, 23, 1932.
Wellington.

ROSE v. ROSE.

Divorce—Petition by Husband for Restitution—Deed of Separation in Force—Separation thereunder to be for Life and neither Husband Nor Wife to seek Restitution of Conjugal Rights—Deed not pleaded in Bar on Husband's Subsequent Petition—Whether Court Might Ignore Separation Agreement—Court's Discretionary Power Considered—Divorce and Matrimonial Causes Act, 1928, ss. 3, 10 (i).

The question for the Court's determination was whether a decree for restitution of conjugal rights should be granted in circumstances which may be shortly stated. In November, 1930, the petitioner's wife withdrew from co-habitation but, on a petition for restitution of conjugal rights being filed, she returned to her husband. In December, 1930, a deed of separation was entered into between the spouses and they separated. The wife was subsequently requested by her husband to return, but she refused and the present proceedings were brought.

The deed of separation is for life and provides that husband and wife shall not seek to enforce any restitution of conjugal rights. No appearance was entered until after the petition had been heard, and the case stood over for argument and determination by the Full Court. No answer was filed but counsel, who was heard as *amicus curiæ*, asked for leave to file an answer in the event of the Court holding that it might ignore an agreement of separation not pleaded in bar.

Held: Dismissing Petition: Having regard to the express provisions of s. 10 (i) of the Divorce and Matrimonial Causes Act, 1928, the Court, in the exercise of its discretion, should refuse the decree where a deed of separation, for life or for an indefinite period and apparently still in force, was disclosed, even though the respondent did not defend and plead it in bar, unless the petitioner affirmatively satisfied the Court that the deed was obtained by fraud or by coercion, or in such circumstances that the public interest was served by disregarding it or that it had been brought to an end in some way, as for example by consent or by conduct, before the demand for return to co-habitation.

S. W. Fitzherbert for the Petitioner.

W. H. Leicester as *amicus curiæ* for the Respondent.

KENNEDY, J., in delivering the judgment of the Court, said that if the respondent had appeared and pleaded the deed of separation in force at the time of the request to the wife to return, that would have been a complete answer to the petition; for although the Ecclesiastical Courts treated a deed of separation as illegal and void, the Court of Chancery would restrain a suit brought contrary to covenant, and, after the substitution of equitable defences for injunctions restraining suits, a separation deed containing a covenant not to sue for restitution, became a defence to a suit for restitution: **Marshall v. Marshall,** 5 P.D. 19; **Clark v. Clark,** 10 P.D. 188, and **Russell v. Russell** (1895) P. 315, at pp. 332 and 333. A decree must also have been refused in accordance with the principle formulated in **Russell v. Russell** (*supra*) after the enactment of the statutory provision that failure to comply with a decree for restitution of conjugal rights was equivalent to desertion without cause. The scope and origin of that defence was explained (at p. 334) by *Lopes*, L.J., delivering a judgment concurred in by *Lindley*, L.J. It seemed to their Honours in the present case that, since 1884, and by necessary "implication, the Court must have power to refuse a decree for restitution wherever the result of such decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case." The principle so stated was applied by Lord *Birkenhead*, L.C., when sitting as a judge of first instance, in **Walter v. Walter** (1921) P. 302, where the parties had entered into a deed of separation and had lived separate and apart pursuant to that deed but where the deed did not contain a covenant not to sue, and by Mr. Justice *Salmond* in New Zealand in **Fielding v. Fielding** (1921) N.Z.L.R., 1069.

At the time the case last mentioned was decided, the Divorce and Matrimonial Causes Amendment Act, 1920, provided that failure to comply with a decree for restitution of conjugal rights was to be deemed to be desertion without reasonable cause and that a petition for dissolution of marriage might forthwith be presented on the ground of desertion, although the period fixed by the principal Act in the case of desertion had not elapsed since the failure to comply with the decree. The 1928 Act provided simply that a petition for divorce or judicial separation may be presented on the ground of the failure to comply with a decree for restitution of conjugal rights, but this charge did not, in their Honours' view, affect the principle.

It had been submitted that as the deed was not pleaded, the Court should disregard its existence. In England, the rule had been applied that where no question of public policy or of a statutory bar to proceedings was raised by a deed of separation, and there was a mutual covenant of which either party might avail himself or herself, or which either party might seek to put aside, the Court was not bound to take notice of such covenant in a suit praying for relief contrary to the covenant, if the respondent did not appear or set it up. This was laid down in **Tress v. Tress** (1887) 12 P. 128, dissented from in **Kennedy v. Kennedy** (1907) P. 49; but since followed on a number of cases amongst which may be mentioned **Phillips v. Phillips** (1917) P. 90; **Pugh v. Pugh** (1920) 37 T.L.R. 105; **Williams v. Williams** (1921) P. 131 and **Mann v. Mann** (1922) P. 238. In **Palmer v. Palmer** (1923) P. 180, the Court of Appeal, made no reference to **Tress v. Tress** or to **Kennedy v. Kennedy** (*supra*); but acted upon the rule in disregarding a deed of separation which was not pleaded in bar. The practice may now be regarded as definitely settled and **Kennedy v. Kennedy** must be treated as not authoritative on this point.

The ground of the decision was not stated in **Tress v. Tress** (*supra*) although in the course of the argument the President is reported to have said: "It may be that the respondent knew of circumstances which would prevent him from successfully pleading the deed. But if there are any circumstances in which the deed would not be binding it lies upon him to put in a valid answer." *Low*, J. in **Phillips v. Phillips** (*supra*) stated the reason for the rule in similar terms. The true ground, their Honours thought, appeared from the observations of Sir *Henry Duke*, P., in the Court of Appeal in **Palmer v. Palmer** (*supra*) when he said: "The question whether the existence of the deed of separation constitutes a bar against the granting of a decree for restitution has often been discussed, and in the Ecclesiastical Courts it was not treated as a bar. Section 22 of the Act of 1875 provides for the grant of a decree for the restitution of conjugal rights upon the principles of the Ecclesiastical Court, and, that being so, the law must be considered as it was before the Matrimonial Causes Act, 1857. I think the petitioner has a right to have her case tried on that footing. The husband did not appear nor set up the deed. The wife appeared and revealed it, and said that she had been coerced into signing it and had made an appeal to the husband to return to her. Under these circumstances if the Court is satisfied of good faith on her part, and that there is evidence that she is really desirous that her husband should return to her, I think she is entitled to the decree for which she asks."

In New Zealand, while s. 3 of the Divorce and Matrimonial Causes Act, 1928, provided that in all proceedings other than proceedings for divorce, the Court shall proceed and act and give relief upon principles and rules which, in the opinion of the Court, as nearly as may be conform to the principles and rules upon which the Ecclesiastical Courts of England acted and gave relief. But, subject to the provisions of this Act, s. 8 enacted that the Court on being satisfied that the allegations contained in the petition for restitution of conjugal rights were true, may *in its discretion* make a decree. The Court then in granting or refusing a decree was not bound to exercise only the discretion possessed by the Ecclesiastical Courts, but was itself invested by the statute with a judicial discretion. The words "may in its discretion" were so interpreted by Mr. Justice *Hosking* in **Avery v. Avery** (1923) N.Z.L.R., 47.

The deed of separation was for life; but after the deed has been in full force for not less than three years, either party might present a petition praying for divorce on this ground. On the petition being heard, the Court had the same discretionary power to refuse a divorce as it had when the ground was failure to comply with a decree for restitution of conjugal rights. If, however, in the present case a decree for restitution of conjugal rights were made and if a failure to comply with it were made

the ground for a petition for divorce, the respondent would not then have the right to have the petition dismissed which she would have if the ground relied on were that both the petitioner and the respondent were parties to the deed of separation. She would lose the absolute right to have the petition dismissed which she would have, on proving to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner.

Their Honours thought that, as in **Russell v. Russell** (*supra*), the Court may consider the effect of the decree asked for, and may take cognisance of the fact that, although the statute prescribed for those living separate and apart the desire to rely upon their separation as a ground for divorce, the lapse of a minimum period of three years from the separation, a petitioner by indirect means might forthwith petition for divorce. They adopted as applicable to this case the remarks made by Mr. Justice *Salmond* in **Fielding v. Fielding** (*supra*) at p. 1073 when referring to the Act of 1920.

Having regard, then, to the express provisions of s. 10 (i) of the Divorce and Matrimonial Causes Act, 1928, their Honours thought that the Court, in the exercise of its discretion, should refuse the decree where a deed of separation, for life or for an indefinite period and apparently still in force, was disclosed, even though the respondent did not defend and plead it in bar, unless the petitioner affirmatively satisfied the Court that the deed was obtained by fraud or by coercion or in such circumstances that the public interest was served by disregarding it or that it had been brought to an end in some way, as for example by consent or by conduct, before the demand for return to cohabitation.

The petition was accordingly dismissed.

Solicitors for the Petitioner: **O. and R. Beere and Co.**, Wellington.

Solicitors for the Respondent: **Leicester, Jowett and Rainey**, Wellington.

Supreme Court

Adams, J. December 11, 1931; January 29, 1932. Christchurch.

In re CLIFFORD (SIR GEORGE), DECEASED.

Will—Construction—Income of Estate Bequeathed to Son and Daughters in Defined Shares—Provision in case of Daughters dying Without leaving Issue—No Provision where Issue Survive—Whether Gift Over to such Issue may be Implied—Whether Gift to Son is for Life Only or an Absolute Gift with Executory Limitation Over in Default of Issue.

Originating summons for an order determining questions arising upon the construction of the will of the late Sir George Clifford, Bart.

The testator made provision for his wife by settlements during his life. By his will, dated December 18, 1926, he provides her with funds for her immediate requirements; he then made provision for his son Charles Lewis Clifford by gifts of all his real and part of his personal estate and by request to his wife to lease all her lands to the son at a nominal rent during her life and to devise them to him by her will. He then expressed a desire that his racing trophies and presentation plate should be divided among those of his family who are resident in New Zealand, and bequeathed all other his personal property to his trustees in trust after payment of succession duty and funeral and testamentary expenses. The relevant clauses referred to in the judgment are as follows: "to divide the annual revenue therefrom as to two-fifths to my said son Charles Lewis Clifford and as to the balance in equal third shares to my three daughters during their lives but if any beneficiary shall die without leaving issue him or her surviving then the shares of any of them so dying shall be divided among the survivors of such daughters as have issue then living and the issue *per stirpes* of any daughter then deceased;" and the following and last clause of the will: "Before however any annual division of revenue be made I direct that my said trustees shall secure that the payment thereout to my wife shall bring up her annual income from all sources to a sum of not less than five thousand pounds."

Six questions are set out in the summons but the only questions argued were: (1) The testator having failed to provide for the case of his son or a daughter dying leaving issue him or her surviving, can a gift over in that event be implied to the issue of the beneficiary so dying? (2) Is the gift of two one-fifth shares in the residue to Charles Lewis Clifford for his life only, or an absolute gift with an executory limitation over in default of issue?

Held: The Court could find nothing, on the clearly defined rules of construction, to infer or imply words to give effect to what may have been the testator's intention in regard to the shares of daughters dying with issue them surviving. According to the rules of construction, the word "their" in the phrase "during their lives" must be read as relating to the immediate antecedent "my three daughters," and the limitation did not apply to the prior gift in favour of the son. It was also held that the gift to the son of two-fifths of the residuary fund was absolute, subject to the trust in favour of the testator's widow; but it was liable to be divested in the event of the son's dying without leaving surviving issue.

R. Loughnan for trustees and through them for infant grandchildren.

Sim for defendant Sir Charles Lewis Clifford.

Upham for defendant Dame Helen Francis Clifford.

Wanklyn for remaining defendants who are all the daughters of deceased.

