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"It is a profound but sometimes a forgotten truth that the law was made for man and not man for the law. Law, after all, is but a branch (though a great branch indeed) of what is perhaps the widest science of all—the science of sociology. Breadth of outlook should be joined by us with a knowledge of professional doctrine. If this be our ideal, we shall begin to realise more fully the words of Coke when he spoke of 'the gladsome light of jurisprudence.'"
—MR. JUSTICE MCCARDIE.

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The Rules in Heydon's Case.

When the Legislature has "passed" the words of a Statute, it is *functus officii* in its regard: it has completed its task as a law-maker. On the other hand, to quote the words of Lord Blackburn: "It is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intentions of the Legislature." In the course of the speech in which the learned Law Lord used those words, *Wear River Commissioners v. Adamson* (1877) 2 App. Cas. 743, he went on to explain the principles on which the Courts act in construing instruments in writing; "and," he said, "a statute is an instrument in writing." He added,

> "in all cases, the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances; for the meaning of words varies according to the circumstances with respect to which they were used."

Consequently, when the words of a statute are obscure and the Courts are called upon to interpret the mind of the Legislature by ascertaining its intention, there are certain technical devices that must necessarily be employed, such as "the Rules in Heydon's case" (see 3 Co. Rep. 7a, 7b; 76 E.R. 637). Lord Coke says it was there resolved "that for the sure and true interpretation of all Statutes in general four things are to be discerned and considered:

> "(1) What was the law before making of the Act; (2) What was the mischief and the defect for which the Common Law (or the Statute Law) did not provide; (3) What remedy the Parliament hath resolved and appointed to cure the discase of the Commonwealth; (4) The true reason of the remedy."

All the judges were enjoined,

> "to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*."

The principles of *Heydon's Case* have been applied in the English Courts on innumerable occasions, and in our Courts frequently. To go back no later than the past year; His Honour Mr. Justice Smith, applied them in *Abbott v. L. D. Nathan and Co., Ltd.* [1931] N.Z.L.R. 928, at p. 934, where he referred to their application by Edwards, J., in *Christie v. Hastie* [1921] N.Z.L.R. 1, at page 9. Another instance is provided in the judgment of His Honour Mr. Justice Reed in *South British Insurance Co. Ltd. v. Feeley and Anor.* delivered in Wellington on September 12. This judgment is worth careful consideration. It has a twofold interest in that it also settles the extent of the damages recoverable by a party injured in a motor-collision in respect of the indemnity under the contract of insurance created by s. 6 of the Motor Vehicles Insurance (Third Party Risks) Act, 1928. (This section and s. 3 have also been under judicial scrutiny in *National Insurance Company v. Joyes,* [1932] N.Z.L.R. 802; p. 146, *ante*; and in *Findlater v. the Public Trustee* [1931] G.L.R. 291; 7 N.Z.L.J. 129; but neither case has any direct bearing on the facts now to be considered).

A plaintiff who had suffered in a motor collision, by reason of his inability to carry on his ordinary avocations owing to the injuries he had sustained, was obliged to employ assistance during the period of his incapacity. He was awarded £600 general damages, and special damages including the sum of £63 wages paid for such assistance, and £58 10s. for board and lodging for the persons so employed. The Insurance Company, which under contract of insurance had indemnified the motorist, now sought by originating summons to determine the extent of its indemnity. It submitted that the amounts for wages and board and lodging necessitated by reason of the substituted assistance during the injured party's incapacity, were not damages directly and immediately connected with his bodily injury, but were in the nature of a property loss which is not covered by the Motor Vehicles Insurance (Third Party Risks Act) 1928. Section 6 (1) of that statute is as follows:

> "On payment of the insurance premium in respect of any motor-vehicle as aforesaid the insurance company nominated by the owner shall be deemed to have contracted to indemnify him to the extent hereinafter provided from liability . . . to pay damages (inclusive of costs) on account of the death of or of bodily injury to any person or persons, where such death or bodily injury is the result of an accident happening at any time during the period in respect of which the insurance premium has been paid, and is sustained or caused by or through or in connection with the use of such motor-vehicle in New Zealand."

In the course of his judgment, Mr. Justice Reed after quoting the rules in *Heydon's case*, which, he said, "are as in full force and effect to-day as they were when first laid down by the Barons of the Exchequer nearly 250 years ago," said that our Acts Interpretation Act, 1924 provides that every act and every provision and enactment thereof shall be deemed remedial and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

The learned Judge then showed that the effect of compliance with ss. 3 and 5 of the Act is, without further formality, to create a statutory contract between the Insurance Company and the owner of the motor-vehicle. Then, he applied the principles of *Heydon's case*, as follows:

> "The mischief that the Legislature has *inter alia* sought to remedy by this Act is the failure of persons, suffering bodily injury through the negligent driving of a motor-vehicle, to recover the fruits of a judgment for damages through the possible impecuniosity of negligent drivers and owners of vehicles.
>
> "The Act only extends to cases of damages for bodily injuries (including death); it has no application to damages

to property. In all actions for bodily injury due to negligence, damages may be awarded by a jury for the actual bodily injury sustained; the pain undergone; the effect on the health of the sufferer according to its degree and probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the rest of his life. *Phillips v. South Western Railway Coy.*, 4 Q.B.D. 406. To these may be added matters not in issue in that case: pecuniary loss sustained through the plaintiff being prevented by his injuries from attending to that business or, in the case of a woman, from attending to her household affairs. All these have been treated in the Courts as proper heads of damage in actions in respect of bodily injuries received in motor accidents. Is there any indication in the statute that these heads of damage should be excluded from consideration? Is not the contention here advanced an instance of "the subtle invention and evasion for the continuance of the mischief and *pro privato commodo*" that we are charged to suppress?"

His Honour proceeded to say that there is no half-way house; either the full damages that a person who has suffered bodily injury by the negligent driving of a motor-vehicle can be recovered, or this remedial measure is whittled away to the extent that a labourer could not recover his wages whilst confined to his bed from bodily injuries received, nor a widow with young children the expense of assistance in the house during the time her injuries prevented her looking after them. The Act in his opinion has no such restricted meaning.

The learned Judge concluded by saying that he was of opinion that the amount allowed by the jury in respect of wages and board and lodging for the assistance required during the incapacity of the claimant is payable by the Insurance Company under its contract of indemnity.

International Recognition of Divorce Decrees.

The thirty-seventh Conference of the International Law Association, held at Oxford recently, under the presidency of Lord Blanesburgh, turned its attention to the difficulties arising through the conflicting laws of the nations in relation to matrimonial suits, and the confusion which arises as to the extent to which decrees of divorce and nullity granted in one country will be recognised in others. Local laws are affected by foreign legislative variations in respect of domicil, and these, in turn, are qualified by the local application of the doctrines of nationality and residence.

The Conference rejected suggestions that all divorce laws should be reduced to the level of those making easiest the dissolution of marriage. It also foresaw difficulties in the way of securing uniformity in legislation to provide that the decrees issued in any one State should be recognised by the others. The members were also of opinion that no solution is possible that will "open the door to abuse by any State which chooses to make the dissolution of marriage a business."

The result of the Conference's deliberations was the passing unanimously of a resolution which recommended a solution by means of an International Convention for the mutual recognition of matrimonial decrees by the various States under carefully drawn conditions that would exclude the more flagrant abuses. Whether this is a practical possibility remains to be seen. The statement by the Conference of the indicated conditions requires several hundred words of careful legal phrasing: its acceptance without alteration by the world's legislatures seems a somewhat vain hope.

Supreme Court

MacGregor, J. July 17, September 9, 1932.
Wellington.

In re MOUG (A BANKRUPT).

Bankruptcy—"Settlement of Property"—Whether "Made in Good Faith and for Valuable Consideration"—To compromise Maintenance Proceedings, Agreement entered into to settle £750 to return £1 a week maintenance—Such amount later paid to Trustees with £100 added in view of lower interest rates then prevailing—Settlor subsequently adjudicated Bankrupt—Claim by Official Assignee to recover both sums from Trustees—Whether each amount a settlement in good faith and for valuable consideration—Bankruptcy Act, 1908, S. 75.

This motion raises an interesting question under section 75 of the Bankruptcy Act, 1908.

The question now in issue is whether the "settlement of property" detailed in the subjoined judgment was "made in favour of a purchaser or incumbrancer in good faith and for "valuable consideration" within the meaning of the section. At the hearing it was in effect conceded that the settlement was made in good faith, but it was strenuously contended for the Official Assignee that it was not made for valuable consideration.

Held: That, as the *bona fide* compromise of a *bona fide* action claiming rights against a defendant's property is a valuable consideration within the meaning of the section, the payment of the £750 could not be impeached. *Aliter*, in respect of the £100 which was a voluntary payment though made in good faith.

Hanna for the Official Assignee.

Boys and **Virtue** for all respondents (jointly).

MACGREGOR, J., said that from the affidavits it appeared that one John Moug was duly adjudged a bankrupt under a creditor's petition on January 29, 1932. It further appeared that on September 18, 1931, the sum of £850, the property of Moug, was paid by him to Messrs. Virtue and Boys as trustees for his infant daughter, on the terms set out in two Memoranda dated respectively March 1, 1931 and September 18, 1931. The circumstances leading up to this payment of £850 are extraordinary, and must be examined in some detail. In 1930, Moug was a mercer in Wellington, a married man with one child, a daughter. On March 13, 1930, Mr. and Mrs. Moug entered into an agreement for separation, under which Moug became liable to pay to his wife the sum of £1 a week for the maintenance of his daughter. Moug failed to pay this sum regularly, and on May 12, 1930, an order was made by the Stipendiary Magistrate at Wellington under the Destitute Persons Act, 1910, ordering him to pay £1 per week to his wife for his daughter's maintenance. Default was made in payment of this sum at intervals between May and November 1930, during part of which time Moug was out of work. On or about November 1, 1930, however, it appeared that Moug was lucky (or unlucky?) enough to win the first prize in a lottery known as "The Free Ambulance Art Union" amounting to the sum of £3,000. Shortly after that date Moug placed £2,000, part of the £3,000, on fixed deposit with the Union Bank of Australia at their Wellington office. How he spent or disposed of the remaining £1,000 did not clearly appear, except as to the sum of £80, which his wife's solicitors promptly compelled him to pay into the Magistrate's Court as representing the instalments due by him for his daughter's maintenance up to November 17, 1930. The next step was that on December 17, 1930, Mrs. Moug through her solicitors lodged a complaint against Moug claiming under the Destitute Persons Act, 1910 for: (a) An increase or variation of the then existing order in respect of the daughter, and (b) A Maintenance Order in respect of his wife. This complaint was set down for hearing on December 22, 1930. On December 19, 1930, however, a conference was held between the parties, at which Moug finally agreed to pay to trustees a sum of £750 to be invested by them in trust to provide maintenance at the rate of £1 per week for his daughter until she should attain the age of 16 or die, the capital money then to revert to Moug himself. A draft declaration of trust embodying the terms agreed on was prepared immediately after the conference, but was not then engrossed or completed. On December 22, 1930 the proceedings before the Magistrate were adjourned

until January 28, 1931, and on that day were further adjourned "*sine die*." Before the draft declaration of trust was engrossed and completed, however, it became known to the parties concerned that the Union Bank declined to allow the fixed deposit receipt of £2,000 to be broken into in order to allow the trustees to receive the said sum of £750. It therefore became necessary, in order to overcome this difficulty, to recast the said Declaration of Trust, which appeared in its amended form in the Memorandum of Agreement dated March 1, 1931, attached to the affidavit of the Official Assignee. On March 23, 1931, this Agreement (or Declaration of Trust) was submitted to the Stipendiary Magistrate at Wellington, when a copy was deposited in the Magistrate's Court, and the complaints for maintenance and variation were struck out, and the order for maintenance made on May 12, 1930 was cancelled, by the Magistrate. Matters apparently remained in this position until August, 1931, when attachment proceedings were commenced to attach the fixed deposit of £2,000 already referred to, by the petitioning creditor, in respect of a debt or claim of about £300 due by Moug. In September, 1931, the Union Bank released their fixed deposit of £2,000, and on or about September 18, the bankrupt paid thereout to Messrs. Boys and Virtue the trustees of the Declaration of Trust the sum of £850 now sought to be recovered by the Official Assignee in these proceedings. This sum of £850 was made up of the sum of £750 agreed to be paid in March, 1931, and an additional sum of £100 paid over to the trustees subject to the provisions of the trust in terms of a letter of September 18, 1931. This additional sum was agreed to be paid in order to provide a large enough capital sum to ensure £1 a week for the child,—in view of the lower rates of interest then obviously impending. The letter of September 18, 1931, stated that: "the provisions of the trust in so far as they now relate to £750 will automatically become applicable in respect of the whole sum now held—viz. £850 0s. 0d."

