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"We doubt whether Parliament itself has fully realised how extensive the practice of delegation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused."

—Report of Committee on Ministers' Powers.

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Safeguarding Delegated Legislative Powers.

In our last issue, we outlined the purpose of the Committee on Ministers' Powers, and mentioned the publication of its recent Report which has given rise to much discussion in Great Britain. As already indicated, the Committee admitted that the delegation of legislative powers to Ministers of the Crown (i.e. Government Departments) is a practical necessity and is justifiable on the ground of "the kind and quantity of legislation which modern public opinion requires." While such may be one of the results of democratic rule, it is open to argument whether the public would not be glad of some respite from the output of legislation with which it has been burdened of recent years; but it is undeniable that the type of statute in which most frequently occur unrestricted powers of regulation-making, particularly applies to restrict in one way or another the liberty of the subject who is airily assumed to have asked for it.

In an article in the *New Statesman* discussing the Report, Dr. W. A. Robson, whose book, *Justice and Administrative Law*, was by way of answer to Lord Hewart, alleges that the conflict is between the Executive on the one hand, and the Judiciary and the legal profession on the other. "The lawyers," he says, "still consider themselves the champions of the popular cause." He claims that the increase of delegated legislation is necessary, and "is essentially due to the diffusion of voting power, and the demands which have arisen from the masses of the people." But the *Economist* (London) will have no such excuses: it says, "Strong safeguards are clearly needed. . . . Since British bureaucracy is presumably no less apt than bureaucracy all over the world to take an ell sometimes when given an inch, we doubt not that continued vigilance will be required. . . . For the moment, however, let us be grateful to Lord Hewart for his book."

The Committee, while admitting the inevitability of delegated legislative powers, considers that these are open to abuse: "the real dangers," it says, "are incidental, and safeguards are necessary." This abuse may arise from lack of direction and absence of system in the exercise of such powers. Moreover, Parliament, in its haste to pass legislation, often acts in the dark as to the implications of the over-riding authority it confers on Ministers; as a result, the statute-law is extended in unthought of directions by means of Regulations over which Parliament has seldom any supervision. Thus, as the *Times* (London) remarked editorially, "Critics of the Government and its methods, chief among them Lord Hewart, are justified of their warnings against a trend of legislation too long tolerated by Parliament."

Certain safeguards are suggested in the Report. These are intended to serve as a check on bureaucratic law-making. The principal ones are these:

> The precise limits of the law-making power should always be expressly defined in clear language by the statute which confers the power;
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> Power to modify Acts of Parliament should not be conferred in any but the most exceptional cases;
>
> Similarly, only in very exceptional cases should the exercise of the delegated power be placed beyond the control of the Courts; in other words, the power of the Courts to compel Ministers to keep within their delegated powers should be maintained;
>
> Particular interests affected by the exercise of the law-making power should be consulted.
>
> An explanatory memorandum should accompany every Bill which proposes to confer law-making powers, drawing attention to the power, explaining why it is needed and how it would be exercised if it were conferred, and stating what safeguards there would be against abuse;
>
> The setting up of a Standing Committee of both Houses of Parliament to report on every Bill containing a proposal to confer law-making power on a Minister, and on every regulation, rule, order, etc., made in exercise of delegated legislative powers and laid before the House in pursuance of statutory requirements.

Do these safeguards go far enough? There is much food for thought for the practical-minded lawyer in the Committee's proposals which, in intention, are unexceptionable. It will be doubted whether the real remedy is not still to be sought, so that a sufficiently definite result may be achieved: a remedy for "methods by which powers have been delegated, and which are open to serious criticism," as the Report states. While aware of some of the difficulties that confronted the Committee, we do not think that the recommendations are of very great practical value if applied to our own conditions. For instance, to define clearly the precise limits of the delegated law-making power in the statute itself, seems at first glance to obviate the necessity for the explanatory memorandum that is also proposed. The Committee expresses the hope "that in future Parliament will be more conscious both of the principles at stake and of the safeguards needed."

The upholding of the power of the Courts to control the law-making powers conferred by statute is platitudinous; and something more than this is needed. There are defined limits to law making and to interpretation; and these must be respected. For example, as was said by Lord Macnaghten in *Vacher and Sons, Ltd. v. The London Society of Compositors* [1913] A.C. 107, at p. 118:

> "Some people may think the policy of the Act unwise and even dangerous to the community. . . . But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is,

I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature."

We do not wish to be misunderstood: we are not now considering the exercise of judicial or quasi-judicial functions by Ministers; nor are we concerned at the moment with the powers of the Court to declare whether Regulations are *ultra vires* the particular Act, or not. But we do think that the Judiciary will not welcome the new difficulties which must arise if the "precise limits of the law-making power," which themselves are to be "expressly defined in clear language" in the statute, are to come before the Courts for re-delimitation. In any event the Committee draws attention "to the fact that present procedure by writs of certiorari, prohibition, and mandamus, is archaic, cumbrous and inelastic." Another difficulty—or is it a superfluity?—occurs to mind when reading the recommendation regarding the explanatory memorandum. The draftsman may so frame the clauses of his Bill that they coincide with his explanation of the need, mode of exercise, and safeguards against abuse of the law-making power to be conferred by such clauses. But the Legislature may subsequently so amend the draftsman's language as to give a completely new orientation to his carefully-drawn clauses that they become enacted in a sense totally foreign to his explanatory memorandum. How, then, is the Court to consider the enactment-in-being from which have been eliminated (to use the Committee's words) "the precise limits of the law-making power [which] shall always be expressly defined in clear language by the statute which confers the power"?

There are practical difficulties, too, in seeking results of the nature desired, by the setting-up of a Standing Committee of both Houses of Parliament to report on every regulation, order, rule, etc., made in exercise of delegated legislative powers. The suggestion that such reports are to be laid before Parliament implies the creation of a Recess Committee to overlook the work of the draftsman of each such Regulation, though the Report suggests that such Committee should not act as censors or critics, whatever it means by that. We think that such a proposal defeats the object it seeks to achieve. Unless the authority of such a Committee be made entirely independent of Ministerial control or suggestion—which seems a somewhat visionary hope, as things are—we cannot envisage a result that will, in effect, be different from the present condition of delegated legislative powers, which we now deplore.

Within our limits here, it is impossible to consider in all its aspects this part of the Committee's Report. We leave it to others to enlarge on the recommendations and their application to our local circumstances. We hope that suggestions of a constructive nature will be forthcoming from our readers. New light has been shed upon this highly important subject. The opportunity should be taken to hammer out some practicable scheme whereby the "new despotism" by Order-in-Council may be effectively controlled. The liberty of the subject is the concern of every one of us: once and for all, a curb should be put on further restricting that liberty without the subject's knowledge or consent, except as expressed in the constitutional manner through his representatives in Parliament assembled, and safeguarded by the availability of a ready recourse to the Courts in all circumstances. The goal to be achieved is a nice balancing of the needs of government with the rights of the subject.

Supreme Court.

MacGregor, J. February 8, 9, April 26, 27, May 5, 1932. Wellington.

BYRON v. WOOLNOUGH WINDOW CO. LTD. AND HANSFORD & MILLS CONSTRUCTION CO. LTD. (IN LIQUIDATION) (No. 2).

Practice—Costs—One of Two Defendants Successful—Whether Costs Incidental to the Joinder of the Successful Defendant—reasonably and properly incurred as between Successful and Unsuccessful Defendant—Application of such Test discussed.

Action for damages brought by a workman who was injured by a window-sash falling on him from one of the upper windows of a building in course of construction. The respective defendants were the contractor for the whole building, and a sub-contractor who supplied the windows therefor. The plaintiff alleged that both defendants had been negligent, thus causing injuries. The jury found against each defendant for damages, and judgment was entered against both at the trial. Each defendant moved in pursuance of leave reserved to set aside the judgment so entered, and for judgment in its favour *non obstante veredicto*. In the final result, the judgment was confirmed against the contractor, with costs, and judgment was given in favour of the sub-contractor, with costs against the plaintiff. The question now arose, what is the proper order to be made regarding the ultimate payment of the costs awarded to the successful defendant?

Held: Following the rule in *The Esrom* (1914) W.N.81: where plaintiff sues two defendants, who mutually throw the blame on the other of them, unsuccessful defendant should pay the costs incurred by the plaintiff, and by the successful defendant to them direct. The test to be applied is whether the costs incidental to the joinder of the successful defendant were reasonably and properly incurred as between him and the unsuccessful defendant.

Mazengarb and **James** for plaintiff.
O'Leary for first defendant.
Stevenson for second defendant.