ADAMS, J., said that the testator was disposing of a large estate but did not seek the assistance of a skilled draftsman, with unfortunate results. The two codicils had been prepared by his solicitor, but the testator appears to have more or less dictated the words of the instruments, particularly of the first codicil which in the circumstances was insensible. He did not allow the solicitor to see the will itself. The testator was somewhat advanced in years and apparently wished to keep the contents of his will secret. The two questions before the Court arose on the construction of that part of the will quoted, down to the words "of any daughter then deceased."

His Honour remarked that in the final clause of the will the testator obviously meant and intended that the annual revenue from his residuary estate should be charged with the sum of any deficiency in the annual income of his wife from all sources in priority to the claims of the beneficiaries under the residuary trust, but that was left to inference or implication. As to that, there was no difficulty. The testator had failed to provide in express words for the contingency which might, and in the circumstances most probably would arise, of the death of one or more of his daughters dying and leaving issue her surviving.

The rule of construction applicable to the first question was stated in **Kinsella v. Caffrey** (1860) XI Ir. Chancery Reps. 154. After referring to earlier authorities, most of which were cited in argument His Honour then quoted the observations of the learned Master of the Rolls in that case, (*q.v.*) Such propositions had been approved and applied by the Court of Appeal in **In re Rawlins' Trusts** (1890) 45 Ch. D. 299, and in **Champ v. Champ** (1892) 30 Ir. Com. Law R. 72. In **In re Rawlins' Trusts** the testator gave his real and personal estate to his wife and his nephews S. and W. upon trust for his wife during her life; and after her death he gave his real estate to his brother during his life, with remainder, as to three freehold houses, to his (testator's) nephews S. and W., upon trust to pay the rents and interest to his niece during her life for her separate use; and after her death, she leaving no child or children, the testator gave one of the freehold houses to his nephew S., and the other two to his nephew W. And after bequeathing certain legacies, to be paid out of residue, or if none, then out of the rents of the real estate, the testator gave the residue of his real and personal estate to his nephews S. and W. equally. The testator's niece survived his wife and brother, and died leaving two children. *Kay*, J. held that the niece took an absolute interest in fee simple in the three houses, but this was reversed in the Court of Appeal. His Honour quoted *Cotton*, L.J., at p. 304, and *Bowen*, L.J., at p. 307; and he added that the decision in **Champ v. Champ** (*supra*) was founded on **Kinsella v. Caffrey** (*supra*). The questions in the case arose upon the construction of a marriage settlement which contained no express trust for the children of the marriage. *Holmes*, J., observed (p. 81) that subject to the rules of law as to the construction of technical language he had always understood that the same governing canon of construction applied equally to wills and deeds; that both ought to be construed so as to carry out the intention of the testator or parties, but that the intention must be found in the language of the instrument itself. "An implied gift or

trust does not import the introduction into a document of something omitted. The gift or trust is contained in the writing itself, although it is not expressly declared but deduced by reasonable inference from the language used." *Gibson*, J. said (p. 84) that if the instrument to be construed in that case had been a will, and not a deed, there could have been no doubt as to the application of **Kinsella v. Caffrey**, and further on he says: "Subject, however, to these points of distinction, the general principles of construction adopted by the Court apply to deeds and wills alike. The object is to discover the intent of the parties from a careful study of the entire document, and for that purpose, when the true construction requires it, words may be altered, or supplied or clauses may be transposed." In **Champ's case**, the implication of a gift in favour of children was aided by reference in the deed to children of any marriage of the husband, Arthur Champ, and by the fact that in a marriage settlement an intention to provide for children or issue is presumed.

In re Rawlins (*supra*) was carried to the House of Lords—reported *sub nomine* **Scale v. Rawling** (1892) A.C. 342—and was affirmed, His Honour said. He then quoted from the speech of Lord *Halsbury*, L.C., with which Lords *Herschell*, *Macnaghten*, *Morris* and *Hannen* concurred. Those decisions explained and applied, but did not extend, the observations of Sir James Wigram in his classic work on **Extrinsic Evidence in Interpretation of Wills**, 5th edn., pp. 8, 9. On a question of construction such as the present, therefore, the question for the Court is, "not what the testator meant, as distinguished from what his words express, but what is the meaning of his words." *Ibid* p. 9.

Although the testator had omitted to provide for the case of a daughter dying leaving issue her surviving, and, His Honour thought it most probable that his intention had been to give the shares of daughters so dying to their issue then living, or to the then surviving daughters and their issue then living, His Honour could not, on the principle of construction so clearly stated in the authorities to which he had referred, find anything which would justify the Court in inferring or implying words to give effect to what may have been the intention of the testator. He could not say what had been in his mind, because he had failed to disclose it in the words he had used with the aid of such construction as is permissible.

Mr. *Sim* submitted that the testator's son was in a different category from the daughters and took an absolute interest in two-fifths of the annual revenue, subject to defeasance in the event of his dying without issue him surviving, and in His Honour's opinion that submission is well founded. The word "their" in the phrase "during their lives" must, he thought, be read as relating to the immediate antecedent in accordance with the ordinary rule of construction. The rule was stated by *Blackburn*, J., in **Eastern Counties and London and Blackwell Railway Companies v. Marriage** (1860) 9 H.L.C. 32, 37, in these words—"It is an ordinary rule, not so much of law as of the grammatical construction of the English language, that words of relation *prima facie* refer to the nearest antecedent." Here, the nearest antecedent is "my three daughters" and there was no sufficient reason to extend the limitation to the prior gift of two-fifths of the annual revenue to Charles Lewis Clifford. On that construction, there was no ambiguity.

A more difficult question arose out of the last clause of the will. Under that clause, the annual revenue of the residuary fund was subject to a charge in favour of the testator's wife, so that if in any year her income from all sources is less than £5,000, the deficiency was to be made up out of the annual revenue for that year. His Honour thought, however, that was no more than a charge upon the annual revenue. The rule applicable to that part of the present case had been recently stated by Mr. Justice *Younger* in **In re Harrison: Hunter v. Bush** (1918) 2 Ch. D. 59. That learned Judge said: "As I understand the authorities on this point, the rule of construction which is commonly known as the rule in *Lassence v. Tierney*—1 Mac. & G. 551—or *Hancock v. Watson*—(1902) A.C. 14—is based on this proposition, that, if in the language used you find what amounts to an absolute gift with limitations subsequently engrafted on that absolute gift which do not exhaust in every event the whole capital, the principle of sound construction is that, to the extent to which the subsequent dispositions do not in the event exhaust the whole interest in the property, the original absolute gift remains. In my view that is a sound rule of construction and not an artificial one, nor is it limited to anyone class of instrument, nor to direct gifts only as distinguished from gifts made through the medium of a trust; it extends to all gifts made in language apt to make it applicable."

His Honour remarked that, if he might say so, that appeared to his mind to be a clear and accurate statement of the rule. In **In re Marshall: Graham v. Marshall** (1926) Ch.D. 661, which was the latest case so far as he knew, the testator directed his trustees to stand possessed of a fund upon trust to divide the fund into seven parts and to pay or transfer two such parts to his son, provided that such two-seventh parts should not vest absolutely in the son, but should be retained by the trustees and held by them upon the trusts declared; but directed that on the death of the son without leaving any children him surviving his share should sink into and form part of his residuary estate. The son died a bachelor and intestate. The gift over having failed, it was held by Mr. Justice *Eve* that the rule applied and the share of the son passed to his legal representative.

His Honour held, therefore, that the gift of two-fifths of the residuary fund to the testator's son, Charles Lewis Clifford, was absolute; but was subject to the trust in favour of the testator's wife and liable to be divested in the event of his death without leaving issue.

The answers to the questions argued, were accordingly answered: (1) No; (2) The gift of two one-fifth shares in the residue to Charles Lewis Clifford was an absolute gift with an executory gift over in the event of his dying without leaving issue him surviving.

Solicitors for the trustees: **Izard and Loughnan**, Christchurch.

Ostler, J. February 5, 11, 1932.
Palmerston North.

MARSH v. MUDFORD AND GRAHAM.

Vendor and Purchaser—Application for Rectification of Certificate of Title or Payment of Compensation—Sale of Specific Piece of Land—Mistake in Survey—Purchaser acquiring larger Area than contemplated and same brought under Land Transfer Act—Error discovered by Vendor's Executrix Nineteen Years after Sale—Whether Purchaser liable for Payment for Excess Area or to Reconvey Excess Area.

Action claiming an order for rectification of the Certificate of Title and the re-conveyance of 7ac. 2rds. 19.7pp. of land, or alternatively, for the payment of the sum of £470, the value of the said land, and £200 for its use and occupation. There was an alternative claim for £167 15s. 0d. for balance owing on account of purchase money, and £201 6s. 0d. for interest on the same.

The plaintiff is the executrix and sole beneficiary under the will of Francis Williamson, deceased, who was the owner of a section of land containing some 100 acres and known under the name of the Rangitikei Manawatu Block B 1 in Block 16 of the Te Kawa Survey District. This land was in the shape of a long thin strip, lying East and West. It was ring-fenced and divided into two paddocks. The defendant Mudford agreed to purchase the western paddock at the price of £22 per acre. The area of this paddock was not exactly known and Williamson agreed to have it surveyed. He engaged a surveyor who made an accurate survey of the boundaries of the paddock, but by some mistake the surveyor wrongly computed the area. The area was computed as being 50acs. 0rds. 24.6ps., whereas the true area was 57acs. 3rds. 10ps. There was no preliminary agreement signed, and both parties went to Mr. Innes, the well-known solicitor of Palmerston North, to complete the transaction. Mr. Innes discovered that in this paddock there was an area of about 8¼ acres included: to this Williamson had had no title. The title to this piece was vested in a native. Mr. Innes thereupon prepared a conveyance of 41acs. 3rds. 11ps., which was executed by the parties on February 14, 1912. The words of the conveyance in so far as they are material are as follows: "In consideration of the sum of £920 paid by the purchaser to the vendor the receipt whereof is hereby acknowledged . . . the vendor hereby conveys and confirms unto the purchaser the lands described in the schedule hereto with all buildings and erections thereon and all ways rights and easements belonging thereto . . . ," etc. The schedule in the conveyance described the land as "All that parcel of land situate in the Provincial District of Wellington containing forty-one acres three roods eleven decimal three perches more or less being part of the land known as Rangitikei Manawatu B1 Block 16 Te Kawau Survey District bounded as appears on the plan drawn hereon and in outline coloured red."

Thus, defendant Mudford paid £920 for an area computed as nearly 42 acres, and he acquired by the conveyance over 49 acres. Mudford then purchased from the native the 8¼ acres, and also a further 21 acres adjoining. In 1925, he sold the whole of these lands to Simon Graham, the other defendant, who was his son-in-law. Graham subsequently brought this land under the Land Transfer Act, and has mortgaged it to the State Advances Superintendent. In 1924, plaintiff agreed to sell to one Donaldson the remaining portion of her 100 acres, and a plan was put on the agreement showing that Donaldson had purchased 48acs. 1rd. 15.4pp. In May 1931, however, this land was brought under the Land Transfer Act, and it was then discovered that its true area was only 40acs. 2rds. 3.3pp. Plaintiff, being then put upon enquiry, discovered the error in computation made by the surveyor and applied to the defendants to transfer to her 7acs. 2rds. 19.7pp. of the land sold to Mudford, or to pay compensation. Upon refusal to do so she commenced this action. She has apparently being paying rates and taxes all along on some 48 acres although her section contained only 40 acres.

Held: Giving judgment for defendants: The parties had agreed on the sale and purchase of a specific piece of land, and the purchaser obtained the land that he had indicated. By a common mistake, he received a larger area than he had paid for, and the vendor was paid for less than he gave. This did not come within authorities for recovery of sums of money paid under a common mistake of fact, and vendor could not recover compensation for excess land conveyed in absence of an applicable stipulation in the contract. Relief could not be had in equity, as there had been no unfairness on either side.

Maroney v. Noble (1915) 34 N.Z.L.R. 50 applied;

Okill v. Whitaker, 41 E.R. 973, and **Hawkins v. Jackson,** 19 L.J. Ch. 451 followed.