Moug was declared a bankrupt on January 29, 1932, and there would be a considerable deficiency in his estate. He appeared to have squandered a large part of his easily gained £3,000, which he cannot or will not account for satisfactorily. In these circumstances, the Official Assignee claimed to recover from Messrs. Boys and Virtue as trustees the two sums of £750 and £100 under s. 75 of the Bankruptcy Act, alleging that the payment of each sum was a "settlement of property" not "made in favour of a purchaser or incumbrancer in good faith and for valuable consideration."

As already stated, it was conceded that both payments were made in good faith. His Honour thought it clear also that they were made without any idea of prejudicing outside creditors. In March and September 1931, the parties concerned in these transactions were well aware that Moug was entitled to the balance of the fixed deposit of £2,000 over and above the two sums of £750 and £100 required to provide for his daughter's maintenance. The debatable question remained: Were the payments in dispute in each case "made in favour of a purchaser . . . for valuable consideration?" Was there a *quid pro quo* for the money paid on each occasion? (see *per* Sir *James Hannen* in **Hance v. Harding,** 20 Q.B.D. p. 732). This *quid pro quo* need not be a money payment. The release of a right, or the compromise of a claim, may be sufficient to constitute a person "purchaser" within the meaning of section 75: **In re Pope, ex parte Dicksee** [1908] 2 K.B. 169. In the latest case on the subject, **In re Cole** [1931] 2 Ch. 174, it was held by *Farwell*, J., that a *bona fide* compromise of a *bona fide* action claiming rights against a defendant's property is valuable consideration within the meaning of the section, and the plaintiff in such an action is a "purchaser" within that section. It was further held in that case that it is not the business of the Court of Bankruptcy before which the settlement is subsequently impeached to consider whether the action could possibly have succeeded if fought out to a finish.

After consideration it appeared to His Honour that **In re Cole** (*supra*) is in principle decisive of the present case, in so far at least as the claim for £750 is concerned. It is clear from the affidavits that this sum of £750 was in good faith agreed to be paid to the trustees by Moug in March, 1931, in consideration of Mrs. Moug withdrawing the proceedings brought against him by her under the Destitute Persons Act, 1910. These proceedings were withdrawn subsequently accordingly, and the previous separation order was cancelled by the Magistrate, as agreed by the parties. In His Honour's opinion this obviously amounted to "valuable consideration" under s. 75. Mr. *Hanna* for the Official Assignee contended that Mrs. Moug's covenants in the agreement are not binding on her in view of the terms of ss. 24 and 27 of the Destitute Persons Act, 1910. That argument no doubt raised a nice question of law, but His Honour did not think it well founded. However, it was not necessary in his opinion to decide it definitely here and now. The authorities are clear that where once the Court is satisfied that there has been a compromise of legal proceedings in good faith, that compromise, at any rate for the purpose of supporting a contract, represents good consideration, and it is not for the Court to determine whether or not the action could or would have succeeded if prosecuted to the end. (See **In re Cole** (*supra*) p. 178). In his judgment that broadly was the legal position in the present case, with respect to the payment of £750 to the trustees.

The later payment of £100, however, demanded separate consideration. It could hardly be contended with success, that there was any fresh consideration given for the payment when it was made in September, 1931. Unless therefore it can be held that the payment of £100 legally related back to the original consideration given for the £750 some months earlier, it must be treated as a purely voluntary payment—in other words, a "gift" by Moug to the trustees for the benefit of his daughter. The request for payment, which was duly acceded to, of course did not constitute "valuable consideration" at all. Mr. *Virtue* contended that the £100 was paid really to give fuller effect to the contract made in March, 1931, when the proceedings under the Destitute Persons Act, 1910 were abandoned, and that, therefore, there was here an *ex post facto* consideration for value, as in **In re Hume,** 28 N.Z.L.R. 793. But in **Hume's case** the circumstances were widely different from the present transaction. There the promise in law was a voluntary one, followed by subsequent expenditure of money and labour which *Cooper*, J., deemed sufficient to convert the voluntary promise into an enforceable contract. That sequence of events was held by the learned judge to constitute an *ex post facto* valuable consideration. Here, on the other hand, we have in substance a voluntary payment of £100 preceded some months earlier by another payment of £750 for valuable consideration. In other words, that is merely a past consideration, which according to our law is no consideration at all: **Anson on Contract** (17th Edn.) p. 112. In the result, His Honour thought the motion succeeded in so far as it related to the £100 payment; but must fail as to the £750 claimed to be recovered thereby.

Order made that Messrs. Virtue and Boys do pay to the Official Assignee the sum of £100. (His Honour understood that at least that sum will be required to pay 20s. in the £ on the proved debts of the bankrupt, so that the full amount was recoverable).

As the motion had failed with respect to the larger sum involved, the Official Assignee was ordered to pay Messrs. Virtue and Boys the sum of £15 15s. 0d. and disbursements in or towards their costs of these proceedings.

Solicitors for the Official Assignee: **Duncan and Hanna,** Wellington.

Solicitors for John Moug: **Young, White and Courtney,** Wellington.

Solicitors for Neta Moug and the infant daughter: **Hardie-Boys, Haldane and Fortune,** Wellington.

Blair, J. April 18, July 27, 1932. Wellington.

In re TAYLOR (DECD.): PUBLIC TRUSTEE v. LAMBERT AND ORS.

Adoption of Children—Effect on Distribution—One Child of Family Adopted by Adoption Order—Natural Sister Subsequently Dying Intestate and Unmarried—Whether Adoption Order Excluded Sister of Deceased from a Distributive Share in Latter's Estate—Infants Act, 1909, s. 21.

Originating Summons. Eva Margaret Taylor died intestate and unmarried at the age of twelve years. Both her parents predeceased her. They had four children, three of whom are still alive. One of these children, Gladys Annie, was on December 4, 1926, lawfully adopted by a Mr. and Mrs. Lambert, by order under s. 16 of the Infants Act, 1908. Eva Margaret Taylor left real and personal estate of the approximate net value of £890. The question for answer in this originating summons was whether the adoption order excludes Gladys Annie who is now Gladys Lambert from a distributive share in her deceased sister's estate.

Held: The adopted child had a right to share in her deceased natural sister's estate.

Smith for Public Trustee.

Lloyd Wilson for Gladys Lambert.

Cleary for I. and D. Taylor.

BLAIR, J., said that as to adoption orders, s. 21 of the Infants Act, 1908, provides that: "Such order of adoption shall confer the name of the adopting parent on the adopted child and the adopted child shall for all purposes civil and criminal and as regards all legal and equitable liabilities, rights, benefits, privileges and consequences of the natural relation of parent and child be deemed in law to be the child born in lawful wedlock of the adopting parent." Then follow certain exceptions.

Subs. (2) of s. 21 provides firstly that the adopting parent is to be deemed for all purposes the parent of the adopted child as if such adopted child had been born to the adopting parent in lawful wedlock. The subsection then proceeds: "and such order of adoption shall thereby terminate all the rights and legal responsibilities and incidents existing between the child and his natural parents *except the right of the child to take the property as heir or next of kin of his natural parents directly or by right of representation.*" The italics are His Honour's.

It was clear from the italicised words, firstly, that the legislature intended to preserve for the benefit of any adopted child, notwithstanding the adoption, all its rights as heir or next of kin of its natural parents: secondly, the Section in like case preserves all the adopted child's rights as heir or next of kin of its natural parents "*by right of representation.*" His Honour asked what do these words mean, and to what extent do they extend the direct rights it has as heirs or next of kin of its natural parents? That the legislature intended to preserve for the adopted child something more than direct rights was, he thought, clear, because otherwise the words "*or by right of representation*" were meaningless.

There are no words in subs. (1) or in the first portion of subs. (2) which expressly terminated the adopted child's rights from its natural parents. Those two portions of the Act are designed, firstly, to confer and impose on the child certain rights and liabilities, and, secondly, to confer and impose like rights and liabilities on the adopting parent. It is left to the concluding portion of subs. (2) to deal with the subject of terminating the adopted child's rights as the child of its natural parents. It may, His Honour thought, be taken that one should approach the consideration of the Section with the presumption that no rights incidental to blood relationship were to be treated as destroyed except such rights as the Statute expressly takes away.

The Act makes provision which has the effect of providing that on the death intestate of an adopted child's brother or sister by adoption, the adopted child is not treated as related in blood to such brothers or sisters by adoption. Therefore if an adopted child by the fact of adoption were to be treated as having lost the benefit of blood relationship to her natural brothers and sisters it meant that adoption has somewhat far-reaching effect in isolating an adopted child from its blood relatives.

The word "representatives" was discussed in **Lindsay v. Ellicott,** 46 L.J. Ch. 878, where *Jessel,* M.R., after referring to the word as covering legal representatives such as executors or administrators, said: "Now these observations do not apply to the persons who take derivatively, if I may use the expression, under the Statute of Distributions. Where you have a class who take under the Statute of Distributions as a primary class, and by reason of some members being dead another generation take under the Stature, the second class do take by representation. They represent a dead member of the class. Thus where an intestate dies leaving brothers and sisters, and leaves children of a dead brother and sister, the children take as representing the dead brother and sister."

A parent and child are related to each other in the first degree, brothers and sisters are related to each other in the second degree. The father of a childless intestate takes the whole of the estate, so that if the father of this deceased child had survived her, her brothers and sisters would not have shared. If the intestate's mother, brothers, and sisters had survived her, but no father, then the mother, brothers and sisters would have shared equally (1 Jac. II, C. XVII). As both the father and mother of the childless intestate predeceased her, the enquiry for next of kin starts at the father of the intestate, and the brothers and sisters of the intestate are thus nearest of kin to the deceased childless intestate. These brothers and sisters, (one of whom being the child Gladys Lambert who has been adopted by strangers) are nearest of kin, because related in blood in the second degree to the intestate through their father who was related in the first degree.

His Honour thought that when the Statute made use of the words "*by right of representation*" it was intended to preserve for the benefit of the child adopted by strangers the benefit of this *jure representationis* which such adopted child had as the natural daughter of her father. As already pointed out by him, the Stature refuses to the adopted child the advantage of blood relationship to her brothers and sisters by adoption, and it would to his mind be straining not only the words but the spirit of the Act if he were to construe it so as to deprive an adopted child also of any advantage it had by virtue of blood relationship to its natural parents.

The Death Duties Act, 1921, s. 20 treats an adopted child, for death duty purposes, as the child of its adopting parents, but adds to the Section the following: "but shall not be deemed to destroy that relation as between the natural parents and that child or to create or destroy any other relationship between any persons." **In re Goldsmid** [1916] N.Z.L.R. 1124, which was a case concerning the rights of adopting parents in the property of a deceased adopted child, *Edwards, J.*, said: "All rights and legal responsibilities and incidents existing between the child and his or her natural parents are extinguished except only the rights of the child as heir or next of kin in the property of his or her natural parents."

That learned Judge used those words with reference to the facts then before him, and he was not enquiring into the position which His Honour was no considering which was whether an adopted child's rights as representing its deceased natural parent were taken away by adoption. He would thus derive no help one way or the other from this dictum.

In re Carter, 25 N.Z.L.R. 278, was a case concerning the succession to the property of an intestate adopted child, which child was illegitimate when adopted. Both adopting parents were dead, but one adopting parent left a child by a former marriage. It was held that the adoption order terminated the statutory rights of the natural mother of the illegitimate adopted child to succeed to its estate, and treated the natural child of the adopting parents as the legal half-brother of the intestate illegitimate child. The decision was given on the Adoption of Children Act, 1881, s. 5, and was based on the words "other legal consequences" in that section. Those words are omitted from the corresponding section of the Infants Act, 1908. There are expressions in the judgment which are relied upon by Counsel for the intestate's natural brother and sisters, but His Honour did not think that the decision was helpful in deciding this case.

His Honour said he could not construe the section as taking away the adopted child's right to share in her deceased natural sister's estate, and he answered the question in the summons accordingly.