MACGREGOR, J., said that a similar question had been discussed and determined by *Reed*, J., in **Enderby v. Scott and Another** [1928] G.L.R. 313. In that case, it was held that the test to be applied was, were the costs incidental to the joinder of the successful defendant reasonably and properly incurred as between him and the unsuccessful defendant. Applying that test in the present case, it appeared to His Honour that it was not unreasonable to join the successful defendant along with the defendant against whom final judgment had been entered. On the facts as known to the plaintiff and his advisers before the trial, it was impossible to be certain whose negligence it was that caused the accident. They were both charged by the plaintiff with that negligence. Each defendant at the trial not unnaturally endeavoured to throw the blame on the other. It was only after the evidence had been thoroughly elucidated during the hearing, that it became fairly obvious that the contractor alone was legally responsible. In those circumstances, His Honour thought the rule laid down in **The Esrom** (1914) W.N. 81 should be followed. In that case it was decided by *Bargrave Deane*, J., that the usual and modern course now is that, where a plaintiff sues two defendants, who mutually throw the blame on the defendant other than himself, the unsuccessful defendant should pay the costs incurred by the plaintiff, and by the successful defendant to them direct: see **The Annual Practice** (1932) p. 1366.

His Honour, therefore, ordered that the defendant the Hansford and Mills Construction Company Limited (in Liquidation) pay to the plaintiff his costs as adjudged, and also pay to the defendant The Woolnough Window Company Limited the costs awarded to them.

Solicitors for the plaintiff: **Mazengarb, Hay and Macalister,** Wellington.

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

Solicitors for the second defendant: **Izard, Weston, Stevenson and Castle,** Wellington.

In re PETONE BUILDING CONSTRUCTION CO. LTD. (IN LIQUIDATION.)

Ostler, J. May 13, 26, 1932. Wellington.

Company—Removal from List of Contributories—Transfer Executed Before Winding-up Order—Not Registered—Whether Shareholder should be placed on "B" List or Remain on "A" List—Companies Act, 1908, s. 66.

Notice of objection by John Cotton to being placed on the list of contributories of The Petone Building Construction Co. Ltd. which is being wound up by order of the Court. The company was incorporated on July 27, 1927, as a private company with a nominal capital of £5,000, its object being to carry on business as a building constructing company. The winding-up order was made by the Court on a creditor's petition on September 11, 1931, and the list of contributories filed by the official liquidator in the winding-up contained the name of Cotton as being the registered holder of 500 £1 shares in the company on which £225 is still unpaid. The list of creditors filed shows that the debts of the company amount to about £750. There are no other contributories on the list except Cotton, who has been placed by the official liquidator on the "A" list. Cotton duly applied for and was allotted 500 ordinary shares in the company. On July 8, 1930, when he still owed £260 on the shares, he executed a transfer of the shares to James Wilson, the manager of the company. This transfer was prepared by solicitors, and was executed by Wilson as accepting the shares. The consideration expressed in the transfer was £1, and Cotton also on the same day paid £10 to the company in order to bring the amount paid on his shares up to £250. The transfer was stamped by Cotton's solicitors on September 15, 1930, and it was delivered by them at the registered office of the company on October 3, 1930, with a letter containing the registration fee and requesting the company to register the transfer. The letter was never acknowledged. The transfer was never registered, or passed for registration, or even considered by the Directors, and on the date of the order for winding-up Cotton's name was still on the register as the owner of these 500 shares. He claimed that it was there solely through the negligence and breach of duty of the directors through not registering the transfer, and he asked that his name be removed from the list of contributories.

Held: Applicant not entitled to be removed from "A" list of contributories as he had been equally guilty of neglect with the company in not seeing that the transfer was registered. Therefore, on winding-up date he was still registered holder of shares and not entitled to have his name removed from the "A" list.

Dickson for the objector.

Free for the Liquidator.

OSTLER, J., said that inasmuch as the transfer was not delivered for registration until October 3, 1930, and the winding-up order was made on September 11, 1931, less than twelve months later, it was clear that in any case Cotton was not entitled to be removed from the list altogether: see s. 66 of the Companies Act, 1908. At the most, all he was entitled to was to be put on the "B" list, and this may not help him as there are no other contributories at all either on the "A" or the "B" list. It would depend upon whether the company's debts for which claims have been made were incurred before or after October 3, 1930. But inasmuch as a contributor on the "B" list is not liable for debts contracted by the company after he ceased to be a member, and some at least of the debts may be in this category, it became necessary to decide whether he was entitled to be placed on the "B" list or whether he must remain on the "A" list.

Wilson had sworn affidavits in order to prove that the transfer had never been intended to be a genuine one. He said that Cotton asked him to accept the transfer and to hold the shares for him because he, Cotton, was in financial difficulties, and that it was never intended that the transfer should be registered. This was denied by Cotton who said that the transfer was intended to effect a genuine sale of the shares to Wilson. His Honour said he had seen neither of the parties, and in a controversy of this nature it was impossible for the Court to ascertain the truth on affidavits alone. But in his opinion the onus of proof lay on Wilson because he was contradicting a written instrument regular on the face of it. He, therefore, held for the purpose of this case that this onus had not been discharged, and he must for this reason assume that the transfer was genuine. He refrained, however, from making any comment on the evidence at all, as, if the transfer were a genuine one and Cotton were left on the list of contributories, he would be entitled to an indemnity from Wilson and the question as to whether the transfer were genuine or not might hereafter fall to be decided between them in an action.

Even assuming that the transfer was a genuine one, in His Honour's opinion, Cotton was not entitled to be removed from the "A" list of contributories, because he had been at least equally guilty of neglect with the company in not seeing that the transfer was registered. After sending in the transfer on October 3, 1930, he did nothing further for more than a year. **Lowe's case,** L.R. 9 Eq. 589, and the cases following it, which were relied on by counsel for Cotton were not in point. These were cases in which the transfers were sent in for registration shortly before the commencement of the winding-up. The facts of this case brought it within **Walker's case,** L.R. 6 Eq. 30, and **Custard's case,** L.R. 8 Eq. 438. In this case, there were faults on both sides. The company neglected to register the transfer and Cotton neglected to take any steps for nearly a year to see that it was registered. Therefore, as on the date of the winding-up he was still the registered holder of these shares, he was not entitled to have his name removed from the "A" list of contributories.

Application dismissed.

Solicitors for applicant: **Pere and Dickson,** Petone.

Solicitors for the Liquidator: **Meek, Kirk, Harding, Phillips and Free,** Wellington.

Reed, J. May 12, 20, 1932. Palmerston North.

In re THE LESLIE COLLIER COY. LTD. (IN LIQDN.)

Company—Distraint by Landlord on Company's Chattels—Company Subsequently in Voluntary Liquidation—Sale arranged by Agreement and Proceeds Held in Trust pending Order of the Court—Whether Landlord may Receive Proceeds of Sale—Form of Order—Companies Act, 1908, ss. 226, 224 (a).

Motion under S. 226 of the Companies Act, 1908, for an order that a landlord be allowed to receive the proceeds of a sale of chattels. The Manawatu Daily Times Co. Ltd. as landlord distrained for rent in arrear on the goods and chattels of the abovementioned Company. On the same day, but later in point of time, a resolution was passed putting the Company into voluntary liquidation and notice thereof was given to the landlord. It was then arranged that the goods be sold, but that the advertisement should not describe the sale as by a bailiff under distress for rent but as a sale by the Company in liquidation; and it was further arranged that the proceeds should be deposited with the landlord's solicitors in trust to abide the order of the Court.

Held: Making Order in terms of Motion: Same principles must be applied to this Motion as would be applied were it a substantive application for leave to proceed with the distress: *In re George Castle Ltd.*, p. 38 *ante*; [1932] G.L.R. 167, referred to and applied.

Oakley in support of order.

Relling to oppose.

REED, J., said that the arrangement made relieved the landlord from applying for leave to proceed, but this motion must be applied the same principles as would be applied were it a substantive application for leave under s. 244 (a) to proceed with the distress. As the legal questions involved had already been decided by His Honour in *Re George Castle Ltd.*, p. 38 *ante*; [1932] G.L.R. 167, he said he would not have reserved judgment had it not been represented to him that a case involving the same questions had been removed into a Full Court for argument and would shortly be heard. On later being informed that that case may not be proceeded with, he suggested to Counsel herein that the present motion be brought before a Full Court. As one of the Counsel was not agreeable to that being done it became necessary to give judgment.

His Honour saw no reason to depart from the view he had previously expressed. His opinion was based on English authorities. He recognised that the Statute law differed in so far as

in England a distress put in before liquidation stands good, unless, upon application made on behalf of (*inter alia*) the liquidator, the Court orders a stay, whereas in New Zealand the leave of the Court must be obtained by the landlord before further proceedings with the distress. The difference in the procedure cannot affect the principles to be applied by the Court, in the one case in refusing to stay the proceeding, and in the other in granting leave to proceed. It was not inequitable that the landlord should be allowed to proceed to sale, and, consequently, under the arrangement made between the parties, be entitled to the proceeds thereof which were less than the amount of the rent due.

