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

"The truth about our Common Law lies somewhere between the opposing views of Mr. Bumble and Coke, L.C.J. (a) *that it is a Hass, and* (b) *that it is the perfection of human reason."*

—The *Times* (London).

Vol. X. Tuesday, June 5, 1934 No. 10

The Correct Citation of Reports.

AN American librarian recently, in referring to the Law Reports of England, said that his experience has been that more mistakes are made in citing that series than in citing any other English Reports. This gentleman, who is the Minnesota Law Librarian, would have possibly spoken even more feelingly if he had experienced the too-frequent manner in which Law Reports generally are mis-cited in the Courts in this country.

Apart from that precision with which any expert is expected to handle his tools of trade, there is, in the profession of the Law, a courtesy due to the Bench and to one's fellow practitioners in correctly citing authorities. It is only when references given in Court have to be checked, the seriousness of the sins of commission and omission in citation are realized in the resultant loss of time and in trouble which could have been obviated. And it must not be overlooked that mis-citation in Court gives the appearance of inefficiency.

When the Incorporated Council of Law Reporting undertook the publication of authorized Reports in 1865, there were current fourteen sets of accepted Reports, besides a number which were unacceptable or irregular. On the inception of the *Law Reports*, thirteen sets of hitherto-acceptable reports went out of existence; those of Best and Smith remained; the short-lived *New Reports* were abandoned in 1866, and the *Jurist* in 1867; and *The Reports* lasted from 1893 to 1895, when they became embodied in the *Law Reports* which remain the official series.

Before considering the *Law Reports*, attention may be drawn to the various Reports which ante-dated the official series. These, when cited, should be referred to by their proper names, not by initials. Thus, for example, "*Barnewall and Adolphus Reports*" will not be confused with "*Barnewall and Alderson Reports*," as they might be if "B. and A." were given, or the permissible written abbreviations of "B. and Ad." or "B. and Ald." (Strange as it may seem, the latter references have been heard *coram Judice.*) An example of the verbal citation of a case in one of these pre-1865 Reports is, "*Draper v. Thompson*, 4 Carrington and Payne, 84, at page 86."

In some of the circuit towns, and in the majority of office libraries in the Dominion, the old Reports are not to be found. It is accordingly a courtesy leading to facility of reference, to *add* the parallel reference to the *English Reports* reprint of the old reports. Thus, to the *Carrington and Payne* reference already given, may be added "172 English Reports, 618, at page 619." (The *New Zealand Official Reports*, as may have been noticed, invariably provide this convenience for their users.) Among the things "not done by the best counsel," is the giving of the *English Reports*' reference only, and the omission of the source whence that reprint is derived.

Now we come to the English Reports which, in their mis-citation, bring down comment at times indiscriminately upon the heads of the just and the unjust alike. How often we hear counsel quoting "Q.B.," "Q.B.D." quite oblivious of the several series which are so distinct, and of a citation that may indicate any one or more of them. To what does "1 Q.B." refer? The Judge, used to correct references will go at once to Adolphus and Ellis's *Queen's Bench Reports*, New Series, which in eighteen volumes cover the years 1841 to 1852. But, if the case cited were of an 1865 vintage, the former reference would be as misleading as would be a reference to "Q.B.D." which, preceded by the same "1," would most likely be a case decided in 1875. A reference to "1 Q.B.," actually given in Court, sent a harassed reporter to Adolphus and Ellis's *Queen's Bench Reports*, whereas, after a protracted search through "L.R. 1 Q.B." and "1 Q.B.D." the correct reference was found to be "[1891] 1 Q.B.," where the parties' names were found the reverse of those given in Court. He felt with the learned Judge at whom counsel had quoted "Q.B.D.," "Q.B.D.," after being gently corrected from the Bench: "'[1894] 2 Queen's Bench,' please." His Honour, on counsel's persistence in error, leaned over and said: "You seem determined to stick to your 'Q.B.D.'; but, if you won't cite correctly, I say, 'U.B.D.'!"

In passing, it should be said that "the best counsel" do not say "*versus*" in quoting a case to the Court; but, for example, "Smith *and* Jones"; and that "Rex" and "Regina" fall from the lips of the elect as "The King" or "The Queen," however abbreviated these august names may be in the Report from which quotation is made. Again, never quote "A.C." or "Q.B.D." *simpliciter*; always "Appeal Cases," "Queen's Bench Division," and so on.