Solicitors for the Public Trustee: **The Solicitor to the Public Trustee.**

Solicitor for Gladys Lambert: **Ll. K. Wilson,** Wellington.

Solicitors for the other Defendants: **O'Donnell and Cleary,** Wellington.

Reed, J. April 28, June 22, 1932.
Wellington.

In re INGLIS BROS. & CO. LTD. (IN LIQUIDATION).

Company—Registered Debenture—Unregistered Charge—Deed of Supplementary Debenture—Debenture given to Bank to Secure Overdraft charging all Company's Assets with Specified Exceptions—Charge Subsequently extended by Deed to Cover Part of Excepted Assets but Subject in respect thereof to prior unregistered charge in favour of Guarantee Corporation which was not a party to the Deed—Whether Bank entitled to rank as First Mortgagee by Virtue of Registered Debenture and Deed Against and in Priority to Corporation and All other Creditors—Companies Act, 1908, s. 130; Property Law Act, 1908, s. 44.

Application by the liquidator of Inglis Bros. & Co. Ltd. (in liquidation), under s. 226 of the Companies Act, 1908, to

determine certain questions in the winding up of the abovementioned Company.

On November 2, 1927, the company made and executed a debenture, in favour of the National Bank, to secure payment of advances on current account, and thereby charged with such payment all its property and assets, with certain specified exceptions. By Deed dated February 28, 1929, made between the Company and the National Bank, the Company extended the charge to cover part of the originally exempted assets; and proceeds "and [witnesseth] that the said debenture shall be read and construed as if the said above mentioned property were included in the charge therein contained but so that the said abovementioned property so charged shall be subject to a prior charge to the extent of £6000 in favour of the New Zealand Guarantee Corporation Limited Provided always that nothing herein contained shall be deemed to give or confer on the said New Zealand Guarantee Corporation Limited any charge over any assets of the Company other than those specifically mentioned And in all other respects the Company hereby confirms the said debenture." The Company at no time executed any document specifically creating any charge in favour of the Guarantee Corporation.

The first question asked was as follows: (1) "Whether a Deed bearing date the 28th day of February 1929 expressed to be made between the abovenamed Company of the one part and the National Bank of New Zealand Limited of the other part creates or constitutes of itself a charge over any of the assets therein referred to in favour of the New Zealand Guarantee Corporation Limited not a party thereto and if so is such charge duly registered as a mortgage or charge in compliance with the requirements of the 'Companies Act 1908' by virtue of the fact that the said Deed has itself been duly registered by the said Bank in such compliance but for the purpose of protecting its own rights thereunder as against the above-named Company.

The Capital of the Company was £107,000 divided into preference and ordinary shares. At the time of the execution of the abovementioned variation of the debenture the Company was indebted to the Guarantee Corporation in approximately the sum of £6,000. In the first debenture given to the National Bank amongst the assets exempted from the charge, and which are mentioned in the supplementary debenture as 2b and 2c, were "all stocks of motor cars and Chevrolet trucks purchased from or supplied by General Motors (New Zealand) Limited and used cars or trucks taken as part payment of such new cars or trucks purchased from or supplied by General Motors (New Zealand) Limited. All Bills of Exchange Promissory Notes held on account of sales of such cars and trucks all book debts in relation thereto and all cash received in respect thereof." The Guarantee Corporation had been financing the Company in respect of these matters, the terms of which are set out in writing in two agreements, which were executed subsequent to the execution of the supplementary debenture, but were in pursuance of prior arrangements to the same effect. The agreements are between the Company and the Corporation, and the due observance of the terms thereof is guaranteed by sureties. Each agreement made provision for advances up to £3,000, one was in respect of the purchase of Buick cars from General Motors (N.Z.) Ltd., and the other in respect of the purchase of Pontiac and Oakland cars from the same Company. Each agreement contains a clause requiring a separate special account to be opened in the National Bank into which the advances were to be paid and solely used for the purchase, in the one case of Buick cars, and in the other of Pontiac and Oakland cars. This arrangement was known to the National Bank, and accounts for the exemption from the first debenture of the stocks of motor cars and documents in connection therewith. Apparently the Bank later considered that there was a surplus in the exempted assets, hence the supplementary debenture giving it security over such assets subject to the amount due to the Guarantee Corporation. There is no provision in these agreements that the Company shall give a debenture to the Corporation, or shall charge any of the Company's assets in its favour. At the date of the Company going into liquidation it owed to the Bank £59,821 2s. 8d., to the Guarantee Corporation £8,339 11s. 1d., and to all other creditors £21,436 2s. 8d. To date of hearing the Receivers have realised from the assets £11,778 0s. 2d., and have accounted to the Bank for the sum of £9,160 0s. 4d. The forecast of the final result is that even allowing for the inclusion of the assets set out in 2b and 2c of the Bank's debentures, freed from the prior charge, there will be insufficient to discharge in full the debt owing to the Bank.

Held: After consideration of the question of registration: on construction of the terms of the Deed, the intention was clear that a charge should be created in favour of the Corporation which is entitled to the first £6,000 out of the proceeds of the realisation of the exempted assets.

Quaere: Whether the words in the Bank's Deed, "subject to a prior charge to the extent of £6,000 in favour of the New Zealand Guarantee Corporation Ltd." did not constitute the Bank, as between itself and the Corporation, a trustee to pay, out of the proceeds of the realisation, to the extent of £6,000.

Rothenberg for the Liquidator.

Levi and **O'Leary** for the N.Z. Guarantee Corporation.

Hoggard for the unsecured creditors.

Ward for the National Bank of New Zealand Limited.

REED, J., after reciting the above facts, said that the Corporation had no registered charge other than might be spelt out of the words in the supplementary debenture to the Bank, which document was, of course, duly registered in accordance with the provisions of s. 130 of the Companies Act, 1908.

The questions for determination might be shortly stated as: (1) Has the Guarantee Corporation established a good charge? (2) If not, did the security of the Bank extend over the exempted assets freed from that charge? (3) If not, did the words used in the supplementary debenture constitute a reservation in favour of the Company, intended to be conferred upon the Guarantee Corporation, but on failure to do which, the reservation enures to the benefit of the Company and the unsecured creditors.

The first question to be considered then, was as to whether the Guarantee Corporation had established a good charge? The fact that the Guarantee Corporation was not a party to the Deed was no answer. Any person (which includes a Company) may take an immediate benefit under a deed although not named as a party thereto: s. 44 Property Law Act, 1908: **MacLeod v, MacLeod** [1931] N.Z.L.R. 12; *Re* **Bastings, Leary v. Bastings**, 29 N.Z.L.R. 409. To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used. It is sufficient if the Court can fairly gather from the instrument an *intention* by the parties that the property therein referred to should constitute a security: *per Romer*, J., in **Craddock v. The Scottish Provident Institution**, 69 L.T. 380, affirmed on appeal: 70 L.T. 718. The question, therefore, appeared to resolve itself into one of construction of the document, but before that question was dealt with it was necessary to consider whether, if a charge in favour of the Guarantee Corporation be established, that charge has been duly registered, without which it would be void against the liquidator or any creditor of the Company: s. 130, Companies Act, 1908. Registration is affected by lodging in the office of the Registrar of Companies a copy of the instrument creating the mortgage, accompanied by an affidavit of the execution of the instrument and verifying the copy as a true copy. It was contended that if it be held in the present case that there was a sufficient registration of the charge in favour of the Guarantee Corporation, it opened the door to fraud upon creditors, inasmuch as the Register-Book would probably not disclose its existence, and that therefore the Court should not hold that there had been a sufficient registration. His Honour could not agree with that contention. When the verified copy of the instrument is lodged the duty imposed by the Act is performed. Any further duty is cast upon the Registrar who is required to enter in the Register-Book, the date of the mortgage, the amount secured by it, short particulars of the property mortgaged, and the name of the person entitled to the charge. Any person desiring to search the Register-Book is, on payment of 1s. entitled to inspect it, *together with all documents entered therein*. If the Registrar had failed to note the charge in favour of the Guarantee Corporation (if there be such a charge) that cannot be held against that Corporation. The object of the Act is not to confer a title but simply to enable any person who has dealings with the givers of securities to ascertain by search whether there are any previous charges **In re Jackson and Bassford Ltd.** [1906] 2 Ch. 467, 476. In an old case of **Bisco v. Earl of Banbury**, 1 Ch. Ca. 287, the purchaser had actual notice of a specific mortgage, but did not inspect the mortgage deed, which referred to other incumbrances. He was held to be bound by those incumbrances for he would have discovered their existence if he had inspected the deed, as any prudent man would have done. That is an example

of one of the classes of constructive notice as classified by *Wigram*, V.C., in **Jones v. Smith,** 1 Hare 43 at 55, that is to say: "Cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered or in any way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an enquiry after the incumbrance, or other circumstance affecting the property, of which he had actual notice." The same principle applies where in a Statute, the sole object of registration being required is to give notice. If then a charge in favour of the Guarantee Corporation existed, His Honour thought it was duly registered within the meaning of the Act.

The question then was whether the Court could fairly gather from the instrument an intention that a charge should be created. First, did the Company intend by this Deed to confer any rights on the Guarantee Corporation? His Honour thought it was clear that it did, otherwise why the proviso that *nothing herein contained* should confer on the Corporation any charge over any assets of the Company otherwise than those specifically mentioned. It had been suggested that this proviso is only *ex abundante cautela*: caution against what? Clearly it could only be the possibility of a construction that it had conferred something more than it purported to confer. Now that could not be if there were in existence a charge, nor if it were intended to subsequently grant a charge, for the extent of that charge, in the one case, would already be defined, and in the other could be limited by the terms of the document. His Honour thought that upon a reasonable construction of the clause, the intention was clear that a charge should be created by the document itself. For these reasons, therefore, he held that the New Zealand Guarantee Corporation has established a charge, and is entitled to the first £6,000 out of the proceeds of a realisation of the exempted assets.

The first question was, therefore, answered "Yes," and it became unnecessary to consider the second.

An interesting question, which was not argued, and, therefore, upon which His Honour expressed no opinion, was: Assuming that no charge, in the sense of a mortgage, was created by the words used, whether the charge given to the Bank over the exempted assets is not impressed with a trust to the extent of £6,000 in favour of the Guarantee Corporation. It would appear that if the charge given to the Bank had been "subject to the payment, out of the proceeds of the realisation of the assets, a sum of £6,000 to the Guarantee Corporation" or even "subject to a lien on the said assets by the Guarantee Corporation to the amount of £6,000" that the Bank as between itself and the Guarantee Corporation would be a trustee for the latter, to the extent of £6,000 on the realisation of the assets: **Story's Equity Jurisprudence,** Para. 1244; **Gregory v. Williams,** 3 Mer. 582, as explained in **In re Empress Engineering Coy.,** 16 Ch. D. by *Jessel*, M.R., at p. 128, and *James*, J., at 129; **Re Flavell, Murray v. Flavell,** 25 Ch. D. 89. The first supposititious condition attached to the charge would bring the case directly within the ruling in **Gregory v. Williams.** As to the second, the effect of s. 44 of the Property Law Act, 1908, would require to be considered upon the question as to whether the Guarantee Corporation had the status of a *cestui que* trust, that is to say whether the effect of the statute is to make the Guarantee Corporation a party to the instrument to the extent that it could not be abrogated by a substituted agreement made between the same parties, without the consent of the Guarantee Corporation. A mere agreement to which the Guarantee Corporation was neither directly, nor by virtue of the statute, a party and which, therefore, could be rescinded by consent of the named parties would not constitute a trust. The important question would, therefore, be whether the actual words: "subject to a prior charge to the extent of £6,000 in favour of the New Zealand Guarantee Corporation Limited" did not within the principles to be drawn from the authorities, constitute the Bank as between itself and the Guarantee Corporation a trustee to pay, out of the proceeds of the realisation, to the extent of £6,000. But, as His Honour has said, that question was not argued, and he expressed no opinion.

Solicitor for the Liquidators: **W. L. Rothenberg,** Wellington.

Solicitors for the N.Z. Guarantee Corporation: **Levi, Jackson and Yaldwyn,** Wellington.

Solicitors for the National Bank: **Brandon, Ward and Hislop,** Wellington.

Solicitors for the unsecured creditors: **Findlay, Hoggard, Cousins and Wright,** Wellington.

Herdman, J. August 22; September 1, 1932. Auckland.

O'NEILL AND ORS. v. PUPUKE GOLF CLUB (INC.)