Order in terms of the motion that the Manawatu Daily Times Co. Ltd. be empowered to receive and retain on account of rent the proceeds of the sale of the stock and chattels of the Leslie Collier Co. Ltd. (In Liquidation) seized by the said Manawatu Daily Times Company Limited for rent due by the Leslie Collier Co. Ltd. (In Liquidation) and sold by public auction at Palmerston North on April 26, 1932. Costs (£7 7s. 0d.) and disbursements allowed to the Manawatu Daily Times Co. Ltd., payable out of the assets of the Leslie Collier Company Ltd. (in liquidation).

Solicitors for the Manawatu Daily Times Coy. Ltd.: **Innes and Oakley,** Palmerston North.

Solicitors for the Liquidator: **Relling and Lees,** Palmerston North.

Blair, J. June 7, 16, 1932.
New Plymouth.

In re MOYNIHAN'S APPLICATION.

Mining—Coal Lease of Crown Lands—Application made to and refused by Commissioner of Crown Lands sitting as Warden—No Reasons Given—Misunderstanding of Functions by Commissioner—On Appeal, Case referred back for Reasons for Refusal or Proper Hearing and Adjudication—Objections to Court's Jurisdiction—Procedure on Appeal Considered—Coal Mines Act, 1925, ss. 21 (j), 23 (b) (k)—Mining Act, 1926, s. 276.

Appeal from the Commissioner of Crown Lands at NewPlymouth for a coal lease in respect of certain lands in the Ohura District. If there had been a warden in this district the application would have been made to him, but the duties of the warden or Commissioner in respect of applications for coal mining rights are identical. This point is of importance because, as will presently be seen, the Commissioner in the present case instead of sitting and adjudicating, as a warden would ordinarily do, arrogated to himself the function of counsel for the objectors to the application.

There were no objectors, and the Crown lessee of the land in question consented. The Commissioner refused the application and formal notification was given by the Commissioner to the applicant of such refusal, but without indicating any reasons.

When this matter first came before His Honour, on appeal from the Commissioner's refusal to grant the lease subject to the Minister's approval, the position was that there being no objectors, there was no one who had any *locus standi* to appear to support the Commissioner's finding. The real respondent was the Commissioner himself, as he it was who had raised an objection which to my mind was clearly no objection at all. Counsel appeared for the Commissioner on the appeal, and His Honour heard him as *amicus curiae*.

Held: Commissioner had misunderstood his functions in that he had regard to a matter which can only arise after, he, acting in the place of the Warden, had adjudicated on the merits of the application. Some of the objections voiced by the Commissioner in his memorandum, asked for by the Court on the appeal, are curable by appropriate conditions in the lease itself, and the application should have been granted by the Commissioner. Order accordingly, the terms and conditions of the lease and the amount of royalty to be settled by the Minister of Mines and the lease to be subject to his consent.

Croker for applicant.

Quilliam for Commissioner of Crown Lands.

BLAIR, J., said that to a request for the reason for the refusal of the application the Commissioner, on November 26, 1931, said that the application "was never granted in terms of s. 23 subs. (k) of the Coal Mines Act, 1925. The Hon. the Minister of Mines has refused his consent as required pursuant to s. 24 of the Act, and the application is refused by me in terms of s. 23 subs. (k) of the Coal Mines Act 1925." That could only mean that because the Minister had refused his consent, the Commissioner acting as Warden had refused the application. In that respect, the Commissioner clearly misunderstood his functions.

It was true that a coal mining right, although granted by the Warden or Commissioner, must by s. 24 of the Act be made subject to the consent of the Minister. The Minister had a complete discretion as to granting or withholding any coal mining right. The Commissioner was not asked, nor could he have been asked to issue a lease without the same being subject to the consent of the Minister. The course the Commissioner apparently took was to ascertain whether the Minister would consent, and having obtained a negative reply, the Commissioner based his refusal to grant the lease on this ground. The misconception as to his functions on the part of the Commissioner was that he had regard to a matter which could only arise, after he, acting in the place of the Warden, had adjudicated on the merits of the application. In other words, he had based his decision upon a matter entirely foreign to the matter he was as to adjudicate upon. The Minister should be consulted after and not before the application has been judicially adjudicated upon by the Commissioner.

It was true that when requested to give reasons so that an appeal might be taken, the Commissioner stated that he had rejected the application under s. 23 (k) of the Act, which says: "The application may be granted or refused by the Warden or Commissioner in his discretion." Those words meant that the Commissioner is clothed with a judicial discretion, but they cannot authorise the Commissioner to exercise his discretion upon a ground entirely foreign to the matters the Statute requires him to consider.

S. 23 (b) of the Coal Mines Act, 1925, authorises the Warden or Commissioner on hearing an application to take cognisance of his own motion of any valid objection to any application. In order to be fair to the Commissioner and to give him an opportunity of setting out, if such existed, any valid objection to the application, His Honour said that instead of allowing the appeal, he had adopted the course of remitting the case back to the Commissioner, for either: (a) a statement of the facts and reasons for his refusal of the application, or (b) a proper bearing and adjudication upon the application.

His Honour confessed that he had some doubts whether there was power in this Court to do this. The procedure on appeals is regulated by s. 376 of the Mining Act, 1926, and subs. (a) says that the appellate Court after hearing the appeal shall make such order reversing or varying the decision appealed against or dismissing the appeal as it thinks fit. There was no specific power to remit the case, as His Honour did, but it was possibly implied.

The appeal was brought on again at the next sittings at New Plymouth, and filed in Court was a statement by the Commissioner. The first point taken by him was that this Court had no power to make the order His Honour had made remitting the case to him as above set out. It naturally occurred to one that the person who was prejudiced by remitting the case back to the Commissioner, would be the appellant and not the Commissioner. The appellant would much prefer that the case came before this Court in the form it came, because upon its face it showed that the Commissioner had no proper reason for dismissing the appellant's application. As already indicated, His Honour's reason for remitting the case to the Commissioner was to give him an opportunity of showing that he had some valid reason for his decision. The objection he made to the Court's jurisdiction to remit the case may be well founded, and if the Court upheld his objection the result would be that it would be His Honour's duty to dispose of the appeal on the material, or rather want of material, with which it first came before him. To uphold his objection could have but one result, namely to allow the appeal.

Notwithstanding the Commissioner's objection, His Honour thought that he should look at the Commissioner's memorandum to see whether any valid reasons could be found for the decision. From a perusal of it, it seemed clear that the Commissioner claimed to be in possession of a number of facts relating to the method of operating proposed by the appellant, such as the alleged damage to occur to other properties by the appellant's operations, and the effect of competition by the appellant with opposition coal mines. Where the Commissioner acquired the alleged facts was not stated, and it was abundantly clear also that if those alleged facts were deposed to by anyone, not only

was the source not stated but none of these objections were voiced to the appellant, nor was any opportunity given to him to answer any of them. By s. 21 (j) of the Coal Mines Act, it is provided that copies of all applications shall be sent to the Inspector of the district, who shall report to the Commissioner thereon. If the Commissioner obtained such a report, its existence was not disclosed in the Commissioner's memorandum, nor was it suggested that this report, if obtained, was disclosed to the applicant, and an opportunity given to him to answer it if required. When His Honour remitted the case to the Commissioner, His Honour had asked for the facts upon which his decision was based, and if he had had a report this should have been disclosed. All he had from the Commissioner was his interpretation of what must have been a number of *ex parte* statements made to him, but by whom it was not stated. It may be from certain statements made that opposition mine-owners may have directly or indirectly procured information to reach the Commissioner. The Commissioner's statement made it plain to His Honour that the enquiry which he made into this application was not a judicial enquiry, and his decision could not stand.

The only evidence that was tendered to the Court was that of the applicant and his witnesses, and that satisfied His Honour that the appellant's application should have been granted.

The granting or withholding of grant of a lease, and the terms of such lease are, by Statute, in the final and unfettered discretion of the Minister. Some of the objections voiced by the Commissioner were curable, by appropriate conditions in the lease itself. It appeared to His Honour that the application should have been granted by the Commissioner.

Appeal allowed and the decision of the Commissioner refusing the application reversed, and the appellant's application for a lease granted. The terms and conditions of the lease and the amount of royalty to be settled by the Hon. The Minister of Mines, and the lease to be subject to the consent of the Minister.

Solicitors for the appellant: **Croker and McCormick,** New Plymouth.

Solicitors for the Commissioner of Crown Lands: **Govett, Quilliam and Hutchen,** New Plymouth.

Ostler, J. April 21, May 3, 1932.

In re GEORGE McMAHON (A BANKRUPT).