A. M. Ongley for plaintiff.

H. R. Cooper for defendants.

OSTLER, J., set out the foregoing fact and said that at the hearing Mr. *Ongley* had admitted that, seeing that Graham was a purchaser for value without notice, and that the State Advances Department had not been made a party to the action, he could not ask the Court to rectify the contract. He accordingly abandoned that part of his claim, and confined his claim to one for balance of purchase money against defendant Mudford. He acknowledged that this meant that, so far as defendant Graham was concerned, he was entitled to be dismissed from the action with costs.

His Honour said that there had been no preliminary agreement in writing. The only record of the contract was the conveyance. The conveyance showed no error on its face, but merely recorded that for the sum of £920 the land described in the schedule was conveyed to the defendant. There was no provision in the conveyance for compensation being allowed for any deficiency, or for extra payment being made for any excess of area. It was quite plain, therefore, on the authorities, that had there been a deficiency in area the defendant could not at this stage have successfully claimed any compensation from the vendor's estate. For that proposition His Honour said that he did not need to go further than the decision of *Hosking*, J., in **Maroney v. Noble,** 34 N.Z.L.R. 50. That was a case in which the defendant agreed to sell to the plaintiff a piece of land containing 764 acres more or less at a price or sum to be calculated at the rate of £14 per acre. Plaintiff was to give another piece of land in part payment and was to pay the balance of the purchase price in cash. He paid £8,126 on the assumption that he was obtaining 764 acres. After the completion of the transaction he ascertained that the area of the land he had bought was no less than 52 acres short, and that he had paid £803 19s. 0d. too much. He claimed the recovery of this sum from the defendant. It was held that, as there was no provision in the contract for compensation and the transaction was completed, he could not recover compensation for the deficiency. His Honour quoted the learned Judge at pages 63 and 65.

In that case, the deficiency in area was at least partly caused by errors in the original survey. If it were plain on the authorities that a purchaser could not after completion obtain compensation for a deficiency unless under some stipulation, in His Honour's opinion the law equally plainly precluded a vendor in like circumstances from claiming compensation for an excess. He had already quoted the passage in which *Hosking*,J., so held; and there were other ample authorities to the same effect. What might be called the leading case is **Okill v. Whitaker,** 41 E.R. 973. In that case premises were sold for the residue of a term of which both parties at the time supposed that eight years only were unexpired, and the price was fixed expressly on that assumption. It afterwards transpired that twenty years were in fact unexpired at the time of the sale. But a bill by the vendor to make the purchaser a trustee of the term for the twelve additional years was dismissed. His Honour quoted from the judgment in that case given by the Lord Chancellor (Lord *Cottenham*), expressly covering the facts of the present case. In addition, there was the case of **Howkins v. Jackson,** 19 L.J. Ch. 451, which was an illustration of the same principle. There were also a number of cases dealing with the purchaser's inability to obtain compensation for a deficiency in the absence of stipulation. See **Besley v. Besley,** 9 Ch. D. 103; **Allen v. Richardson,** 13 Ch. D. 524; **Debenham v. Sawbridge** (1901) 2 Ch. 908. His Honour also quoted **Kerr on Fraud and Mistake,** 6th edition, page 626 and, again, at page 640.

In the present case the parties agreed on the sale and purchase of a specific piece of land. The purchaser obtained the specific piece of land which he had agreed to purchase. By a common mistake, it is true, he obtained more than he paid for, and the vendor was paid for less than he gave. But there was no unfairness on the defendant's part, and therefore, on the clear authorities His Honour had cited, the plaintiff was not entitled to compensation for the excess land which the defendant acquired.

Judgment for defendants.

Solicitors for plaintiff: **Gifford Moore, Ongley and Tremaine,** Palmerston North.

Solicitors for defendants: **Cooper, Rapley and Rutherfurd,** Palmerston North.

Blair, J. November 25, 1931; February 5, 1932. Blenheim.

MARLBOROUGH HOSPITAL BOARD v. McMAHON.

Imprisonment for Debt—Judgment against Worker in receipt of Weekly Compensation while in Hospital—Afterwards "lump sum" Compensation paid him—Whether a "Special circumstance" enabling Judgment Debtor to plead Protection of Workers Compensation Act, s. 60,—Imprisonment for Debt Limitation Act, s. 8—Amendment Act, 1914, s. 2—Workers Compensation Act, 1922, s. 60.

The plaintiff Board obtained judgment against the defendant in the Magistrate's Court at Blenheim for the sum of £117 in respect of hospital treatment extending over a period of some months. The treatment was for injuries received by accident at Picton. In respect of this accident defendant prior to plaintiff's obtaining judgment against him received compensation at the rate of £3 8s. 5d. per week while in the hospital. Subsequently to the Board's obtaining judgment against defendant the defendant received a "lump sum" compensation amounting to £350 under the Workers' Compensation Act, 1922, because of permanent partial incapacity arising out of this accident. Although defendant received weekly compensation during the whole period he was in the hospital, he paid nothing to the Board. The plaintiff Board issued a judgment summons against defendant in respect of the judgment debt. The facts were not in dispute.

The Magistrate made an order on the Judgment Summons for payment of the judgment debt, in default three months' imprisonment, the warrant to be suspended for one month.

Defendant under S. 2 of the Imprisonment for Debt Limitation Amendment Act, 1914, applied to the Supreme Court for a rehearing, alleging as "special circumstances" within that section that although he had no dependants he had been unable to do any work or earn any moneys since the judgment and that the compensation moneys were protected by S. 60 of the Workers' Compensation Act, 1922.

Held: Dismissing Motion: S. 60 of the Workers Compensation Act, 1922, had no application to proceedings by way of judgment summons which are directed against the person, and are not proceedings by way of execution or attachment. Test required by s. 8 of Imprisonment for Debt Limitation Act, 1908, satisfied by fact of receipt of £350 by judgment debtor without dependents. S. 60 of the Workers Compensation Act, 1922, does not provide protection against judgment creditors' remedies.

Nathan for plaintiff.

Smith for defendant.

BLAIR, J., said, that, read literally, the section had no application to proceedings by way of judgment summons. Such proceedings are directed against the person of the judgment debtor and are not proceedings by way of execution or attachment against the compensation moneys in defendant's hands. Under the Imprisonment for Debt Limitation Act, 1908, the Court before making an order for judgment summons must be satisfied that the debtor has since the judgment had "*sufficient means to and ability to pay the sum so recovered against him.*"

The fact that debtor received the sum of £350 since the date of judgment satisfied this test, and it might be that the Magistrate, being aware that debtor had no dependants, might not have been satisfied as to what had happened to the weekly payments debtor received while in the hospital. The case was silent on that point; but it was immaterial because S. 60, if it protected the £350, would equally protect any unexpended weekly payments.

S. 60, His Honour proceeded, clearly did not expressly exclude compensation moneys from being taken into account by a Magistrate when hearing a judgment summons, and the point he had to decide was whether he must construe S. 60 as containing an implication to that effect. If the words of S. 60 were doubtful as to their meaning, he was entitled to look at the intention of the Legislature. But the Section was not doubtful, and clearly set out the cases where compensation moneys might not be touched. The Section was altogether silent as to a creditor's remedies under the Imprisonment for Debt Limitation Act. His Honour said he was not entitled to read into S. 60 something that was not there, even if he thought that the Legislature, had it considered the point, would have provided for the case. That being the position he did not think that the learned Magistrate in making the order on Judgment Summons was wrong.

Motion dismissed accordingly.

Solicitors for plaintiff Board: **A. C. Nathan.**

Solicitor for defendant: **C. T. Smith.**

Ostler, J. March 15, 16, 22, 1932. Wellington.

CARVER v. CARVER AND ANOR.

Divorce—Settlement of Wife-Respondent's Property for Husband and Children—Whether Petitioner entitled to any Settlement in his Favour—Court's Discretionary Power Discussed—Suggested Scheme in favour of Children Considered—Form of Order Made—Divorce and Matrimonial Causes Act, 1928, s. 36.

Petition under S. 36 of the Divorce and Matrimonial Causes Act, 1928, for a settlement of wife-respondent's property in favour of petitioner and the children.

At the conclusion of the hearing on March 16, an order was made that respondent should pay petitioner's party and party costs of the divorce proceedings on the lower scale. An order was was also made giving the custody of all three children to the respondent until the further order of the Court, she having undertaken not to live in adultery with the co-respondent. Rights of reasonable access were given to the petitioner, the terms of which were to be settled by the Court if the parties failed to agree, and liberty was reserved to both parties to apply to the Court on the question either of custody or terms of access. Decision on the petition for settlement of the respondent's property was reserved.

Held: (1) The Court, having discretion in deciding whether any part of guilty wife's property should be settled on husband, must take his conduct into consideration. On facts, Petitioner not entitled to any such settlement. (2) Order made settling portion of wife's property on children (no better scheme than that submitted by Counsel being available for time being), with liberty to Petitioner, Respondent, or the Trustee of such settlement to apply for variation.

Hanna for the petitioner.

O. C. Mazengarb and James for respondent.

OSTLER, J., said that the first question was whether petitioner had shown himself entitled in the facts of this case to a settlement of any part of respondent's property in his favour. In His Honour's opinion, he had not done so. He preferred to believe the evidence of respondent that it was the husband's infidelity in 1923 which was the first cause of the wreck of their married life. It was true that she then took him back and condoned his offence; but her confidence in him was shattered by his conduct, and it was apparent from her evidence that from that time the old relationship of mutual trust was never re-established. For a year or more before February 1930, when respondent committed the matrimonial offence which was the ground of the divorce, there had been negotiations for a separation, conducted for the greater part at arm's length through solicitors. The main concern of petitioner in those negotiations had been to get as large a share of his wife's income as he could squeeze out of her. He demanded no less than an income of £300 a year. When respondent at length declined to agree to his terms and committed the offence which was the cause of the divorce, petitioner's chief concern was to take advantage of the situation to extort money out of her. He delayed his divorce proceedings for fifteen months while he endeavoured in the most callous manner to coerce her into making over to him as much of her property as e could induce her to part with. The letters he wrote during this period threw a most unfavourable light on his mental attitude. After reading them, His Honour was satisfied that respondent's account of what took place in Sydney was the correct one. In his opinion the petitioner's object in going to Sydney was not to rescue his daughter, but by threatening to take her away from her mother to extort money from her.

The cases to which His Honour had been referred by counsel, all laid down that the Court has a discretion in deciding whether any part of a guilty wife's property should be settled on her husband, and that in exercising that discretion the conduct of the husband must be taken into consideration. The whole of the law on the point was to be found summed up in the English Court of Appeal in **Constantinidi v. Constantinidi and Lance** (1905) P. 253. Taking all the facts into consideration he declined to exercise the discretion vested in him in favour of petitioner. He had already had some of his wife's property; he sold and kept the proceeds of her furniture in "Green Gables," and he had had other moneys which it was unnecessary to mention. His conduct had been such that His Honour did not feel justified in making any settlement in his favour. It was true that at present his land agency business has vanished, but he was a comparatively young man. He had had no one dependent on him. He should be able to earn sufficient to maintain himself in reasonable comfort.

