New Zealand
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Incorporating "Butterworth's Fortnightly Notes."

"Although a Judge may think that an argument is nonsense, the advocate may have an equally strong opinion to the opposite effect. Where such a conflict of opinion arises, the office of the advocate is one of extreme delicacy . . . if it is necessary for him to persevere, he has need of no common amount of courage and tact. To speak to an unwilling or hostile audience, especially an audience deserving of respect, is a strong trial of a man's capacity."

—LORD MONCRIEFF.

Vol. X. Tuesday, May 8, 1934 No. 8

The Separation Order in a Defended Divorce.

A judgment of considerable importance, *Keast v. Keast*, was recently given by the Court of Appeal, both Divisions of which sat together for the purpose of deciding whether a separation order was conclusive evidence of the wrongful conduct of a husband, or whether the Court in its divorce jurisdiction could go behind the order made by a Magistrate under the Destitute Persons Act, 1910.

Section 18 of the Divorce and Matrimonial Causes Act, 1928, provides that in every case where a decree is sought on the grounds (*a*) of respondent's failure to comply with a decree for restitution of conjugal rights, or (*b*) that petitioner and respondent are parties to an agreement for separation which is and has been in full force for not less than three years, or (*c*) that petitioner and respondent are parties to a decree of judicial separation or to a separation order made by a Stipendiary Magistrate, and that such decree or order is and has been in full force for not less than three years,

> "and the petitioner has proved his or her case, the Court shall have a discretion as to whether or not a decree shall be made; but if upon the hearing of a petition praying for relief on the ground specified" [in (*b*) or (*c*), *supra*] "the respondent opposes the making of a decree, *and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition.*"

Upon the construction of the italicised words in s. 18, the recent decision in *Keast v. Keast* is of the highest importance.

For the past ten years, the Courts have followed the decisions in *Lunn v. Lunn*, [1924] G.L.R. 157, and *McKenzie v. McKenzie*, [1925] N.Z.L.R. 303, and, as Mr. Justice Kennedy said in his judgment in *Keast v. Keast*, the broad question arising in that appeal was whether those cases were properly decided and should be followed.

In *Lunn v. Lunn*, the husband-petitioner sought a divorce on the grounds of a separation order continuing in full force for three years, the Magistrate having found judicially at the time of the making of such order that the failure of the petitioner to provide maintenance was wilful and without reasonable cause. Mr. Justice Chapman held that the Court had no power to go behind the Magistrate's order. He said:

> "It seems to me that the Court must of necessity be satisfied when the evidence is incontestable, and that that is especially the case when successfully to contest the only evidence would be to destroy the order without which the petitioner would have no case."

In *McKenzie v. McKenzie*, the husband's petition was opposed by the respondent on the ground that the separation order made on the ground that petitioner had failed to provide her with adequate maintenance was a bar to the petitioner's claim to a dissolution of the marriage. Mr. Justice Sim, in dismissing the petition, said:

> "The question whether he had so failed or not must be treated, I think, as *res judicata*, and this Court is not entitled to go behind the order and determine whether the decision of the Magistrate was right or wrong. . . . Where the Court is dealing with cases . . . based on the existence of a decree of judicial separation or of a separation order, the ground on which such decree or order is declared therein to be made must be treated, as between the parties thereto, to be conclusively established by such decree or order, and the existence of such ground must be treated as proved to the satisfaction of the Court for the purposes of" [now s. 18 of the 1928 Act].

Very early in the life of this JOURNAL, it was predicted in its pages (Vol. 1, p. 83) that the latter decision "raised a question of importance likely to find its way to the Court of Appeal before the matter can be regarded as finally decided." On p. 117, a contributor added to this comment that its writer "might have referred with advantage to the case of *Harriman v. Harriman*, [1909] P. 123, which decided that the Court is not estopped from satisfying itself as to the existence of proof of the husband's wrongful conduct as a fact, and not *inter partes*." It is interesting to note that in *Keast v. Keast*, the judgment in *Harriman v. Harriman* was called in aid to overrule both *Lunn v. Lunn* and *McKenzie v. McKenzie*, in neither of which cases did it appear to have been brought to the notice of the learned Judge who decided it.

In his judgment in *Keast v. Keast*, the learned Chief Justice remarks:

> "I have struggled to distinguish *Harriman's* case and to hold that the principle there laid down does not apply here. This for several reasons. The *Lunn* and *McKenzie* cases, decided in 1924 and 1925 respectively by two eminent and experienced Judges, have been consistently followed ever since by other Judges without question. In 1928 the statutes relating to divorce were consolidated and amended; but the provisions which now appear as s. 18 of the present Act were re-enacted without material amendment. . . . But I feel that if *Harriman's* case had been cited in 1924 and 1925, and having regard to the words in s. 18 'and it is proved to the satisfaction of the Court,' the *Lunn* and *McKenzie* cases would have been differently decided; and, that being so, I see no alternative now to their being overruled."

The facts in *Keast v. Keast* were that appellant had petitioned for a divorce on the ground that he and his wife were parties to a separation order made by a Magistrate at the end of April, 1925, and that such separation order had been in full force for not less than three years at the date of the petition. The wife opposed the petition on the ground that the separation had been due

to the wrongful act or conduct of the petitioner: s. 18. To meet this defence, appellant at the trial before Mr. Justice Blair set up the allegation that he was in fact separated from his wife in January, 1925, prior to the making of the separation order, and that such separation was due to the refusal of the respondent to cohabit with him and not to any wrongful act or conduct on his part. The learned Judge, after finding on the facts that such prior alleged *de facto* separation was for a temporary parting and not for a permanent separation, further held that, on the authority of *Lunn v. Lunn* and *McKenzie v. McKenzie*, he could not go behind the Magistrate's order, made on the ground that appellant had "wilfully and without reasonable cause failed and intends to fail to provide her [the respondent] with adequate maintenance," which was a finding that the separation was due to the wrongful conduct of the petitioner; and, as the making of a decree was being opposed, this was a complete answer under s. 18 of the Act. He accordingly dismissed the petition.

The appeal from this decision was argued before the Court of Appeal (Myers, C.J., Reed and Ostler, JJ.) in September last, but, as the question was of general importance owing to the raising of *Harriman's* case by appellant's counsel in an endeavour to overcome the decisions in the *Lunn* and *McKenzie* cases, it was ordered to be re-argued before the two Divisions of the Court of Appeal, and it accordingly came before a Court consisting of Myers, C.J., and Reed, MacGregor, Ostler, Kennedy, and Johnston, JJ.

The decision in *Harriman v. Harriman* followed argument before the Full Court of Appeal in England, consisting of Cozens-Hardy, M.R., Vaughan Williams, Fletcher Moulton, Farwell, Buckley, and Kennedy, L.JJ. The vital question there to be decided was whether a Court exercising jurisdiction in divorce was bound by a finding *inter partes* of another Court upon any fact relevant to the proceedings in divorce. The unanimous opinion of the learned Lords Justices was that the Divorce Court was not estopped by any such finding. The decision is explained by Lord Justice Fletcher Moulton, as follows:

> "By s. 31 of the Matrimonial Causes Act, 1857, the relief is made dependent on the Court being satisfied on the evidence that the case for the petitioner has been proved. 'Proved' here means proved as a fact, and not merely proved *inter partes*. Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The Court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them. Hence the production of a decree for judicial separation on the ground of cruelty is not a matter of law sufficient to make it the judicial duty of the Court to accept as a fact that the respondent has been guilty of such cruelty; and if the circumstances under which the decree was obtained are such as to raise a doubt in the mind of the Court as to whether the cruelty was in fact committed, it would be entitled and bound to require such additional evidence as should be sufficient to convince it of the fact."

Mr. Justice Reed, in his judgment in *Keast v. Keast*, in applying *Harriman v. Harriman*, says:

> "Now the language of the section most under consideration in the present case is even more definite that the sections [of the English Act] quoted, as to the necessity of proof before the Court. . . . The statute, therefore, definitely requires that the wrongful act or conduct shall be 'proved to the satisfaction of the Court'; and 'proved' here means, as in s. 31 of the English Act, proved as a fact and not merely proved *inter partes*. The production of a separation order made by a Magistrate would, no doubt, if upon its face it showed jurisdiction, be usually treated as *prima facie* evidence of the truth of the grounds upon which it purported to be made, but, in a defended case, where necessarily the question as to whether the separation was due to the wrongful act or conduct of the petitioner must be in issue, the Court would obviously require more evidence than the bare order to prove to its satisfaction that the petitioner was at fault."

Mr. Justice Ostler, on this branch of the case, says:

> "The Court is not bound to be satisfied as to the petitioner's wrongful conduct because he is estopped as against the respondent from denying it. There is no estoppel against the Court. As was said by Cozens-Hardy, M.R. [1909] P. 123, 132, the analogy of ordinary actions cannot be applied. If the Court were bound in divorce proceedings to accept a separation order as conclusive proof of the facts appearing on its face, it would be substituting proof to the satisfaction of some other Court for the proof which the statute requires shall be to its satisfaction."

Mr. Justice Kennedy, in the course of his judgment, finds:

> "The doctrine is well established that divorce is a matter of public interest as well as of concern to the parties to a marriage. So fully is the interest of the public protected that the Court is, by s. 14 of the Divorce and Matrimonial Causes Act, 1928, explicitly directed to satisfy itself, as far as it reasonably can, as to the facts alleged; and by s. 18, which is specially relevant in this case, it is provided that, if upon the hearing of a petition praying for relief upon any of the grounds specified in paras. (*i*) or (*j*) of s. 10 of the Act, the respondent opposes the making of the decree, the Court is to dismiss the petition *if it is proved to the satisfaction of the Court* that the separation is due to the wrongful act or conduct of the petitioner. Not only is there this provision but the Court has a general discretion to refuse a decree, and provision is made, up to the granting of the decree absolute, for intervention in opposition to the decree. . . . There can, because of the public interest, be no estoppel against the Court; and, it seems to me, in the light afforded by *Harriman v. Harriman*, that this principle was overlooked both in *Lunn v. Lunn* and in *McKenzie v. McKenzie*. These cases treat the earlier decisions as creating an estoppel binding not only *inter partes*, but also on the Court. That this is not the correct view appears from the judgments of all the members of the Court in *Harriman v. Harriman*."

The Court accordingly came unanimously to the conclusion that the appeal should be allowed, overruling *Lunn v. Lunn* and *McKenzie v. McKenzie*; and a new trial of the suit was ordered.

Two observations may now be made.

First: The decision in *Keast v. Keast* has no application to undefended divorce petitions, for the reason that it is concerned with the application of s. 18 of the Divorce and Matrimonial Causes Act, 1928, on one of the grounds set out in paras. (*h*), (*i*), and (*j*) of s. 10, when the respondent opposes the making of a decree.

Secondly: The separation orders in the *Lunn* and *McKenzie* cases were made after evidence had been given by both parties in the Magistrates' Court. In *Keast's* case, the separation order was made by consent. In their several judgments, the members of the Court of Appeal did not apply themselves to drawing any distinction between a separation order made by consent and an order made after contest. They were satisfied to find on the broad question as to whether the Court in the exercise of its jurisdiction in divorce can go behind a separation order when, under s. 18, the respondent opposes the making of a decree.