Bankruptcy—Workers Compensation—Worker's Final Payment as Compensation handed to another for Safe Custody—After adjudication, balance handed back to Bankrupt Worker—Whether same Protected—Workers Compensation Act, 1922, S. 60.

Motion by the Official Assignee of the estate of George McMahon, a bankrupt, for the opinion of the Court on the following facts.

McMahon was adjudicated a bankrupt on his own petition on February 12, 1932. On June 27, 1930, he had met with an accident in the course of his employment and had been admitted to the Picton Hospital. He was an inmate of that hospital except for short periods until March, 1931. On the date of his discharge from the hospital he owed the Marlborough Hospital Board £117 6s. 0d., for maintenance and treatment in the hospital. (See *Marlborough Hospital Board v. McMahon*, p. 89 *ante*). During the period in which he was an inmate of the hospital he received weekly compensation payments of £3 8s. 5d., but failed to pay the amount due to the Board. On October 1, 1931, he received a lump sum of £350, being the final payment due to him as compensation for the accident. He placed this £350 for safe custody with an hotelkeeper named Hicks in Picton, and he drew from time to time such sums as he required for his board, lodgings and maintenance. The balance of this sum amounting to £230 10s. 0d. was handed back to the bankrupt on his request, and after his bankruptcy, on or about March 1, 1932. There was only one creditor in the bankruptcy, that being the Marlborough Hospital Board for the sum of £117 6s. 0d. The bankrupt had no assets apart from this balance of his compensation money, which he claimed is protected under s. 60 of the Workers' Compensation Act, 1922. The question for the opinion of the Court was whether this sum was so protected.

Held: Actual monies received as compensation (or part thereof) were held by bankrupt and were protected from being assets in the bankruptcy.

O'Regan for bankrupt.

Nathan for Official Assignee.

OSTLER, J., after quoting S. 60 said that it was contended in the first place on behalf of the Official Assignee that on the monies being handed over to Hicks for custody, they ceased to be monies paid by way of compensation under the Act, because the bankrupt could not legally require repayment of the very monies which he had handed over: see **Orton v. Butler,** 5 B. & Ald. 652; **Foster v. Green,** 31 L.J. Ex. 158 at 161. It was quite true that the bankrupt could not sue Hicks for the recovery of the identical bank notes or cheque which he handed over. His action would be not for the recovery of these very articles, but for an equivalent amount of noney. The action would necessarily be for a debt. Nevertheless, in His Honour's opinion, the monies which the bankrupt received from Hicks were still monies paid by way of compensation within the meaning of s. 60. If with these monies he had bought chattels or land, no doubt having changed the money into so other form of property that property would be assets in his bankruptcy. But he had not done that. The money which he received for compensation was still held by him (or rather part of it), and therefore, in His Honour's opinion, it was protected by the plain words of section 60.

Counsel for the Official Assignee raised a further point based on the words inserted in the section, "and remaining in the hands of the Public Trustee under any order of the Court." His argument was that the effect of the inclusion of these words was to exclude from protection monies paid by way of compensation in the hands of any other trustee than the Public Trustee. He relied on the principle *inclusio unius est exclusio alterius*. He contrasted s. 60 with the section in the schedule to the Act of 1908 which did not contain those words. In His Honour's opinion this argument is invalid. S. 60 was in plain terms, and was easy to construe in accordance with its plain grammatical meaning. It applied to money paid to the person injured whether it were in his hands or whether it had been paid by him to any person and held for him, and also money which had been paid but by order of the Court had remained in the hands of the Public Trustee. In His Honour's opinion, these monies are protected by s. 60 of the Act from being assets in the bankruptcy.

Solicitor for bankrupt: **C. T. Smith,** Blenheim.

Solicitor for Official Assignee: **A. C. Nathan,** Blenheim.

MacGregor, J. May 27, June 29, 1932.
Wellington.

In re A MORTGAGE FROM S. TO M. (No. 2).

Mortgagors Relief—Notice of Intention to Exercise Mortgagees' Powers—After Default, Notice Given by Mortgagee of Intention (*inter alia*) **"to issue execution in pursuance of any judgment . . . which may hereafter be obtained"—Judgment Obtained Later for Principal and Interest Moneys—Writ of Sale Issued—Whether Notice Sufficient inasmuch as at its Date no Action had been Commenced and no Right had arisen Entitling Mortgagee to Issue Writ of Sale—Mortgagors Relief Act, 1931, Ss. 4, 5 (1).**

Motion for an injunction to restrain the execution of a writ of sale against the plaintiff. The writ of sale in question was issued May 6, 1932, against the plaintiff by the defendant M., and it was in the hands of the sheriff at Wellington for execution at the time of the delivery of the judgment. The judgment under which the writ of sale was issued was for monies due under a mortgage from the plaintiff to the defendant M.. The ground on which the injunction was now claimed was that no notice (or alternatively no proper notice) had been given by the defendant M. to the plaintiff of her intention to issue any process of execution in pursuance of the said judgment under and in terms of the Mortgagors Relief Act 1931.

(An earlier judgment relative to the rights of the mortgage under the same mortgage is reported on p. 119, *ante*, and is referred to in the course of the present judgment. The Court then held it had no jurisdiction to hear an application by S. for relief after M. had taken judgment against him by default

for the amount of principal and interest moneys owing under the mortgage, as he then had ceased to be liable as a mortgagor and had become a judgment debtor.)

Held: That the notice was sufficient, as at the date on which it was given, default had been made by the mortgagor, and the mortgagee, apart from the Act itself, could lawfully pursue her remedies under her mortgage. The Act placed a limitation on these common law rights and provided the procedure to be adopted before they could be exercised. These conditions had been sufficiently complied with, and there was no good reason why the mortgagee should be restrained from executing her writ of sale against the mortgagor.

D. Perry for the plaintiff.

Pringle for the defendant.

MACGREGOR, J., said that the facts were not in controversy, and the whole question turned on the true interpretation of certain sections in the Mortgagors Relief Act, 1931. At the argument it was conceded by Mr. *Perry* for the plaintiff that this statute should be strictly construed, inasmuch as it materially encroaches on the vested rights of mortgagees (**Scott v. Wakefield** [1931] G.L.R. 444). Of this Act, indeed, it might be said, as was said of the Mortgages Extension Acts in **Whitton v. Taylor and Ors,** [1925] G.L.R. at p. 155, that it is "special legislation to meet difficult and unusual local conditions. The ordinary rights of one of the parties in a commercial contract have been arbitarily modified, while the other party to the contract has been given advantages which he never bargained for. In such a case the legislation should be interpreted with the greatest strictness, and no right should be taken away unless it is perfectly plain that the legislation intended to destroy it."

In the present case it was clear that, apart from the Mortgagors Relief Act 1931, the defendant M. had a vested right to issue execution by writ of sale or otherwise in pursuance of the judgment obtained by her against the plaintiff. The question now to be determined therefore, was whether it was perfectly plain that the legislature intended to destroy that right by the precise terms of the Mortgagors Relief Act itself. In order to answer that question, it was necessary first to ascertain the admitted facts of the case. The mortgage in question (a second mortgage) was given by the plaintiff to the defendant M. on September 21, 1929. Default had been made in payment of interest from and after September, 1931. Notice under s. 5 of the Act was then given by the plaintiff to the defendant M. and the other persons liable on October 20, 1931. (His Honour then set out a copy of that notice which gave notice that the mortgagee intended (*inter alia*) "To issue execution in pursuance of any judgment decree or order of any Court in its civil jurisdiction which has been or may hereafter be obtained against you in respect of any covenant condition or agreement expressed or implied in the said Memorandum of Mortgage and Deed of Covenant.")

No application for relief under the Act was made by the plaintiff, and on March 17, 1932, a writ was issued against the plaintiff by M. for the principal and interest then payable under the mortgage. The plaintiff did not defend this action, and on April 5, 1932, M. in due course obtained judgment against the plaintiff for the amount due to her: £364 5s. 5d. and costs. On April 7, 1932, application was made to the Court by the plaintiff for relief under s. 5 of the Mortgagors and Tenants Relief Act 1932, but this application also was dismissed—for want of jurisdiction (8 N.Z.L.J. 119). A writ of Sale under the judgment was then issued on May 6, 1932, and the present motion for an injunction was filed on May 18, to restrain the execution of that writ of sale.