The position was different, however, with regard to the children. Petitioner was entitled to ask the Court for a settlement in their favour in their own interest and also in his own, for he was liable at law for their maintenance. The financial position of respondent was, however, so involved that His Honour had great difficulty in divising a satisfactory scheme. She herself, however, was anxious that a settlement of part of the income from her Christchurch property should be made on the children, and her Counsel had submitted a scheme of settlement for His Honour's approval, under which £100 a year of her income was charged in favour of each of the three children. It was not a very satisfactory scheme, but His Honour did not think a better one could be devised for the time being, and he was prepared, therefore, to adopt it and to order a settlement in accordance with its terms. If and when respondent's estate got on a better footing, the scheme of settlement would require revision so as to give more protection to the interests of the children. Not only respondent, but petitioner also has an interest in making the settlement in favour of the children safe and effective. There would be an order in the following terms:—

(1) *That* the estate and interest of the Respondent in one undivided moiety in ALL THAT parcel of land containing 1 rood 6¾ perches more or less situated in the City of Christchurch being part of Town Sections 589 and 591, after payment by the respondent each year out of the rents therefrom of: (1) All land-tax, rates and insurance premiums chargeable against the respondent in respect of the said land and the other freehold lands now standing in the name of the respondent; (2) Interest and instalments of principal under the mortgages registered against the said land; (3) Interest on the loan of £700 advanced by Mr. S. Richards to the respondent; (4) Interest on the mortgages registered against the other freehold lands of the respondent situate in Woburn Road, Lower Hutt, and in Pitoitoi Road, Day's Bay; (5) The annuity of £108 payable by the respondent to Mrs. Beatrice Frost, *do stand charged* pursuant to the pro-

visions of Section 36 of the Divorce and Matrimonial Causes Act, 1928, with the following payments as from the 1st day of April, 1932, namely:—(a) During the joint lives of the respondent and her son Matthew Arthur Carver the sum of £100 per annum for the benefit of the said Matthew Arthur Carver; (b) During the joint lives of the respondent and her son Pat Oram Carver the sum of £100 per annum for the benefit of the said Pat Oram Carver; (c) During the joint lives of the respondent and her daughter Ngaire Patience Carver the sum of £100 per annum for the benefit of the said Ngaire Patience Carver.

(2) *That* with respect to each sum of £100 per annum the same be paid to Robert Lachlan Macalister of the City of Wellington, Solicitor who is hereby appointed Trustee to receive and disburse the same for the benefit of the child on whose account it is payable and that such Trustee be paid such commission for his services out of such income received by him as may be agreed upon between Trustee and the respondent and in default of such agreement as may be fixed by this Honourable Court.

(3) *That* during the minority of each such child and thereafter during any period or periods in respect of which any such child is resident with the respondent the Trustee shall pay over to the respondent the income received by him in respect of such child to be applied by her for the maintenance education and benefit of such child without such Trustee being required to see to the actual application thereof.

(4) *That* the said Trustee be and he is hereby authorised to consent to the release of any mortgage or mortgages at present existing over the said land and to the registration in priority to this order over such land of a new Memorandum or Memoranda of Mortgage for such amount or amounts as may be requisite and necessary for the purpose of refinancing and discharging the liabilities of the respondent over the land hereby charged or over any of the other assets of the respondent or otherwise, but in giving such consent it shall be the duty of the said Trustee to see that the interests of the said children are not jeopardised.

(5) *That* liberty be and is hereby reserved to the petitioner the said trustee and the respondent to apply to this Honourable Court at any time or times for any variation in the terms of this Order.

Solicitors for the petitioner: **Duncan and Hanna.**

Solicitors for the respondent: **Mazengarb, Hay and Macalister.**

Smith, J. February 15, 1932.
Auckland (In Chambers).

TOWNSEND v. TOWNSEND.

Divorce—Practice—Defended Suit set down for Trial before Judge alone and Date of Hearing fixed by Registrar—Subsequent Motion by Petitioner for Order granting leave to Set Down Cause for Hearing before Judge and Jury of Twelve and Abridging or Dispensing with Time for Delivery of Notice requiring such Jury—Custom of Setting Down before Judge alone discussed—Divorce and Matrimonial Causes Act, 1928, S. 43; Divorce Rule 51.

Motion to have this cause set down for trial at the sittings of the Court which commenced on February 2, 1932, before a Judge and jury of twelve.

The petition for divorce was filed on December 4, 1931; wife, petitioner, and husband, respondent. The ground alleged was adultery with a woman unknown to the petitioner. On December 18, 1931, the respondent filed his appearance and answer. No order had been made joining any woman as respondent pursuant to S. 11 (2) of the Divorce and Matrimonial Causes Act. 1928. On January 21, 1932, the petitioner's solicitors filed a *praecipe* to set the cause down for trial before a Judge alone at the sittings of the Court commencing on February 2, 1932. This was done by petitioner's solicitors, pursuant to a practice which had been followed in Auckland subsequently to the passing of the 1928 Act to set down all causes in divorce, in the first place, for trial before a Judge alone. At the end of January, 1932, the Registrar made fixtures for the ensuing sittings of the Court and this cause was fixed for hearing on February 16, 1932. Respondent's solicitor was made aware of this fixture on February 2. On February 10, respondent's solicitor wrote to the solicitors for the petitioner as follows: "I find that you have had this case set down for trial on the 16th inst. before a Judge alone. The law, as I understand it, is that a defended case based on alleged adultery, must be set down for trial before a Judge and jury. It appears to be plain that the case cannot proceed during the present session, and I notify you of the position in order to give you time to look into it. It seems to me that nothing but an adjournment till next session or a striking out will meet the case. Possibly my client may consider an adjournment. I cannot say until I have referred the matter to him. I shall be glad to learn what you propose in the matter. Desiring not to involve either party in further costs, I refrain at the moment from taking proceedings to strike out or set aside. However, as I do not wish to inconvenience the Court on the 16th, I shall be obliged before then to take some step in order to bring the matter to the notice of the Court."

Pursuant to an order abridging the time for service, petitioner's counsel moved on February 15, 1932, for an order granting leave to the petitioner to set the cause down for trial at the current sittings before a Judge and jury of twelve, and also for an order abridging or dispensing with the time for delivering notice to the Registrar requiring such jury upon the grounds: (1) That the pleadings were concluded on December 18, 1931, which date was prior to commencement of the then present sittings of this Court; (2) That the cause was duly set down for trial before a Judge alone at the present sessions in accordance with the usual custom obtaining in the setting down of such causes; and (3) That the respondent now claimed the right of having the cause set down before a Judge and a jury of twelve.

Held: Dismissing application, that, following **Elliott v. Elliott** (1931) G.L.R. 579, the setting-down for trial before a Judge alone was a nullity. The fact that a custom had obtained in the Court of hearing to set down all causes before a Judge alone, was insufficient ground for granting the Order sought by Petitioner.

Johnstone for Petitioner in support.

Slipper to oppose.

SMITH, J., said that the construction of the Act of 1923 and of the existing rules with regard to the setting down for trial of causes in divorce founded on adultery was dealt with in the case of **Elliott v. Elliott** (1931, G.L.R. 581. In that case it was laid down by *Myers*, C.J., and *MacGregor*, J., "that there is not now in New Zealand any more than there is in England an absolute right to either party to have the case tried before a jury; but there is a primary right to have the case set down before a Judge and jury." It followed that the setting down of the present cause for trial before a Judge alone was a nullity. It so happened that a jury was available for the 16th February itself; but if the fixture had been for a date for which no jury was called it was clear that respondent would have had the right to claim a trial by jury unless an order were made for trial before a Judge alone. The respondent had the same right on the 16th instant. He was in no way bound by the purported setting down of the case for trial before a Judge alone. The case must then be regarded as a case in which an appearance and an answer had been filed, but which had not been set down; and it appeared to fall within the principle of the decision of *Chapman*, J., in **Hayne v. Hayne and Anor.** (1923) N.Z.L.R. 55.

His Honour added that Rule 51 should be observed unless sufficient reason were shown for granting the leave of the Court to set down the case. He was unable to regard the following of a custom to set the case down before a Judge alone as a sufficient ground for granting such leave because the decision in **Elliott v. Elliott** (*supra*) was published in the *Gazette Law Reports* for November 6, 1931, approximately a month before the petition in this cause had been filed.* It had been stated by petitioner's counsel that there was ground to fear that delay until the next sittings might be used in some way by the respondent to prejudice the petitioner in the proof of her case. There were no facts on affidavit at the time of application to support that suggestion; but it was open to the petitioner to make some fresh application based upon such a ground supported by affidavit.

Application dismissed.

Solicitors for petitioner: **Bennett and Jacobsen** Auckland.
Solicitor for respondent: **T. B. Slipper** Auckland.

**And in the* N.Z. LAW JOURNAL *on September 15, 1931:* 7 N.Z.L.J., 227.—Ed.

Court of Arbitration.

Frazer, J. December 22, 1931; February 3, 15, 1932.

THE PUBLIC TRUSTEE v. BETHELL.

Workers Compensation—Death while cutting willow-branches under contract—Whether Deceased a Piece-worker or Independent Contractor—Whether Work on which Deceased engaged within S. 63 of Workers' Compensation Act—Meaning of "Timber" discussed, and expression "Standing timber (including the cutting of scrub)" defined—Workers' Compensation Act, 1922, Ss. 3, 63.

Action by the Public Trustee, as administrator of the Estate of Gordon Ashley Kingsbury decd., and on behalf of the dependants of the deceased, claimed to recover from the defendant compensation in respect of the death of the deceased.

The deceased was killed on September 30, 1931, while he was engaged in cutting willow-branches on the defendant's property at Culverden. There was no witness of the accident that caused his death, but it is common ground that he had sawn a large branch partly through, when it broke and struck a bank as it fell. The butt was swung backwards, and struck the deceased in the chest, killing him.

The facts are, briefly, that the deceased had entered into an agreement with the defendant to fashion 500 to 600 stakes from branches to be cut from willows growing on the defendant's property, and to accept payment at the rate of 12s. 6d. per 100. The willows were growing for a considerable distance along the banks of a creek: they were irregularly spaced, and a few yards apart. The stakes were to be 3 ft. 9 in. long and about 4 inches wide, and sharpened at one end, They were intended for use as material for temporary fencing. The general practice is to select branches about a foot through, with fifteen to twenty feet of straight wood. The branches are cut down, divided into four-foot lengths, and the lengths are split into stakes. Ten to twenty branches are sufficient to yield 500 to 600 stakes. The deceased was not familiar with the part of the defendant's property on which the willows were growing, and the defendant took him to the creek and pointed out a number of trees from which suitable branches could be taken. The deceased was an experienced man, and could cut and fashion 100 stakes a day. He was free to work when he pleased and for any hours that he pleased. Though only about a week's work was involved, he was told that the stakes would not be required until midsummer. The defendant understood that the deceased would be given other work by the County Engineer, and accordingly he told him not to hurry over the stakes. The deceased supplied his own tools, and was not supervised or controlled in any way by the defendant.

Held: In circumstances of his contract, deceased was an independent contractor. In New Zealand, there is clear authority for drawing a line between trees that are timber and trees that are not. But in s. 63, the word "timber" must be given the meaning of "trees" as opposed to scrub, and it is applicable to trees individually as well as to trees in the mass. The meaning of the expression "to cut standing timber" cannot be extended to include the cutting of branches only from selected trees.

Cuthbert for plaintiff.

Hutchison for defendant.

FRAZER, J., in delivering the judgment of the Court, said that the plaintiff contended that the deceased was a piece-worker; and the defendant contended that he was an independent contractor. The plaintiff further claimed that, even if the deceased were an independent contractor, the work upon which he was engaged was of such a nature as to bring the contract under s. 63 of The Workers Compensation Act, 1922. Counsel for the plaintiff relied on two circumstances as indicating that the work was being performed on a piecework basis: (a) that the defendant had selected the branches to be cut; and (b) that the number of stakes was indefinite—500 to 600. The defendant, however, stated that he had merely pointed out suitable branches for the purpose, and that the deceased was under no obligation to use those particular branches.