As to citations generally; where a case appears in two or more series of Reports, unless there be some special reason to the contrary, counsel should direct the Court to the official or semi-official series—*e.g.*, the *Law Reports*, in preference to the *Law Journal*, or *Law Times*, or *Times Law Reports* series; the *Victorian Law Reports* to the *Argus Reports*, and so on.

In the best-regulated Reports the "mode of citation" usually appears at the head of the Table of Cases, as in the *Law Reports* series since 1885, or the *Commonwealth Law Reports*, *Queensland State Reports*, and, in the present series, the *New Zealand Law Reports*, and in many others. In other series, the method of citation appears in bold type at the head of the title page, such as *1933* SESSION CASES, or on an early, otherwise blank, page, as in the *Irish Reports*. But, if there is any doubt as to citation, open up any modern Reports where two printed pages face one another, and, at the top of the facing pages, and usually carried across the inner margins, the proper method of citation will appear.

This is a general rule in citation: Where the year appears in brackets—[ ]—the year is cited: [1934]

1 Ch. is "1934 one Chancery." But where, as in a reported case a year in parentheses—( )—precedes, that is the year in which the case was decided, and, in general, it is not cited; but the number which follows *must* be cited: For example, *Pearks v. Moseley*, (1880) 5 A.C. 714 is sufficiently cited as: "*Pearks* and *Moseley* five Appeal Cases, 714."

These two rules thus emerge:

(*a*) Where [ ] (brackets) appear always quote the year; if followed by a number, such as, [1932] 2 Ch., quote both year and volume number, as the citation indicates more than one volume in the year.

(*b*) Where a numeral precedes the name of a Report series, such as 5 A.C. or 18 Ch. D., quote the numeral. (In these circumstances, when, in a written Report or a Digest, the year of the decision appears in parentheses, this is for the convenience of the reader to enable him to follow the sequence of decisions; the year, when so appearing in parentheses, need not be quoted verbally).

Having made these general observations, we come to the citation of particular reports. There is no difficulty as to the Reports of the several overseas Dominions, if the foregoing suggestions are kept in mind. But trouble seems to centre in cases decided in the English Divisional Courts, and in Scottish decisions.

In the *Law Reports*, there are certain series to be borne in mind. The pre-official Reports years—namely before 1865—are remarkable for a number of private Reports to which reference has been made, but they may be eliminated for the present. The *Law Reports* fall into periods:

(*1865-1875*): These are always preceded, in citation, by the words "Law Reports" and the volume number: Cite them as follows:

L.R.C.C.R. (2 vols.): "Law Reports, (*number*) Crown Cases Reserved."
L.R.C.P. (10 vols.): "Law Reports, (*number*) Common Pleas."
L.R. Ch. App. (10 vols.): "Law Reports, (*number*) Chancery."
L.R. Eq. (20 vols.): "Law Reports, (*number*) Equity Cases."
L.R. Exch. (10 vols.): "Law Reports, (*number*) Exchequer."
L.R. English and Irish Appeals (7 vols.): "Law Reports, (*number*) House of Lords."
L.R.P. & D. (3 vols.): "Law Reports, (*number*) Probate and Divorce."
L.R.P.C. (6 vols.): "Law Reports, (*number*) Privy Council."
L.R.Q.B. (10 vols.): "Law Reports, (*number*) Queen's Bench" (*not* Queen's Bench Cases or Queen's Bench Division).
L.R. Sc. & Div. (2 vols.): "Law Reports, (*number*) Scottish and Divorce Appeals."

(*1875-1890*): These are quoted according to the Court, and preceded by the volume number:

(1–15) App. Cas. or A.C.: "(*number*) Appeal Cases."
(1–45) Ch.D.: "(*number*) Chancery Division."
(1–5) C.P.D.: "(*number*) Common Pleas Division."
(1–5) Ex. D.: "(*number*) Exchequer Division."
(1–15) P.D.: "(*number*) Probate Division."
(1–25) Q.B.D.: "(*number*) Queen's Bench Division."

(*1891* TO PRESENT TIME): These are preceded by the year alone in brackets, with or without a low number (1, 2, or 3,) for that year's volumes. They are cited as follows:

[1933] A.C.: "Nineteen thirty three Appeal Cases."
[1933] 1 Ch.: "Nineteen thirty three, one Chancery."
[1933] 2 K.B.: "Nineteen thirty three, two King's Bench."
[1933] P.: "Nineteen thirty three, Probate."