In these circumstances, the plaintiff contended that the notice of October 24, 1931, was not a sufficient notice by the mortgagee of her intention to issue execution under s. 5 (1) of the Mortgagors Relief Act, 1931, inasmuch as in October, 1931, no action in which execution could be issued had even been commenced by her. In other words, the contention for the plaintiff was that under the Act a mortgagee is not entitled to give notice of his intention to exercise any particular remedy, unless and until the right to exercise that particular remedy had already arisen. In relation to the facts of the present case, plaintiff's submission was that the mortgagee M. could not lawfully give notice of her intention to issue execution under a judgment before that judgment had actually been entered. The only authority cited in support of that somewhat startling contention was the case of **In re Heyting** [1918] N.Z.L.R. 233. His Honour said he had read that case, but did not think it had any real bearing on the precise question here involved. The point actually decided in **Heyting's case** was that an applicant for admission as a solicitor was not entitled to give notice of his intention to apply for admission without then possessing the qualifications on which he based his application to be admitted. But the reason for that was given by *Skerrett*, C.J., at p. 240: "so that his alleged qualifications, if necessary, might be enquired into." No such reason could, in His Honour's opinion be held to exist in the present case.

The cardinal contention for the plaintiff here was in effect not that he received no "notice of intention" under s. 5 of the Act, but that he had received that notice too soon. The notice was given on October 20, 1931. At that date, default had been made by the plaintiff, and the defendant M. (apart from the Act itself) could lawfully pursue all her remedies under her mortgage. She could exercise her power of sale, and also could sue for the amount due under her mortgage and issue execution on any judgment so recovered. S. 4 of the Act imposes a limitation on these common law rights of the mortgagee, and s. 5 sets out the procedure to be adopted. S. 5 (1) states as follows: "A mortgagee before proceeding to do any such act or exercise any such power as is defined in the last preceding section shall give to the mortgagor notice in writing of his intention to do such act or exercise such power."

After consideration, His Honour found himself quite unable to appreciate or uphold the contention for the plaintiff in this case. It seemed to him that the requisite statutory conditions had been sufficiently complied with. The procedure to be adopted by the mortgagee in such cases under s. 5 had in His Honour's opinion been followed by the defendant M.; and he could see no good reason why she should be restrained by this Court from pursuing her legal remedy according to law. This motion must accordingly fail.

Motion for injunction dismissed.

Solicitors for the plaintiff: **Perry, Perry and Pope,** Wellington.
Solicitors for the defendants: **Pringle and Gilkison,** Wellington.

(In Chambers) May 31, 1932.
Smith, J. Auckland.

PATON v. SIMPSON.

Practice—Charging Order—Application for Order Absolute—Service—Motion for Substituted Service—Form of Order Made—Code of Civil Procedure, RR. 326, 395, 604.

Motion for substituted service. The applicant had obtained a judgment against the defendant in an action in the Magistrate's Court at Whangarei for the sum of £29 17s. 9d. including costs. The judgment was thereafter removed into the Supreme Court and was still unsatisfied. The plaintiff became aware that certain moneys amounting to £21 15s. 5d. were due by the Public Works Department to the defendant. Application was accordingly made for leave to issue a charging order *nisi*. The whereabouts of the defendant were not known at the time when the action was commenced, and at the time of the issue of the order *nisi*. The plaintiff applied for leave to dispense with service of the motion to make absolute the before-mentioned order *nisi*; alternatively, he applied for leave to proceed by way of substituted service.

Held: Where a charging order *nisi* has been obtained and an application is about to be made for the grant of an order absolute, the Court has jurisdiction in a proper case to order substituted service of the notice of motion to make absolute such order *nisi*.

Webb, in support.

SMITH, J., (orally), said he thought there was jurisdiction to make the following order: "I direct that service of the motion to make absolute the charging order *nisi* be effected on the defendant by publishing an abstract of the said motion once in the *New Zealand Herald* at least ten days before the said motion is to be heard and that the said abstract be settled by the Registrar."

Order accordingly.

Solicitors for plaintiff: **Webb and Ross,** Auckland.

The Statute of Westminster.

By R. McVeagh.

(*Continued from page 171*)

II.

The third preamble of the Statute is logically followed by the prohibition contained in section 4 already set out. It is almost revolutionary in its sweep. Hitherto the Imperial Parliament has made provision affecting the whole Empire relative to the Army, the Navy, the Air Force, Foreign Enlistment, Territorial Waters and Extradition. Future legislation concerning these subjects and affecting any Dominion can be adopted so long as the section stands, only at the request of that Dominion.

In recent times it has become almost a habit of the European Powers to hold conventions for ensuring common policy or legislation in relation to various matters. The alteration of the law relating to the liability of shipowners in cases where pilotage is compulsory is an instance; although it must be stated that the alteration does not apply to the overseas Dominions. Henceforth, in order to give effect to the resolutions adopted at such conferences the consent of the Dominions affected must be obtained.

The provision in the Statute which is of outstanding importance is section 3 which is as follows:

> "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

While this marks a striking advance upon the constitutional powers of the Dominions, it is obvious that the universality of the language employed requires some qualification. Clearly it was never intended that the Dominion Parliaments should issue commands or prohibitions binding the nationals of other countries.

The principle applying to the case has been thus stated by Sir Peter Benson Maxwell: "Every statute is to be interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law." This statement of the law was acted upon as correct by Sir James Hannen in *Bloxam v. Favre*, 8 P.D. 101. Five years later Lord Esher, M.R., in *Colquhoun v. Brooks*, 21 Q.B.D. 52, said: "Whenever we find that an outrage on the comity of nations will be produced by our giving full effect to general words in a statute, we must put upon those words such a limitation as will exclude that outrage."

The question therefore will be to determine what form that limitation should take as applied to section 3 of the Statute—who will be held to owe obedience to laws having extra-territorial operation? Naturally those, who being absent from, yet have their domicils in the Dominion.

A consideration of the decided cases will serve to show what was the mischief which existed prior to the passing of the Statute and thus help in determining the propriety of the solution suggested. Since the decision of the Privy Council in the *Attorney-General for Canada v. Cain* [1906] A.C. 542, the judgment of the Full Court in *In re Gleich*, O.B. & F. (S.C.) 39, has been treated as discredited. In *Gleich's case* an order was made in New Zealand by justices for the deportation of a person charged with an indictable misdemeanour committed in South Australia. The validity of the order was challenged upon the ground that the Foreign Offenders Apprehension Act, 1863, under which the order was made, authorised the detention of the applicant upon the high seas and was therefore beyond the powers of the Parliament of New Zealand. The Court (Prendergast, C.J., Johnston, Richmond and Williams, JJ., Gillies, J., dissenting) were of that opinion and made absolute a rule *nisi* for a *habeas corpus*.

The next important case in order of date was *McLeod v. Attorney-General for New South Wales* [1891] A.C. 455. In that case, the appellant having been married in New South Wales went through the form of marriage with another woman in the State of Missouri during his wife's lifetime. Upon his return to New South Wales he was convicted of bigamy under a section of an Act in the following terms: "Whosoever being married marries another person during the lifetime of the former husband or wife *wheresoever such second marriage takes place* shall be liable to penal servitude for seven years." The Judicial Committee held that the conviction could not stand. Adverting to the fact that the jurisdiction of the Parliament of New South Wales was confined to its own territory and to the maxim "*Extra territorium jus dicenti impune non paretur*," the Committee said:

> "The Legislature has no power over any persons except its own subjects—that is persons natural born subjects, or whilst they are within the limits of the Kingdom."

It became necessary to limit the universality of the language of the section and it was accordingly construed as meaning "whosoever being married and who is amenable at the time of the offence committed to the jurisdiction of the Colony of New South Wales," and the word "wheresoever" as meaning "wheresoever in this Colony the offence is committed."

In *Earl Russell's case* [1901] A.C. 446, the Earl—a peer of the realm and therefore a British subject—was indicted for bigamy. In principle, the facts were the same as in *McLeod's case*. The Earl during his wife's lifetime, after a divorce which was invalid, went through a form of marriage in the State of Nevada. He was convicted. The conviction was justified by the right of the British Parliament to make laws for British subjects whether they are within or without the territory.

In the *Attorney-General for Canada v. Cain* [1906] A.C. 542, two Acts of the Dominion Legislature prohibited any alien or foreigner from landing in Canada under contract to perform any service or labour. They empowered the Attorney-General, if satisfied that any immigrant landed in contravention of the Act, to take him into custody and return him to the country from which he came. It was argued that the Statutes were *ultra vires* inasmuch as they involved the exercise of extra-territorial jurisdiction. The Judicial Committee held that as every State had power to exclude aliens, it had as a necessary incident, the power to exercise constraint upon those aliens outside the boundaries of the State. In effect the judgment was that the Imperial Parliament confided power to the Dominion Parliament to exclude a certain class of persons and, by necessary implication, what was essential to make that power effective. *Cain's case* is therefore not in conflict with *McLeod's*.