Club—Committee's Power to Make By-Laws—Whether enabled by By-Law to Prohibit Saturday Morning Play by Women Members who were fined and suspended for disobeying same—Whether such By-Law ultra vires.

Application for injunction to restrain Committee of a Golf Club by means of a by-law to debar women members from Saturday morning play.

The Defendant Club is an incorporated society within the meaning of the Incorporated Societies Act, 1905. By virtue of its constitution the Club can make rules. Under the heading "Management" one of its rules provides that: "The Committee may make by-laws for the regulation of the club house, grounds and links, and for the arrangement and control of games and matches." In pursuance of this authority the Committee of the Club made the following by-law: "Saturday morning play by Lady Members, other than week end members is absolutely prohibited. The course is however open to Lady Members on Saturday afternoon, but only on condition that their round must not start till after 3 p.m. and until all gentlemen players have commenced their matches and that right of way must be given to the men at all times."

This by-law was made, so the Defendant said, to preserve the conditions of the greens and to allow men who are members of the Club to conduct their competitions without congestion and interference. On the other hand, other witnesses declared that there is no necessity for such a by-law, that the grounds can be properly maintained and that all members can enjoy their rights of membership reasonably without it being necessary to give to men players what virtually amounts to a monopoly of the grounds on Saturdays.

The Plaintiffs were punished by fine for disobeying this by-law and were suspended from the exercise of their privileges as members of the Club. They claimed that the action taken against them by the Club was irregular and unlawful inasmuch as the by-law under which the Committee purported to act was *ultra vires* of the powers of the Committee and void.

Held: Granting injunction: The Club's rules do not enable the Committee to make a by-law to benefit one section of members and so restrict the playing-rights of another section as to take action against latter class if a breach of such by-law is committed.

H. P. Richmond for plaintiffs.
Johnstone and **McKay** for defendant.

HERDMAN, J., said that the evidence contained in the various affidavits that had been filed was so conflicting that it was impossible for him, without further evidence or without hearing the witnesses themselves, to decide whether in fact it was necessary in the interests of the Club as a whole that the prohibition created by the by-law should exist. It seemed to him, therefore, that he had to confine himself to deciding whether as a matter of law the Committee acted within its powers when it made this by-law. For the purpose of determining that question, it was necessary to consider the constitution and rules of the Club and in particular para. (c) of R. 8.

Clubs incorporated under the Incorporated Societies Act, 1908, are governed in accordance with the provisions contained in that statute and the registered rules of the society and the contract between a club member and the club is contained in these rules. When anyone joins the club he or she expects to enjoy such playing rights as the rules sanction at the time he or she becomes a member subject, of course, to any change in the rules which the club may make. A club may alter its rules in manner provided by the rules. In the present instance the Club could, if it had thought fit, have made a new rule restricting play on Saturday, but instead of calling a general meeting for that purpose it has attempted to achieve its object by making a by-law.

The rules of the Club provide that the Club shall consist of an unlimited number of persons, not being less than fifteen, and including playing members, limited members, life playing members, non-playing members, life non-playing members, country members, and junior members, of whom playing members, limited members, life playing members, and country members alone are entitled to vote at meetings, or take part in the management of the Club. The management and control of

the affairs of the Club is vested in a Committee which is authorised to exercise all powers and to do all acts and things which may be exercised or done by the Club and which are not expressly directed or required to be exercised or done by the Club in general meeting. In particular, and without derogating from its general powers, the Committee is authorised to impose fines.

Under the rules different privileges are enjoyed by different members. An ordinary member whether a man or a woman has apparently under the rules full privileges, but limited members, non-playing members and junior members, enjoy restricted privileges only. For instance, in the case of a junior member it is decreed that he must not play after 1 p.m. on Saturdays, or on Sundays or on general holidays. If, then, the prohibition against women playing on Saturdays remains in force junior members who are boys between 12 and 18 years of age will be able, subject to any restriction which the Committee may impose, to use the links on a Saturday morning, but women who are full members of the Club will be excluded from the course.

His Honour said he was inclined to suspect that the by-law which was questioned aimed at securing a monopoly of the course for certain members on Saturdays up till 3 p.m. Even when 3 o'clock arrived, the women were required by the by-law to see that all male players have commenced their matches and right of way must be given to men at all times.

It seemed strange that in placing restrictions upon women's play the same course was not followed as in the case of junior members and limited members. Restrictions to which the last-mentioned members are subject are prescribed by rules not by by-laws.

On behalf of the Club it was contended that the making of the by-law is authorised by paragraph (c) of Rule 8. It was said that the power conferred upon the Committee of regulating the use of the grounds and links and the arrangement and control of games and matches justified the creation of a by-law which had all the force of a rule and which was to place one section of playing members at a permanent disadvantage. If there had been a prohibition against all play on Saturday mornings the argument might have had some force, but as it is the Committee has discriminated between men and women players and has deprived the latter of an advantage which they possessed under the Club rules when they joined the Club.

His Honour thought it was plain that the rule could not have been devised for the protection of the grounds in the interests of all players, for, as he had pointed out, men and boys may, if they like, use the links on Saturday mornings. The Committee must have had some other object in view and that object appears to have been to give men players special facilities on Saturdays. It may be that men players who are debarred by circumstances from using the course during the week were entitled to some special consideration, but can they get that by means of a by-law which curtails the rights of other members of the Club ?

That this Court has power to interfere on behalf of the Plaintiffs if the Committee acted illegally is, His Honour thought, beyond question. The principle laid down in **Dawkins v. Antrobus,** 17 Ch. D., p. 615, is this : " The Court will not interfere against the decision of the members of the Club professing to act under their rules, unless it can be shewn either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been *mala fides* or malice in arriving at the decision."

In **Lambert v. Addison,** 47 Law Times, p. 20, the validity of a by-law which provided that retired members of a club might be re-admitted on payment of back subscriptions was questioned, but the authority for the making of that by-law was a rule which entrusted the government of a club to a committee and which empowered that body to publish such by-laws as they might deem expedient. In that case, the powers conferred upon the Committee were so wide so full and so plainly expressed that there could be little doubt about their authority to make the by-law which was questioned.

In the present case, however, the powers of the Committee are circumscribed. They may make by-laws for the regulation of the club house, grounds and links and for the arrangement and control of games and matches.

It is obvious that it is in the interest of all members of the club that the matters referred to should be controlled by regulation. Some power to discipline members must be given to a committee, otherwise individual members could use a club house and grounds as they pleased, the playing of matches would become impossible and the object of the existence of the club, namely, " to encourage the growth and spread of the game of golf " would be defeated.

But do the rules in the present instance go the length of enabling the Committee to make a by-law which benefits one section of members only, which restricts the playing rights of another section and which authorises the Committee, if a breach of the by-law be committed and the authority of the Committee is defied, to take some action against an offending members which involves disqualification for the time being ?

Could the Committee pass a by-law which provided that women could not use the links at all or could play only on one day in each week or that members over fifty years of age could not play on more than one day in the week or only within certain hours ? His Honour did not think so. The Club in general meeting might lawfully make such rules, but it is difficult to believe that a committee by means of by-laws which usually relate to matters of minor importance could so seriously interfere with the rights conferred upon a member by rules in existence when he joined the Club and paid his subscription.

If His Honour decided that the by-law is valid, then it seemed to him that it would be difficult to determine the limit of what would amount to an arbitrary authority of a committee over members' rights to play.

Judgment for the Plaintiffs.

Solicitors for plaintiffs : **Buddle, Richmond and Buddle,** Auckland.

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

Court of Arbitration.

Frazer, J. July 25, August 30, 1932. Christchurch.

SHEWAN v. WESTPORT STOCKTON COAL CO. LTD.

Workers Compensation—Computation of Average Weekly Earnings—" While at Work "—Irregular Nature of Operations of Mine and Irregular Working Hours Considered—Basis of Computation of Compensation Reviewed—Average Weekly Earnings Constructed from Material before Court—Workers' Compensation Act, 1922, S. 6.

Claim for compensation in respect of an injury by accident suffered by the plaintiff at his work. It was admitted that the accident arose out of and in the course of his employment with the defendant company, and that he was incapacitated for one week. The only question was as to the basis on which his average weekly earnings were to be calculated.

The plaintiff claimed that his average weekly earnings should be computed on the basis of a normal or standard working week of five full days. The defendant company contended that, owing to the consistently irregular nature of the operations of the mine during the twelve months preceding the accident, the basis of computation should be set out in **Awa v. Taupiri Coal Mines Ltd.** [1926] G.L.R. 22.

Held : Mere irregularity of work, where the employment is continuous, does not abrogate the normal or standard week. " While at work " means " while actually working." But where the conditions of work are such as to enable the inference to be drawn that a normal or standard working week of a fixed number of days or hours is not contemplated, the foundation of the recognised normal week is absent. The Court then (as appears at the end of the judgment) applied to the facts in issue a construction of the average weekly earnings of the plaintiff. **Livingstone v. Westport Stockton Coal Co. Ltd.,** 14 G.L.R. 515, considered.

P. J. O'Regan for the plaintiff.

C. S. Thomas for the defendant.

FRAZER, J., in delivering the judgment of the Court, said that, though the amount involved was trifling, an important question of principle was involved.

The plaintiff was a trucker, and was paid at a time-wage rate of £1 2s. a day. The effect of the judgments in **Densem v. Speden,** 8 G.L.R. 58 ; **Livingstone v. Westport-Stockton Coal Co. Ltd.,** 14 G.L.R. 515 ; **Dalziel v. Craw Bros.,** 11 N.Z.W.C.C. 16 ; **Public Trustee v. Russell and Bignell,** 17 G.L.R. 230, and **Statham v. McCurdy** [1927] G.L.R. 43, is that a worker is entitled to have his compensation assessed on the basis of his average weekly

earnings being his earnings for a normal week—that is, a full or standard week's earnings. This, of course, presupposes that a definitely recognised standard week exists. In **Statham v. McCurdy** (*supra*), the Court said. "The standard week is, in the generality of cases, to be taken as the normal week. In the present case there was a definitely recognised standard week of 48 hours. It was not always worked, but the nature and conditions of the employment were such as to make it clear that the standard week was 48 hours. . . . It is not to be understood, however, that a time-worker's earnings for a full week are in all cases to be the measure of his average weekly earnings. Where the nature and conditions of the employment do not permit a worker to perform more than a limited number of days' work each week, and it is not contemplated that he will work a full week, the usual standard week of 44 or 48 hours has in fact no existence, and the Court must ascertain from the facts of the particular case what the normal week's work consisted of, and compute the average weekly earnings accordingly." In **Vogel v. Paparua County Council** [1932] G.L.R. 179, 8 N.Z.L.J. 75, the Court regarded the average weekly earnings of an unemployment relief worker, who was given three days' work a week, as three days' wages, for his normal working week was a week of only three days. In the judgment in that case, the Court reviewed a number of the earlier judgments, and restated the principles on which the Court based its interpretation of the expressions "while at work" and "absent from work" appearing in s. 6 (1) of the Act.

His Honour then quoted from the judgment in that case. See last paragraph on p. 76, *ante*.

The cases of **Livingstone v. Westport-Stockton Coal Co. Ltd.**; **Public Trustee v. Russell and Bignell**; **Statham v. McCurdy, and Vogel v. Paparua County Council** (*supra*) may be taken as typical examples of a very common class of employment in which a worker has a definitely recognised working week of a fixed number of days or hours, though owing to illness, wet weather, breakdown of machinery, shortage of material, or other special circumstances, he may not always work the full week. If his employment is continuous, though his actual working hours are irregular, he is entitled to have his average weekly earnings calculated on the basis of a full week's work having been performed during each week of the last year (or less period) of his continuous employment, and he is entitled to have any idle weeks left out of the calculation.

The cases of **Scott v. Hill** [1921] G.L.R. 425, and **Awa v. Taupiri Coal Mines Ltd.** (*supra*) are instances of an unusual class of employment. The latter case dealt specifically with a piece-worker, but the Act makes no distinction between a piece-worker and a time-worker. It is a mistake to regard the judgment in **Livingstone v. Westport-Stockton Coal Co. Ltd.** as applying to all time-workers, regardless of the special conditions of their employment, and it is equally a mistake to regard that judgment as being altogether inapplicable in the case of piece-workers. Similarly, it is a mistake to regard the judgment in **Awa v. Taupiri Mines Ltd.** as applying to all piece-workers regardless of the special conditions of their employment, and it is equally a mistake to regard that judgment as being altogether inapplicable in the case of time-workers.