The possible anomalies to which the judgment in *Keast v. Keast* may give rise, and the explanation given of the decision of the majority of the Court in *Ansley v. Ansley*, [1931] N.Z.L.R. 1010, and its exact extent, will be the subject of further consideration in our next issue.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1934.
Mar. 28; April 17.
Myers, C.J.
Reed, J.
MacGregor, J.
Ostler, J.
Kennedy, J.
Johnston, J.

KEAST v. KEAST.

Divorce—Husband's Petition—Separation Order in force for Three Years—Opposed by Wife on Ground that Separation "due to the wrongful act or conduct of petitioner"—Ground of Separation Order wilful failure to provide Adequate Maintenance—Estoppel *inter partes*—Whether binding on Divorce Court—Meaning of "separation"—Divorce and Matrimonial Causes Act, 1928, ss. 10 (*j*) and 18.

Sections 10 (*j*) and 18 of the Divorce and Matrimonial Causes Act, 1928, provide that if, upon the hearing of a petition praying for relief on the ground, *inter alia*, that the petitioner and respondent

"are parties to . . . a separation order made by a Stipendiary Magistrate in New Zealand, and that such . . . order . . . is in full force and has been in full force for not less than three years,"

the respondent

"opposes the making of a decree, and *it is proved to the satisfaction of the Court* that the *separation was due* to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition."

Appellant petitioned for a divorce on the ground that he and his wife were parties to a separation order made by a Stipendiary Magistrate under the Destitute Persons Act, 1910, and that such order had been in full force for not less than three years at the date of the petition. The order purported to be made "with the consent filed herein of the said defendant" (such consent in fact extending only to an order for maintenance and payment of costs), and upon the ground that the defendant had "wilfully and without just cause failed and intends to fail to provide her with adequate maintenance." No evidence was taken in the Magistrates' Court.

Blair, J., who heard the petition, allowed an amendment therein, alleging a separation in fact prior to the making of the separation order due to the refusal of the wife to cohabit with the petitioner. The clause was added on the assumption that, if the statements therein were proved, the petitioner would be entitled to a decree on the authority of *Ansley v. Ansley*, [1931] N.Z.L.R. 1010. The learned Judge, however, found there was no separation prior to the separation order, and, following *Lunn v. Lunn*, [1924] G.L.R. 157, and *McKenzie v. McKenzie*, [1925] N.Z.L.R. 303, that he was bound by the bare separation order, and, as the separation was due to the wrongful conduct of the petitioner, he dismissed the petition.

On appeal to the Court of Appeal, both Divisions sitting together,

Pope, for the appellant; **Cuthbert**, for the respondent; **Fair**, K.C., Solicitor-General, for the Attorney-General,

Held, 1. That, in view of the public interest, which does not allow parties to obtain a divorce by consent, and of the requirements of the section, the Divorce Court is not bound by any estoppel *inter partes* and to accept a separation order as conclusive proof of the facts appearing on the face of such order. A new trial was therefore ordered.

Harriman v. Harriman, [1909] P. 123, followed.
Lunn v. Lunn, [1924] G.L.R. 157, and **McKenzie v. McKenzie**, [1925] N.Z.L.R. 303, in neither of which was **Harriman v. Harriman** cited, overruled.

2. That, explaining the extent of the decision in *Ansley v. Ansley*, [1931] N.Z.L.R. 1010, the words "the separation" in the context in which they occur in s. 18 of the Divorce and Matrimonial Causes Act, 1928, do not include wilful desertion which is a termination of cohabitation by the unilateral act of one party, but refer to a cessation of conjugal cohabitation by mutual consent of the parties by an agreement for separation whether made by deed or other writing or verbally, or imposed by decree of judicial separation or separation order in New Zealand, although such *de facto* termination of cohabitation may precede the agreement for separation, decree of judicial separation, or separation order relied upon as the ground of divorce in terms of s. 10 (*i*) or (*j*) of the Divorce and Matrimonial Causes Act, 1928.

Appeal allowed.

Solicitors: Brady and McRae, Timaru, for the appellant; **Cunningham and Taylor**, Christchurch, for the respondent.

Case Annotation: *Harriman v. Harriman*, E. & E. Digest, Vol. 27, p. 479, para. 5068.

NOTE:—For the Divorce and Matrimonial Causes Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Husband and Wife*, p. 821.

SUPREME COURT
In Banco.
Christchurch.
1934.
March 22.
Johnstone, J.

IN RE SLADEN (DECEASED), SLADEN AND OTHERS v. SLADEN AND ANOTHER.

Will—Construction—Annuity to Sister—"So long as she shall remain unmarried"—Gift of Residuary Estate in Trust for named Beneficiaries and his Sister "if she shall remain a spinster"—Limited Conditional Interest.

F.S., by his will, directed his trustees to invest his residuary estate, and

"out of the income of the said trust premises pay an annuity of four hundred pounds to my wife during her widowhood . . . and pay a further annuity of one hundred and fifty pounds to my sister Rachel Ann Sladen so long as she shall remain unmarried and my said wife shall remain alive and my widow . . . that after the death of my said wife my trustees shall stand possessed of the said trust premises and the income thereof in trust for all or any my children or child and the said Rachel Ann Sladen if she shall remain a spinster in the proportion of two equal shares to each of my children and one equal share to the said Rachel Ann Sladen."

He directed his trustees, in the event of the marriage of his said wife, to stand possessed of the trust premises in trust to distribute the same

"amongst all my children or child my said wife and the said Rachel Ann Sladen if she shall remain a spinster in the proportion of two equal shares to each of my children and my said wife and one equal share to the said Rachel Ann Sladen."

Testator's wife and children, and his sister, Rachel, all survived him, but the said sister had subsequently died.

Hutchison, for the plaintiffs; **M. J. Burns**, for Agnes Whitworth; **Hunter**, for the other defendants.

Answering the questions in the originating summons,

Held, 1. That the annuity granted to testator's sister ceased upon her death.

2. That, upon the death or remarriage of the testator's widow, his sister's estate would take no interest in the capital of testator's estate, testator's intention being to give only a limited and conditional interest to his sister, her death terminating the period of spinsterhood for which the gift was given.

In re Gibson, Cullen v. Gibson, [1924] N.Z.L.R. 285, followed.

Rishton v. Cobb, (1839) 5 My. & Cr. 145, 41 E.R. 326, and **In re Davison, Davison v. North**, [1928] N.Z.L.R. 118, distinguished.

Solicitors: J. J. Dougal, Son, and Hutchison, Christchurch, for plaintiffs; **Livingstone and Burns**, Christchurch, for Agnes Whitworth; **Hunter and Ronaldson**, Christchurch, for remaining defendants.

Case Annotation: **Rishton v. Cobb**, E. & E. Digest, Vol. 44, p. 670, para. 5103.

SUPREME COURT
Wellington.
1934.
April 16, 24.
Reed, J.

B. AND OTHERS v. M.

Mortgagors and Tenants Relief—Construction—Order refusing Relief but not giving Leave to exercise Power of Sale—Mortgagees unlawfully selling and purchasing land through Registrar—Land Transfer Title acquired—Action for possession of Land by Mortgagees—Purchasers—Relationship of Mortgagor and Mortgagees not subsisting—Mortgagors and Tenants Relief Act, 1933, s. 5.

The acts and powers referred to in s. 5 of the Mortgagors and Tenants Relief Act, 1933, are dependent on the relationship of mortgagor and mortgagee still subsisting.

Consequently, although the mortgagees—by reason of their not having obtained an order giving them leave to exercise their power of sale—had unlawfully sold and bought in from the Registrar the land subject to their mortgage, they had obtained without fraud an indefeasible Land Transfer title to such land and were entitled to possession thereof. The relationship of mortgagor and mortgagees had ceased, and the Mortgagors and Tenants Relief Act, 1933, could not be invoked by the former mortgagor to resist the action for possession.

Boyd v. Mayor, etc., of Wellington, [1924] N.Z.L.R. 1174, followed.

Shorland, for the plaintiffs; **C. H. Croker** and **A. B. Croker,** for the defendants.

Solicitors: Govett, Quilliam, and Hutchen, New Plymouth, for the plaintiffs; **Croker and McCormick,** New Plymouth, for the defendant.

NOTE:—For the Mortgagors and Tenants Relief Act, 1933, see Kavanagh and Ball's *The New Rent and Interest Reductions and Mortgage Legislation,* 2nd Ed., p. 1.

SUPREME COURT
New Plymouth.
1934.
Feb. 20; Mar. 22.
MacGregor, J.

BOURKE v. JESSOP AND ANOTHER (No. 2).

Negligence—Pillion-passenger taking Risk of Collision in riding on Unlighted Motor-cycle—Proved Concerted Action with Negligent Driver towards Common End—Identification with Driver in joint Tortious Enterprise.

Motion, pursuant to leave reserved, to set aside the judgment for the defendants, and to enter judgment for the plaintiff.

This action, heard before Mr. Justice *MacGregor* and a jury, was a retrial ordered by the Court of Appeal, as reported [1933] N.Z.L.J. 295, the jury finding for the defendants,

Chrystal, for the plaintiff, in support; **R. H. Quilliam,** for the defendants, to oppose.

Held, dismissing motion, That, where a motor-cycle with a pillion-passenger was being driven along a public road without lights on a dark night, the passenger taking a share in the direction and control of the motor-cycle, and both driver and passenger being equally aware of the foolhardy and dangerous nature of their undertaking, they were engaged in a common purpose or joint enterprise—*i.e.,* "concerted action towards a common end."

The negligence of the driver must, therefore, be attributed to the passenger.

Brooke v. Bool, [1928] 2 K.B. 578, 44 T.L.R. 531, and **Delaney v. City of Toronto,** (1921) 49 D.L.R. 245, 64 D.L.R. 122, followed. **Bourke v. Jessop,** [1933] N.Z.L.R. 806, approved.

Solicitors: J. Hessell, Kaponga, for the plaintiff; **Govett, Quilliam,** and **Hutchen,** New Plymouth, for the defendants.

Case Annotation: *Brooke v. Bool,* E. & E. Digest Supplement No. 8 to Vol. 36, p. 9, para. 473a; *Delaney v. City of Toronto,* E. & E. Digest, Vol. 36, p. 115, note xxxii to para. 771.

COURT OF APPEAL
Wellington.
1934.
March 16.
Myers, C.J.
Herdman, J.
Blair, J.
Kennedy, J.

J. BALLANTYNE AND CO., LIMITED v. THE CHRISTCHURCH DRESS AND MANTLE MAKERS' INDUSTRIAL UNION OF WORKERS.

Factories—Construction—Minimum Payment to Employees—Factories Act, 1921-22, s. 32 (*a*).

The material part of s. 32 (*a*) of the Factories Act, 1921-22, is as follows:—

"(*a*) Every person who is employed in any capacity in a factory shall be entitled to receive from the occupier such payment for his work as is agreed on, being not less than ten shillings in any one week, with annual increments of five shillings a week until a wage of thirty shillings is reached and thereafter not less than thirty shillings a week."

On case stated under s. 105 of the Industrial Conciliation and Arbitration Act, 1925, for the opinion of the Court of Appeal,

R. A. Young and **Bishop,** for the appellants; **K. G. Archer,** for the respondents,

Held, That the minimum rate of remuneration fixed by s. 32 (*a*) for persons employed in factories during the seventh half-year of their employment is twenty-five shillings per week, the whole of the words after "agreed on" being parenthetical.

Solicitors: R. A. Young, Christchurch, for the appellants; **K. G. Archer,** Christchurch, for the respondents.

NOTE:—For the Factories Act, 1921-22, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Factories and Shops,* p. 198.