It has been said that it is impossible now to regard *Gleich's case* as a correct statement of the law. But this view may be questioned. In *Gleich's case* no question arose, or could have arisen as to the inherent right of a State to exclude aliens. The issue was whether

a subordinate State could detain in custody outside the territorial limits a person who had not been found guilty of any offence. The local Act—the Foreign Offenders' Apprehension Act, 1863—was held to be *ultra vires* beyond those limits. Two years after *Gleich's* case was decided, the Fugitive Offenders Act, 1881, was passed by the Imperial Parliament and the difficulty was thus surmounted.

In *In re Award of Wellington Cooks and Stewards Union*, 26 N.Z.L.R. 395, the Full Court had to consider whether shipowners not domiciled in New Zealand but whose ships traded to the Colony were bound by awards made under the Industrial Conciliation and Arbitration Act 1905. The ships were registered and the ships' articles entered into outside of New Zealand. It was held that such owners were not so bound. In the course of his judgment in this case, Stout, C.J., dealt with the case of ships owned by persons who were domiciled in New Zealand, the ships being registered in and trading to New Zealand and the ships' articles being entered into in that Colony. He advocated the view that the power of the Parliament of New Zealand to make laws "for the peace order and good government" of the Colony justified as a natural corollary the recognition of a New Zealand ship—as apart from a British ship—and that Parliament had full control over such a ship. As related to such a ship, this amounted to a bold claim of the right to pass enactments having extra-territorial operation. The other members of the Bench (Edwards, Cooper and Chapman, JJ.) expressly abstained from pronouncing an opinion upon this question.

In *R. v. Lander* [1919] N.Z.L.R. 305, the Court of Appeal had once more to consider the question. The facts in that case were in every material respect the same as in *McLeod's case*. The accused was indicted for bigamy under sections 224 and 225 of the Crimes Act 1908. He was domiciled in New Zealand and while serving abroad went through a form of marriage in England, his wife being still alive. He was found guilty and the question of law as to whether he was within the operation of the State was reserved for the Court of Appeal. It was strenuously contended by the Solicitor-General (Sir John Salmond, K.C.) in support of the conviction that *McLeod's case* was distinguishable inasmuch that as it related to the case under consideration it was only a dictum, that it was based on no precedent authority, that it was an illogical and mistaken application of the maxim cited in that case, that it was inconsistent with subsequent decisions of the Privy Council itself, e.g., *Ashbury v. Ellis* [1893] A.C. 339, and *Cain's case*, and that it was in conflict with section 53 of the Constitution Act empowering Parliament to make laws for the "peace order and good government of New Zealand." The conviction was quashed by Edwards, Chapman, Sim and Hosking, JJ., Stout, C.J., dissenting. The opinions of the majority were rested upon *McLeod's case*.

The foregoing cases serve to show that the question as to the power of subordinate legislatures to enact statutes having extra-territorial operation has received grave consideration and that the consensus of opinion is opposed to the view that the ambit of jurisdiction extends beyond the boundaries. This was the mischief which it was the design of section 3 of the Statute of Westminister to avoid. It may be predicted that extra-territorial legislation will be held to be limited to those who are domiciled within the Dominion of the enacting legislature. At times the determination of a man's domicil is a question of exceeding difficulty and perplexity—more difficult to the man himself, than to the Courts which may have to pass upon it. It is a fundamental principle that in the case of those who have to obey laws, the disobedience of which may be followed with penal consequences, the conditions which amount to a violation should be easily ascertained and understood. It requires no great effort of the imagination to appreciate that in the future there will be many instances of a *bona fide* misinterpretation of facts relating to domicile by persons accused of a breach of acts having extra-territorial operation. Judges will have to undertake the difficult task of directing juries on the question of domicile, which, of course, is one of mixed law and fact, and juries, bewildered by the niceties and refinements of "domicil of origin" and "domicil of choice" will proceed into the jury room and wrestle, as they now do in cases of contributory negligence as developed in modern decisions, with a question as subtle as a problem in metaphysics.

(*To be Concluded*).

On the Home Front.

Some few issues ago, we had a note to the effect that motor accidents still provides many of us with needed employment in the Courts. But even this lifeline is being taken from us. Faced with the constant emphasis in the newspapers of the dangers of out-of-doors, we had learnt to picture the average citizen as leading the life of a hunted rabbit, glad when he could scuttle back to the safe confines of his home. This, we were inclined to feel, was good for trade.

Now, we learn from the American National Safety Congress that in 1930, in the United States, there were 30,000 fatalities in the home, only 3,000 less than those caused by automobiles. Slipping in the bath-tub was actually more dangerous than crossing a street. Next in order of domestic accidents came falling downstairs, upsetting scalding liquids, blowing out the gas, and touching exposed wires and using explosive agents to clean stoves and clothing.

And now a correspondent suggests to us that the toll of motor accidents could speedily be terminated, once and for all, and the unemployment question solved conclusively by the re-enactment of the old statutory provision that every motor vehicle should be preceded by a man carrying a flag!

In the Court of Appeal.

A Recent Interlude.

There have been many hard things said about mortgagees, but Mr. Justice Ostler meant none of them when he enquired of counsel in the Court of Appeal the other day if it makes any difference to the mortgagor if there be a change of mortgagees, so long as the terms of the mortgage are the same. "Would it make any difference if Beelzebub became the mortgagee?" he asked.

"How could a mortgagor damnify Beelzebub?" was the query of Mr. Justice Smith.

"He would probably have to ask the member for the district to get to work," said Mr. Justice Reed who was presiding.

Legal Vistas.

The Great Fire of London and our Earthquake Legislation

By CLAUDE H. WESTON.

It is doubtful whether our Legislature in passing the Hawke's Bay Earthquake Act, 1931 realised they were following a precedent established in England in 1666. Just as Sir Mathew Hale, Lord Chief Justice of the King's Bench, with other judges, constituted a statutory commission for settling disputes between property owners, which arose after the Great Fire of London, so Sir Michael Myers, the Chief Justice of New Zealand, as President of the Hawke's Bay Adjustment Committee, and his colleagues, dealt successfully with a delicate and difficult situation resulting from that terrible disaster.

Sir Matthew Hale and his brother judges sat in Clifford's Inn behind St. Dunstan's Church on the north side of Fleet Street, and performed their important task so much to the satisfaction of the City that the Mayor and Commonalty ordered their portraits to be painted and hung in the Guildhall, where they still remain.

One biographer of Sir Matthe relates that "the sudden and quiet building of the City, which is justly to be reckoned among the wonders of the Age, is in no small measure due to the great care which he and Sir Orlando Bridgeman, then Lord Chief Justice of the Common Pleas, used, and the judgment they showed in that affair."

Although the society of Clifford's Inn has long since dissolved, the building still stands, its site having been bought, together with the old Sergeants' Inn in Chancery Lane, by the Law Union and Rock Assurance Company. On March 29, 1618, the date of the deed under which the Inn acquired the property from the Earl of Cumberland and Lord Clifford, the society was an ancient, unincorporated, voluntary society, probably dating back to 1290, and subject in some vague sense to the Inner Temple and to the jurisdiction of the judges. It was discharging the functions of a college in a legal university, and according to a recital in the Deed "had been ordered and governed by the Principall and Rules of the said House for the tyme being in very good sort and with great discretion both to the good of the Common Welthe and to the honour of the said Earle and Lord Clifford and their ancestors."

In 1663, it fell among the lesser lodges described by Waterhous in *Fortescutus Illustratus*—"These hospitia are either minora preparatory lodges of freshmen, for none were to be admitted of an Inn of Court but such as first have been in an Inn of Chancery, or majora such as received not the Gudgeons and Smelts but the Polypus's and Leviathans, the Behemoths and the Giants of the Law."

The fate of the Society's ashes was decided by Cozens-Hardy, J., and the Court of Appeal in *Smith v. Kerr* [1900] 2 Ch. 511, and [1902] 1 Ch. 774.

"A good advocate should be an optimist."
—*The Justice of the Peace* (London).

London Letter.

Temple, London,
21st May, 1932.

My dear N.Z.,

The New K.C.'s: Of the new Silks, my friend Roland Burrows is the most interesting, in two senses. He is a model of erudition and a mine of information in all legal matters, past and present. He is the sort of fellow, for instance, who could and would instantly deliver you half-an-hour's lecture upon the difficult ecclesiastical legal matters, without reference to any book and notwithstanding that, in his practice, he might not have had any recent or, indeed, any practical experience at the Bar. I see that our *Law Journal* credits him with a particular knowledge of bankruptcy law, but with great deference I should venture to question this assertion. I should say that he has a profound knowledge of every branch of law, so profound in general that it is not appropriate to particularise: in brief, he is a legal genius. Not the tallest nor the most sunburnt nor the handsomest man in the world, he is entirely a type of his own, in manner, method and mentality.