In **Awa's case,** there were two special features, which necessarily prevent the judgment given therein from being capable of general application. It is always dangerous to attempt to apply a judgment based on a particular set of facts to a case that presents an entirely different set of facts. In **Awa's case** there was an admission of fact that an ordinary week's work at the mine in question was not a full week's work. Only one full fortnight was worked during the year. The Court found that the normal week, so called—that is, a full week's work without overtime—had no real existence in that case. There was also a difficulty in ascertaining the days and weeks on and during which no work was done, and the Court was compelled to rely on the dictum in **Densem v. Speden,** 8 G.L.R. 58 (that is, that the Court is not bound to attribute the time worked in particular weeks), and to construct an artificial average from the material available. Where particular weeks can be definitely ascertained to be idle weeks, they must be left out of the calculation altogether (**Vogel v. Paparua County Council**).

In the present case, the plaintiff claimed to have his compensation based on a full week's wages, in accordance with the judgment in **Livingstone v. Westport-Stockton Coal Co. Ltd.** In order that he may succeed, it must be proved that his employment contemplated a normal or standard week of five shifts. The defendant company supplied a complete record of time worked by the mine and by the plaintiff during the twelve months preceding the accident, which makes it clear that the method adopted in **Awa v. Taupiri Mines Ltd.,** of constructing an artificial average, without reference to particular weeks, could not be adopted here, even if the present case did not come within the rule laid down in **Livingstone v. Westport-Stockton Coal Co. Ltd.**

The facts are that by the award governing the conditions of work at the defendant company's mine, a full fortnight's work was fixed at eleven shifts. Some years ago, however, the miners refused to work on Saturdays, and the management acquiesced in the recognition of a full week of five shifts. It was agreed that time-workers might be called upon to work one additional shift per fortnight if an emergency arose, but no extra shifts had been worked during the twelve months preceding the accident. The mine worked on 127 days during the year, and the plaintiff worked on 126 days. Only five full weeks were worked during the year, and the mine worked only to fill current orders. There were thirteen calendar weeks in which no work was done, the causes being shortage of orders and industrial disputes. In the weeks in which work was available, 18½ days were lost through holidays, breakdowns, and labour difficulties. The terms of the award require payment to be made only for time actually worked.

It is obvious from the judgments to which reference has been made, that mere irregularity of work, where the employment is continuous, does not abrogate the normal or standard week. The expression "while *at* work," appearing in s. 6 (1), does not mean "while *in* work," but means "while actually working." The judgment in **Livingstone v. Westport-Stockton Coal Co. Ltd.,** when read with the earlier judgments, makes it clear that this meaning must be assigned to the expression. The result is that where a normal working week exists in fact, a worker's average weekly earnings are taken to be the sum he would have earned in such a week, if he had worked the full number of days or hours without loss of time. Overtime payments, if any, are separately computed, and added to the average weekly earnings so ascertained. The fact that time is sometimes lost does not in itself affect the method of computing a worker's average weekly earnings. Many occupations are notoriously subject to broken time, owing to wet weather and other causes. In the opinion of the Court, regard must be had to the state of affairs contemplated by the parties. If the conditions of work are such as to enable the inference to be drawn that the workers may reasonably expect to be given work on every working day in the week, unless rain, or a breakdown of machinery, or some other special circumstance makes it impossible for work to be provided for them, the judgment in **Livingstone v. Westport-Stockton Coal Co. Ltd.** must apply. If, on the other hand, the conditions of work are such as to enable the inference to be drawn that a normal or standard working week of a fixed number of days or hours is not contemplated, but that the work is consistently irregular, inasmuch as the workers can expect work only when work is available, the judgment in **Livingstone v. Westport-Stockton Coal Co. Ltd.** has no application, because the foundation—the recognised normal week—is absent. In the absence of any definite evidence to the contrary, the Court would, no doubt, accept the weekly hours fixed by the appropriate award or industrial agreement as the normal week. Here, however, the Court had definite proof that the mine worked only to fill orders: work was so irregular that the management arranged with the miners that whistle signals would be given every night, in order to indicate whether work would be available or not on the following day. The men would not expect to be given work unless notified that work was available. In these circumstances, the Court was bound to find that the normal or standard week of five shifts had no existence in fact. The reference in the award as modified by the understanding already referred to, to ten shifts a fortnight, could be regarded only as a provision of a maximum number of shifts for a pay period, and not as an indication that ten shifts were to be a standard or normal week's work.

The Court was not entitled to invoke the provisions of s. 6 (2) unless it is impracticable to construct an average from the material submitted to it (**Public Trustee v. Russell and Bignell**). It was necessary, therefore, to analyse the data furnished. The record put in may be summarised as follows: Days worked by plaintiff: 126; Days on which mine worked: 127; Calendar weeks during which mine did not work: 13; Days lost through holidays, breakdowns and labour disputes in remaining 39 weeks: 18½; Plaintiff's daily earnings: £1 2s.

In the opinion of the Court, the correct method of computing the average weekly earnings of the plaintiff is to add the day on which, for personal reasons, he did not work, to the number of days worked by him, and to add to this number (127) the 18½ days lost by the mine through holidays, etc., making a total of 145½ days; then to multiply the daily earnings by 145½; and finally to divide the product by the number of weeks (39) in which work was available. The calculation is worked

out thus: Daily earnings: £1 2s. 0d.; Multiply by 145½: £160 1s. 0d.; Divide by 39: £4 2s. 1d. This average of £4 2s. 1d. per week is greater than that which the defendant company put forward, though less than that claimed by the plaintiff. If the plaintiff had been a piece-worker, the calculation would have been based on the average of his daily earnings, which would necessarily vary from day to day, and his average weekly earnings which would have been arrived at by the same method as that set out above; that is, the daily average would have been multiplied by 145½ and the result divided by 39.

The Court realised the difficulty of applying the language of s. 6 (1) to all the multifarious conditions of employment that it is intended to meet; and in view of the frequency with which cases presenting features similar to those of the present case are now being dealt with, it is desirous, when an opportunity offers, of stating a case for the opinion of the Court of Appeal. The amount involved in the present case is trifling, and, probably for that reason, the parties did not request this Court to state a case.

Judgment for the plaintiff for £2 14s. 9d.

Solicitors for the plaintiff: **P. J. O'Regan and Son,** Wellington.
Solicitor for the defendant: **C. S. Thomas,** Christchurch.

Frazer, J. June 18, July 22, 1932. Dunedin.

BEEL v. BRUHNS AND ORS.
BEEL v. THE KING.

Workers Compensation—Loss of Binocular Vision—Injury sustained during Employment as Hedge-clipper by Cemetery Trustees—Whether Claim lay against the Crown—Whether Cemetery Trustees an "Employer"—Whether they carried on the "trade or business" of trimming hedges—Workers Compensation Act, 1922, Ss. 2, 3, 12—Cemeteries Act, Ss. 4, 5, 17, 53.

Two claims for compensation for an injury by accident suffered by the plaintiff on September 3, 1931. The two claims were heard together.

The plaintiff was given work by the Hyde Cemetery Trustees, under an unemployment relief scheme. His wages while so employed, calculated in accordance with the provisions of the Workers' Compensation Act, were £1 17s. 6d. per week. On September 3, 1931, while he was clipping a hawthorn hedge, he received an injury to his left eye, which was penetrated by a thorn. The eye was so injured as to necessitate the removal of the lens. The plaintiff, as a result of the accident, was absent from work for about four weeks. He is now deprived of binocular vision, for though he has useful vision in the left eye, when it is aided with a lens, he cannot use it in conjunction with the right eye. He is, therefore, in the position of a man with a reserve eye, inasmuch as he can use only one eye at a time.

Held: (1) Although cemetery trustees are subject, in the public interest, to a measure of control by the Crown, they are not so closely connected with the executive government as to be regarded as "an emanation of the Crown" so as to be identified with the Crown, and the claim against the Crown failed.

(2) "Trade or business" has been given the extended meaning of any trade, business or work carried on temporarily or permanently by an employer, and includes operations that enable an employer in some way to discharge his functions, and hedge-clipping in this case was for the purpose of the "trade or business" of the Trustees in the management and control of a cemetery.

Fairmaid for the plaintiff and suppliant.
F. B. Adams for the defendants and the Crown.

FRAZER, J., in delivering the judgment of the Court, said that the injury was not a schedule injury, and the plaintiff was accordingly not entitled to compensation for permanent partial incapacity unless he could show that his earning capacity had been reduced below £1 17s. 6d. per week. It was stated that before the accident, the plaintiff was an all-round handy man, and that as a result of the loss of his binocular vision he would in future be under a handicap in performing certain operations, which would tend to reduce his earning power. He would, however, be able to earn at least £1 17s. 6d. a week in any employment. His claim, therefore, must be confined to compensation for the period of his total disablement.

The Court had been referred to several sections of the Cemeteries Act, in order to enable it to determine whether any liability attached to the Crown. It was unnecessary to refer to the sections *in extenso*. Their general effect is to vest the control and management of a cemetery in trustees, who have power to engage labour and borrow money and generally manage the affairs of the cemetery. The Crown, however, retains powers of inspection and supervision, maintains an audit of the finances of the trustees, and controls disinterments. These powers and authorities related to matters of public interest, the maintenance of order and decency, and the conservation of public health; but the actual management and control of the cemetery were left entirely in the hands of the Trustees. From early historical times, the burial of the dead had been a matter within the jurisdiction of local governing authorities, not of the executive government. Further, the Trustees of a cemetery were not so closely connected with the executive government as to be regarded as "an emanation of the Crown" (**Southland Boys' and Girls' High Schools Board v. Invercargill City Corporation,** [1931] N.Z.L.R., 881, and cases therein referred to). Public and semi-public bodies are subject, in the public interest, to a measure of control by the Crown, but a great deal more than this is required before they can be regarded as being identified with the Crown itself, in the same manner as a Department of State is identified with and represents the Crown. In the case already referred to, and in **McCallum v. Official Assignee of Sagar and Lusty** [1928] N.Z.L.R. 292, it was held that an Education Board and a High Schools Board, though directly engaged in the work of administration of a State educational system, and obviously more closely connected with the executive government than are the Trustees of a cemetery, were not to be identified with the Crown. In the opinion of the Court, the claim against the Crown must fail.

In so far as the Cemetery Trustees are concerned, they are not a body corporate. The plaintiff was employed by them under a contract of service, and s. 2 of the Act defines "employer" as including any body of persons, corporate or unincorporate. S. 3, however, provides that the Act shall apply only to the employment of a worker in and for the purposes of any trade or business carried on by the employer. The term "trade or business" is defined by s. 2 as including any trade, business or work carried on temporarily or permanently by or on behalf of an employer. Was, then, the work of trimming the hedges surrounding a cemetery part of the "trade or business" of the Trustees? If the Trustees had been a corporation or a local authority, the exercise and performance of their functions in respect of the local district controlled by them would have been regarded as their trade or business: s. 3 (4). Similarly, if they were so identified with the central government as to be considered as an "emanation of the Crown," the exercise by them of any powers or functions by or on behalf of the Crown in respect of the Government of New Zealand would be regarded as the trade or business of the Crown: s. 12 (1). They are, however, an unincorporated body, and the management and control of a cemetery are perhaps not aptly described by the expression "trade or business"; but that expression, as has been seen, is given the extended meaning of any trade, business or work carried on temporarily or permanently by an employer. In **Christie v. Will** [1929] G.L.R., 262, the Court, while not attempting to give an exhaustive definition of the word "work" in this connection, expressed the opinion that it must be construed *ejusdem generis* with trade or business, and that it included operations that enabled an employer in some way to discharge his functions. In the opinion of the Court, that definition fits the present case. A cemetery is managed on lines similar to those on which a business undertaking is conducted; the cemetery Trustees, in the discharge of their duties and functions, employed the plaintiff to do certain necessary work for the maintenance and improvement of the cemetery; and accordingly his employment was in and for the purposes of the "trade or business" of the Trustees.

Judgment for the plaintiff, as against the Trustees, for four weeks' compensation at the rate of £1 5s. per week, and £1 medical fees. Costs allowed, £8 8s., with witnesses' expenses as ascertained by the Clerk of Awards.

Judgment accordingly.

Solicitors for the plaintiff and suppliant: **Sievwright, James and Nichol,** Dunedin.
Solicitors for the defendants and the Crown: **Adams Bros.,** Dunedin.