His Honour said the point was immaterial, because a principal was entitled to specify what he required to be done, provided that he did so at the time the contract was entered into. It was when a principal sought to exercise control in respect of matters not specified beforehand, that a doubt arose as to whether the relation was not that of master and servant rather than that of principal and contractor. The indefiniteness of the number of stakes to be fashioned was explainable by the nature of the work. If ten to twenty branches yield 500 to 600 stakes, it followed that possibly 60 stakes could be cut from a single branch. In such circumstances, it would be only reasonable that a number within certain limits should be stated, rather than a definite number. It would be unreasonable to fix the number at, say, 500; for if a contractor had fashioned 499 stakes, he would have to go to the labour of cutting another branch in order to get one stake from it, to complete the 500. The reasonable view was that the deceased would have completed his contract if he had cut and split a sufficient number of branches to make a number of stakes between 500 and 600, and had fashioned that number of stakes. Having considered all the circumstances of the arrangement made between the defendant and the deceased, the Court was of the opinion that it was a contract made between a principal and an independent contractor.

The question as to the nature of the arrangement having been determined, it was necessary to decide whether the contract came within the provisions of S. 63. A contractor who entered into a "a contract to cut standing timber (including the cutting of scrub) or a contract to clear land of stumps or logs" was by that section deemed to be working under a contract of service if he did all or part of the work himself. Was a contract to fashion a number of stakes from branches of willow trees a contract to cut standing timber? Certainly, the cutting of the branches was an essential and even a substantial part of the work to be done, but did it amount to cutting standing timber?

The word "timber," according to Murray's *New English Dictionary*, was "applied to the wood of growing trees capable of being used for structural purposes, hence collectively to the trees themselves: standing timber, trees, woods." According to the same authority, the word meant specifically, in English law, "trees growing upon the land and forming part of the freehold inheritance; embracing generally the oak, ash and elm, of the age of 20 years or more; in particular districts, by local custom, including other trees, with various limitations as to age." In Yorkshire, birch, and, in Buckinghamshire beech, were timber. A timber-tree was defined in the same dictionary as "a tree yielding timber or wood fit for building or construction." A willow is certainly not a timber-tree within this definition. *Webster's Dictionary* (1921) defined timber as "wood suitable for use in buildings, carpentry, etc., whether in the tree or cut and seasoned." In the Western United States, Webster says that the word is applied to "forest land covered by trees producing such wood." Funk and Wagnall's *New Standard Dictionary* defined timber as "growing or standing trees from which such wood (i.e., of suitable size and quality for building and allied purposes) may be obtained; in English law, oak, ash and elm, and sometimes by local custom other kinds of trees; often called standing timber." The American *Dictionary of Words and Phrases Judicially Defined* quotes the *Century Dictionary* thus: "Timber is not a word of invariable meaning. It may be used to designate wood suitable for building houses or ships, or for use in carpentry, joinery, etc., or trees cut down and squared, or capable of being squared, or cut into beams, rafters, boards, etc., or growing trees suitable for constructive uses, or trees generally, or wood, or a single piece of wood, whether suitable for use in some construction or already in use."

It was to be noted that some American dictionaries gave a wider meaning to the word timber than that recognised by the law of England which limits the use of the word to trees of which the wood is capable of being used for structural purposes. On the question as to whether the word was to be given the wider meaning in New Zealand, counsel cited the New Zealand case of **Wills v. Perrett,** 1 G.L.R. 98, and the Victorian case of **Campbell v. Kerr,** 12 V.L.R. 384. In the former case, puriri was held by Mr. Justice *Conolly* to be timber, and the English rule was applied to native trees generally, if fit for use for structural purposes. In the latter case, the Victorian Full Court considered that the word "timber" was applicable to native trees whether suitable for structural purposes or not. In both cases, the rights of a tenant under a lease were in issue, and in the Victorian case the statement of facts showed that there were no trees fit for building purposes on the demised land. The judgment of the Full Court, however, went beyond the facts of the case, and decided that in Victoria timber meant

trees, as opposed to scrub. This judgment cannot be regarded as authoritative, for the Full Court of South Australia expressly disapproved of it in **Chapman v. Strawbridge** (1910) S.A.L.R. 119, and held that timber meant, as in England, trees suitable for structural purposes. In a still more recent Court of Appeal case in New Zealand, **Ellis v. Burnand v. Waitomo County Council** (1926) G.L.R. 294, Mr. Justice *Sim* said, in the course of a judgment which was concurred in by the other members of the Court, that "native bush means, in ordinary language native forest of every kind, including timber trees." To put it in other words, some native trees are timber and some are not. In the same year, s. 2 of The Valuation of Land Act, 1925, which had been discussed in that judgment, was amended by substituting the word "trees" for "timber." There was, then, in New Zealand, clear authority for drawing a line of demarcation between trees that are timber and trees that are not.

The next question for determination was whether the word "timber," in s. 63 of The Workers Compensation Act, 1922, was to be given its correct legal meaning or a more extended meaning. The section was limited in its operation to certain hazardous occupations usually performed by working contractors in a small way of business. It was possible that the word timber may there have a wider meaning than that which would be given to it in interpreting a lease or a rating provision; and, as the *Century Dictionary* says, it is not a word of invariable meaning. The legislation, no doubt, had in contemplation, when framing ss. 3 and 63 of the Act, the case of men engaged in bush-felling, timber-getting, and land-clearing operations generally. It might have used the expression "bush-felling" if it had intended to confine the operation of the section to the clearing of native bush, but the use of the word "timber" seemed to indicate that it had also in mind the development of non-indigenous forests, to the working of which the expression "bush-felling" would not be appropriate. To confine the use of the word to timber trees in the strict sense, whether native or exotic, would, however, lead to the conclusion that the legislature had intended that a bush-feller who had contracted to cut bush consisting of non-timber trees was not to be within the protection of the section, though he would be protected if his contract were to cut timber trees and scrub or to clear the land of stumps or logs. This appeared to be an unreasonable construction to place on the section, and it was impossible to imagine why the legislature should have limited the benefits of the Act to contractors cutting true timber trees and scrub, to the exclusion of contractors cutting non-timber trees. Bearing in mind the obvious purpose of the legislation, and applying the rule *noscuntur a sociis*, the Court was of the opinion that "timber," in s. 63, must be given the meaning of trees, as opposed to scrub.

A further question remained to be decided. Did the word timber mean individual or selected trees, or did it mean trees in the mass? Counsel for the defendant argued that scrub undoubtedly referred to shrubs, brushwood and stunted trees in the mass, and that "clearing land of stumps or logs" related to a mass clearance of forest débris, and that accordingly timber, in s. 63, must mean trees in the mass. It was always difficult to draw a line in cases such as the present one. Primarily, no doubt, "timber," applied to trees, meant trees in the mass; but a contract might be let, for example, to cut isolated rimu trees out of a mixed bush, and it could hardly be argued that such a contract was not a contract for cutting standing timber. In the opinion of the Court, the word timber, as used in s. 63, was applicable to trees individually as well as to trees in the mass.

The last question was whether the cutting of branches from a number of selected trees could be described as cutting standing timber. It might be assumed for the purposes of the case that the cutting of the branches was an essential and substantial part of the contract. In the ordinary usage of the English language, the cutting of standing timber meant the cutting down of the whole tree, not the lopping off of a branch or two. Dr. Johnson's *Dictionary* defined timber, as applied to a single tree, as "the main trunk of a tree." Bouvier's *Law Dictionary* gave it the meaning of "the body, stem or trunk of a tree." The Court was unable to extend the meaning of the expression "to cut standing timber" to include the cutting of branches only. To do so would be contrary to common usage and without lexicographical authority.

The plaintiff's claim must, therefore, fail. Judgment for the defendant, with leave reserved to apply for costs.

Solicitor for the plaintiff: **R. A. Cuthbert**, Christchurch.

Solicitors for the defendant: **J. J. Dougall, Son and Hutchison**, Christchurch.

National Expenditure Adjustment Bill, 1932.

Some Comments.

Of all the measures which have been before Parliament during the present Session, probably the one most in the focus of criticism is the National Expenditure Adjustment Bill. Of particular interest to members of the profession is Part III of the Bill, the purpose of which is to effect reductions in rates of interest payable by mortgagors, and in rents, commensurate with reductions in salaries and wages. This is given in full on a later page.

The provisions of this Bill originated largely out of the Report of the Economic Committee and the Interim Report of the National Expenditure Commission. The Economic Committee's Report, in its summary of this subject, states that the rigidity of fixed charges during a period of falling prices both hampers industry and prevents the smooth and equitable distribution of the loss over the population; while the Interim Report of the National Expenditure Commission expresses the opinion that private compositions under present conditions are too slow in operation and may not result in an equal all-round adjustment.

However important these two aspects may be, relief from them may be too dearly bought by the enactment of such provisions as are here proposed, especially coming as they do on top of the three Acts passed during the last twelve months for the relief of Mortgagors and Tenants.

If the present fall in prices were only temporary there might be some justification for the measure, in that the burden of interest charges and rent is reduced, while in the case of mortgages the obligation to repay principal is preserved, so that when the return to the prices of a few years ago is secured, the mortgagee can expect to receive a return of his principal intact. However, beyond a certain limited point nobody expects a general return of prices to the level previously ruling, and in the absence of any general return to higher prices, there is less justification for a general reduction of interest and rents than there would be for a general reduction of principal moneys. To be consistent, unless there is a general price and wages increase, Parliament will have to follow this legislation either by an extension beyond the time now fixed, namely, April 1, 1935, or by a general scaling down of obligations in respect of principal.

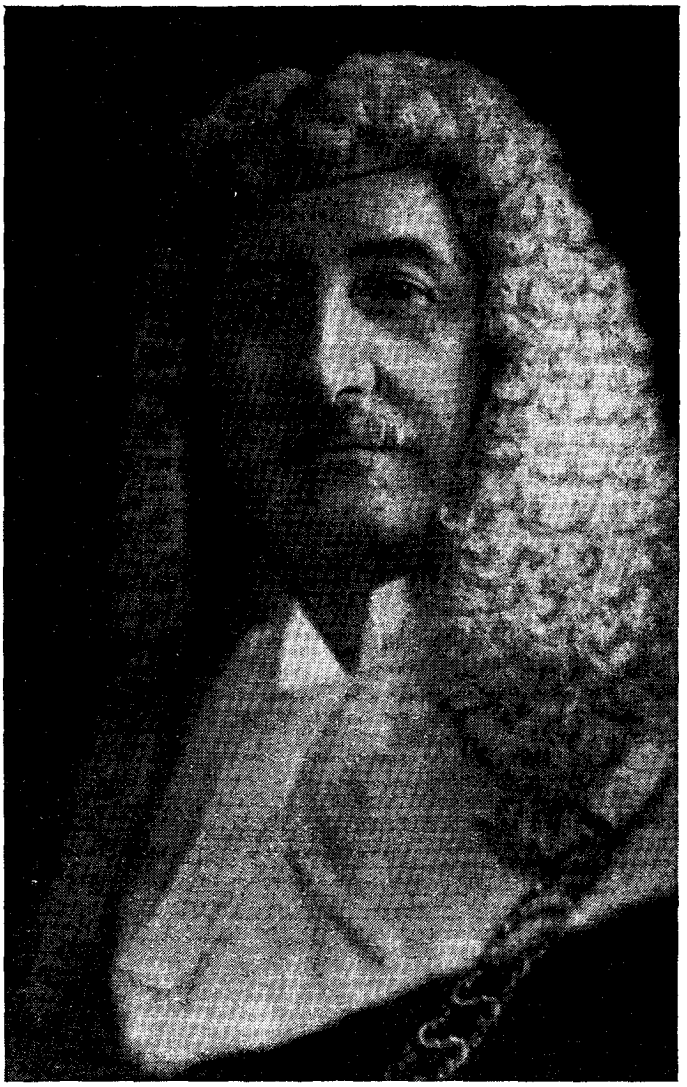
In the meantime evidence is not lacking of the detrimental effect of the previous Mortgagors Relief legislation, and the more recent uncertainty in regard to interest reduction. This is the freezing of credit. However great the margin of security offering, owing to the existing uncertainty, it is next to impossible to raise money on any class of security whatever, as practitioners know only too well. From the point of view of the borrower, on the other hand, a temporary reduction of interest is of little comfort when there is looming over him the obligation to repay a principal sum which he knows he can never hope to raise.