FULL COURT.
Wellington.
1934.
March 19;
April 12.
Myers, C.J.
Herdman, J.
MacGregor, J.
Blair, J.
Kennedy, J.

LEWIS v. STEWART.

Negligence—Contributory Negligence—Trial Judge of Opinion that no Evidence of Last Opportunity by Defendant—Defendant relying on Defence of Contributory Negligence *simpliciter,* not desiring Last Opportunity Issue requested by Plaintiff—Offer of Issue of Joint and Simultaneous Negligence refused by both Parties—Issues to Jury of Negligence on Part of Plaintiff and on Part of Defendant only—No "substantial cause" Issue or "last opportunity" Direction—New trial.

In a motor-car collision case, the learned Judge left to the jury two issues only—(*a*) Whether the defendant was guilty of negligence in certain respects; (*b*) Whether the plaintiff was guilty of negligence in certain respects—and he directed the jury to assess the damages to the plaintiff irrespective of the answers to such issues.

At the end of the learned Judge's summing up he said:

"The law says if both are negligent neither can recover from the other. I say this, because you are not concerned in this case with questions of last opportunity. That is not an issue and does not have to be considered. If it did, I should ask you to consider whether anyone but Lewis (the plaintiff) had a last opportunity."

Plaintiff's counsel requested that the usual issues as to "last opportunity" should be included. Defendant's counsel objected to the inclusion of this issue, relying on the defence of contributory negligence *simpliciter.* The learned Judge indicated that in his opinion there was on the facts no room for the doctrine of last opportunity, except possibly as to plaintiff, and ruled that as the doctrine, if open, would on the facts at most apply against plaintiff, and defendant did not want the issue, it should

be omitted. He offered both parties an issue as to joint and simultaneous negligence, but neither desired it.

The jury found negligence on the part of both plaintiff and defendant, and fixed the amount of the damages. The learned Judge entered up judgment for defendant.

A motion for judgment for plaintiff or alternatively for a new trial was, by consent, referred to the Full Court.

Mazengarb and **James,** for the plaintiff; **Leicester,** for the defendant.

Held, by *Myers,* C.J., *MacGregor, Kennedy,* and *Herdman,* JJ., *Blair,* J., dissenting, That the judgment should be set aside and a new trial ordered.

On the grounds,

Per *Myers,* C.J., *MacGregor* and *Kennedy,* JJ., That there was evidence requiring the submission of a third issue, which might in form be directed not to the question of last opportunity, but to the question of whether, if both parties were negligent, the effective and substantial cause of the accident was the negligence of the plaintiff or of the defendant or the combined negligence of the two, which would require from the trial Judge an explanation of the doctrine of last opportunity.

Per *Herdman,* J., That the jury were not directed to decide whether both parties were equally to blame, and they were not told to find whether, the parties having both been guilty of negligence, the negligence of the defendant in the final result was the decisive factor in precipitating the catastrophe; and that it could not be said that there was no evidence that would have justified the jury in requiring the defendant to accept responsibility, notwithstanding the proved negligence of the plaintiff.

Held, by *Blair,* J., dissenting, That the judgment should stand upon the ground that, while there was evidence that plaintiff had last opportunity, defendant had elected not to rely upon that defence, but that there was no evidence upon which a "substantial cause" issue could be put to the jury, the question of whether or not there was any such evidence being for the Judge; and that, applying **Swadling v. Cooper,** [1931] A.C. 1, where there is no room for the last opportunity doctrine, there is no need to put to the jury the "substantial cause" issue.

Solicitors: Mazengarb, Hay, and Macalister, for the plaintiff; **Leicester, Jowett, and Rainey,** for the defendant.

Case Annotation: *Swadling v. Cooper,* E. & E. Digest Supplement No. 8 to Vol. 36, p. 12, para. 731a.

SUPREME COURT
Wanganui.
1934.
Feb. 23, 24;
April 9.
Ostler, J.

IN RE A MORTGAGE, L. TO THE STATE ADVANCES SUPERINTENDENT.

Mortgagors and Tenants Relief—Stock Mortgagee in Control of Mortgagor's Farm Receipts—Retention of same for Payment of Interest and Reduction of Principal—First Mortgage Interest unpaid—Order as to Application of Moneys received by Stock Mortgagee—Mortgagors and Tenants Relief Act, 1933, s. 11.

L., a dairy farmer, gave a first mortgage over his land to the State Advances Superintendent in February, 1931, since when no instalments had been paid, and the mortgagee had been obliged to pay the fire-insurance premiums. The O. Dairy Co., Ltd., holding a second mortgage over the land and a chattels security over the stock, and having control of the receipts from his farming operations, paid itself interest in full, and reduced the principal owing to it by about £220. The Adjustment Commission recommended relief, subject to the condition that L. should pay to the State Advances Office £80 on account of arrears, and £5 11s. 6d. for the unpaid fire-insurance premiums. The dairy company refused to pay these sums.

On receiving the Commission's report, the learned Judge asked for an assurance that the dairy company would pay the amount of £85 11s. 6d. to the first mortgagee. On being informed that the company refused to make such payment,

Held, That, as the dairy company was a stock mortgagee, the Court could make an order as to the application of the moneys received by it from the mortgagor as from July 1, 1933.

It was, accordingly, ordered that the dairy company do forthwith, upon service of the order upon its secretary or managing director, out of the moneys retained by it since July 1, 1933, pay to the State Advances Office Superintendent the clear sum of £85 11s. 6d., and the costs of the drawing up, filing, and service of the order, which were fixed at £5 5s.

G. W. Currie, for the mortgagor; **C. F. Treadwell,** for the State Advances Superintendent; **C. P. Brown,** for the Dairy Company.

Solicitors: Treadwell, Gordon, Treadwell, and Haggitt, Wanganui, for the State Advances Department; **Watt, Currie, and Jack,** Wanganui, for the mortgagor; **C. P. and C. S. Brown and Darcy,** Wanganui, for the dairy company.

NOTE:—For the Mortgagors and Tenants Relief Act, 1933, see Kavanagh and Ball's *The New Rent and Interest Reductions and Mortgage Legislation,* 2nd Ed. p. 1.

COURT OF APPEAL
Wellington.
1934.
Mar. 26; April 12.
Myers, C.J.
Herdman, J.
MacGregor, J.
Blair, J.
Kennedy, J.

IN RE LYON (DECEASED), LYON v. PUBLIC TRUSTEE.

Insurance—Life—"Policy"—Protection from Creditors—Applicability to Policies effected in Country other than New Zealand—Life Insurance Act, 1908, ss. 41, 65, 66; Amendment Act, 1925, s. 4.

Appeal from the judgment of Mr. Justice *Ostler,* reported [1933] N.Z.L.J. 214.

Section 65 (2) and (3) of the Life Insurance Act, 1908, protecting life insurance policies from creditors of the assured, applies not only to policies effected in New Zealand, but also to policies which have been effected in another country with a company not carrying on business in New Zealand and are possessed by a person domiciled in New Zealand at the date of his death if reduced into possession by the executor in New Zealand without the necessity of taking out administration in the other country.

So **held** by the Court of Appeal (*Myers,* C.J., *MacGregor, Blair,* and *Kennedy,* JJ., *Herdman,* J., dissenting) reversing the decision of *Ostler,* J.

Twaddell v. New Oriental Bank Corporation, Ltd., (1895) 21 V.L.R. 171, and **Hammond v. Public Trustee,** (1877) 2 N.Z. Jur. (N.S.) S.C. 185, referred to.

Held, *per Herdman,* J., dissenting, That the provisions of the Life Insurance Act, especially those relating to the secretary and the regulation of dealings with policies, show that the Act can relate only to policies issued by companies carrying on business in New Zealand.

Rout, for the appellant; **E. S. Smith,** for the respondent; **O'Leary** and **Fletcher,** for the creditors.

Solicitors: Rout and Milner, Nelson, for the appellant; **The Solicitor,** Public Trust Office, Wellington, for the respondent; **Pitt and Moore,** Nelson, for the creditors.

Case Annotation: *Hammond v. Public Trustee,* E. & E. Digest, Vol. 29, p. 377, note p.; *Twaddell v. New Oriental Bank Corporation, Ltd., ibid.* p. 387, note t.

NOTE:—For the Life Insurance Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908–1931, Vol. 4, title *Insurance,* p. 78; Amendment Act, 1925, *ibid,* p. 127.

Economics and the Law.

The "Societe Belge" Case.

By G. R. Powles, LL.B.

The decision of the House of Lords in the *Adelaide and Prudential* case noted in the last number of the Journal (p. 86, *ante*) does not shine in solitary glory in the legal firmament—it has a twin of almost equal brilliance. On the same day (December 15, 1933) the learned Lords in another currency case (*Re Société Intercommunale Belge D'Electricité*, 150 L.T. 41) also reversed both lower Courts, but here the similarity ends. In the *Adelaide* case the actual decision is not important. It is of no great moment to anyone other than the parties whether the Adelaide Company has to discharge its obligations in Australian currency or in sterling. What is important to the legal and commercial communities of the Empire is the *ratio* of the learned Lords' decision—how they have arrived at the result and how they have dealt with the economic facts with which they were faced. In the *Société Belge* case the *ratio* is comparatively unimportant, while the decision itself is of far-reaching effect.

The device of the "gold clause" to protect lenders against fluctuations in currency apparently originated in the United States in their monetary turmoils of about a hundred years ago. Along with other ingenious devices it soon crept across the Atlantic, and in post-war days had become in general commercial use particularly where the lending was of an international character; hence its importance in the City of London. It took many forms, but usually, as in *Société Belge* case, provided for payment in gold coins of a certain weight and fineness. After September, 1931, the question of course arose as to whether the English holder of a bond containing a gold clause could demand payment of his bond in gold or its equivalent in sterling, or whether he had to be content with sterling to the face value of his bond. Farwell, J., and the Court of Appeal held that payment of the face value in sterling would suffice. As might have been expected this decision was the subject of much unfavourable comment from creditor interests on both sides of the Atlantic. Such comment was not confined to commercial circles, for the *American Law Reports* (Vol. 84 p. 1499) criticised the decision as being "at variance with the views which have been taken and adhered to by the Courts in this country for more than half a century," and said, "It seems difficult to justify this decision on the theory that it was one merely of construction of the contract apart from any questions of public policy." (Nemesis descended upon the head of this American writer, for in June, 1933, Congress passed a resolution eliminating the gold clause from public and private obligations—outstanding as well as new. It would be interesting to know what effect the decision of the Court of Appeal had upon the passing of this resolution.) When, therefore, the House of Lords reversed the Court of Appeal it is easy to understand why "a general welcome was accorded by the Press and the commercial community to the House of Lords' decision which . . . performed a service of international significance" (see 78 *Solicitors' Journal*, p. 41).

From a purely professional point of view, it is interesting to consider how the performance of this signal international service was also consonant with legal principle. The neat question at issue was one of construction. By the bond before the Court the Société undertook to pay "£100 in sterling in gold coin of United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928"; and there was a similar provision with reference to the payment of half-yearly interest at 5½ per cent. The words "Bond for One Hundred Pounds" were printed in large letters on the face of the bond, and the figures "£100" appeared in the corners and in various other places. Indorsed on the back of the bond was a redemption table calculated on a simple sterling basis. The bond was expressed to be governed by English Law.