Now for some occasional difficulties:

SCOTTISH REPORTS: In Scotland the name of the reporter persists until 1908 for citation purposes—*e.g.*, Rettie, Fraser, Macpherson, and so provides a trap for the unwary. These Reports should be cited according to the name of the first reporter on the title-page of the particular volume:

First series of Session Cases: "(Volume number) Shaw (page)."
Second series of Session Cases: "(Volume number) Dunlop (page)."
Third series of Session Cases: "(Volume number) Macpherson (page)."
Fourth series of Session Cases: "(Volume number) Rettie (page)."
Fifth series of Session Cases: "(Volume number) Fraser (page)."
New series (since 1907): "(Year) Session Cases (page)."

IRISH REPORTS: The Irish Law Reports do not present any difficulty: The correct citation is generally found centred on an otherwise blank leaf backing the title-page such as: "8 L.R. Ir.," or "[1898] 2 I.R."

NEW ZEALAND REPORTS: The first five volumes of the *New Zealand Law Reports* are each in two separately numbered parts: Court of Appeal cases, and Supreme Court cases. Citation of cases in these five volumes is as follows:—

For Court of Appeal cases, cite: "New Zealand Law Reports (volume number) Court of Appeal (page)."
For Supreme Court cases, cite: "New Zealand Law Reports (volume number) Supreme Court (page)."

In citing the *N.Z Jurist Reports*, (1873-79) care should be taken in giving "First Series," "Second Series," or "Cases in Mining Law," since each is separately numbered and paged.

In *Ollivier, Bell, and Fitzgerald's Reports*, the Supreme Court cases and Court of Appeal cases are similarly paged separately, and the name of the Court should be cited preceding the page referred to.

NEW SOUTH WALES: There is a considerable difference between citing "New South Wales Law Reports" and "New South Wales State Reports." These are two distinct series, and each is cited by volume number; the former ran from 1880 until the Commonwealth was constituted; the latter run from 1901, when the volumes were numbered from "1" onwards. Since both are cited by the volume number preceding the name of the Reports, the proper citation of the series is most necessary.

Lord Chancellor Westbury said that reporting is a privilege of the Bar. Consequently, only a Law Report taken or vouched for by a practising or qualified barrister may be taken in Court. This accords with the long practice of reporting, which, at first, according to Maitland, was identified with the law-apprentices in their note-books, and followed by the reports of Plowden, Coke, Dyer, etc., in the sixteenth century, and Ventris, Shower, Holt, Salkeld, Beaven, East, and others, later. The Reports are thus provided by counsel for counsel.

It remains to say that it is well for the members of the Bar who use Reports as their tools of trade to handle them with dexterity; but, as officers of the Court, it is incumbent on them to assist the Bench. It is a hindering, or a doubtful assistance, to mis-cite cases. This does not accord with the duty of courtesy owed to the Bench and to fellow-counsel. While the foregoing suggestions as to correct citation do not pretend to be exhaustive, it is hoped they may be of assistance as a working guide to promote fulfilment of that duty.

Summary of Recent Judgments.

SUPREME COURT Wellington. 1934. May 21, 25.

McINTOSH v. McINTOSH.

Evidence—Divorce—Continuous Separation—Spouses living apart under Deed of Separation—Evidence to negative Legitimacy of Child born during period of Separation—Admissibility.

The legal presumption of access and of the legitimacy of a child of the spouses born during marriage is rebutted by its conception during the operation of a decree of the Court pronouncing their separation, or during a period when the spouses are living apart under a deed of separation; and the evidence of either spouse to negative legitimacy is, therefore, admissible.

Andrews v. Andrews and Chalmers, [1924] P. 255, and **Mart v. Mart,** [1926] P. 24, applied.

Russell v. Russell, [1924] A.C. 687, **R. v. Seaton,** [1933] N.Z.L.R. 548, and **G. v. G.,** *ante,* 84, distinguished.

Counsel: **Stephenson,** for the petitioner.

Solicitor: **A. J. West-Walker,** Wellington, for the petitioner.

Case Annotation: *Andrews v. Andrews and Chalmers,* E. & E. Digest Supplement No. 8 to Vol. 3, p. 41, para. 22*a*; *Mart v. Mart, ibid,* 4; *Russell v. Russell, ibid,* 28.