The Appointment of Receivers.

Some of the Effects Considered.

By C. Palmer Brown, M.A., LL.B.

Receiverships have become so common in the Dominion that the incidents of the office are of general interest; and it is curious that those incidents are very uncertain. Most of the reported cases deal with Receivers appointed by the Court while the cases we have to consider in daily practice arise from appointment by the parties. There is a vital distinction between these cases in that a Receiver appointed by the Court is an official of the Court and not an agent; while the Receiver appointed by the parties is an agent and an agent only, though by no means an ordinary agent. But on two points—the effect on contract and the effect on the occupation of the premises—the two cases raise similar questions.

The cases on occupation may first be considered. In *Rickards v. Mayor, etc. of Kidderminister* [1896] 2 Ch. 212, North, J., held that on the appointment of a Receiver by the parties there had been a change of occupation of the premises for the purposes of the poor rate and consequently the local authority could not distrain for arrears. There was an express power to take possession and he held that in the circumstances he was bound to find that a change of possession had taken place; but in the same volume of reports in the case of *re Marriage, Neave and Co.* [1896] 2 Ch. 663, there was an order appointing a Receiver and manager but no order as to delivery of possession. Lindley, M.R., Lopes and Rigby, L.JJ., held that for the same purposes of the poor rate there had been no change of occupation and consequently arrears were recoverable. Emphasis is laid in the judgments on the point that the order did not provide for occupation. Lindley, M.R. puts it thus:

> "The real truth is that the Company were and still are in point of law in occupation of the property and the receivers are there as managers of the Company's business. A receiver has no right that I know of to discharge people contrary to contract. It is a mistake to suppose that because a receiver may hire and dismiss servants which of course he may do so long as he breaks no contract therefore he ousts the Company. That is not the case at all. These gentlemen are receivers and managers—it may be said instead of the Company—under an order of the Court but the legal possession remains where it was."

It is conceivable that a Receiver may and can do his business without actually going on the property; but the appointment was of a receiver and manager, and, apart from authority, it would be difficult to say how a manager is to manage a business without taking possession of the premises. Lindley, M.R., on this point says:

> "What they have done is this: they have gone to the property for the purpose of receiving and managing the income and businesses of the Company but they have not done anything to change the ostensible possession of the property in any way whatever and upon the facts it appears to me that the possession and occupation have not been changed at all."

So in *National Provincial Bank of England v. United English Theatres* [1916] 1 Ch. 132; 114 L.T. 276, Astbury, J., even when the Receiver admitted that he had entered into possession, said:

> "The real point is what was the quality of the possession that was so taken. I think he only took the possession that he was entitled to take and that there was no such change of possession directed as was contemplated under the statutes in question."

The only inference one can draw is that possession in each case is a question of fact, and the mere appointment of the Receiver and manager does not of itself change the possession.

The same point has been considered from a different angle in its relation to arrears of gas and electricity supplied. In *Paterson v. Gas Coke and Light Co. Ltd.* [1896] 2 Ch. 476, the Receiver appointed by the Court found a sum due for arrears when he took possession, with a statutory power vested in the Gas Company to cut off the supply on non-payment. There were also special powers to require payment from a new tenant where he had agreed with the outgoing tenant to pay. The Receiver claimed a supply of gas without paying the arrears; but the same Court that decided *re Marriage, Neave and Co.* (*supra*) (the same receivers were before the Court) held that such a supply could not be required without paying the arrears. Lindley, M.R., said:

> "The Statute contemplates and provides for a change of possession of a very different nature and its language is quite inappropriate to cover such a case as this. The plaintiff's rights as receivers and managers were merely those of custodians of the mill company's property. The relation of the mill company to the plaintiffs was not the relation of outgoing and incoming tenant nor of vendor and purchaser but that of owner and caretaker and the relation of the plaintiffs to the Gas Company was the same."

The case of *Husey v. London Electrical Supply Corporation* [1902] 1 Ch. 411, contains a detailed examination of the statutes but does not advance the principle. It was apparently assumed that the Receiver could affirm the contract and would then be bound to pay arrears or could require a new contract. What would happen on the new contract is not discussed, as no such contract was proved.

In *Granger v. South Wales Electrical Power Distributing Co.*, 145 L.T. 93, there was an obligation on the Conpany to supply energy to any person who required a supply other than a supply in bulk and the special Act incorporated a general clause in the Electric Lighting Act authorising the supply company to cut off the supply on nonpayment. The Receiver and manager had been appointed by the Court. It was held, however, by Bennett, J., that the Receiver as distinct from the Company was a separate person within the meaning of the section in question and entitled to a new supply without paying the arrears due by the company. He said:

> "The occupation of the receiver is not I think for all purposes the occupation of the Company. The receiver is certainly not the agent of the Company; by the Company I mean the Albion Steam Coal Co. Ltd. No agent of the Company has a right of access to the terminal upon the property of that Company without the consent of the receiver and as receiver he has control at any rate of the terminals to which electrical energy can be supplied and being a person in control of something to which electrical energy can be supplied I see no reason why I should not give effect to the language of sec. 40 and hold him to be a person who requires a supply within the meaning of that section."

The decisions are difficult to reconcile. The latter case depends on a theory of the separate entity of the Receiver which acquires support from the cases on contract, which will next be discussed.

(*To be continued.*)

Vehicular Traffic Conditions.

A Transition Period.

By J. B. NICHOL, LL.B.

I read with much interest the remarks of His Honour the Chief Justice at Christchurch on the subject of motor collision cases. There is no doubt, as His Honour points out, that the position is very serious, but with all due deference I suggest that in order to find a remedy we have to view the matter from a slightly different angle.

The apparent inconsistency between the verdict of juries in criminal cases and juries in civil cases on the same set of facts is, in my opinion, easily explained. In the criminal court the average juryman is reluctant to brand an ordinarily decent citizen as a criminal simply for negligence. In the civil court, the same juryman's sympathies are extended to the injured party, and he will naturally find for the sufferer if he can. Although the two verdicts may appear inconsistent, the attitude of the juryman himself has been quite consistent. It is easier to alter our laws than to alter human nature.

I suggest that the present unsatisfactory position is largely due to the fact that we are still in the transition stage between one form of vehicular traffic and another; that we are not yet fully familiar with motor traffic, and have not yet adjusted ourselves to the change. As in the case of most innovations it is accompanied by certain evils for which experience must find a remedy; and I suggest that the evil to which His Honour has so markedly drawn attention, will to some extent remedy itself in course of time; the more quickly when the public realise that the Government and the local authorities are to some extent to blame for the frequency of motor accidents.

I believe that comparatively few people realise the change in traffic conditions since motor vehicles have to such a large extent supplanted the horse. As I was accustomed to horses from my earliest years and had the opportunity to become fairly proficient in riding, driving and handling them generally, and as I have now been driving a car for nine years, I am perhaps qualified to offer a comparison between the new traffic conditions and the old.

Before the motor car arrived the average of traffic (omitting heavy traffic) would be from eight to ten miles an hour. The average speed to-day (including heavy traffic) is probably three times as great. In the day of the horse the longer the journey, the more leisurely was the pace, as you had to "nurse" the animal over a long distance. To-day the longer the journey the greater is the tendency to accelerate. The result is that on the highways between the towns, on which a large proportion of motor accidents occur, the average rate of speed has increased to a much greater extent than that mentioned above. Perhaps the most striking change, however, is in regard to heavy traffic. The horse teams dragged the heavy waggons at a walking pace. To-day the heavy loaded motor truck tears along at a pace equal to most motor cars; and, unfortunately, many of their drivers, secure in the knowledge that in a collision with a car their heavy vehicles will suffer comparatively little damage, appear to drive on the principle that it is for the other fellow to look out for himself.

If we consider traffic conditions in the cities and towns, we find that notwithstanding the fact that our forefathers in their wisdom decided that sixty-six feet was the minimum width necessary to accommodate traffic as they knew it, we now find the width of many of our streets reduced by almost half in order to provide permanent parking areas for motorists.

If the additional risk to the public were offset by a proportionate increase of skill and care on the part of drivers, there would not be so much ground for complaint; but from observation and experience I am convinced that the average driver of to-day is neither as skilful nor as careful as the average driver on the road before the advent of the car; although, when we consider all the additional risks to the public, we must admit that a higher degree of skill and care should really be necessary.

The lower standard of driving to-day is no doubt partly due to the fact that such a large proportion of car owners have learned to drive late in life; but we are justified in assuming that their children will easily attain a higher standard, and that in process of time a higher average standard will be reached.

There is no doubt, however, that a much higher standard would soon be reached if the restrictions on the issue of drivers' licenses were tightened up. Under present conditions the possession of a driver's license is no proof that the holder of it is really capable of handling a car. It is a well known fact that in many country towns and districts a man can purchase a car to-day, and, if he is acquainted with the proper official of the local authority, he can obtain a driver's license to-morrow. If he is put through a test, it is frequently of a very perfunctory kind. With the license in his pocket he is let loose on the public (including fellow motorists) with a machine weighing, probably, from $1\frac{1}{4}$ tons upwards and capable of a speed of fifty miles or more per hour. The wonder is that serious accidents are not more numerous. I have known also of city residents, with no immediate hope whatever of obtaining drivers' licenses in their home city, obtaining licenses while spending a holiday elsewhere. Even the fairly stiff test that applicants for drivers' licenses have to pass in some of our cities does not afford to the public the protection one should expect, as the license entitles the holder to take the wheel of any make of car. The driving license, for example, of the owner of a Ford car of the old type, entitled him to take the wheel of a high-powered English car, which, without tuition, he is probably no more capable of handling than a novice.

There is no doubt that the inexperienced driver of to-day is a greater menace on our roads than the inexperienced driver in the days of only horse traffic; for in those days one could, and usually would, procure an animal in keeping with his own capabilities; and, in addition, a horse's training and natural intelligence to some extent counterbalanced the inexperience of the driver.

The laxity that characterises the issue of drivers' licenses is unfair to the public generally—to motorists and non-motorists alike. The non-motoring public probably do not yet realise that such laxity exists, but it is only a matter of time when motorists themselves will have to take steps for their own protection to ensure that more rigid restrictions are placed on the issue of drivers' licenses. With a higher average degree

of skill and care required from the driver the number of motor collisions should be reduced; and negligence that may be excused by a jury to-day may in the near future be regarded as unpardonable.

When the law licenses a man to drive a motor vehicle with all the attendant risks to the public, without first requiring him to prove that he is not only a fit person to be trusted with a car but that he is capable in every way of handling it, can one reasonably expect a jury to desire to punish him on discovering that he should not have been granted a license?

Bench and Bar.

Mr. L. C. Adams, of Auckland, was recently admitted as a Barrister.

Mr. B. S. Barry, formerly Managing Clerk to Mr. R. M. Grant, of Auckland, has taken over the practice of Mr. W. E. Ward at Whakatane.

Mr. W. L. Rothenberg was recently admitted as a barrister and Mr. D. Clark as a barrister and solicitor by Mr. Justice MacGregor at Wellington.

The following gentlemen have recently commenced practice, each on his own account: Mr. R. S. Frapwell and Mr. B. A. Quelch in Dunedin, and Mr. T. V. Mahoney in Invercargill.

Messrs. T. A. Niblock (of the office of Messrs. Duncan, Cotterell & Co.), and B. A. Bauer (of Mr. K. G. Archer's office) have recently been admitted as barristers and solicitors by His Honour the Chief Justice.

Mr. A. M. Goulding, President of the Auckland District Law Society, has been appointed a member of the Auckland City Mortgagors' Liabilities Adjustment Commission.

Dr. E. E. Bailey, 1929 Rhodes Scholar, has returned to New Zealand after taking his Ph.D. in law. In an interview, he said that when conditions allow Sir William Holdsworth would be glad to come to New Zealand to lecture to our University Students on historical aspects of English law.

Mr. M. J. Gresson, Christchurch, has been retained to appear for the appellant in *Gould v. Commissioner of Stamp Duties* before the Judicial Committee. Mr. Gresson, who will be leaving for London early in 1933, will thus be available to undertake instructions for any matters requiring personal attention in Great Britain.

Sir Alison Russell, K.C., whose *Legislative Drafting and Forms* was reviewed on p. 220, *ante*, is visiting the Dominion. He has held a number of important Colonial Office appointments, chiefly in Africa. Sir Alison retired from the position of Chief Justice of Tanganyika in 1929, having previously been Attorney-General and Acting-Chief Secretary of Uganda and Attorney-General of Cyprus. He is visiting New Zealand for the first time, and has just completed a motor tour of the southern and eastern States of Australia. He expects to stay in the Dominion for about two months.