The plaintiff claimed that the covenant was not one to pay £100, but to pay in sterling the equivalent of one hundred sovereigns of the stated weight and fineness. If this were so, the primary meaning of the words "One Hundred Pounds" would be disregarded. The defendants contended that they were entitled to pay whatever might be good legal tender for the nominal amount of the bond. If this were correct, no meaning whatever would be given to the words "gold coin . . . 1928" in the bond. The question was: Was the "gold clause" the measure of liability or was it merely the mode of payment?

The Court was thus faced with two opposing but equally fundamental principles of construction: the one that the words used must be given their primary meaning, and the other that no part of a document must be disregarded, unless in each case no other construction is reasonably possible. As a solution of the problem, the plaintiff relied upon the canon of construction laid down by Parke, B., in *Ford v. Beech*, (1846) 11 Q.B. 852, 866:

> "that (an agreement) ought to receive that construction which its language will admit and which will best effectuate the intention of the parties to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they have used in the expression of their intent."

Nevertheless, taking the bond as it stood, it was apparent that there could be two views as to its general intent, and Farwell, J., and the Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.*) held that the bond was a contract to pay a fixed sum of money, £100, and to pay it in one particular form of legal tender, the provisions as to gold relating merely to the manner in which the payment of the fixed sum was to be made. Farwell, J., Lord Hanworth, M.R., and Lawrence, L.J., held that such a provision for payment in one particular form of legal tender to the exclusion of others could not abrogate the enactment of the Legislature that the debt could be discharged by other forms of legal tender. Romer, L.J., came to the conclusion that such a provision was illegal and must be disregarded. The result of all four judgments was the same, namely, payment of £100 in whatever might be current legal tender at the time of payment.

In the House of Lords, Lords Atkin, Tomlin, Warrington, and Wright concurred in the opinion of Lord Russell of Killowen. After reciting the facts Lord Russell deals with the descriptive matter printed and impressed upon the bond, and with an Olympian stroke sweeps away the clouds which had hampered the vision of the lower Courts. He says,

* [1933] 1 Ch. 684.

"if the contractual provisions reveal only one construction, outside descriptive words will not be competent to alter that construction. If they cannot be reconciled with it, they become misdescriptive."

He then considers the circumstances existing at the date of the bond and points out that although the country was on the gold standard notes were legal tender and were inconvertible and gold coin was substantially no longer in circulation. Relying on these facts, and on the impossibility of paying the interest (£2 15s.) in gold coin, he makes two surmises: the first that the gold clause was inserted in contemplation of the contingency of Great Britain going off the gold standard; and the second that neither party can have contemplated payment being actually made in gold coins. The learned Lord then concludes that the reference to gold coin is clearly not a reference to the mode of payment but to the measure of the company's obligation. While he is conscious that such a construction strains the words of the document, he prefers it to the only other alternatives, namely, giving no meaning at all to the gold clause, or giving it a meaning which from the surrounding circumstances and other parts of the document the parties cannot have intended it to bear.

Thus does our highest authority give "business efficacy" to a commercial document.

Leading from this decision there are two interesting by-paths which repay brief exploration. The first is the reference to judgments of the Permanent Court of International Justice. It is believed that this is the first instance where such judgments have been referred to in English Courts upon domestic matters, and the references in this case may be symptomatic of the growing importance of the Court at the Hague. Lord Russell, while expressly stating that such judgments are in no way binding upon him, cites a lengthy passage which he says states happily and succinctly the considerations and principles which have influenced him. The concluding portion of this passage is as follows:—

"The parties were not content to use simply the word 'franc,' or to contract for payment in French francs, but stipulated for 'gold francs.' It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be not to construe but to destroy it."

The second by-path more intimately concerns us in New Zealand, as s. 7 of our Coinage Act, 1933, is the same (with minor local variations) as s. 6 of the English Coinage Act, 1870. This section is as follows:—

"Every contract, sale, payment, bill, note, instrument and security for money, and every transaction, dealing, matter and thing whatever relating to money, . . . which is made, executed or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state."

In the case under review, Farwell, J., thought that a contract to pay in one particular form of legal tender to the exclusion of all others was not necessarily rendered illegal, but that, if the contract is a mere contract for the payment of money, then such a stipulation cannot be enforced. Romer, L.J., specifically discusses the section and concludes that any contract that attempts to exclude a payment of money by the tender of any coins that are legal tender by the Act of 1870 is illegal. It must be confessed, however, that, after reading the section, the most attractive views are those expressed in the House of Lords. In the *Société Belge* case, Lord Russell said,

"It would be unwise and I do not desire to deal with the question whether an effective bargain can be made for a debt to be paid only in one form of legal tender. Still less do I desire to express a view as to the meaning and effect of s. 6 of the Coinage Act 1870";

and in *Adelaide and Prudential* case Lord Tomlin said:

"I confess that I find difficulty in assigning any meaning of precision to this obscure section."

Law Revision.

Some Interesting Subjects.

In a recent issue of the JOURNAL, Lord Macmillan was quoted as saying that the lawyer's duty is to adapt himself to the new conditions, as the law was a living and growing thing entrusted to his care. Now the Lord Chancellor (Viscount Sankey) has decided to establish a Standing Committee to consider how far, having regard to the Statute Law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to them require revision in modern conditions. He has, in the first place, asked the Committee specially to report as soon as may be upon the following:—

(1) The doctrine of no contribution between tort-feasors. (*Merryweather v. Nixan*, with special reference to the remarks of Herschell, L.C., in *Palmer v. Wick and Pulteneytown Steam Shipping Company, Limited*, [1894] A.C. 318.)

(2) The legal maxim *actio personalis moritur cum persona*, and the rule that in a civil Court the death of a human being could not be complained of as an injury. (*Baker v. Bolton*, 1808, 1 Campbell, 493, and the *America*, [1914] P. 167, [1917] A.C. 38.)

(3) The liability of the husband for the torts of the wife. (*Edwards v. Porter* [1925] A.C. 1.)

(4) The state of the law relating to the right to recover interest in civil proceedings. (See in particular "Roscoe's *Nisi Prius*," 19th Ed., Vol. 1, 508-12.)

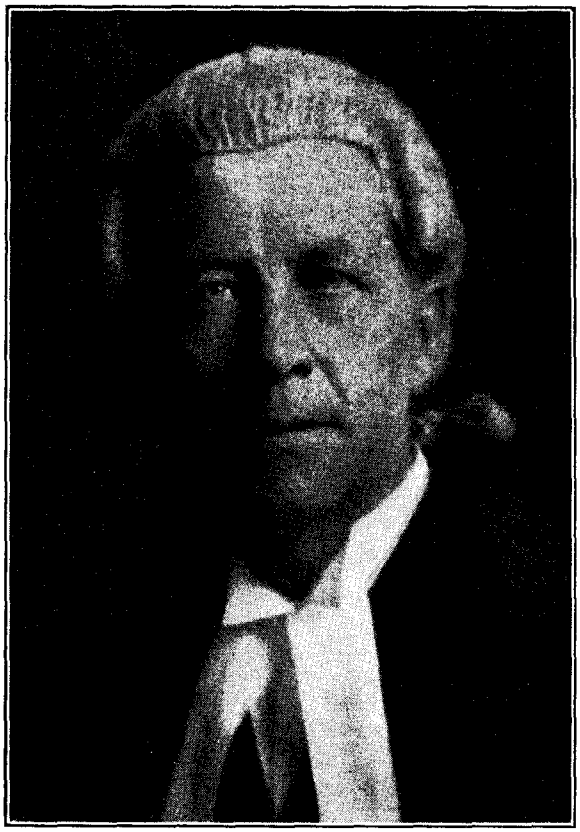
The Committee will be presided over by the Master of the Rolls and will consist of the following: Lord Wright, Lord Justice Romer, Mr. Justice Swift, Mr. Justice Goddard, Mr. Cyril Asquith, Professor Harold Cooke Gutteridge, K.C., Professor Arnold Duncan McNair, Mr. William Egerton Mortimer, Mr. Terence James O'Connor, K.C., M.P., Sir Reginald Ward Poole, Mr. Samuel Lowry Porter, Sir Claud Schuster, K.C., Mr. Alfred Topham, K.C.

The American Reports.—"One criticism levelled against the legal profession was against its thousands of volumes of case law," said Lord Wright, recently. "England, however, is not as badly off as America. An eminent writer has calculated that in the year 1902 no less than 262,000 pages of Reports had been published there; that a student working on them at a hundred pages a day would take eight years to read them; and that by the time he had finished further Reports would have collected which would take him fifty more."

The New Judge: His Honour Mr. Justice Fair.

Within two months of Mr. Justice Johnston's taking his place on the Supreme Court Bench another appointment has been made to the Judiciary in the elevation of the Solicitor-General (Mr. A. Fair, K.C.). On this occasion, the vacancy was filled with commendable promptitude, the new Judge being sworn in on the day following that upon which Mr. Justice MacGregor officially retired.

There is considerable precedent for seeking in His Majesty's Solicitor-General a recruit for judicial office. During the last hundred years, many puisne Judgeships have come the way of the holders of the appointment in England. Among them was Robert Monsey Rolfe who, after being Solicitor-General, became one of the Barons of the Court of Exchequer, and progressed through the office of Lord Justice of Appeal in Chancery to the Woolsack. Another Solicitor-General to go to the Bench was Sir William Baliol Brett (1868, better known as Lord Esher. Skipping the years between, we come to the recent period when Sir Samuel Evans, Solicitor-General in 1908, became President of the Probate, Divorce, and Admiralty Division, an example which was followed last year by the most recent holder of the office, Sir F. B. Merriman. In 1913, Lord Buckmaster became Lord Chancellor from the holding of the Solicitor-Generalship, and, from the same office, Sir Gordon Hewart became the present Lord Chief Justice. There are other examples of the practice, quite apart from the large number of ex-Solicitor-Generals who reached the highest judicial offices in England—and lasting eminence—*via* the Attorney-Generalships.



S. P. Andrew, Photo

His Honour Mr. Justice Fair.

Mr. Justice Fair follows precedent very closely in this Dominion. When Sir John Salmond, then Solicitor-General, was elevated to the Supreme Court Bench, he was succeeded as Law Officer by Mr. W. C. MacGregor, K.C., who became Mr. Justice MacGregor on Mr. Justice Salmond's death. Mr. Justice MacGregor, on his retirement from the Bench, makes way for his successor to the Solicitor-Generalship in the person of Mr. Justice Fair.

The new Judge was born at Charleston, near Westport, in 1885, and thus brings the number of native-born New Zealanders on the Bench up to eight—the highest number so far. After receiving his primary education at Charleston and Westport, he went to Nelson College with an Education Board scholarship. In 1904, he entered Victoria University College, and took a full part in its various sporting and other activities. He graduated as a Bachelor of Laws in 1907, when he was admitted as a barrister and solicitor. He received his practical training as a member of the staffs of Messrs. Skerrett and Wylie and Messrs. Chapman, Skerrett, Wylie, and Tripp, being senior clerk in their common-law department, where he was closely associated with the late Sir Charles Skerrett and with a large and varied common-law practice. In the course of this, in addition to a large amount of advising, preparing briefs, and Magistrates' Court practice, he appeared frequently as counsel in the Supreme Court and Court of Appeal. Among the leading cases with which he was associated in the Court of Appeal was *Cock v. Attorney-General*, (1909) 28 N.Z.L.R. 405, and the well-known libel action of *Massey v. The New Zealand Times Co., Ltd.*, (1911) 30 N.Z.L.R. 929.