SUPREME COURT Auckland. 1934. March 2; May 17. *Herdman, J.*

CANDY AND ANOTHER v. MAXWELL AND ANOTHER.

Motor-vehicles—"Centre-line"—Road partly formed of Bitumen—Sides of Bitumen Formation consisting of Metal, Sand, Gravel, and Grass—"Portion of road used or reasonably usable . . . for vehicular traffic in general"—Motor-vehicles Act, 1924—Motor-vehicle Regulations, 1933, Reg. 11 (1), (2).

A surveyed road was 54 ft. in width, of which the width of the bitumen formation at the point of impact of two motor-vehicles was 28 ft., the surface at the side of the bitumenized portion being composed of metal, sand, gravel, and grass. Deducting the width of the grass surface, a width of 39 ft. was left, consisting partly of the bitumen formation and partly of metal, sand, and gravel.

In these circumstances, construing Reg. 11 of the Motor-vehicle Regulations, 1933, viz.:—

"(1) In this regulation, where not inconsistent with the context, 'centre-line' means the middle line of that portion of the road used or reasonably usable for the time being for vehicular traffic in general,"

Held, That the centre-line of the bitumen formation is to be regarded as the "centre-line" of the particular road.

Semble, When there is definite proof that a bitumen road is in existence, the correct view to take is that it is the road which must be considered as being actually used.

R. v. Hurt, (1920) 32 Can. Crim. Cas. 21, [1920] 1 W.W.R. 89, referred to.

Counsel: **Strang,** for the plaintiffs; **W. J. King,** for the defendants.

Solicitors: **James Oliphant,** Te Awamutu, for the plaintiff; **King and McCaw,** Hamilton, for the defendants.

Case Annotation: *R. v. Hurt,* E. & E. Digest, Vol. 42, note *q*, p. 843.

NOTE:—For the Motor-vehicles Act, 1924, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 8, title *Transport,* p. 800.

SUPREME COURT Palmerston North. 1934. May 10. *Reed, J.*

LEE v. HOROWHENUA ELECTRIC-POWER BOARD.

Electric-power Boards—"Consumer"—Proprietor of Land in Board's District employing Share-milkers—Milkers having free cottages and milking-sheds supplied with Electricity—Right of Board to require Proprietor to apply for such Supply—Electric-power Boards Act, 1925, s. 82 (*o*)—Electrical Supply Regulations, 1927, cls. 3, 11, 15.

Where a proprietor of land in the Horowhenua Electric-power Board District is an employer of share-milkers on the terms that he receives the profits and accounts to them for their agreed proportions, each of such share-milkers having a free cottage and a milking-shed equipped with milking-machines and installed with electricity, there is nothing in the Electric-power Boards Act, 1925, the Electrical Supply Regulations, 1927, or the By-laws of the Horowhenua Electric-power Board to prevent the Board from requiring such proprietor to apply as a consumer in respect of the supply of electricity to his share-milkers' cottages and sheds with consequent liability on his part to pay for such supply.

Counsel: **W. A. Izard,** for the plaintiff; **Park,** for the defendant.

Solicitors: **Marshall, Izard, and Wilson,** Wanganui, for the plaintiff; **Park and Adams,** Levin, for the defendant.

NOTE:—For the Electric-power Boards Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Electric Lighting and Power,* p. 4.

SUPREME COURT Wellington. 1934. May 15, 23. *Reed, J.*

HARGREAVES v. WELLINGTON WATER-SIDE WORKERS' INDUSTRIAL UNION OF WORKERS.

Industrial Conciliation and Arbitration—Industrial Union—Rules making Admission to Membership "subject to the consent of the Executive"—*Ultra Vires*—Executive's refusal of admission—No Award in existence—Preference to Unionists ruling Employment of Labour and Union in control of Supply of Labour—Damages—Industrial Conciliation and Arbitration Act, 1925, s. 5 (*c*) (viii).

The right to work at any calling is the natural right of every human being; it may be limited by statute, but such limitation must be expressed in plain and unambiguous terms as must a statutory provision which is claimed to authorize such limitation by by-law or regulation.

Magner v. Gohns, [1916] N.Z.L.R. 529, referred to.

Section 5 (*c*) (viii) of the Industrial Conciliation and Arbitration Act, 1925, indicates the intention that unions shall be open, subject to an applicant being able to comply with conditions as to membership.