The Office of Attorney-General.

A Plea for a Reconstruction of the Office.

By Practitioner.

At no time in our history has New Zealand needed, as much as now, the advice and counsel of the leaders of the legal profession. The legal profession is one which must always play an important part in the destines of any British country. That the head of the profession should be the Government's Chief Adviser is, of course, apparent. He does so in the role of Attorney-General.

From the 13th Century, the office of Attorney-General has been recognised in England; and to-day that office is invariably held by the outstanding man in the legal profession of the political colour of the Party in power. To adopt the language in the *Encyclopædia Britannica*, the Attorney-General "is appointed by Letters Patent authorising him to hold Office during the Sovereign's pleasure. He is *ex officio* the leader of the Bar, and only Counsel of the highest eminence are appointed to the office."

The legal profession should know the value of tradition. In New Zealand, we have had many able and distinguished leaders of our Bar who have occupied the position of Attorney-General with credit to themselves and advantage to the country. Frequently, however, our politicians have ignored the true and proper function of such office. Other gentlemen appointed have done yeoman service for the profession. But the particular benefits gained by the profession are not the test, and we should be the first to realise and admit it.

To play the important part in the country's affairs that the profession should always play, it should have as its public mouthpiece one of the sagest and most distinguished leaders. The Government should at all times have the right to have such a man in its councils at the right hand of the Prime Minister.

In New Zealand where the professions are amalgamated, it is usually impossible for prominent lawyers to leave their offices for the long hours that service in Parliament requires. So, in a country such as ours where a leader of the Bar rarely enters the Lower House, the remedy is, and it has ample precedent, to appoint an Attorney-General in the Upper House from the leaders of the profession.

In these trying and difficult times, suitable men are available from our ranks for the office of Attorney-General, for we claim men who are always ready to sacrifice their possible gain for the public weal.

This suggestion is made for the Government's careful consideration: In England the salary of the Attorney-General is £7,000 a year, plus full fees for all cases in which he appears for the Crown. Here, the salary is approximately £1,000 and the practice has been to forbid right of private practice. This is a stumbling block. It is suggested that if the salary were reduced by half and private practice were allowed, the Government would have the best services the profession could offer in the settlement of its difficult tasks, and, in addition, would effect a substantial reduction in the salary of a Minister.

To lump together various Ministeries with that of Attorney-General is simply prostituting the office, making efficiency unlikely, with consequent loss in the dignity of the Government and the profession.

Australian Notes.

By Wilfred Blacket, K.C.

"The Long Road of Litigation." In two cases mentioned earlier in these Notes the High Court has now made final determination. In *Ex parte Stuart—Robertson M.L.A.*, wherein the Judge in Bankruptcy had made an order for payment of £4 per week out of the appellant's statutory "allowance" under the circumstances mentioned on p. 7, *ante*, the order was upheld by the Chief Justice and four of the Justices, Mr. Justice Evatt dissenting on the ground that the Bankruptcy Court should have refused to make any order as the State Act had clearly expressed its intention that the salary should be applied in payment of expenses incurred by a member in performing his Parliamentary duties. Also in *Simpson v. Bannerman*, the Alsatian dog case, the facts of which are stated on p. 50, *ante*, the plaintiff succeeded in his application to have the original verdict in his favour restored. Of the opinions in favour of the plaintiff in the course of the litigation Judge Edwards of the District Court, Halse Rogers of the Supreme Court, and Starke, J., of the High Court, decided against the defendant broadly upon the ground that a 5 ft. 6 in. fence was not a sufficient protection to persons using the highway; but Gavan Duffy, C.J., and Dixon, Evatt, and McTiernan, JJ., of the High Court thought it unnecessary to consider the question of common law liabilities, inasmuch as s. 19 of the Dog and Goat Act, N.S.W., imposed a liability without condition or qualification upon the owner to pay for his dog's bite. The original purpose of this section was to make it unnecessary in these cases to prove *scienter*, but Parliament, as frequently happens, enacted a good deal more than it intended.

Some Strange Occurrences. In Melbourne recently there have been some very unusual happenings in criminal cases. In *R. v. Scott and Stanway*, Mr. J. P. Bourke, barrister, had defended Scott at the Police Court, and during the proceedings there, with his client had had a conversation with Stanway. At the Sessions, Maxwell, K.C., led Bourke for the defence of Scott, who in course of his evidence stated that in the conversation mentioned Stanway had admitted having stolen the motor-car the subject of the charge against the two, and had said that he would plead guilty. Stanway from the dock promptly and loudly asserted that Scott was "a liar." Scott said that if Bourke was called he would support the statement. Maxwell, later, told Woinarski, J., presiding, that Scott desired that Bourke should be called, and that he himself thought that Bourke should give evidence. The Judge agreed, but said with obvious accuracy that this was "a very unpleasant and unusual thing." Bourke accordingly divested himself of his wig and his robes—not all of them but only the professional ones—and went into the box, and later another witness, Detective Dalmenico, was called on Scott's behalf as to the same conversation. After the jury had retired, Mr. Maxwell explained that Scott's alleged admission was no part of the defence that he had intended to put to the jury, and pointed out that Scott's evidence as to Stanway's admission had been brought out by the Crown Prosecutor in cross-examination. Judge Woinarski entirely acquitted Maxwell of all blame for the happening, but he gave J. P. Bourke a considerable scolding, stating especially that he ought not to have been a party to the interview with Stanway, and ought not to have accepted a brief for the Sessions, and that he ought to make a study of the ethics of his profession.

At the same Sessions one *Edwards* was tried on a charge of having solicited certain persons to conspire to prevent the course of justice. At a previous Court, one Tony Coruna had been awaiting trial on a charge relating to counterfeit coin. Some plain clothes police mingled with the jurors in attendance at the Court and Edwards offered Constable Cook who was one of them £5 to acquit Coruna, £2 10s. to be paid when Cook was called on the jury and the balance upon acquittal. Cook said he knew another man who would like to be "in on the game" on those terms, and introduced him to Constable White. Edwards made the same buyer's quote to White and was then arrested. Apparently no "fivers" were available for the purchase of jurors in Edward's own case for he was promptly convicted and sentenced to three years' imprisonment. And the moral of this incident is that Edwards who was a fruiterer should not have tried to buy and sell jurors: he ought to have stuck to bananas.

At Adelaide *Frank Bonfiglio* endeavoured to induce a Crown witness to refuse to give evidence in a case then pending and for this attempt to interfere with the course of justice was fined £50 and committed to prison for ten months. He was an Italian but should not have tried to induce the witness to levant.

At Adelaide also a man named *Taylor* charged with illegally selling liquor produced his galah parrot as a sort of a witness. It neither swore nor was sworn, but according to the telegraphed report said "Hello cocky"—no doubt very distinctly—and imitated the scraping of a knife on a plate, the working of a bicycle pump and the shutting of a gate. The police had sworn that they heard the words: "I've got two bob: give us a bottle of beer," and "You'd better close the gate, the cops might be about," but His Worship decided that the defendant by himself and his bird had discharged the onus upon him to show that liquor had not been sold, and dismissed the information.

A Sad Case. A very pathetic case came before Harvey, C.J.E., Sydney, recently. An estate now valued at upwards of £200,000 had been left to a lady whose name need not be mentioned and her children in equal shares. The lady is 40 years of age, has been three times married, but has no children, and, as the result of a necessary surgical operation, cannot ever become a mother. Upon these facts her application that the trustees should pay the other half of the estate to her was granted. The loser won.

What is a "printed paper?"—By the Printing Act of 1827, N.S.W., the provision being re-enacted in 1899, it was made an offence for any printer to publish any paper upon which his name and place of abode were not printed. In *Ex p. Franks, Cor.* the Court of Criminal Appeal, Sydney, the question whether a document produced by the Roneo process on a Gestetner machine was within the terms of the Act, came up for decision. The evidence showed that by this process a stencil sheet of wax was used in lieu of the raised type used in ordinary typography, and that a very large number of copies could be made from a single stencil. The Court unanimously held that the paper so produced and published by Franks, and in respect of which he

had been convicted by a magistrate, clearly came within the "mischief of the Act,"—I quote the reported words of their Honours although the phrase might seem to be defamatory of the Act,—but that it was not a printed paper within the purview of the Act of 1827. One may vision the trouble that would have arisen from a contrary decision because ordinary type script more closely resembles printing than do the documents produced by Roneo, for the letters on a typewriter are formed by raised type, and it would be a dreadful thing for any typiste to have to put her name and place of abode on every script she sent out. A really nice girl might refuse to do so.

Motorists, Boxers, and Others.—In Adelaide a motorist who hit a dog with his car and did not stop was fined £5 plus £4 12s. costs, for such conduct is a criminal offence under the South Australian Act. For a second offence a motorist is liable to a fine and imprisonment and loss of his license. No discount is allowed in case of Alsatians for the Act applies to all animals.

In Sydney one Stribling, a prize fighter, was restrained by injunction from going up in an aeroplane, but this order was based upon a stipulation in his contract that he would not do anything of the kind during his engagement. The Australian Sporting Club also obtained an injunction against Radio Broadcasting Ltd., preventing the defendants from using any part of the plaintiff's premises for the purpose of broadcasting an account of Stribling's fight with another man.

In Melbourne two waitresses who saw a man robbing the till at the Federal States Café chased him down the street, caught him, and *vi et armis*, held him till the police came along. He was awarded a solid term of imprisonment. And this incident shows that it is not easy for a man to get away from some of these Melbourne girls.

At Newcastle a man arrested on July 12, on a charge of drunkenness stood on his head and sang *The Wearing of the Green*, in order to prove that he was sober. The police refused to be convinced, and that may probably have been because they know that there are some men who quite naturally resort to that militant ballad after the tenth whisky. It is quite likely too that they thought it would not be a good thing for him to go outside and sing that song on a day when *Boyne Water* was much more popular.

In Melbourne a constable who wanted to get evidence that an unregistered person was illegally practising dentistry went to him and had a tooth drawn. He is hopeful of getting a series of similar convictions if his mouth will stand it.

Illegal Enterprise.—In Sydney one John Hall Payne, farmer, pleaded guilty to seven charges of false pretences and was sentenced to two years' imprisonment. Like his near-namesake, he seems to have been strong in fiction for he took out a Workers' Compensation policy with an insurance company and falsely asserting that he had employed a person named John Pinn obtained from a doctor a certificate asserting that the said alleged Pinn had seriously damaged his leg, an injury which Payne declared had been caused by the misfortune of the said non-existent Pinn in bumping his hypothetical knee against the supposititious step of a fiduciary milk cart. The company paid out £230 on his claim and other companies paid £565 on other similarly humorous and unsubstantial claims. Our vote-seeking politicians are always out to help the "Man on the land," but they need not trouble about John Hall Payne for he has proved that he is quite able to help himself.

Final Forensic Fables.

The Second Series.

Apologising for the appearance of the volume, O says its production violates an undertaking given in *Final Forensic Fables* that it was to have no successor. He says: "There is no danger that the above undertaking (now repeated) will again be broken."

It was Scrutton, L.J., who in *Swadling v. Cooper* (46 T.L.R., at p. 74), referred to O's Forensic Fable on "The Experienced Judge, the Running Down Case and the Law Relating to Contributory Negligence" in the terms following:—

"Some judges ask the jury whether the negligence of the plaintiff or the negligence of the defendant caused the accident. A gentleman described as an experienced judge in a recent unauthorised report, with which most members of the Bar are familiar, asked that question. A new trial was ordered in that case, as recorded in the unauthorised report, and would, I think, be ordered by this Court if a case came before it in that form; because the judge who tried to deal with the case in that way must explain that the accident may have been due to the negligence of both; and to say, 'Was the accident caused by the negligence of the plaintiff, or do you think it was caused by the negligence of the defendant?' does not settle the question, because it may have been caused by the negligence of both . . ."

Fulfilment, in fact, of the fabulous incidents of the same fable may be found in the reports of *Swadling v. Cooper* (46 T.L.R. 12) and *Hargrave v. Burn* (46 T.L.R. 59).