When war broke out Mr. Justice Fair was on holiday in England. He enlisted in the Inns of Court O.T.C., and from there was given a commission in the Suffolk Regiment and attached to the 8th Battalion in the Second Hundred Thousand of Kitchener's Army. Illness prevented his accompanying them to France. On his recovery, he was attached to the 5th Battalion (T.F.) of the Suffolk Regiment, and served with it in Egypt, Palestine, and Syria, until the close of that campaign, holding the rank of Captain. In September, 1918, he was awarded the Military Cross. He is joint compiler of the *History of the Fifth Battalion Suffolk Regiment.*

At the conclusion of hostilities, he returned to New Zealand and commenced on his own account in Wellington at the beginning of 1920. When Mr. P. S. K. Macassey was appointed Crown Prosecutor at Wellington in March, 1921, the new Judge succeeded him as Crown Solicitor in the Crown Law Office. In 1923, on Mr. MacGregor's vacating the office of Solicitor-General, he was appointed Principal Law Officer of the Crown and permanent head of the Crown Law Office. In 1925, he became Solicitor-General and was made a K.C.

Since 1923, with infrequent exceptions, he has appeared for the Crown in all its important litigation in the Courts, and no sitting of the Court of Appeal has been held without his appearing, generally with several briefs. His advocacy has been attended with striking

success as with the exception of recent cases on the validity of Regulations, and questions of law reserved in criminal cases, he has been almost uniformly successful. The office requires its holder to deal with a great variety of work ranging from such constitutional questions as were decided in *Worth v. Worth*, [1931] N.Z.L.R. 1109, and those recently before the Court in *Timberlands Woodpulp, Ltd. v. The Attorney-General* and *Nelson v. Braisby* to the uninspiring but important questions on rating decided in *The King v. Mayor, &c., of Inglewood*, [1931] N.Z.L.R. 177.

Even the profession, perhaps, hardly realises the wide scope of the functions included in his office. Apart from political questions he is the *alter ego* of the Attorney-General: for, as s. 14 of the Civil List Act, 1920, says,

> "Notwithstanding any Act, rule, or law to the contrary, any power, duty, authority, or function imposed upon or vested in the Attorney-General by virtue of his office may be exercised and performed either by the person holding the office of Attorney-General or by the person holding the office of Solicitor-General."

He is permanent head of the Crown Law Office which is responsible for advising all Ministers of the Crown and the twenty-six Departments of State under them. He represents the Crown in its capacity of Protector of Charities, in which role he recently successfully appealed to preserve a charity *In re Brewer (deceased), Solicitor-General v. Bydder*, [1933] N.Z.L.R. 1221. He performs the duties which fall to the King's Proctor in England, and appears to argue other important questions relating to the marriage relationship, such as in *Keast v. Keast*, reported elsewhere in this issue. He is in control of all Crown Prosecutors and prosecutions, and appears on the frequent questions of law reserved in criminal proceedings. He is a member of the Council of Law Reporting, and in the absence of the Attorney-General he has always acted as Chairman of that body. He also performs the functions exercised by Treasury Counsel in England, and a large part of his work is upon revenue matters involving at times many thousands of pounds of revenue from income-tax, death duties, and stamp duties.

In addition to these manifold duties, Mr. Fair during his term as Solicitor-General had to consider the codification of international law carried out by the League of Nations. It will be seen that he was a member of the Crown Law Office for a period of fourteen years, and its head for eleven and a half years. During that time six different Governments and five Attorneys-General have held office. Probably no other Solicitor-General has held office under similar conditions since the institution of responsible government.

Under such circumstances, it can be understood that the demands of the office leave its holder very little time for other activities, but from 1925 Mr. Fair was an active member of the Council of Law Reporting and took a large part in the measures that resulted in the alteration in form and enlargement of the *New Zealand Law Reports*. He has been a member of the Rules Committee since its foundation.

Outside his official duties the new Judge has devoted time to the interests of Victoria University College, as President of the Graduates' Association and as a member of the College Council, on which body he has sat since 1923 as a graduates' representative. Prior to his appointment as Solicitor-General he was actively interested in the affairs of the Returned Soldiers' Association, and for some years was a member of the Wellington War Memorial Committee. He was President of the New Zealand Club for two years. Tennis and golf occupy his leisure time.

Mr. Justice Fair, who will be stationed at Auckland, has a well founded reputation for intense industry and devotion to his work. His conscientiousness is one of his outstanding characteristics.

Members of the Bar who appear in his Court may anticipate a courteous and patient hearing, for he is the last one to shed his quiet and unostentatious kindness and considerateness on reaching the heights of his profession.

The JOURNAL wishes Mr. Justice Fair many happy years of useful service on the Supreme Court Bench.

Legal Education.

Beneath the Dreaming Spires.

By A. L. HASLAM, B.C.L., D. Phil. (Oxon.), LL.M. (N.Z.).

In view of the discussion on legal education appearing in these columns, a few scattered reminiscences on the method of instruction obtaining at Oxford University may be of passing interest to readers of the JOURNAL. Many of us New Zealanders recall our working hours as undergraduates as valiant and sometimes losing fights with the authors of standard text books. We memorised our *Anson*, we swallowed our home-made précis of *Dicey*, and it was not until after we had joined the ranks of the profession that we had occasion to go to original sources. Our lecturers may have imagined that we obediently looked up the references to reported decisions which they recommended for special study, but most of us thought we knew better. Far better to work through the fields that wiser men had ploughed, than venture into the perplexing jungle of legal authorities.

But the Oxford Honours School of Jurisprudence demands a different method of approach. Like the other Schools at that ancient University, it gives no first class B.A. to the man who has nothing more to commend him than an average intelligence and a prodigious memory. The student who has rehashed to his examiner, *totisdem verbis*, Sir John Salmond's view of the law of dangerous premises with nothing more, might earn a marginal "third"; but he could hardly hope for a second, and certainly would not be granted a first.

From the start the student has to develop a capacity for criticism, for analysis and for independent judgment. If in his weekly essay his tutor demands something on the concept of possession, he must spend hours in the Codrington Library weighing up the theories of Salmond, Pollock, and Maitland, not forgetting Ulpian and Savigny. It is true that a graduate after three years at Oxford may know little of procedure, of bankruptcy, or of company law, but the Bar examinations will rectify this defect in his legal armoury. He will, however, have a scholarly appreciation of the historical side of English Law, will have studied real property from the Domesday Book to the reforms of Lord Birkenhead, have read for himself the bulk of leading decisions in the Law of Contract or of Torts, and will have more than a vague idea of whether the latter word should be in the singular! The average student finds particularly irksome the requirements of the authorities as to Roman Law. The South African students, being bred to the Roman Dutch system, take to it more kindly.

Final examinations take place at the end of the third year, though graduates from other Universities are allowed to sit after two years. A fairly wide choice is given—usually five questions must be attempted out of about twelve—but each question has to be written in the form of a short treatise, balancing conflicting theories and dicta, and concluding with the student's own preference, which he must justify.

The basis of instruction lies in the tutorial system, which means that for an hour or more per week a learned don criticizes the student's fledgling contributions to learning, suggests a better method of approach, and generally supervises his study. Lectures are never compulsory; with the result that Dr. Cheshire at Lincoln could hardly get a big enough hall for his classes, whereas Professor ———— at another College mumbled wearily to empty benches.

After graduating in the Honours School, it is permissible to proceed to the degree of Bachelor of Civil Law, which entails a strenuous and nerve-shattering year of intense study. There is more Roman Law, Jurisprudence, Real and Personal Property, Common Law, Equity (with particular reference to trusts and partnership), either International Law or Conflict of Laws, and a special subject such as Criminal Law or the Law of Evidence. A first-class in that school can feel that he has more than mastered the rudiments.

Of legal tutors, perhaps the best known is Sir William Holdsworth, the Vinerian Professor of English Law, who holds the chair which the great Blackstone once occupied. His nine volumes on the History of English Law are the monumental work of a great scholar, and most of us have read his delightful little book on *Dickens as a Legal Historian*. His tutorials in equity were a wonder to the privileged few who were assigned to his care, and to him the troublesome doctrine of satisfaction and election were the essence of simplicity. Incidentally, Sir William is the only person in Oxford whose moustachios can be seen from behind.

Dr. Stallybrass, well-known by name to New Zealand practitioners as the learned editor of *Salmond on Torts* is, amongst other things, Vice-Principal of Brasenose, the traditional home of all that is toughest and heartiest in Oxford. With caustic wit and cheery personality he holds all of them in check; and heaven help the student who presents to him an essay of indifferent content! His tutorials were a masterpiece, and his faculty of illustrating legal principals with a relevant story of the inner workings of a legal decision can be exemplified in the closing sentence which he delivered at a certain Tutorial on Evidence.

"Gentlemen—I should like you to remember that Baskerville was a fellow of Keble, and when he was arrested for this unusual offence, his closest friend, the Dean of Christ Church, now Bishop of Oxford, made the singularly penetrating comment of 'Oh dear—how very odd.'"

Members of that class are now practising law in Newcastle-on-Tyne, Missouri, Johannesburg, and the Antipodes, but I'll swear that none of us has forgotten Baskerville. I can well remember Dr. Stallybrass objecting strongly to the decision of Russell, J. (as he then was), in *Brimelow v. Casson*, [1924] 1 Ch. 302. Dr. Stallybrass had seen the brief and considered that the learned Judge had misconceived the facts as the iniquitous state of affairs which Russell, J., attacked in his judgment had already been in existence before the dwarf and the chorus girl were engaged in the Revue Company.

At Trinity is Mr. Philip Landon, a law don who is the joint author of *Pease and Landon on Contracts*. No sooner was Stallybrass's *Salmond* in print than Mr. Landon commenced a series of lectures attacking the learned Doctor's pet theories on the fundamental conception of the Law of Torts. He opened his first lecture as follows:

"I must ask you students to disregard entirely the 7th Edition of *Salmond on Torts*. Dr. Stallybrass, though an excellent lawyer, is at present labouring under the temporary influence of certain tracts and pamphlets issued by Harvard Law School, which, though interesting enough speculations as to what the law might be, throw no light on what the law is."

It is little wonder that Oxford students, bred in an environment where nothing is accepted as final, grow up with an attitude of mental independence.

As students of Conflict of Laws, we New Zealanders are apt to regard Dicey's bulky tome as sacrosanct; but Dr. Cheshire's stimulating lectures at Exeter College rather shatter that juristic idol. His talks on *renvoi*, on *domicil*, and on the *lex situs* of choses-in-action make one realise that of all branches of our law Private International Law is the most illogical and chaotic. Dr. Cheshire is also an oracle on Real Property and his textbook on the recent legislation in England is the standard work on the subject. He, too, possesses a ready wit and in an opening lecture was careful to point out to his audience that one of the chief forms of feudal land-tenure was "Knight-service, which by the way, is spelt with a 'K.'"

One must not omit Mr. C. K. Allen, formerly Professor of Jurisprudence and now Warden of Rhodes House. His lectures and essays are worthy examples of Oxford scholarship, as every reader of the *Law Quarterly Review* can testify. Special reference should be made to his *Law in the Making*, a work that is unfortunately too little known in these parts.