Whatever his actual share (undoubtedly a large one) in the legal-literary output of the late Lord Birkenhead, he has vastly enriched the literary-legal assets of our profession; there seems to me to be an almost uncanny instinct in the selection, by the proprietors of *Halsbury*, of this unique brain for the editorial management of the replacement volumes of the *Laws of England*. It is clear that, while the orthodox authorities of the Law are uncertain and unreliable in their handling of their material and in their selection of their men, the *Halsbury* organisation, forever improving itself and learning by experience, comes to display an almost unerring judgment in both aspects of its work. Less than a month ago, I had a passage from it put to me, in the Privy Council, by no less a lawyer than Lord Russell and at the instigation of no less a light than Wilfrid Green, as being the most lucid and accurate expression of the point in issue!

I permit myself to spoil a good tale, or a fine advertisement, by reminding you that W.G. is a terribly persuasive advocate, who can make almost any Jury do anything he wishes; and then by informing you that the article in *Halsbury* (from which the passage came) had in fact been contributed, though Lord Russell did not know it, by W.G. himself!!

So much for Roland Burrows, who may have no outstanding future as an advocate in the Courts but who, otherwise, has been placed by me, in the foregoing observations, in company where he is quite entitled to be placed. The other new K.C.'s do not affect me greatly, nor does their appointment move me to any violent emotion, though it may well be that Sir Maurice Amos, K.B.E. is the greatest of men in his line; that the Hon. Henn Collins the deserving owner of a very substantial junior practice at our Bar and fit successor to his forebears; that Linton Thorp is a good fellow to whom we wish all luck; and that Alexander Macmorran is much to be commended because he is his father's son and both are now Silks together. They are not a very lively lot, though in every way worthy; and the list is chiefly interesting for what it leaves out.

A Loss to the Bar . . . and Bench: I have to record, with genuine sorrow though I had no claim to more than a nodding acquaintance with him, the death of Edward Alfred Mitchell-Innes, K.C., Chancellor of the Diocese of Ripon, Solicitor-General of the Palatinate, Recorder of Leeds, head of the General Council of the Bar and greatly loved leader of the North Eastern Circuit. His name is perhaps more familiar than his achievements, which are of the sound and less pretentious order not only at the Bar but in various capacities, wherein judicially and administratively he served his country well. A perfectly charming man in every way: to speak invidiously but necessarily—the gentleman, *par excellence*, but wholly devoid of any possible characteristic of a priggish order: pleasant spoken and very pleasant looking, and in truth, all that a man should be inwardly whom these outward graces recommend.

Why on earth he had not been made a Judge, on a score of available occasions, is more than I can tell you. This, however, I will tell you: when earlier I mentioned what is a set and convinced view of mine, that our High Authorities are singularly at fault, from time to time, in their handling of material and their selection of men, it was of Mitchell-Innes I have mainly thought when I formed that view. With some peculiar means of testing the matter, in personal quarters and in professional quarters, I have been utterly unable to discover any excuse for his being passed over, except possibly this: we live in an age of advertisement and push, and a man who has not the latter nor lends himself to the former, but is content to go upon his merits and let others be judge of those . . . such a man may expect to be passed over; and modesty in our Great Men is a thing we must dispense with, if we insist upon the joys and glories of the American Husteladvert. And I am not too sure that a man is wise, apart from this policy of depending upon his merits, to have the merits; or, at any rate, to have the merits of humour and humanity, great kindliness and chivalry and other antiquated anachronisms *ejusdem generis*. Well, the Judicature was apparently ready to deprive itself of this best of men; but we of the Bar were not ready, and are infinitely sad, now to be deprived.

Yours ever,
INNER TEMPLAR.

"Dissociation" as a Defence.

The Recorder, confronted by the evidence of a Medical Expert that a prisoner was suffering from "Dissociation," and that little bits of his mind "split off," observed that he had to deal with that bit which had offended against the Law, and sent the whole man to prison. The action is as eminently reasonable as that of the half-owner of the barking dog who decided to kill his half. But the plea of "Dissociation" should have a future among fashionable delinquents: Kleptomania is hopelessly *demodé*: and Nervous Disorder might just as well be called Dope right away. But "Dissociation" sounds nice, and is we are told a characteristic of the Creative Genius. Thus the plea of the Bad Egg of Pedigree stock will in future be: "Please, My Lord, parts of me are quite good!" Nor will it in most cases be difficult to believe that "little bits of his (or her) mind has split off."

New Zealand Law Society.

Meeting of Council.

A meeting of the Council of the New Zealand Law Society was held on Friday, July 1, 1932, in the Supreme Court Buildings, Wellington.

The President, Mr. A. Gray, K.C., took the chair.

The following gentlemen attended the meeting as representatives of the various District Law Societies:—Auckland: Messrs. A. M. Goulding, A. H. Johnstone, and R. P. Towle; Canterbury: Messrs. A. T. Donnelly, and H. F. O'Leary (Proxy); Gisborne: Mr. C. A. L. Treadwell; Hamilton: Mr. N. S. Johnston; Hawke's Bay: Mr. H. B. Lusk; Marlborough: Mr. H. F. Johnston, K.C.; Nelson: Mr. H. E. Anderson (Proxy); Otago: Messrs. F. Adams and R. H. Webb; Southland: Mr. S. A. Wiren (Proxy); Taranaki: Mr. J. C. Nicholson; Wanganui: Mr. N. G. Armstrong; Westland: Mr. A. M. Cousins; and Wellington: Messrs. A. Gray, K.C., C. H. Treadwell, and G. G. G. Watson.

The Council considered a number of matters of interest to the profession including the following:

The Rating Act, 1925: The Council considered an important question arising out of the judgment delivered in the case of *Devonport Borough Council v. Quartley*, [1930] N.Z.L.R. 884, concerning the registration of judgments against the land affected by local bodies under the Rating Act. It was pointed out by a District Law Society in a memorandum on the subject that a result of the decision referred to had been to remove a safeguard which had been enjoyed in the past, viz. that the Registrar of the Supreme Court would only enforce the judgment by a sale of the land so long as the person against whom the judgment was taken was still the registered proprietor at the time of the sale.

It was resolved to request the Attorney-General to bring down legislation requiring existing judgments to be registered against the land affected within three months of the passing of the Act, and that future judgments should be made subject to the provisions of the Statutory Land Charges Registration Act, 1928.

Consents by Mortgagees to Leases from Mortgagors: A District Law Society brought under the notice of the Council a letter relating to this subject which it had received from a practitioner in its District, and requested a ruling on the subject for the guidance of practitioners. The practitioner referred to the form of consent which it had been the practice of his firm to obtain from a mortgagee when the mortgaged lands were leased by a mortgagor. The mortgagee was required to become a party to the memorandum of lease in the ordinary form adopted by the English conveyancers under the old system of conveyancing, with such alterations as were necessary.

The matter was considered by the Council, and it was resolved to thank the District Law Society for placing the matter before the Council; but it was considered that in the opinion of the Council it is not desirable that a general rule of practice should be laid down by the Council upon the matter brought under notice.

Scale of Charges for Drawing and Typing Documents: A question relating to the scale of charges adopted by the Council on July 19, 1920, for the use of practitioners,

was raised by a District Law Society and brought to the notice of the Council with a view to the scale being revised.

It was resolved to set up a committee to enquire into and report on the matter.

Solicitors' Charges for Proceedings under the Mortgagors' Relief Acts and the National Expenditure Adjustment Act: The President referred to the recent Regulations under the Finance Act, 1932 which were Gazetted on May 26, 1932, whereby the maximum fees that a solicitor may charge against a mortgagor client or a lessee client in respect of proceedings under the abovementioned Acts were fixed.

The Council considered correspondence which had been received from two District Law Societies—both of which requested that some representation be made to the Judges with a view to the Regulations being reconsidered and amended—and resolved to refer the matter to a committee to confer with the proper authorities with this in view.

"**Radio Warranty**" **in Fire Policies**: The Council considered a report furnished by a committee set up at the last meeting of the Council. The Committee reported having conferred with a committee of the Fire and Accident Underwriters' Associations in the following matters, namely:

(*a*) "*Radio Warranty.*"—It was ascertained that in view of the large number of fires in New Zealand which were traceable to electrical causes, the Government was preparing Regulations with a view to controlling the installation of radio apparatus, and that when these Regulations came into force the Association would consider replacing the radio warranty with a clause providing that the apparatus should be open to inspection at any time.

(*b*) *Unoccupied Premises and Misrepresentation.*—The Committee further reported that it had been suggested that a warranty giving some protection to mortgagees in cases of this kind should be endorsed on the policy. The Associations' Committee agreed to consider a scheme for protecting mortgagees generally against such risks in consideration of a nominal premium.

The Committee's report was adopted.

(Since the report in this matter was drawn up, the following letter dated June 28, 1932, has been received from the Secretary of the Council of the Fire and Accident Underwriters' Association:

"**Mortgagee Protection.**

"Referring to our recent conversation and to my letter of 20th May, 1932, I have to say that the promised review of this matter by the Council in General Meeting will take place at the first opportunity.