When our legislators come to realise the importance of preserving a feeling of security in the binding force of contractual obligations, the outlook of the Country will be considerably improved.

Chief Justices of the Empire.

III.—The Lord Chief Justice of Northern Ireland.

A TALL, loose-limbed man goes unobstrusively across the hall of the Law Courts, and with a faint air of timidity acknowledges the hall-porter's salute. His height, his slight stoop, and his long reach at once suggests that here is a man more interested in and adapted for field sports than for mere athletics, a countryman rather than a townsman. Nor would such an impression be wrong: the Lord Chief Justice never seems to be at his ease in towns, but it is otherwise on the Bann—that wide brown salmon river that eddies past Moore Lodge, or at Moore Lodge itself, where the red flame-flower ripples down the walls. There he stands revealed as a man of great native charm.



Marion Corscadden] THE RIGHT HON. WILLIAM MOORE. [*Belfast*

Born in 1864, he shows few marks of the passage of the years. Time has certainly marked some wrinkles, but not many. Yet the Lord Chief Justice has never been content with a placid life. He has always preferred to live dangerously. His school days were passed at Marlborough, whence he went to Trinity College, Dublin, and he was called to the Irish Bar in 1887. He soon built up an excellent junior practice. In those spacious days of "the nineties," Quarter Sessions and Assizes bulked large to the Irish Junior, and William Moore got so large a share that in 1899 he took silk, and in the same year entered the Imperial Parliament as member for North Antrim. He rapidly became prominent in Parliament as one of the leaders of the Irish Unionist party. He attended Parliament diligently, to the detriment of his professional interests, and took a foremost part in the resistance of the Irish Unionists to the now almost forgotten policy of Devolution in Irish affairs. At this time William Moore became the stormy petrel of Irish politics in the House of Commons. A thoroughly sincere politician, he put his views forward uncompromisingly, and preferred to sacrifice his own more immediate interests to his principles. At that time no Irish Unionist politician was more disliked by the Nationalist rank and file, or more respected by those of his adversaries who had met him face to face upon the floor of the House of Commons and had realised his sincerity of purpose and his determination in forwarding the causes he had at heart.

During these years William Moore had got himself into the bad graces of the Conservative leaders by his refusal to be swayed by the views of his official chiefs, when they conflicted with his own; in the great Conservative disaster of 1906 he lost his seat in North Antrim. This was really due, not to any great change of political faith in the constituency, but rather to a commendable refusal by its old member to yield to the wishes of excited partisans. But he was too necessary to be long out of the House, and in the same year he won North Armagh at a by-election occasioned by the death of Colonel Saunderson. Under the new conditions, with his party in a hopeless minority, the member for North Armagh was less prominent, but no less attentive to his duties. His chance of office came only with the Coalition, and in 1917 he was made a Puisne Judge of the Irish King's Bench Division. As time went on, "the troubles," as the Irish euphemism calls them, increased, until, in 1921, Partition came about, and two new nations arose within the Empire. "The split" produced, as one of its results, a great rending apart of officialdom in Dublin, and most of the men in office had to make their choice between remaining in their old haunts—none too secure, by the way—or going to Belfast to commence a new life and to help build up the new State of Northern Ireland from the beginning. One of the latter was the Chief, who came from Dublin as Lord Justice of Appeal of the new Supreme Court of Northern Ireland. The formation of the new State had indeed been decreed by Act of the Imperial Parliament, but much was to be done before the youngest child of the Mother of States and Parliaments was able to stand upon its feet. The years since 1916 had seen a steady increase of turmoil and dis-

order in Ireland, and " the split " was violently resented by those who considered that the country was and should remain a single entity. As a result of violent political collisions, and of a general demoralisation of civic ties, political crime was rife. Murder, riot and arson were daily occurrences. One might have seen five large incendiary fires burning at once in different parts of Belfast; in some quarters of the city, sniping, often at innocent passers-by, was continuous day and night. Outside the chief city similar conditions prevailed in many places, while, of course, lesser crime flourished abundantly.

Into this turmoil a band of devoted men thrust themselves. They had to find a Courthouse, create an office staff for the Judiciary; on the other side, they had to create a police force, and while it was in the making had to use it to contend with determined and dangerous criminals. In every direction everything had to be done, to be created out of nothing amid circumstances which would have embarrassed the administration of an old and well-managed State. One of these devoted men was the new Lord Justice, and while he would be the last to claim special distinction amongst them, he certainly bore his full share in the difficult and dangerous work that had to be done. By the year 1925 this task had been brought to a conclusion. Not only had civil tumult been suppressed, but even lesser criminals who had committed their felonies on the other side of the Border were taught that they could not use Northern Ireland as a port of refuge, however well they behaved there. In that year, Sir Denis Henry, the first Lord Chief Justice appointed to the Supreme Court of Northern Ireland, died, and the Lord Justice was promoted to the vacant office.

This office includes the jurisdiction exercised by the former Lord Chancellor of Ireland over minors and lunatics in Northern Ireland, with all the administrative duties of the Lord Chief Justice, of course, with the same limits as to territorial jurisdiction.

In his high office, as throughout his life, the Chief Justice has shown himself at once fearless of risks, once he is convinced that he is in the right, but very sensitive for the rights of those who appear before him in any capacity. No judge tries prisoners better, or with a greater consideration. At the same time, he is not prepared to allow this concern for the rights of litigants to waste time unnecessarily, and he is always prepared to take the responsibility for a timely direction.

Almost entirely free from personal vanity, he has a very high appreciation of the dignity of the office which he holds and of the profession from which he has sprung. He is a most loyal friend, an excellent host; his only fault is that he is supposed to hold unorthodox views upon the possible existence of an Old Stone Age in Ireland.

J. H.

" An Englishman can be sure that if there were no precedent to meet his case, the Judge would find some way out and justice would be done. This is a very great thing."

—Mr. P. H. Martineau (President of the English Law Society.)

New Zealand Law Society.

Annual Meeting.

The Annual Meeting of the Council of the New Zealand Law Society was held on Friday, March 18, 1932, in the Supreme Court Buildings, Wellington, the chair being taken by Mr. A. Gray, K.C., the retiring President.

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

Auckland: Messrs. A. M. Goulding, A. H. Johnstone, and R. P. Towle.
Canterbury: Mr. H. C. D. van Asch.
Gisborne: Mr. C. A. L. Treadwell.
Hamilton: Mr. N. S. Johnson.
Hawke's Bay: Mr. H. B. Lusk.
Marlborough: Mr. H. F. Johnston, K.C.
Nelson: Mr. C. R. Fell.
Otago: Messrs. J. B. Nichol and R. H. Webb.
Southland: Mr. P. Levi (*Proxy*).
Taranaki: Mr. N. H. Moss (*Proxy*).
Wanganui: Mr. N. G. Armstrong.
Westland: Mr. A. M. Cousins.
Wellington: Messrs. A. Gray, K.C., C. H. Treadwell, and G. G. G. Watson.

The Report and Balance-sheet for the year ended December 31, 1931, which had been printed and circulated, were adopted.

Appointment of Officers: The following appointments of officers were made for the current year: President: Mr. A. Gray, K.C. (re-elected); Vice-President: Mr. C. H. Treadwell (re-elected); and Treasurer: Mr. P. Levi (re-elected). Messrs. Clarke, Menzies, Griffin, and Ross were re-elected auditors.

The Magistrates' Courts Act, 1908: The Council was asked to consider the question of recommending an amendment of this Act so as to extend the jurisdiction of Magistrates' Courts, relating to the recovery of possession of tenements, to an unlimited or an increased amount, say £4,000.

The Council considered the matter and resolved that it could not see its way to make any recommendation in the matter; but that the question of simplifying the procedure in the Supreme Court for the recovery of tenements be brought under the notice of the Rules Committee.

" **Dominion Day** ": The observance of Dominion Day as a holiday in the Dominion was referred to the Council by the Associated Chambers of Commerce with a view to its being deleted from the list of holidays by reason of the inconvenience its observance causes to the commercial community.

It was resolved to inform that body that the matter is not one calling for any action on the part of the Council of the New Zealand Law Society, the question being one for the various District Law Societies to consider.

re " **Radio Warranty** " **in Fire Policies**: An important question was raised by a District Law Society with reference to this condition added to Fire Policies, and

the Council resolved to set up a committee for the purpose of discussing with the Underwriters' Association the position arising in this connection, and in connection with all insurance questions, relating to the protection of mortgagees.

Appointment of Organising Officer, etc.: The following resolutions were passed concerning the appointment of an Organising Officer for the New Zealand Law Society:

"That subject to financial arrangements being made whereby no special levy or contribution is required from practitioners, this Council approves the principle of the appointment of an executive officer on the basis suggested by the Taranaki District Law Society."

"That a sub-committee consisting of Messrs. C. H. Treadwell, P. Levi, G. G. G. Watson, and A. M. Cousins, be set up to prepare a schedule of duties of the Organising Officer and a report as to ways and means in regard to finance, such report and schedule to be circulated to the District Societies for their individual consideration and views, the proposal and District Council replies to be brought forward for consideration at a Council meeting."

Land Transfer (Compulsory Registration of Titles) Act, 1924: The Committee appointed to confer with the Registrar-General of Land with reference to incidence of liability for costs of survey on sale of land, the title to which is limited as to parcels, reported as follows, such report being adopted by the Council:

"We have conferred with the Registrar-General of Land as instructed.

"We are unable to distinguish the case put in the letter of the Secretary of the Otago District Law Society to the New Zealand Law Society of the 15th September 1931 from the ruling given by the New Zealand Law Society No. 109 on page 54 of the compiled decisions of the Council. In our opinion, it is impossible to distinguish the case where a certificate of title has been issued limited as to parcels from the case where the title is under the conveyancing system; indeed, both these cases were dealt with in the ruling of the Council above referred to. We are of opinion that in the case now referred the cost of the survey must fall on the purchaser, unless a contract to the contrary has been made on the sale.

"In the second place, we are of opinion that the purchaser cannot insist on a survey of the property in order to remove the limitation as to parcels. The position is precisely the same as if the land were under the conveyancing system. The Registrar-General of Land entirely agrees with this view. He also says that he considers that there is no need for any legislation on the subject, an opinion with which we entirely agree.

"C. H. Treadwell
"A. M. Cousins."

Reciprocity between New Zealand Barristers and Barristers in England: Correspondence was read which had recently been received from the High Commissioner for New Zealand in England concerning enquiries which were made regarding the question of reciprocity between New Zealand barristers and barristers in England.

It was resolved to refer the correspondence to the Standing Committee of the Council for consideration.

"Unlike most of my brethren on the Bench, I have served articles. I could lick stamps with anybody, and I know how to stitch up paper with pink thread. When in error a volume is published entitled *Love Labours of a Law Lord*, it will be found that a considerable number of letters were indited in my employer's time and on my employer's stationery to the lady who is now my wife."

—Lord Macmillan, to the Solicitors' Managing Clerks' Association.

London Letter.

Temple, London,
February 26, 1932.

The Circuit Mess: I hope you will approve of my appointment to a most eminent and least lucrative office, Attorney-General of my Circuit? You know the theory of the thing, no doubt, and I hope you reproduce it in your part of the world. The essence of the Circuit is the Mess: the essence of the Mess is social discipline and stern application of levelling processes: and so, when a member of the circuit achieves anything notable (a Recordership or marriage, for example) we do not swell his already swelling head with praise or official congratulation: we prosecute him at the Grand Night of the Mess and fine him heavily in the wherewithal of messing: to wit, wine. He is allowed to plead only in his own mitigation; and the more successfully he appeals, the heavier the fine in wine which the Junior, supreme Judge in this jurisdiction, imposes.

But mitigation or no mitigation, there is required a bold and unscrupulous advocate to blacken the case against the accused to the full extent to which this can be done. An "old hand," past feeling fear or mercy, is appointed to this office.