Lastly, mention must be made of Professor de Zulueta, whose enthusiasm for Roman Law is almost a religion. Nothing delights him more than a musty palimpsest of some ancient civilian. The writer once had to submit to the refinement of torture at a *viva voce* of being cross-examined about "correality and solidarity." The abysmal ignorance of the candidate was becoming all too apparent, when the Professor gave a "leading" question: "Now Mr. ———— you surely recall Justinian's reply to the advocates of Ephesus." The unlearned one had never even heard of the local bar of Ephesus, and this final query was the unkindest cut of all. I really believe that the Professor suffered more deeply than I did.

What Mr. Gladstone did say in 1882.—"It occurred to me that the ablest cross-examiners—not even my friend, Pat Hastings—has ever been able to get an answer to certain questions notably: 'What did Mr. Gladstone say in 1882?'" remarked Dr. E. Leslie Burgin, M.P., at the recent 102nd Anniversary Dinner of the United Law Clerks' Society. He said he had, therefore, set the librarian of the House of Commons to look up what in fact Mr. Gladstone had said in that year. The result was: "No change, practical or speculative, social, political, or economic, has any terrors for the profession of the law."

The Late Mr. J. C. Stephens.

An Outstanding Personality.

By J. B. CALLAN, K.C.

The sudden death of Jefferson Counsell Stephens on April 20 has removed from the profession a member widely known and highly respected, has deprived Dunedin of a citizen of great and varied usefulness, and has taken from very many an old and trusted friend.

Mr. Stephens's name is known throughout the Dominion by reason of his writings and his long membership of the Council of Law Reporting; but some account of the man himself may be valued by those who had not the pleasure of knowing him personally.

He passed practically the whole of his professional life in the office out of which came Sir Robert Stout and Sir William Sim, with each of whom he had been closely associated. His own professional work was largely an opinion practice in Company, Commercial, and Local Body topics; but the traditions of the firm and his association with Sir William Sim led Mr. Stephens to take a close and abiding interest in questions of procedure, as to which he accumulated a vast store of recondite learning. This he ultimately gave to the profession in his recently published book, *Supreme Court Forms*. No one can use this book, or even turn over its pages, without being struck by the mass of research and information that are recorded in the "Notes." Exactness, thoroughness, and painstaking care marked every effort of Mr. Stephens in each of the diverse activities in which he engaged.

I have been privileged to see *Supreme Court Forms* in the making. For many weary months Mr. Stephens was a familiar figure in the Dunedin Supreme Court Library as he sat there at nights, on Saturdays, and on public holidays surrounded by the manuscript sheets of his *magnum opus*. I have on occasion sat opposite him for a whole evening while he pursued one small elusive point through a mass of references. He considered the labour of an evening well spent if at the end of it he had added not one stroke to his manuscript, but had satisfied his exacting mind that some haunting doubt as to the accuracy of what he had written was unfounded. All his friends could see that this intense and prolonged labour was taking a heavy toll on his health and strength. Yet when at last he had published, it was his serious intention, after a brief respite, to begin anew on other aspects of the subject for which he had already accumulated notes. This second book we are not to have from his hands, but his published work will remind succeeding generations of New Zealand practitioners that the capacity for long-sustained, minute research, which has characterised the authors of the most famous text-books produced in England, has not been lost in this country.

Some research workers have succeeded only at the expense of sacrificing all other interests. Not so Jefferson Counsell Stephens. He was a busy practitioner whose advice and guidance were valued highly by the Commercial community and by public bodies. He took a life-long and passionate interest in Education, and did a great deal of hard and useful work both on the High School Board of Governors and on the Otago University Council. He maintained to the end sympathy with and understanding of youth, and the students knew him as their friend. To him more than to any other single individual the Law School of Otago University owes its being and its form.

He was a Shakesperian scholar of distinction, and for very many years an active member, and President, of the Shakespeare Club in whose public readings he took a leading part. He was a keen bowler and a genial companion, and a good friend to hosts of Dunedinites outside his own profession.

His long membership of the Council of the Otago Law Society, of which he was several times President, showed the respect and confidence he inspired in his fellow workers who knew him best.

He has transmitted many of his tastes and interests to his son, Mr. A. C. Stephens, who has for many years been a lecturer in, and is now Dean of, the Law Faculty, and who, too, has written a law book and like his father takes a keen interest in drama.

The New Zealand Law Society.

Annual Meeting.

(*Concluded from page 91.*)

Solicitors Receiving Money on Deposit.—The Canterbury Society forwarded the following letter from a firm of Solicitors who required guidance in attempting to carry out the rules gazetted in connection with the above matter:—

> Referring to our conversation with you this morning, we shall be glad if you will bring the following matters as regard the regulations set out in the *N.Z. Gazette*, November 30th, 1933, at page 3165, in reference to solicitors taking money on deposit, to the notice of the Council. The form of acknowledgment set out in the schedule appears to be only applicable to solicitors taking a named sum of money on deposit at a stated rate of interest and for a fixed term or at call from a depositor who can be taken in person to the secretary of the Law Society or to an independent solicitor, but is not applicable to the following cases:
>
> 1. Current account deposits.
>
> 2. Cases where a depositor does not live in Christchurch. We have several clients, for whom we collect moneys and run accounts, who live in England, the North Island, South Canterbury, etc.
>
> 3. Cases where a depositor lives abroad and a member of the firm holds his or her Power of Attorney.
>
> It has been the custom in this office for probably 50 years to run current accounts for various clients. All moneys collected on their behalf being paid each month to such current accounts and we either pay a fixed amount to such client each month or send cheques as required. Interest is paid on balance in credit and charged on balance in debit.
>
> Some of these accounts have been in existence for over forty years and have been of great convenience to our clients, especially those living out of New Zealand. It is obviously quite impracticable to get a formal acknowledgment signed by such clients each month.

On the motion of the President, seconded by Mr. Findlay, it was decided that a committee consisting of Messrs. Callan, Hadfield, and A. H. Johnstone should be set up to see if the Regulations should be amended to cover the cases mentioned.

Guarantee Fund: Liability for Contributions where Clerk becomes Partner (a) on 30th September; (b) on 1st December.—The Canterbury Society stated that a clerk who became a partner on the 30th September had objected to paying the full fee, and the Society desired a ruling on the point.

The Otago Society wrote, citing the case of a clerk who became a partner on the 1st December, and also asked for a ruling.

It was unanimously decided to notify the Societies concerned that the Council has no power to allow any proportionate payments, and the practitioners concerned must pay the full fee.

Production Fees—If full production fee payable for each title where mortgagor requires from one solicitor production of four titles held for separate mortgagees.—The Hawkes' Bay District Law Society forwarded the following letter :—

> My Council has decided to ask the New Zealand Law Society for a ruling upon the following point raised by a country member :—
>
> "The solicitor acting for a mortgagor (a deceased person's estate, as it happens) requires production from another solicitor acting for four separate and independent mortgagees of the titles held under their securities."
>
> "Is the mortgagees' solicitor entitled to £1 1s. in respect of each individual title, £4 4s. in all, or is he entitled only to £1 1s. on the first title and 2s. for each one additional ?"
>
> There being no defined local practice in such cases, my Council thinks the greater fee is strictly payable, there being no reason why the mortgagor should benefit by a coincidence but if that be so the fee is probably too high, having regard to the work etc. involved.

On the motion of Mr. Nicholson, seconded by Mr. Lusk, it was decided that the solicitor for the mortgagees was entitled to four full fees.

National Expenditure Adjustment Act, Mortgagors and Tenants Relief Act, Property Law Act, and Mortgagors Relief Act—Proposed Amendments.—The following letter was received from the Gisborne District Law Society :—

> I am instructed by my Council to submit to the New Zealand Law Society for its consideration the following proposed amendments to the National Expenditure Adjustment Act, the Mortgagors and Tenants Relief Act, the Property Law Act, and the Mortgagors Relief Act.
>
> 1. To the National Expenditure Adjustment Act and the Mortgagors and Tenants Relief Act. To bring within the provisions of the Acts a lease granted pursuant to a covenant for renewal contained in the lease which was subject to the provisions of the Act.
>
> 2. To the Property Law Act. By Section 2 of the Property Law Amendment Act, 1928, where a lease contains a covenant that the Lessor will grant a renewal of such lease and the Lessor has refused to grant such renewal on the grounds that the covenants of such lease have not been performed or observed the Lessee may apply to the Court for relief and the Court may order that the Lessor shall grant a renewal on such terms as to costs expenses damages compensation penalty or otherwise as the Court may think fit.
>
> We would suggest an amendment that where the Lessee has made default under such lease, and has applied to the Court for relief under the Mortgagors Relief Act and the Court has made an Order for relief, and the terms of such Order have been observed and performed and no further default has been made subsequent to the making of the Order, that the Lessee shall be entitled as of right to a renewal of such lease without having to make application to the Court under the 1928 Amendment.
>
> 3. To the Mortgagors Relief Act. To amend Section 5, sub-section 2 of the Principal Act by providing that if the Mortgagor is dead and Probate or Letters of Administration of his estate have not been applied for within six months after the date of his death service of such notice shall be sufficient if the same is affixed or left on the land or any house or building thereon and also by advertising the same in a newspaper published in the town nearest to the situation of the mortgaged land.
>
> Would you please place these matters before your Society in due course.

On the motion of Mr. A. H. Johnstone, it was decided that the matters contained in the above letter should be referred to a sub-committee consisting of Messrs. J. Glasgow and C. A. L. Treadwell for a report to be presented at the next meeting of the Society.

Solicitor accepting portion of Annual Fee for introducing Trustee Business.—A report was received from the Wellington District Law Society stating that the practitioner in question had attended a meeting of that Council and that his attention had been drawn to the ruling of the New Zealand Society on the matter.

Dominion Roll of Barristers and Solicitors.—The following letter from the Under-Secretary of Justice was received :—

> Referring to the deputation consisting of Mr. A. M. Cousins and yourself, which waited upon me recently, asking that a comprehensive Roll of New Zealand Barristers and Solicitors be prepared, I have to inform you that at the present time the Roll is complete, as at 31st December, 1924.
>
> The necessary instructions have, however, been issued to the various Registrars of the Supreme Court outside Wellington to forward to the Registrar at Wellington particulars of every person enrolled on and after 1st January, 1925, and also particulars of future admissions immediately upon enrolment.
>
> A complete Roll for the Dominion will be kept by the Registrar at Wellington, by means of the card system.

Enforcing in Victoria judgment of New Zealand Magistrates' Court.—The Otago District Law Society forwarded the following letter received from a firm of practitioners :—

> We recently had occasion to try and enforce the judgment of the New Zealand Magistrates' Court in Victoria and were met with the difficulties arising out of the cases cited by Adams, J., in *Mayer Finance Co. v. Ross and Another*, [1929] N.Z.L.R. 748.
>
> On communicating with our Agents in Victoria they inform us :—
>
> "The County Court Act 1928 of Victoria, Part 7, applies to inter-State debts and the expression 'State' means any State or part of the Commonwealth of Australia and also the Dominion of N.Z. As, however, there is no reciprocal provision in your local Magistrates' Act, the Government has not declared that the Provisions of Part 7 of the County Court Act of Victoria shall apply to judgments of the Magistrate's Court of N.Z. You will notice, also, the Act applies to inferior Courts of any State."
>
> We suggest that the Council consider the advisability of bringing the provisions of the Victoria Act of 1928 before the proper authorities with a view to obtaining an amendment of our Magistrates' Court Act in order to obtain the same benefit for us in respect of that Court as now obtained in respect of the judgments of the Supreme Court.