It is *ultra vires* of a union, registered as an industrial union under that Act, to make admission to membership of the union subject to the consent of the executive, thus providing that in the unfettered discretion of the executive a person may be excluded from membership of the union.

Amalgamated Society of Railway Servants v. Osborne, [1910] A.C. 87, and **Staples and Co., Ltd. v. Mayor, &c., of Wellington,** (1900) 18 N.Z.L.R. 857, followed.

A person refused membership solely on the ground that the executive does not consent to his admission has suffered an infringement of his legal rights, and is entitled at least to nominal damages. Where, although there is in existence no award or industrial agreement giving preference to unionists, such preference in fact rules the employment of labour and the union is in practical control of the labour to be supplied, the damages flowing from the denial of that right may be substantial.

In re Polemis and Furness, Withy and Co., Ltd., [1921] 3 K.B. 560, and **Hargreaves v. Wellington Waterside Workers' Industrial Union of Workers,** [1932] N.Z.L.R. 1211, followed.

So held by *Reed, J.*, declaring plaintiff to have been a member of the defendant union since December 16, 1933, with writ of mandamus to enrol him as a member accordingly; and awarding damages for loss of earnings arising from defendant union's refusing him admission to membership.

Counsel: Shorland, for the plaintiff; **M. J. Gresson,** for the defendant.

Solicitors: Chapman, Tripp, Cooke, and Watson, Wellington, for the plaintiff; **Wynn-Williams, Brown, and Gresson,** Christchurch, for the defendant.

Case Annotation: *In re Polemis and Furness, Withy and Co., Ltd.*, E. & E. Digest, Vol. 36, p. 29, para. 151; *Amalgamated Society of Railway Servants v. Osborne, ibid.*, p. 273, para. 215.

NOTE:—For the Industrial Conciliation and Arbitration Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Industrial Disputes*, p. 939.

SUPREME COURT
Napier.
1934.
March 1;
April 20.
Reed, J.

RE BURNS (A BANKRUPT), EX PARTE THE OFFICIAL ASSIGNEE IN BANKRUPTCY.

Bankruptcy—Fraudulent Preference—Transfer of Property to Creditor within Three Months of Bankruptcy—Principles of Law applicable to test Facts as to whether such Transfer Fraudulent and Void against Creditors—Bankruptcy Act, 1908, ss. 79, 82 (*f*)—Statute 13 Eliz., c. 5.

Motion by the Official Assignee in Bankruptcy in the estate of Mrs. Agnes Fleming Burns, a bankrupt, to set aside a transfer and delivery of furniture by her to the Wanganui Furniture Manufacturing Co., Ltd., on the grounds, (*a*) That such transfer and delivery was a fraudulent preference of that company; and/or (*b*) that such transfer and delivery constituted a fraudulent conveyance or transfer of part of the property of the said Agnes Fleming Burns and was an act of bankruptcy within s. 26 (*b*) of the Bankruptcy Act, 1908; and (*c*) that such transfer and delivery constituted a fraudulent conveyance of chattels within the statute 13 Eliz., c. 5.

To establish a fraudulent preference by an insolvent debtor where bankruptcy has supervened within three months of the transfer of the property to the creditor, the following conditions must be fulfilled:—

(*a*) The debtor must have acted with a view to giving that creditor a preference over the other creditors—*i.e.*, that the real dominant and substantial motive was the desire to prefer the particular creditor; and

(*b*) The creditor must have accepted the transfer with knowledge that the intention of the debtor was a desire to prefer the particular creditor.

In re Lambert, [1931] G.L.R. 379, applied.

Whether a transfer was fraudulent, or is deemed to be fraudulent, under the Bankruptcy Act, 1908, is a question of fact—viz., that it was a transfer by a debtor of the whole of his property to one of his creditors in satisfaction of a past debt, or it was the transfer of so much of his property as to prevent him from carrying on his trade.

Under the Fraudulent Conveyances Act, 1571 (13 Eliz., c. 5), a voluntary transfer of property is void against the creditors if it is made with *intent* to defeat, hinder, or delay creditors. The Court must decide, in each particular case, whether, in all the circumstances, it can come to the conclusion that such was the intention of the transferor.

Thompson v. Webster, (1859) 4 Drew. 628, 61 E.R. 241, followed.

Lusk and **Humphries,** for the Official Assignee; **Brodie,** for the Wanganui Furniture Manufacturing Co., Ltd.