On our circuit this was formerly held by S. R. C. Bosanquet, K.C., now made Official Referee. I am appointed to succeed him, and my first task will be to prosecute S. R. C. Bosanquet, K.C., now made Official Referee (and for that reason) with all the rigour and the ferocity which the law does not permit. I shall enjoy doing it: and, although any day of any week I may have to appear before him, professionally demure and humble, yet upon this one Grand Night I shall (I trust) expose him to the extreme limits of ridicule. In fact, this "Attorney" is less like any attorney you and I meet in life than he is like the District Attorney we watch with amazement upon the American films.

I trust that you do reproduce these practices in New Zealand? I should like to come out and institute them, in correct detail, for you, if you have not already got them. They are so good for the Eminents; and the whole topsy-turvy principle of the organisation is, to my thinking, the only thing which makes barristers tolerable people to live with, and successful barristers bearable people to mess with: and it all turns upon making the least tyrants over the greatest. Thus, the five Circuit Officials are the Leader (its most eminent K.C.), the Recorder and the Treasurer (pure business), the Attorney-General (as above), and the Junior (one of its newest recruits, but carefully chosen for his natural qualities). Of these, the greatest and indeed the omnipotent, is the Junior.

The War Minister: It is apt to note that if there is a War, and we have anything to do with it, our interests will be officially represented, on this occasion and thank goodness, by one of ourselves: Lord Hailsham is, I remind you, our War Minister and was, I further remind you, Douglas Hogg, K.C. As at this time, of course, the Press broadcasts his photograph in every direction, for its topical interest. Entrusted though I am with the duty of making you visualize our legal pre-eminents, I feel that I need say no more. All that I could pos-

sibly say is there: written in his portrayed face. If the likeness is a good one, it must be a speaking likeness: whereas of Sir John Simon, for an example in violent contrast, you could regard a hundred good portraits and be no nearer appreciating the character and the mentality; and as for the cartoons of him, the more you study them the more you are likely to be misled. I suppose it is Lord Hailsham's fundamental simplicity of mind and purpose (in the best sense) which makes his portraits what they are and his face what it is. There is immense strength, of course.

Lord Tomlin's Loss: The death of Lord Tomlin's son, at so early an age and at the outset of a career possibly destined to be comparable with that of his father, was infinitely tragic. Lord Tomlin, more formidable perhaps than the Judge just mentioned, also inspires a definite affection with those who have to do with, or before, him. Never was a face more full of character than his, and rarely has there been a Judge more full of sound points than he; all of us have, at one time or another, endured the process of his persistent reasoning when it has been our lot to fight a weak case; and the very nature of the treatment we have suffered at his hands tends to double the keenness of our sympathy with him in his bereavement. It is an astonishing quality in a man thus to be able to win his suppliant's regard, even while by the relentless machine of his intellect and argument he tears the suppliant's case to bits. But so it is: and however adverse the result or however strenuous the experience, it is a source of actual pleasure, or even pride, to have undergone defeat at his hands in, say, the instance where, before the Judicial Committee, one has to follow one's leader in an appeal which, by the time one rises to speak, has all the appearances already of being a lost cause. I have experienced him both ways, "against" or, more often, "with": and I can well believe what the Chancery men say of his son and what had been that son's promise had he not been thus suddenly killed in his flying accident. As the father's abilities are certainly of an Imperial value, so also it may well be that the loss of the son is of an Imperial extent.

Current News: Roche, J., now going the Oxford Circuit, has accepted the office of Chairman of the Oxfordshire Quarter Sessions: the Licensing Report has been published and has given no great satisfaction to anyone, failing as it does to deal with many fundamental issues: the prospect of using the heavens for advertising purposes has drawn a characteristic letter to the *Times* from that splendid veteran of ours, Lord Dunedin: the Annual General Meeting of the Bar has taken place and has demonstrated what little progress is being made towards the placing of litigation on an economical and practical basis and how long our "industry" is likely to remain and continue un-"rationalised": the Lord Chancellor has become a Viscount: and, while the battle continues between tribunals (firing their volleys at each other from a distance) as to the rights and wrongs of Married Women, elsewhere the good old controversy has been re-engaged as to the utility or futility of the Grand Jury. That, in a paragraph, is the news of the current period: of the astonishing case of the Imprisoned Maidservant, and of the Lord Chief's method of dealing with it, you will read at length in your newspapers.

Yours ever,

INNER TEMPLAR.

A Duty of Counsel.

To cite all Important Authorities.

By C. C. CHALMERS.

It may not be inappropriate, and by way of assisting the younger members of the profession, to draw attention to the important observations of the late Lord Birkenhead upon the duty of counsel, and of solicitors through counsel, to bring to the notice of the Court all important authorities, whether for or against counsel, so that a decision may not be arrived at based on imperfect knowledge.

The case is *Glebe Sugar &c. v. Trustees &c.* [1921] 2 A.C. 66; 125 L.T. 578, H.L. It was a peculiar one. It had been argued by distinguished counsel before the House of Lords on two days, and while the case was under consideration Lord Atkinson called the attention of his judicial brethren to a section in an Act of 1847. It had an important bearing, in fact it was decisive upon the question at issue, and it had not been referred to in argument. The solicitors instructing counsel had not drawn the attention of the latter to it, and the leading counsel were not aware of it. The appeal was then set down for rehearing, and, at the conclusion of the arguments, Lord Birkenhead, L.C., made the following observations upon this question (I quote from L.T. Rep. at p. 579):—

> "A point of considerable importance has arisen on the hearing of this appeal upon which I think it is right to make some observations. It is not, of course, in cases of complication possible for their Lordships to be aware of all the authorities, statutory or otherwise, which may be relevant to the issues requiring decision in a particular case."

Here one may be forgiven for pausing and asking whether a more cogent authority than the foregoing could be found for the purpose of destroying the maxim that ignorance of law is no excuse! To continue the quotation:

> "Their Lordships are therefore very much in the hands of counsel, and those who instruct counsel in these matters, and it is the practice of the House to expect, and indeed insist, that authorities that bear one way or the other upon matters under debate should be brought to the attention of their Lordships, by those who are aware of those authorities. *That observation is irrespective of whether or not the particular authority assists the party who is aware of it.* It is an obligation of confidence between their Lordships and all who assist in the debates in this House in the capacity of counsel. It has been shown that Mr. Sandeman" (K.C.) "Sir John Simon" (K.C.) "and Mr. Macmillan" (K.C. and now a Lord of Appeal) "were unaware of the existence of the section which appears to their Lordships to be highly relevant to, and indeed decisive upon, the matters now under discussion. Indeed the circumstancing in which leading counsel are very often briefed at the last moment render such an absence of knowledge extremely intelligible.
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> "But for myself I find it very difficult to believe that some of those who instructed counsel were not well aware of the existence and the possible importance and relevance of the section in question. It was the duty of such persons if they were so aware to have directed the attention of leading counsel to the section and to its possible relevance in order that they in turn might have brought it to the attention of their Lordships. A similar matter arose in this House some years ago, and it was pointed out by the then presiding judge that the withholding from their Lordships of any authority which might throw light upon the matters under debate was really to obtain a decision from their Lordships in the absence of the material and the information which a properly informed decision required. It is in effect to con-

vert this house into a debating assembly upon legal matters and to obtain a decision founded upon imperfect knowledge. The extreme impropriety of such a course cannot be made too plain."

The learned counsel were acquitted of personal responsibility, but the successful appellant was deprived of costs!

Similar important observations, including the duty of not withholding a vitally relevant fact, were made by Lord Clyde, Lord Justice-General of Scotland in an address: See "The Profession of the Law," 1922, reprinted in *The Scottish Law Review*, January—February, 1922, at p. 5.

The remarks of Edwards, J., in *Porter v. Coleman* (1909) 28 N.Z.L.R. 1110, at page 1113, are also worth looking at. He says:

"The plaintiff must pay the defendants their costs of the summons, which I fix at three guineas, and fees paid. I do not allow any larger sum because the case was not, upon either side, argued before me either upon principle or authority. Counsel contented themselves with stating their respective clients' claims, leaving it to me to supply the principles, and to search for the authorities without assistance from them. In such circumstances I can only look upon the attendance of counsel as merely formal. In future, I may add, all cases involving points of law must be fully argued. . . . The time at my disposal does not permit my dispensing with the customary assistance of counsel in such cases."

Bench and Bar.

Mr. H. M. Ward has commenced practice at Featherston.

Mr. R. A. Young, LL.B., has commenced practice on his own account at Christchurch.

Mr. J. D. McGrath, LL.B., on the motion of his father, Mr. J. J. McGrath, was admitted as a Barrister and Solicitor by His Honour Mr. Justice Blair, on March 17.

Mr. H. N. Robieson has joined Mr. Bertram Egley of Wellington, in partnership, and the practice will be carried on under the firm name of Egley and Robieson.

Miss Julia Maud Dunn, LL.B., daughter of Mr. Alexander Dunn was, on March 18, admitted as a Barrister and Solicitor by the Rt. Hon. the Chief Justice on her father's motion.

Mr. F. P. Fawcett, of the office of Messrs. Haggitt and Elliott, Feilding, was admitted as a Solicitor on March 2, by His Honour Mr. Justice Ostler, on the motion of Mr. Hadfield.

Mr. R. I. Gardiner has retired from the firm of Messrs. Sellar, Gardiner, Bone and Cowell, Auckland, and is commencing practice on his own account. His late firm will henceforth be known as Sellar, Bone and Cowell.

Messrs. J. A. Wicks, R. A. Young, and A. C. Fraser, all of Christchurch, who completed their Bachelor of Laws degree at the last examinations, have recently been admitted at Christchurch as Barristers and Solicitors by His Honour Mr. Justice Adams.

Solicitors' Audit Regulations.

A Summary of Requirements.

By A. E. Currie.

In preparing a revised edition of his work on Solicitors' Audits, the writer has had occasion to summarise the principal difference between the old regulations and the new. As such a statement can be only of temporary importance, it was thought inadvisable to incorporate it in a work of permanent reference. Persons accustomed to work under the old regulations will, however, require to note the alterations that have been made. The principal changes are therefore outlined below:

1. In respect of each yearly period at least three periodical examinations of the books must be made. (Reg. 4).

2. There is no longer any power to substitute another date for March 31, as the close of the audit period. (Reg. 12).

3. The result of the audit is to be reported to the Secretary of the District Law Society instead of to the Solicitor-General (Reg. 2); but a report of irregularities must be sent to each of them. (Reg. 24).

4. Changes are made in the form of declaration to accompany the auditor's report. In particular, the date of each examination must be specified. (Reg. 2 and Schedule).

5. The terms of the report are to be elaborated. The points to be dealt with are specifically set out. (Reg. 21).

6. The report must be sent in with a covering letter signed by the auditor. (Reg. 2 (1)).

7. The solicitor must send each month to his Auditor a list of trust account balances at the end of the month. (Reg. 16).

8. On and after April 1, 1932, solicitors' receipts must be given on an official form. (Reg. 19).

9. Approval of an auditor is to be given in future by the Council of a District Law Society instead of by the Solicitor-General. (Reg. 1 (2), def. "auditor"). An approval given by the Solicitor-General under the revoked regulations holds good till June 30, 1932. (Reg. 12).

10. The name of the selected auditor must be notified by the solicitor to the Secretary of the District Law Society. (Reg. 9).

11. A solicitor may not change his auditor without the consent of the Council of the District Law Society. (Reg. 10).

12. The report of a superseded auditor is available for his successor's information. (Reg. 30).

13. Notice of commencing or recommencing practice, or of alterations in partnership, is to be given by the solicitor to the Secretary of the District Law Society instead of to the Solicitor-General. (Reg. 6).

14. The District Law Society may give information from an auditor's report to any person, so far as it relates to moneys or securities in which he is interested. (Reg. 30. The need for separate reports relating to separate matters is obviated.

The foregoing summary does not relate to transitory provisions the effect of which is already spent.