The following motion, proposed by the President and seconded by Mr. Lusk, was carried :—

> "That a copy of the above letter should be sent to the Minister of Justice with a recommendation that the Magistrates' Court Act should be amended as suggested."

Reduction of Ten per Centum of Solicitor and Client Charges.—The Auckland and Wellington District Law Societies had both given notice of their intention to move to rescind the resolution providing for a special discount of 10 per cent. on all solicitor and client charges.

Mr. O'Leary pointed out that the time had arrived for recission of this discount. The original intention

of the Canterbury Society, which had brought the matter forward in the first place, was to make the discount apply to conveyancing charges only, but the rule had been widened to include all solicitor and client charges. All fees had been automatically lowered through the lowering of values, and the incomes of most practitioners had been so reduced that an additional reduction of ten per cent. was very serious. Other professions had now ceased to grant any reductions. He, therefore, formally moved :—

"That Minute No. 21 of the Council's meeting of the 20th March, 1931, providing for a reduction of ten per cent. on all solicitor and client charges, be rescinded."

Mr. J. B. Johnston seconded the motion, stating that the Auckland Society was entirely in accord with Mr. O'Leary's remarks.

Mr. Howie stated that the Wanganui Society thought the ten per cent. reduction should be abolished with regard to conveyancing transactions, but not with reference to other matters. He, therefore, moved an amendment to this effect but without finding a seconder.

Mr. Swarbrick thought the reduction should apply until the depression lifts, as all other sections of the community were still bearing their share of the loss.

The motion was then put to the meeting and carried. by a large majority.

Admission Fees.—The Hawkes' Bay District Law Society requested the Council to give a ruling as to whether Hawkes' Bay or Wellington Society was entitled to the admission fee of a Napier student who had studied for one year in Napier and the rest of the time in Wellington, had been for five years in Wellington offices, but had gone to Napier to commence practice on his own account.

After some discussion, delegates from the Societies concerned undertook to settle the matter between themselves.

Law Practitioners Act—Solicitors Practising in Western Samoa.—The Auckland Society forwarded a letter from a firm of practitioners in this District asking that a Solicitor of the Supreme Court of New Zealand practising in Western Samoa should be entitled to the benefit of s. 4 (*e*) of the Law Practitioners Act, 1931, and so qualify for admission without examination as a Barrister after five years' practice as a Solicitor.

Consideration of this request was held over until the proposed amendments to the Law Practitioners Act, 1931, were discussed, when it was decided that the Government should be asked to rescind s. 4 (*e*).

Electric-power Boards Amendment Act, 1927, s. 8 (5).—The following report was received, and the members of the deputation thanked for their services :—

"In pursuance of the resolution passed by the Standing Committee on the 2nd March, 1934, a deputation consisting of Messrs. H. F. O'Leary and G. G. G. Watson and the Secretary waited on the Minister of Public Works (the Hon. J. Bitchener) on the 15th March, 1934.

"Mr. Watson outlined the facts as given by the Southland District Law Society, and pointed out the grave injustice that could arise through the engineer's certificate in such a case being made conclusive evidence. The Law Society desired particularly to draw the Minister's attention to the general principle involved in allowing any such certificate, whether under the Act in question or any other Act, to be 'conclusive,' and the Society was very strongly of opinion that the certificate should be *prima facie* evidence only.

"The Minister, who gave the deputation a very sympathetic hearing, stated in reply that he had already had under consideration the necessity for obtaining a certificate from some person other than an official of the interested Power Board, though he had not thought of going quite as far as was suggested by the deputation. He would, however, take into account the representations of the Society and give these every attention."

Law Practitioners Act, 1931—Secret Partnership of Unqualified Person with Solicitor.—The President reported to the Council that his attention had been drawn to a newspaper report of a case, in which the Judge stated in the course of his judgment that he had no doubt a secret partnership has existed between an accountant and a solicitor, now deceased, and that this constituted a breach of ss. 18 and 19 of the Law Practitioners Act, 1931. Section 19 provides that unqualified persons acting through the agency of solicitors shall be liable to a fine not exceeding £100 or to imprisonment for a term not exceeding one year.

It was resolved on the motion of Mr. A. H. Johnstone, to refer the question to the District Law Society concerned for enquiry and report; and that, failing an early report, if necessary the Secretary should take the matter in hand with a view to a prosecution.

Guarantee Fund—Annual Report.—The President, as Chairman of the Management Committee of the Solicitors' Fidelity Guarantee Fund, presented the annual report of the Fund, giving details of the claims made and paid during the year, and also presented a supplementary report setting out the position as at the day of the Council meeting.

Mr. O'Leary drew attention to the tremendous amount of work done by members of the Management Committee, and suggested that, as there was provision in the Act for remuneration, some payment should be made to these members. He, therefore, moved :—

"That the Council is of opinion that members of the Management Committee of the Solicitors' Fidelity Guarantee Fund should be remunerated for work done by them in dealing with claims on the Fund, and that the matter should be brought up at the next Council meeting."

The motion was seconded by Mr. Wiren and carried unanimously.

Superannuation for Society's Staff.—The President read a letter from the Secretary in which it was suggested that a superannuation scheme should be introduced for the Society's staff, each employee to contribute five per cent. of his salary and the Society to contribute an equal amount.

It was proposed by Mr. A. H. Johnstone, and seconded by Mr. J. B. Johnston,

"That Messrs. Watson and O'Leary be appointed a subcommittee to act with representatives of the Wellington District Law Society with respect to the superannuation scheme and other matters referred to in the Secretary's letter to the President, and to report to the next meeting of the Council."

The motion was duly carried.

Law Practitioners Act, 1931—Proposed Amendments.—On the conclusion of the foregoing business, the Council commenced the consideration of proposed Amendments of the Law Practitioners Act, 1931.

Australian Notes.

By Wilfred Blacket, K.C.

Ultra Vires.—In Vol. 9, p. 185, of the Journal I mentioned the case of Williams and Somme, convicted of coining, for the purpose of stressing the uses of the Criminal Appeal Court; but the case afterwards served to illustrate a constitutional point, for the prisoners appealed to the High Court on the ground that the appeal was incompetent inasmuch as it had been made by the Attorney-General of New South Wales, and not by the Federal Attorney-General. As the prosecution and conviction had proceeded under the Commonwealth Crimes Act in respect of a subject within the exclusive jurisdiction of the Commonwealth the point was upheld and an appeal instituted by the Federal Attorney-General, and this was allowed by the State Supreme Court and the sentences increased to four years and three years in lieu of the eighteen months' terms originally imposed. It was an evil day for the legal profession in New Zealand when the provinces were obliterated, for the continually recurring question of *intra* and *ultra vires* as between the Commonwealth and the States are to us even as a large and juicy joint which is always on the sideboard.

Barristers and Bibles.—It seems scarcely credible, but the Melbourne *Argus* asserts that the Victorian Auxiliary of the British and Foreign Bible Society has determined to send a Bible to every member of the legal profession in Melbourne. The motive for this offensive action is not stated. It may be that it is feared that Melbourne barristers do not know that "the world's best seller" is still on sale, or that they cannot obtain the few pence necessary to buy a copy, but whatever the reason may be I would prefer that these misguided enthusiasts should send me a tooth-brush and a bar of soap for these would constitute a less insulting gift.

The Law of Negligence.—*Allen v. Redding* in the High Court is a notable and even a surprising decision. The facts were absolutely simple. Allen was about to cross Hampton Street, Gardenvale, Victoria, at night when he saw a motor-car coming towards him. He went on, and, assuming that the motor-driver would see and avoid him, did not look towards this car again. The motor-driver, Allan Redding, the defendant, seems not to have been looking out either for he did not see the plaintiff until the car struck him. On these facts Judge Woinarski awarded the plaintiff a verdict for £200, but on appeal the State Supreme Court set aside this verdict and entered judgment for the defendant, being of opinion that the plaintiff's own negligence had caused the accident. On appeal to the High Court the Supreme Court judgment was set aside and the verdict for the plaintiff for £200 restored with the customary consequences. The unanimous opinion of the Court, Rich, Starke, Dixon, Evatt, and McTiernan, JJ., throws a very heavy burden upon motor-drivers, and on the facts of this case seems to relieve pedestrians of any duty to use care in crossing in front of motor traffic. In France and the United States foot passengers must look out for themselves, vehicles having complete right of way, and this for historical reasons that need not now be mentioned. In England thoroughfares were first established by and for foot passengers, but still they have to regard their own safety and look out for approaching vehicles, and avoid an accident if they by the exercise of reasonable care are able to do so, and the degree of care that is required of them is to be measured by the circumstances of the case. For instance, a foot-passenger should know that if he is wearing dark clothes and walking on a road with a dark surface it is sometimes very difficult for even a careful and competent driver to see him, and if a man has a desire to attain to old age it would be well for him also to remember that brakes are sometimes faulty; that drink is a curse, and that there are some flash drivers who delight in cutting things fine and making foot-passengers "skip" across to the footpath. Assuming that the High Court decision is right, the fact remains that any person who followed the plaintiff's example in his manner of crossing a street would be acting very foolishly—and yet, after all, is this not the test of the whole matter? One should not always expect perfection in the conduct of others, and this may be proved by a small incident. Ikey was very weary and with his father was waiting for a motor-bus to take them home, but when one came up it was nearly full and a big, rough, rude man shoved in ahead of them and left them standing in the road. "That vos a very bad man, fader," said little Ikey, the tears of tiredness trickling down his cheeks, "God ought to punish him." "God has punished him, Ikey," was the pious reply, "I've got his pocket-book."

The Preferable Baby.—If you want to be an Australian farmer your best policy is to begin by being born abroad, for migrants obtain many benefits from which the native-born are excluded. Victoria, some years ago, desiring to increase its rural population, and not succeeding in doing so by the methods indicated by the Book of Genesis, offered to train British migrants who should come out under agreement with the State Government and settle them on the land on bargain-sale terms. There was, apparently, some thought that the Government might find it inconvenient to carry out its contractual obligations, and so it was provided that compensation payable to any of these sturdy yeomen should be limited to £500. Now a large number of them are clamoring for much compensation. Parliament last year voted £450,000 to be applied in compensation, but it is feared that this amount may be very far from adequate to settle all claims. One of these migrants has brought an action for £7,500 damages for breach of contract, and if he succeeds in obtaining a verdict in excess of £500, others in considerable numbers will litigate their claims. It would seem therefore that the little-baby method would really have been the better way of adding to the rural population of Victoria.

Culture.—A little while ago some Sydney University students issued a magazine which was the filthiest production I ever partly looked at. Obscenity smothered in its filth the few gleams of wit that were contained in the four pages that I read, and I have been told that such was the case throughout, but no action was taken although—or was it "because"—it purported to emanate from the University. Now *Farrago*, the weekly newspaper of the University of Melbourne, comes out with a collection of blasphemous and repulsive assertions. It states for instance that the average "freshers" are "pimply of face and foul in thought and word if not in deed" and that "Patriotism is merely something used to stir up the great bulk of the people to go out and murder, and be murdered, for the business interests of a few."

Moreover, it would appear from the same newspaper that religion, the Holy Ghost, King, Country, and

Marriage are " ballyhoo and cant " and that " freshers " should become " disillusioned and cynical " concerning things generally. It is realised that this outpouring of fanaticism and foolishness is very unfortunate for the University very much needs subscriptions for a new club house and other purposes. Prosecution is advocated by some persons, but the Chancellor of the University promises that the matter will be adjusted by the proper authorities. As usual a professor has been found to praise with faint condemnation this offensive production. He is Professor Agar, the president of the Professorial Board, and the result is that Agar is now just about as popular as Ishmael was in his day. Curious isn't it that a very frequent consequence of University atmosphere is to cause a rush of arrogance to the head. Sometimes the malady is incurable.