Held, That, on the facts appearing in the judgment tested by the above stated principles of law, the transaction before the Court could not be set aside under the Bankruptcy Act, 1908, or under the Fraudulent Conveyances Act, 1571 (13 Eliz., c. 5).

Motion dismissed.

Solicitors: Kennedy, Lusk, and Morling, Napier, for the Official Assignee; **Brodie and Keesing,** Wanganui, for the Company.

Case Annotation: *Thompson v. Webster*, E. & E. Digest, Vol. 25, p. 184, para. 251.

NOTE:—For the Bankruptcy Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, Vol. 1, title *Bankruptcy*, p. 466.

SUPREME COURT
Auckland.
1934.
May 25, 26.
Ostler, J.

PUBLIC TRUSTEE v. M.

Mortgagors and Tenants Relief—Practice—Application for Relief—Action for Principal and Interest—Application filed after Service of Writ—Good Defence Until disposal of Application—Jurisdiction—Court's Power to Stay Action for reasonable Time to enable Disposal of Action—Mortgagors and Tenants Relief Act, 1933, s. 10 (*f*).

Two motions heard at the same time: (*a*) by plaintiff mortgagee asking for an order striking out the statement of defence filed in an action for recovery of principal and interest due on a mortgage of land; and (*b*) by defendant mortgagor for an order of stay of proceedings.

Plaintiff issued a writ for recovery of principal and interest, alleging default under the mortgagor's covenants. The writ was issued on March 2, 1933, and on March 7 defendant filed a statement of defence admitting the mortgage but denying default, and pleading the filing of an application for relief praying for an order under s. 10 (*f*) of the Mortgagors and Tenants Relief Act, 1933, postponing plaintiff's right to sue for or recover principal or interest, and for other relief. On the same day the application for relief was filed asking, in addition, for remission of arrears and reduction of the rate of interest.

The action was set down for hearing at the sittings of the Court commencing on May 1. On May 15 plaintiff filed a motion for an order striking out the statement of defence as being an abuse of the process of the Court. On May 21 defendant filed motion for a stay of proceedings.

Johnstone, K.C., with him **H. J. Butler,** for plaintiff; **Cocker,** for the defendant.

Held, 1. That the filing of an application for relief is a good defence to an action for recovery of principal and interest moneys until disposal of the application.

2. That the legal right of a mortgagee to sue for principal and interest due is subject to the right given to the Court under s. 10 (*f*) of the Mortgagors and Tenants Relief Act, 1933, to postpone that right; and the Court, in appropriate circumstances, has jurisdiction to stay the mortgagee's action for a reasonable time to enable disposal of the application for relief.

The motion for an order striking out the statement of defence was dismissed, thus giving defendant a period of three months before the next sittings of the Court to have his application heard and disposed of. The motion for stay of proceedings was adjourned *sine die* with right reserved to either party to bring it on at any time of giving three days' notice to the other side, and defendant was enjoined to be diligent in getting his application disposed of and not to use it merely for purposes of delay.

Solicitors: Public Trust Office Solicitor, Auckland, for the plaintiff; **Melville, Ferner, and Broun,** Auckland, 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. Dunedin. 1934. March 6, 24.

WROBLENSKI v. PARNELL.

Licensing—Offences—Keeping-open for sale of liquor after Statutory Closing Hours—Sale by Boarder—No Authority from Licensee, and without His Knowledge—Whether Licensee liable—Licensing Act, 1908, s. 190.

On appeal on point of law against a dismissal of an information charging the respondent with keeping open his licensed premises for the sale of liquor at a time when the said premises were directed to be closed,

F. B. Adams, for the appellant; **Paterson,** for the respondent.

Held, That a licensee is not guilty of the offence of selling liquor during the hours when his licensed premises are directed to be closed, where the sale was made by a boarder without the licensee's authority to sell liquor to any person on his behalf.

Kenning v. Forster, [1919] N.Z.L.R. 156, applied.

Solicitors: Adams Bros., Dunedin, for the appellant; **Lang and Paterson,** for the respondent.

NOTE:—For the Licensing Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 4, title *Intoxicating Liquors,* p. 234.