Company Debentures.

And the Mortgagors Relief Act, 1931.

By H. Mackenzie Douglas.

I was gratified to find that this question proved of sufficient interest to excite comment, and I am grateful to Mr. Goulding for his expression of views. Though, as a result of the Order-in-Council of December 15 last, the main question is no longer of more than academic interest, the points involved may be deemed of sufficient general interest to warrant a brief reply to Mr. Goulding's comments.

Assuming that a floating charge debenture actually is an "instrument . . . whereby security for payment of moneys is granted"—which, in itself, may be doubtful—Mr. Goulding has, I think, overlooked the fact that the Act requires that the security so granted be "over land or chattels, or any interest therein respectively." On this aspect of the question, in spite of, and with all respect to, Mr. Goulding's criticism, I still adhere to the views expressed in the first part of my article (7 N.Z.L.J., p. 319).

Mr. Goulding's view that the debenture may be made to crystallise by bare appointment of a receiver (without any act of possession) if correct, overcomes the disabilities in regard to priority, and, at the same time, my main contention as to the unfairness of the Act's application. I doubt, however, whether this view is tenable. The secret appointment of a receiver by the debenture-holder can surely effect nothing; and notification to the company of the appointment is, I submit, constructive entry into possession and therefore (if the Act applies) within the Act.

As to the receiver's agency for the mortgagor company, this question is entirely dependent upon the terms of the authority for the receiver's appointment. Where (as in the cases quoted by Mr. Goulding) there is no provision that the receiver is deemed to be appointed by, and the agent of, the company, he is the agent of the debenture-holder who appoints him. The remarks of Warrington, J., to which Mr. Goulding refers indicate that in such case the receiver may, for some purposes, also be the agent of the company; I can find nothing to support the converse view propounded by Mr. Goulding.

I suggest that the most probable intention in the issue of the Order-in-Council was rather definitely to exclude from the Act a form of security that it was considered ought not to be included, with a view to avoiding the expense of litigation to decide whether or not the Act applied.

Decency and Divorce: Under the Act now in force in Queensland all publication of Evidence in divorce and maintenance cases is absolutely prohibited; but newspapers will still be permitted to publish the names of barristers and solicitors appearing in divorce cases, for it is recognised that these particulars will not be at all offensive to any readers nor have any tendency to vitiate the morals of citizens.

Bills Before Parliament.

National Expenditure Adjustment. (Rt. Hon. Mr. Forbes). Part I.—**Public Expenditure Adjustment.**—Cl. 3.—"Salary" defined: "Salary" means, for the purposes of this Part of this Act, the salary, wages, allowances, fees, commission, and every other emolument, whether in one sum or several sums, received by any person to whom this Part of this Act applies, but does not include: (a) Travelling-expenses, or any allowance in respect of board or lodging, or the use of quarters, or any fee, commission, or other emolument which the Minister of Finance declares not to be salary; or (b) Any superannuation or other retiring-allowance. Cl. 4.—Application of this Part. Cl. 5.—Exemptions. Cl. 6.—Reduction of salaries of Ministers of Crown and Members of Parliament. Cl. 7.—Reduction of salaries of other persons to whom this Part applies. Cl. 8.—Reduced grants to Education Boards and to governing bodies of University colleges, and to local authorities, &c. Cl. 9.—Saving of rights of contributors to Superannuation Funds. Cl. 10.—Saving of rights of Stipendiary Magistrates to retiring-allowances. Cl. 11.—Saving of rights of certain other persons with respect to compensation for loss of office or retiring-allowances. Cl. 12.—Statutory scales, &c., of salaries to be subject to this Part. Cl. 13.—Regulations. Cl. 14.—Application of this Part to Cook Islands and Samoan Public Services. Cl. 15.—Questions in dispute to be settled by Minister of Finance. Part II.—**Reduction of Pensions and Allowances payable out of Consolidated Fund.**—Cl. 16.—Old-age Pensions. Cl. 17.—Widows' Pensions; Amendment of Pensions Act, 1926, in relation to old-age pensions. Cls. 18-19.—Miners' Pensions. Cl. 20.—South African War Pensions. Cls. 21-22.—General Amendments of Pensions Act, 1926. Cl. 23.—Consequential amendments of National Provident Fund Act, 1926. Cl. 24.—Reducing rate of certain war pensions. Cl. 25.—Section 3 of Family Allowances Act, 1926, amended.

Part III.—**Reduction of Interest and Rents.** Cl. 26.—Purpose of this Part.—The purpose of this Part of this Act is to effect reductions in rates of interest payable by mortgagors and in rents, commensurate with the reductions in salaries and wages made by or pursuant to Parts I and II of the Finance Act, 1931, and by Part I of this Act.

Cl. 27.—This Part to bind the Crown.—This Part of this Act shall bind the Crown.

Cl. 28 (1)—Interpretation.—In this Part of this Act "mortgage" means any deed, memorandum of mortgage, instrument, or agreement whereby security for the payment of moneys or for the performance of any contract is granted over land or chattels or any interest therein respectively; and includes any instrument of security granted over or in respect of any policy for securing a life insurance, endowment, or annuity; and also includes any agreement for the sale or purchase of land, or any customary hire-purchase agreement within the meaning of section fifty-seven of the Chattels Transfer Act, 1924.

(2) For the purposes of this Part of this Act an agreement for the sale and purchase of land shall be deemed to be a mortgage of such land, and a customary hire-purchase agreement in respect of any chattel shall be deemed to be a mortgage of such chattel, in each such case to secure payment of the unpaid purchase-money and interest thereon and the fulfilment of the conditions set forth in the agreement.

(3) The Governor-General may at any time, by Order in Council published in the *Gazette*, exclude from the operation of this Part of this Act any specified class or specified classes of mortgages.

Cl. 29.—Reduction of rates of interest and of rents.—Subject to the provisions of this Part of this Act, rates of interest payable under mortgages of property situated in New Zealand and rents payable in respect of land or of any interest in land so situated, payable under contracts in force at the passing of this Act, shall be reduced as provided in this Part of this Act, and the rates as so reduced shall not be increased, except by leave of a competent Court, at any time before the first day of April, nineteen hundred and thirty-five.

Cl. 30.—Standard rate of reduction of interest and rent.—The standard reduction of rates of interest and of rent shall be twenty per centum thereof, calculated as hereinafter provided.

Cl. 31.—Basis on which prescribed reduction to be calculated.—Where the interest or rent reducible in accordance with this

Part of this Act is payable in terms of a contract in force on the first day of January, nineteen hundred and thirty (whether or not such contract is in writing and whether or not it has been varied by the parties thereto since that date), the reduction prescribed by the last preceding section shall be a reduction of the rate in force at that date, and in all other cases shall be a reduction of the rate prescribed by the contract under which it is payable, or, if such contract has been varied by the parties thereto since its commencement, shall be a reduction of the rate originally prescribed thereby.

Cl. 32.—Penal rates and net rates of interest and rent reduced in accordance with this Part.—Where by any contract provision is made for the payment of a penal rate of interest or of rent, or for a reduced rate of interest or rent in consideration of prompt payment or for other consideration, both such penal rate and such net rate shall be reducible and reduced in accordance with the foregoing provisions of this Part of this Act.

Cl. 33.—Reduced rates of interest and rent to come into force on 1st April, 1932.—(1) All interest and rent to which this Part of this Act applies accruing due on or at any time after the first day of April, nineteen hundred and thirty-two, and before the first day of April, nineteen hundred and thirty-five, shall be payable at the reduced rates determined in accordance with the foregoing provisions of this Part of this Act.

(2) Where before or after the passing of this Act any interest or rent in respect of a period commencing after the thirty-first day of March, nineteen hundred and thirty-two, is paid at a rate in excess of the reduced rate fixed in accordance with this Part of this Act the amount so paid in excess shall, at his option, be credited to the person paying the same in respect of interest or rent thereafter becoming due, or may be recovered by him in any Court of competent jurisdiction.

Cl. 34.—Special provisions where rate of interest not specified in contract.—In the case of a customary hire-purchase agreement or in any other case where the rate of interest payable in terms of any contract is not specified therein, the parties to the contract shall determine, for the purposes of this Part of this Act, what part of the moneys payable in terms of the contract shall be deemed to be principal moneys and what part thereof shall be deemed to be interest, and, in default of agreement by the parties as to the said matters, any Stipendiary Magistrate, on application made by any party to the contract, shall determine what shall be deemed, for the purposes of this Part of this Act, to be the rate of interest payable under the contract.

Cl. 35.—Limitations of foregoing provisions in respect of interest.—(1) Notwithstanding anything in the foregoing provisions of this Part of this Act, the net rate of interest payable under any mortgage of chattels shall not be reduced by the operation of this Part of this Act below the rate of six and one-half per centum per annum, and the net rate of interest payable under any other mortgage shall not be so reduced below the rate of five per centum per annum.

(2) Where a mortgage comprises both chattels and land or other property, an apportionment of the moneys secured thereby shall, if necessary for the purposes of this section, be made by agreement between the parties thereto, and in default of agreement may be made by a Stipendiary Magistrate on application in that behalf by any of the parties thereto.

Cl. 36.—Limitation of foregoing provisions in respect of rent.—Notwithstanding anything in the foregoing provisions of this Part of this Act, the rent payable in respect of any premises shall not in any case be reduced so that the net annual rent, after the deduction of any rebate to which the tenant may be entitled, and of any rates or insurance, or the cost of maintenance and repairs, paid or payable in respect of the premises by the person entitled to receive the rent, shall be less than five per centum of the capital value, in the case of land used mainly or substantially for farming purposes, or less than seven per centum of the capital value in any other case. For the purposes of this section the capital value of any premises shall, in case of dispute, be fixed by the Supreme Court, where the gross rent exceeds two hundred and ten pounds per annum, and by a Stipendiary Magistrate in any other case.

Cl. 37.—Right of appeal.—(1) If any mortgagee or landlord, or other person entitled under any contract to receive any interest or rent, is aggrieved by the operation of this Part of this Act, he may appeal to any Court of competent jurisdiction for relief, on any of the following grounds:—

(a) On the ground that the rate of interest or of rent payable under the contract is fair, taking into consideration the nature of the security or the premises, as the case may be:

(b) On the ground that adequate concessions have already been granted to the mortgagor or tenant, either voluntarily or under the provisions of the Mortgagors Relief Act, 1931:

(c) On the ground that the reduction of the rates of interest or of rent in accordance with this Part of this Act would be a cause of undue hardship to the person entitled to receive such interest or rent, as the case may be.

(2) On the hearing of any appeal under this section the Court may make such order as in the circumstances it thinks just and equitable, taking into consideration the economic position of New Zealand as well as the conditions of the parties.

(3) In any case where the total annual amount payable under the contract as interest or as rent exceeds two hundred and ten pounds, the right of appeal under this section shall be to the Supreme Court, and in all other cases shall be a Stipendiary Magistrate.

Cl. 38.—Powers of Court under Mortgagors Relief Acts not affected by this Part.—Nothing in the foregoing provisions of this Part of this Act shall be construed to limit the powers to grant relief to mortgagors and tenants conferred on the Supreme Court or on any Magistrate by the Mortgagors Relief Act, 1931.

Cl. 39.—Regulations.—The Governor-General may from time to time, by Order in Council, make all such regulations as may be deemed necessary for the purpose of giving full effect to the provisions of this Part of this Act.

PART IV.—Cls. 40-45.—Stamp Duty on Receipts of Interest from Government and Local Bodies Securities and from Debentures issued by Companies or other Corporations. PART V.—Rates of Interest on Deposits payable by Savings-Banks and Building or Investment Societies.—Cl. 46.—Governor-General may fix maximum rates of interest payable on deposits with savings-banks. Cl. 47.—As to rates of interest payable by building or investment societies. Cl. 48.—Section 44 of Building Societies Act, 1908, amended. PART VI.—Trading Companies Deposits.