Jack Shephard in Trouble Again!—Upon other occasions I have suggested that Australian juries showed a strange reluctance to convict men charged upon strong evidence with offences against women and girls, but Mervyn Shephard had no such luck. He was charged with indecently assaulting a girl of eleven years. On the trial at Parramatta, N.S.W., Quarter Sessions, the prosecutrix and her two sisters cheerfully admitted that since the Police Court hearing they had gone over their evidence and made a sort of home-lesson of it, and had rehearsed it several times. Judge Barton was, as Daisy Ashford would say, " deeply flabbergasted " at this admission. " It seems to me," said His Honour, " that it is extremely unfair to continue this evidence against the accused. The accused would not be satisfactorily convicted on such evidence." He suggested that the jury should acquit forthwith, but they refused to do so, and, after the depositions had by consent been read over to them, they briefly considered their verdict and " satisfactorily convicted " the prisoner who was then sentenced to twelve months.

Little Girls at Law.—The statesmen of New South Wales some time ago made the discovery that gambling on a large scale is a necessary element of national greatness, and promptly translated their sublime thought into noble action. One by-product of State support of gambling as one of our great national industries is revealed in the facts of *Prentice and others v. Brown*, a suit now proceeding, if one may say so, in the Equity Court. There were, when our story opens thirty-six young girls all under twenty-one working in a Devonshire Street, Sydney, factory. Hazel Brown, aged sixteen, being the youngest of these was naturally " put upon " by the others and made to go out daily to purchase the tarts and turnovers that the others, I mean other girls, required for lunch. Now Hazel, having an eye to the " little more " that Browning mentioned, bought her supplies from a Mrs. Keers who for these purchases of the tarts (I said " of " not " by ") gave by way of bonus a one three-hundredth share in a State lottery ticket on cash purchases to a certain amount and in course of time Hazel had eight of these shares. All would have gone well if Hazel had not had any luck, but when the Keers' ticket won a £5,000 prize the Devonshire Street factory was " humming like a hive " with the converse of thirty-five girls who said that Hazel owed to each of them one thirty-sixth of eight three-hundredths of £5,000. They did not descend to the details herein specified, but said they wanted their " cut of the dough," and have gone to Equity to obtain it or to enable the lawyers to obtain it, as indeed the case may be for the amount won is only £133 6s. 8d.

Practice Precedents.

Divorce: Application for Order that Copy Citation be admitted in Proof of Service in lieu of Original Citation.

Rule 16 of the Divorce Rules under the Divorce and Matrimonial Causes Act, 1928, provides that service of a Citation shall be effected by personally delivering a *true copy* of the Citation to the party cited, and producing the original if required: see *Sim on the Divorce Act and Rules, N.Z.*, 4th Ed. 61.

Rule 19 of the same rules provide that after service has been effected the Citation with a Certificate of Service endorsed thereon shall be forthwith returned into and filed in the Registry of the Supreme Court.

Sometimes the *original* is inadvertently served or the original becomes lost or mislaid after service. The following forms may be applied to meet such cases. Some reason must be given for claiming to be excused from returning the Citation: *Wilson v. Wilson*, (1912) 32 N.Z.L.R. 139, 15 G.L.R. 215.

The Certificate of Service provided by Form No. 9 (see *Sim on the Divorce Act and Rules, N.Z.*, 4th Ed. 94) requires to be amended or altered: See *Chillcott v. Chillcott*, (1873) 43 L.J. P. & M. 8, 29 L.T. 548.

By R. 109 of the Divorce Rules, R. 599 of the Code of Civil Procedure may be invoked whereby the Court may excuse non-compliance with the rules: See *Stout and Sim's Supreme Court Practice*, 7th Ed. 385.

In practice, a copy of the Citation is lodged when the Citation is extracted and this facilitates the issue of a sealed copy to meet such cases as aforesaid.

In England, the procedure as to service of a divorce petition has been changed under the present Act. Now a *notice* to all persons named *is endorsed on the petition* immediately after the signature. The petition is returned with a certificate as to service, and this appears to have taken the place of the Citation as we know it: See *Rayden and Mortimer on Divorce*, 2nd Ed. 132.

Formerly the procedure as to " Lost Citation " was set out in *Rayden's Divorce Practice*, 1910 Ed., 112. The procedure therein is that which prevails to-day in our Courts.

MOTION FOR ORDER THAT COPY CITATION BE ADMITTED IN PROOF OF SERVICE IN LIEU OF ORIGINAL CITATION.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

BETWEEN A.B. of etc., petitioner

AND

C.D. of etc., respondent.

Mr. of counsel for the above-named petitioner to move in Chambers before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Courthouse at on day the day of 19 or so soon thereafter as counsel can be heard *for an order* that the true copy of the Citation extracted herein and annexed to the affidavit of of service of the Original Citation upon the above-named respondent filed herein be admitted in proof of such service in lieu of the Original Citation as required by R. 19 of the rules made under the Divorce and Matrimonial Causes Act, 1928, AND FOR A FURTHER ORDER that the filing of the Citation with a Certificate of Service endorsed thereon as provided by R. 19 of the aforesaid rules be dispensed with

OR IN THE ALTERNATIVE for an order that a copy of the Citation extracted herein certified to be correct by the Registrar of this Court be filed with an affidavit of service of the original citation upon the respondent UPON THE GROUNDS that the said Original Citation was served upon and left with the above-named respondent and was thereafter mislaid and cannot be found AND UPON THE FURTHER GROUNDS that the respondent has in no way been prejudiced by the loss thereof AND UPON THE FURTHER GROUNDS set out in the affidavits of filed herein.

Dated at this day of 19 .

Solicitor for petitioner.

Certified correct pursuant to Rules of Court.

Counsel for petitioner.

Reference: His Honour is respectfully referred to the following rules and authority:—

1. Rule 109 of the rules made under the Divorce and Matrimonial Causes Act, 1928;
2. Rule 599 of the Code of Civil Procedure; and
3. *Chillcott v. Chillcott*, (1873) 43 L.J. P. & M. 8, 29 L.T. 548.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I E.F. of law clerk make oath and say as follows:—

1. That I am a law clerk employed by of solicitor for the petitioner above-mentioned.

2. That I am the E.F. mentioned in the affidavit of service filed in this suit.

3. That after effecting service in the manner set out in the affidavit of service filed herein I mislaid the original Citation in these proceedings issued out of this Court.

4. That I have searched diligently for the said original Citation but have been unable to find same.

5. That I have made enquiries of the respondent concerning the said Original Citation but beyond showing me the copy of the said Original Citation he could not assist me or give me any assistance relative to the said loss.

Sworn at, etc.

AFFIDAVIT OF SERVICE.

(*Same heading.*)

I E.F. of law clerk make oath and say as follows:—

1. That I am a law clerk employed by solicitor herein for the above-named petitioner.

2. That the Citation bearing date the day of 19 issued under the Seal of this Court against the respondent in this suit a true copy whereof is hereunto annexed and marked with the letter "A" was duly served by me on the said at by showing to him the original citation under seal and by leaving with him a true copy thereof on the day of 19 .

3. That at the same time and place I delivered to the said personally a certified copy under Seal of this Court of the petition filed in this suit.

4. That at the time of such service the said acknowledged service and signed an acknowledgment thereof which acknowledgment is annexed hereto and marked with the letter "B."

Sworn, etc.

ACKNOWLEDGMENT.

I C.D. of : do hereby acknowledge that I am the C.D. mentioned in the original citation of A.B. shown to me on the day of 19 and the C.D. mentioned in the petition and copy of Citation served on me at this day of 19 .

Signature.

Witness: Name:
Address:
Occupation:

CERTIFICATE (ON COPY OF CITATION.)

The Citation of which this is a duplicate copy was duly served by the undersigned etc. as in Form No. 9.

ORDER GIVING LEAVE TO PROCEED ON DUPLICATE CITATION.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the Motion filed herein and the affidavits of filed in support thereof AND UPON HEARING Mr. of counsel for the petitioner IT IS ORDERED that the affidavit of service made by E.F. sworn on the day of 19 and filed herein be admitted as sufficient proof of service and that the petitioner be allowed to proceed with the petition upon a duplicate citation under Seal of the Court being extracted and returned into and filed in the Registry of this Court at with a certificate endorsed thereon as follows:—

The Citation of which this is a duplicate was hereby served by the under-mentioned E.F. on the within-named C.D. of : : at on the day of 19 .

By the Court,

Registrar.

Rules and Regulations.

Post and Telegraph Act, 1928. Alterations in Rates and Charges for Ordinary Telegrams and Letter-telegrams.—*Gazette* No. 19, March 29, 1934.

Post and Telegraph Act, 1928. Alterations in Rates and Charges for Money Order Telegrams issued in New Zealand for payment within the Dominion.—*Gazette* No. 19, March 29, 1934.

Municipal Corporations Act, 1920. Order in Council providing for Building Regulations in Boroughs of Dannevirke, Woodville, Pahiatua, and Eketahuna.—*Gazette* No. 19, March 29, 1934.

Shipping and Seamen Act, 1908. Amended Rules for the Examination of Masters and Mates.—*Gazette* No. 19, March 29, 1934.

Customs Acts Amendment Act, 1931. Postage Stamps exempt from Primage Duty.—*Gazette* No. 22, April 5, 1934.

Transport Law Amendment Act, 1933. Provisions as to Exemption of certain Types of Passenger Service Vehicles from Requirements as to Certificate of Fitness.—*Gazette* No. 22, April 5, 1934.

Convention between United Kingdom and Belgium respecting Legal Proceedings in Civil and Commercial Matters. Extension to New Zealand.—*Gazette* No. 22, April 5, 1934.

Public Works Act, 1928; Motor-vehicles Act, 1924. Colours prescribed for Figures on Indication-discs in Terms of the Heavy Motor-vehicle Regulations, 1932.—*Gazette* No. 22, April 5, 1934.

Marriage Act, 1908. Alterations to Boundaries of Morrinsville, Huntly, and Hamilton Marriage Districts.—*Gazette* No. 27, April 19, 1934.

Births and Deaths Registration Act, 1924. Alterations to Boundaries of Morrinsville, Huntly, and Hamilton Registration Districts.—*Gazette* No. 27, April 19, 1934.

Companies Act, 1933. The Companies Regulations, 1934.—*Gazette* No. 27, April 19, 1934.

Motor-vehicles Insurance (Third-party Risks) Act, 1928. Motor-vehicles (Third-party Risks) Regulations, 1934.—*Gazette* No. 27, April 19, 1934.

Poor Prisoners' Defence Act, 1933. The Poor Prisoners' Defence Regulations, 1934.—*Gazette* No. 27, April 19, 1934.

New Books and Publications.

The Pace that Kills. Speed as a Factor in Motor Accidents, 1934. By T. C. Foley. (Public Affairs News Services.) Price 1/6d.

Chitty's Annual Statutes for 1933. Vol. 28, Pt. 2. By Hon. Dougall Meston. (Sweet & Maxwell, Ltd.) Price 42/-.

Spanish Origin of International Law. By J. B. Scott. Francisco De Vitoria and his Law of Nations, 1934, Part I. (Clarendon Press.) Price 21/-.