The appearance of the last instalment of *Final Forensic Fables* has inspired a contemporary bard to lyric rhapsody:

It grieves me that so great a Wit, an Artist and a Sage,
Who can so aptly put a Life upon a single Page,
Should still persistently believe—at any rate have Hopes—
That he can gag his Genius by the Rule in Marie Stopes.

It would, indeed be terrible, if it were not so droll,
To see our O conforming to the Laws of Birth Control.
When he had Three he almost Swore that he would have
No More,
Yet here we Celebrate with Joy the Birth of Number Four.

O how they Live, in Line and Word, the people here Set Out
Howler and Squeaker, Lien, Drop, Buffin and Sarah Stout,
Diehard and Stickit all we know, but never knew so well:
Splasher and Pumpkin, Bluebag, Brawn, Divorce as
viewed from Hell.

While for the King of Cannibals our System doth Unfold
In a Fable wittier, wiser, than ever yet was told:
And, Gentle Reader, if you'd like the Story Short and True,
See our Procedure summarised in Fable Twenty-Two.

Thirty Pictures, Thirty Tales: apt Mottoes: Index new:
Where every line Reveals and Words are Windows with
a View:
Wit without Wounding everywhere: such is the Author's
way.
So, Sighs for the old Buffer, and Smiles for Snappy, J.

O, Sankey, Sankey, you who know how wit and wisdom serve
Why are they not rewarded as they seemingly deserve?
Say now—Dost nod, or is it that thou need'st a knowing nudge?—
Why this judicial personage has not been made a Judge?

Correspondence.

[*It is to be understood that the views expressed by correspondents are not necessarily shared by the Editor.*]

A Mortgagors' Relief Anomaly.

The Editor,
N.Z. Law Journal.

Sir,—I would like to draw attention to s. 10 (2) of the Mortgagors Relief Amendment Act, 1931, which, I think, contains an anomaly.

My client mortgagor after his application had been referred by the Court to an Adjustment Commission, came to an agreement with his mortgagee as to certain modifications of the terms of his mortgage during the next two years. A note embodying these terms was drawn up, and signed. On the Commission reporting accordingly to the Court, when I expected an Order to be made by consent, the mortgagee's solicitor applied for an adjournment "to allow effect to be given to the terms of the arrangement by the execution of all necessary documents": see the subsection cited, *supra*. This application was granted, and the mortgagee's solicitor now insists on my client's executing an "instrument," viz. a Memorandum of Variation of the terms of the mortgage. For this, he will have to pay the costs of preparation and registration; but, apart from that, you will appreciate that if my client executes the registerable Memorandum of Variation, he will be debarred by s. 13 of the Mortgagor and Tenants Relief Act, 1932, from any further application under the Mortgagors Relief legislation.

I shall be glad to have your views on the matter.

Yours, &c.,
"Practitioner."

Dunedin,
September 17, 1932.

[In the first place, it may be said that, at the time when the Mortgagors Relief Amendment Act, 1931, was passed, no Order in Council exempting from the operation of the Act mortgages which had been varied since April 17, 1931, had been gazetted. Nor was a mortgagor able to make successive applications for relief to the extent which he may now do under s. 2 of the 1932 Act.

The Order in Council of December 15, 1931 (*N.Z. Gazette*, December 24, 1931, p. 3511) was revoked by s. 13 of the 1932 Act, in so far as it related to any mortgage as varied; and the provisions of the Order in Council as considerably amplified were embodied in that section. By s. 2 (6) of the same Act, provision was made for successive applications by any mortgagor.

It will be seen, therefore, that at the time when the amending Act of 1931 was passed, an anomaly such as that to which our correspondent has drawn attention could not have arisen; and it seems that the Legislature might with advantage amend s. 13 of the 1932 Act by providing that the Mortgagors Relief Acts shall not cease to apply to a mortgage merely because the parties have agreed to enter into a voluntary arrangement for a modification of their respective rights and obligations as the result of an application made to the Court or of an investigation by an Adjustment Commission.

However, in the absence of such a statutory amendment, it seems that taking into account the spirit of the legislation under notice, "Practitioner" would have good grounds for asking for an Order to be made by consent. This he has apparently failed to obtain. It seems necessary, therefore, to consider if he has any means of escape from the position which has arisen by reason of the mortgagee's solicitor pressing him for a variation of his client's mortgage. Although he is silent on the question as to whether the Memorandum of the Terms of Arrangement drawn up and signed by the parties provided for the execution of a registerable instrument of variation, we think that such a provision is unusual. We have not heard of a case where provision was made by the Court or the parties for the registration of instruments to give effect to an arrangement. Usually, a consent Order is made by the Court; this embodies the terms of the voluntary arrangement reached by the parties, or the Commission's recommendation itself. Unless an instrument varying the terms of the mortgage has been duly registered (where registration is essential to the validity or operation of such instrument), the mortgage is not deemed to be varied for the purposes of s. 13 of the Mortgagors and Tenants Relief Act, 1932.

If the terms of arrangement did not include an agreement to execute a Memorandum of Variation, the mortgagor is still open to refuse to execute it. Failing his obtaining relief from the Court by means of its making an Order embodying the modifications agreed upon, he can make a fresh application under subss. (6) and (7) of s. 2 of the Mortgagors and Tenants Relief Act, 1932, and, in due course, apply to the Adjustment Commission to recommend to the Court that the terms of arrangement be incorporated in a Consent Order, or, failing such consent by the parties, that the Order embody the Commission's recommendation founded on the prior agreement of the parties.—Ed.]

The Late Sir Robert Stout.

Portrait Unveiled.

On September 8, a portrait in oils of the late Sir Robert Stout, for over a quarter of a century Chief Justice of the Dominion, was unveiled by the Chancellor of the University of New Zealand (Professor J. Macmillan Brown). The portrait, which is from the brush of Mrs. M. R. Tripe, has been hung in the library of Victoria University College to which Sir Robert bequeathed his own collection of books. As the Solicitor-General (Mr. A. Fair, K.C.) remarked at the unveiling: "It is proper and fitting that Sir Robert's portrait should be hung in the company of the books that enriched his busiest years, and among the students for whom he had so kindly an affection."

Legal Literature.

WORKERS' COMPENSATION.

Willis's Workmen's Compensation comes to us in its Twenty-eighth Edition to bring up to date our standard source of reference upon all the aspects of these much-invoked statutory provisions. The numbers of claims under our Act which come before the Court are progressively increasing each year. The indispensable "Willis," in addition to the accretion of some hundred and fifty new cases, now discusses at length the subject of compensation for incapacity caused by the diseases of silicosis and asbestosis. No practitioner dealing with compensation claims can afford to be without this exhaustive text-book. Pp. 830, cxxvii, and Index.

"**B.W.C.C.**" Butterworth's Workmen's Compensation Reports are more than a companion to "Willis'" A glance at the judgments of their Honours of our Court of Appeal in the case of *Wilson v. Gannaway and Co. Ltd.*, reported at p. 223, *ante* as well as a knowledge of all other judgments arising out of the Workers Compensation Act, 1932, proves that these Reports are of constant use and frequent reference in settling points of New Zealand law relative to claims for compensation for injuries. Volume 26 is now available, and the Quarterly Advance Service continues its useful work.

"The lawyer needs a good deal of commonsense to keep the experts in their place. The layman may retort to that that he needs a good deal of commonsense to keep the lawyers in their place."

—Sir Frederick Pollock

Forensic Fables.

DIEHARD AND STICKIT, JJ.

Early in the Nineteenth Century Young Mr. Diehard and Young Mr. Stickit, Barristers-at-Law, Observed with Concern that the then Members of the Judiciary Exhibited a Tendency to Cling to Office Long After the Process of Physical and Mental Decay had Set In. Mr. Diehard and Mr. Stickit Regretted on Public Grounds both the Incompetence and the Immortality of these Judicial Limpets. Years Rolled by, and Mr. Diehard and Mr. Stickit, now of Middle Age, Received the Reward of Merit and Took their Seats upon the Bench.

More Years Rolled by, and Diehard, J., and Stickit, J., Began to Note that Youthful Counsel would not Speak Up, that Leaders Insisted on Mumbling, and that the Bar was Deteriorating Day by Day. When Ninety-Three and Ninety-Four Respectively, Diehard and Stickit, JJ., were Still Going Strong. They often Assured Each Other that they were Best Serving the Interests of the Country by Holding on to their Jobs; that of all Judicial Qualifications Ripe Experience was the Most Precious; and that if they were to Retire the Lord Chancellor would Look In Vain for Anybody who was Fit to Succeed Either of Them.

MORAL: *Don't Desert the Gold Standard.*

Rules and Regulations.

Industrial Conciliation and Arbitration Act, 1925. Amended regulations *re* Conciliation Commissioners.—*Gazette* No. 60, September 15, 1932.

Rotorua Borough Act, 1922. Amendments to By-laws *re* supply of electrical energy.—*Gazette* No. 60, September 15, 1932.

New Books and Publications.

Sophian's Chitty's Statutes. Vol. 27. (Sweet & Maxwell Ltd.). Price 47/-.

Jones' Solicitors' Clerk. Part I. Eleventh Edition. Revised and Rewritten by T. S. Duffell. (Effingham Wilson). Price 6/6.

Some Memories. By E. Washington Fox. (Sweet & Maxwell Ltd.). Price 4/6.

The Guide to Poor Relief. By G. H. Exley, M.P.A.S. (Mark Thomas & Co., Liverpool). Price 6/6.

The Theory and Practice of Modern Government, with special reference to Great Britain, France, Germany, and the United States of America. By Herman Finir, D.Sc., 2 Vols. (Methuen & Co.). Price 49/-.

Elements of Conveyancing (With Precedents) for use of students. By J. F. R. Burnett. (Late Deane and Spurling). Fifth Edition. (Sweet & Maxwell Ltd.) Price 25/-.

Crane's Motor Law Concordance. Being a Working Index to the Statutes and Regulations affecting the use of Motor Vehicles on the Road. (Solicitors Law Stationery Society Ltd.). Price 12/-.

Income Tax on Land and Buildings. By W. E. Mustoe, M.A., LL.B. (Sweet & Maxwell Ltd.). Price 11/-.

Annual County Court Practice. By Judge Ruegg, K.C. 51st Edition. (Sweet & Maxwell Ltd.). Price 47/-.

Progress of the Law in the U.S. Supreme Court 1930-1931. By G. Gankin, A.M., LL.M., and Charlotte A. Hankin. (Macmillan—New York). Price 31/-.

A Digest of the Law of Agency. By Wm. Bowstead. Eighth Edition. (Sweet & Maxwell Ltd.). Price 33/6.

Law of Banking and Stock Exchange Transactions. By H. L. Hart, K.C., LL.D. 2 Vols. Fourth Edition, 1931. (Stevens & Sons Ltd.). Price 74/-.

Stroud's Judicial Dictionary. Supplement. By Elsie May Wheeler, incorporating First Supplement to Second Edition. (Sweet & Maxwell Ltd.). Price 49/-.

Lord Cave. A Memoir, by Sir Charles Mallett, with an introduction by Countess Cave of Richmond. Illustrated. (John Murray.) Price 19/-.

Topham's New Law of Property. Fourth Edition. 1932. (Butterworth & Co. (Pub.) Ltd.). Price 19/-.

The Victims of Fraud—A Plea for a new law. By Eustace J. Harvey. (Oxford Press). Price 29/6.

The Law of Arbitration and Awards. By Horace S. Palmer, M.A. (Oxon.) 1932. (Isaac Pitman & Sons Ltd.). Price 7/6.

Manual of the "New Procedure" Rules. By M. W. Valentine Ball. (Sweet & Maxwell Ltd.). Price 2/6.

The Law of the Air. By Arnold D. McNair, C.B.E., LL.D., 1932. (Butterworth & Co. (Pub.) Ltd.). Price 16/-.

Pratt and MacKenzie's Law of Highways. By Joshua Scholfield, M.A. 18th Edition, 1932. (Butterworth & Co. (Pub.) Ltd. Price 88/6.

B. W. C. C., Volume 24. (Butterworth & Co. (Pub.) Ltd.). Price 33/6.

Questions and Answers from Justice of the Peace on Rating. (Butterworth & Co. (Pub.) Ltd.). Price 37/-.

Law of Sale of Goods, 1932. By C. G. Austin. (Pitman & Sons Ltd.). Price 6/6.

MacKenzie's Rating and Valuation Officers' Handbook. Tenth Edition, 1932. (Butterworth & Co. (Pub.) Ltd.) Price 13/6.