"**Radio Warranty.**

"Now that the Radio Regulations have been made compulsory by the Government this Council is at present taking steps to amend the Radio Warranty to simply read:—

"'The Radio Installation is the premises herein described is allowed subject to the installation being open to the Underwriters' Electrical Inspector for inspection at any time.'")

Executive Officer: The sub-committee appointed at the meeting of the Council held on March 18, 1932, furnished its report with reference to the appointment of an Executive Officer of the Society, and recommended, subject to the approval of the Wellington District Law Society, that a Secretary and Librarian, an Assistant Secretary, and an Assistant Librarian be appointed as the executive of both the New Zealand Law Society and the Wellington District Law Society.

It was resolved that an Executive Officer be appointed in accordance with the scheme formulated by the sub-committee in its report, and that the sub-committee be authorised to advertise for applications.

Forensic Fables.

LORD PUSHLEIGH OF RUNNYMEDE AND HIS COAT-OF-ARMS.

Mr. Samuel Pushleigh having been Called to the Bar, Quickly Realised that if he was to Get to the Top he must Take Part in Political Life. So Mr. Pushleigh Became a Friend of the Downtrodden and Oppressed and Joined the Forward Party. He had a Bust of Danton on his Book Case; he Laughed Hoarsely when the House of Lords was Mentioned; and he Spoke on Countless Platforms in a Loud Tone of Voice in Favour of Votes for Minors, the Destruction of Capitalism, a Single Chamber, the Abolition of the Army and the Navy, and the Nationalisation of Everything that was Left Over. Thirty Years later Mr. (now Sir)

Samuel Pushleigh, K.C., Reached the Zenith of his Career. When Title and Coat-of-Arms had to be Decided Upon, Sir Samuel Pushleigh Recalled that an Ancestor (maternal) was Believed to have Fought by the Side of the Black Prince. His Suggestion that he should be the First Baron Crecy of Poictiers was, to his Annoyance, Rejected by the Authorities, and Ultimately he was Gazetted as Lord Pushleigh of Runnymede. But the Coat-of-Arms was All Right. The Crest (a Crowned Cross-Bow, Gules) Surmounted a Shield on which were Quartered First, Three Leopards of England, Proper, Charged with the Fleurs-de-Lys of France, Argent, Secondly, Two Bowmen, Mourant, Sable on a Chevron Topaz, between Three Arrow-Heads in Pale. Emblematical Figures Representing Truth and Justice were the Supporters. On a Label beneath Ran the Proud Motto: *Pour Roy et Loy.*

Moral: *Why not?*

Up to the Minute Case Law.

Noter-up Service to The English and Empire Digest.

All important current cases since the last Supplement (Jan. 1, 1932) to the *English and Empire Digest* are indexed in this feature under the classification prevailing in the latter work.

The reference given in brackets immediately following the case is to the page in the current volume of *The Law Journal*, (London), where the report can be found; and, secondly, to the *Digest*, where all earlier cases are to be found.

AGRICULTURE.

Agricultural Holding—Notice to Quit—Reasons merely stated by Reference to Act—Sufficiency of Notice—DIGBY *v.* PENNY (p. 362).

As to notices to quit and compensation for disturbance: DIGEST 2, p. 48.

COMPANIES.

Foreign Company—Dissolution by Law of Foreign Country—English Branch—Winding Up.—RUSSIAN AND ENGLISH BANK, LTD., *In re* (p. 310).

As to winding up foreign companies: DIGEST 10, p. 1207.

CONSTITUTIONAL LAW.

Crown—Militant Forces—Request of Shipowners trading in Chinese Waters for Armed Guard—Whether any Legal Duty to Provide.—CHINA NAVIGATION CO., LTD. *v.* ATTORNEY-GENERAL (p. 362).

As to the Crown's duty towards the subject: DIGEST 11, p. 496.

EXECUTORS AND ADMINISTRATORS.

Probate—Practice—Trial at Assizes of Probate Action—Jury—Judge's Discretion.—WATKINS *v.* REDDY (p. 395).

As to trial of Public Actions with or without a jury: DIGEST 23, p. 121.

HUSBAND AND WIFE.

Summary Jurisdiction—Persistent Cruelty—Two Acts of Violence—Second Act of Separation—Maintenance Order.—SIMCOCK *v.* SIMCOCK (p. 328).

As to grounds for application by wife: DIGEST 27, p. 555.

Divorce—Wife's Petition—Award of Maintenance—Respondent's Petition for Decrease—Petitioner's Remarriage—Second Husband's Means.—DUFFY *v.* DUFFY (p. 328).

As to monthly or weekly payments: DIGEST 27, p. 505.

INCOME TAX.

Profits of Trade—Brewery Company—Tied Houses—Loss on Certain Houses.—HOARE & CO. *v.* COLLYER (INSPECTOR OF TAXES) (p. 204).

As to what constitutes the profits of a trade: DIGEST, Vol. 28, p. 56.

Sched. D—Profits of Trade—Unlawful Business—Automatic Gambling Machines.—MANN *v.* NASH (INSPECTOR OF TAXES) (p. 239).

As to what profits Sched. D is applicable: DIGEST 28, p. 17.

INSURANCE.

Motor Cars—Third Party Risks—Policy Subject to Conditions.—BRIGHT *v.* ASHFORD (p. 380).

As to insurance against third party risks: DIGEST 29, p. 408.

NEGLIGENCE.

Res Ipsa Loquitur—Injury to Scholar—Evidence merely of Accident—No Evidence as to Supervision—Liability of Headmaster.—LANGHAM *v.* GOVERNORS OF WELLINGBOROUGH SCHOOL AND FRYER (p. 361).

As to presumption of negligence: DIGEST 36, p. 88.

SETTLEMENTS.

Will—Settled Legacy—Protected Life Interest—Forfeiture upon Alienation.—SALTING, *In re*; BAILLIE-HAMILTON *v.* MORGAN (p. 327).

As to protected life interests: DIGEST 40, p. 558.

Legal Literature.

Mahaffy's Statute of Westminster.

By ROBERT P. MAHAFFY, B.A., of the Inner Temple, Barrister-at-Law, formerly Whewell Scholar at Cambridge and sometime Legal Adviser to the Governor of Malta. With a foreword by the RT. HON. SIR JOHN SIMON, K.C., Secretary of State for Foreign Affairs. Butterworth & Co. (Publishers), Ltd. Royal 8vo.: pp. xi + 19.

An annotated copy of the Statute of Westminster, which with its anomalies is now being discussed in these pages by Mr. Robert McVeagh, is a necessity now-a-days in every library of reference. The Statute, though at present of limited application to this Dominion, brings with it implications of vast import to the relations of the political entities comprising the British Commonwealth of Nations. To follow with comprehension this new form of Constitutional law, which is a partial abandonment of the "elasticity of our Imperial framework" (to quote the author's phrase), a review of the constitutional development of the various British Dominions is essential. This is adequately covered by Mr. Mahaffy in his concisely-written Introduction and well-illustrated by references to decided cases and authoritative text-books. Sir John Simon contributes an interesting Foreword in which he characterises Mr. Mahaffy's work as "an admirable guide" in the controversies to which the Statute of Westminister may give rise. A chronological Table of Statutes, a Table of Cases, and an extensive Index, complete an extremely useful and timely monograph.

Paterson's Licensing Acts.

Forty-second (1932) Edition by H. B. HEMMING, LL.B., of Lincoln's Inn, Barrister-at-Law, and S. E. MAJOR, Solicitor, Clerk to the Justices for the County Borough of Barrow-in-Furness and the Petty Sessional Division of Lonsdale North, Lancashire. Butterworth & Co. (Pub.), Ltd.; Shaw & Sons, Ltd.; pp. cxviii, 1322 + Index, 159.

A new and useful feature of this comprehensive work is the note on the law relating to persons driving or attempting to drive, or being in charge of a motor-vehicle, under the influence of liquor to such an extent as to be incapable of having proper control of the vehicle. All relevant cases are quoted, and special attention is paid to *R. v. Hawkes* (1931) 22 Cr. App. R. 172, as to onus of proof in prosecutions of this nature. The use of automatic machines in Clubs and licensed premises brings to notice the recent decisions of *Daniels and Others v. Pinks* [1931] K.B. 374, and *Parker v. Davies and Others* (1931) which take their place among the wealth of cases dealing with the permission of gaming. The many ramifications of licensing law necessitate knowledge of the latest decisions of the Courts and it can be safely said that *Paterson* does not miss anything to do with licensing and all matters of relative interest. Accuracy and conciseness enable an enormous amount of valuable detailed information to be assembled within its covers.