SUPREME COURT Palmerston North 1934. Feb. 13; May 7. *Blair, J.*

F. W. SCHULTZ v. COMMISSIONER OF STAMP DUTIES.
A. O. SCHULTZ v. COMMISSIONER OF STAMP DUTIES.

Revenue—Stamp Duty—Will—Testator devising Property to Son—Condition that same be transferred to Son subject to existing First Mortgage on Devisee's giving Trustees Second Mortgage for difference between First Mortgage and £15 per Acre—Whether Transfer liable to Assessment of Stamp Duty as Conveyance on Sale—Statutory Exemption—"Extent to which" Devisee "is so entitled" under the Will—Stamp Duties Act, 1923, s. 81 (*d*).

Appeals by way of case stated from two assessments of stamp duty by the Commissioner of Stamp Duties.

The testator, O. H. J. Schultz, by his will made a devise of certain farm property to his son, Frederick,

> "upon condition that he takes over the liability of the amount of the mortgage charge due thereon at the date of my death secured to the Bank of New South Wales and in addition gives a second mortgage in favour of" [the named trustees] "for the difference between the aforesaid mortgage to the said bank and the sum of £15 per acre such second mortgage charge in favour of my trustees shall carry interest at the rate of £5 per centum per annum and shall contain all such covenants," etc.

The bank mortgage at the date of testator's death amounted to £3,483 6s. 3d. and the difference between that sum and £15 per acre was £3,914 13s. 9d. The trustees transferred the property to Frederick subject to the bank mortgage and took from him a second mortgage for the latter amount.

Testator also devised a property to his son, Albert,

> "upon condition that he executes in favour of my trustees a mortgage charge over the said farm for an amount equal to £15 per acre."

In other respects the condition was similar to that made in the case of testator's son Frederick. The trustees transferred the farm to Albert unencumbered and took a mortgage for £5,291 5s.

In each transfer the relevant provisions of the will were recited.

The Commissioner of Stamp Duties assessed Frederick's transfer as being liable to £43 9s. stamp duty as on an instrument of conveyance on sale for a consideration of £3,914 13s. 9d., the amount of the second mortgage. In Albert's case, the duty was assessed at £58 6s. as on a consideration of £5,291 5s.

On appeal from these assessments,

Cullinane, for both appellants; **Cooper,** for the respondent.

Held, allowing both appeals, That the exemption provided by s. 81 (*d*) of the Stamp Duties Act, 1923, applied, as the words "the extent to which he" [each appellant] "is so entitled" in that paragraph applied to the whole farm devised to him.

Sutherland v. Minister of Stamp Duties, [1921] N.Z.L.R. 154, and **Thompson v. Commissioner of Stamp Duties,** [1926] N.Z.L.R. 872, distinguished.

Solicitors: Kelly and Cullinane, Feilding, for the appellants; **Crown Law Office,** Wellington, for respondent.

NOTE:—For the Stamp Duties Act, 1923, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Public Revenue and Expenditure,* p. 402.

SUPREME COURT In Banco. Christchurch. 1934. April 12, 17. *Johnston, J.*

RE MATHIAS (DECEASED), JOHNSTONE AND OTHERS v. LAWRENCE AND ANOTHER.

Revenue—Death Duties—Will—Fund comprised in Settlement—Power of Appointment in favour of Children—Exercised by Testator's Will—Whether Property "subject to dispositions of that will"—Direction to Pay, *inter alia,* "all death duties of every description payable in respect of my estate"—Incidence of Estate and Succession Duties—Death Duties Act, 1921, ss. 5 (j), 16 (g), 31 (2), (3), and (4).

The general purport of s. 31 of the Death Duties Act, 1921, is to settle the incidence of estate and succession duties between successors. Subsection (2) is as follows:—

> "Estate duty and succession duty shall be payable in accordance with the directions of the will of the deceased so far as regards any property which is subject to the dispositions of that will."

The incidence of succession duty imposed by subs. 3 and estate duty imposed by subs. 4 is declared to be subject to such directions.

A settled fund to which a testator can appoint by will members of a certain class only and which power of appointment is exercised by will is not "property subject to the dispositions of that will" within the meaning of those words in subs. 2 of s. 31.

Aliter, Where the testator has a general unrestricted power of appointment and exercises it by his will.

Semble, That, even if such settled fund were property subject to the dispositions of the will, the testator's direction to pay out of the proceeds of his estate ". . . all death duties of every description payable in respect of his estate" (although, if clear and explicit, it might cover both estate and succession duty payable on a settled fund, in respect of which a power of appointment had been exercised by the will), was, on the facts and the construction of the will, limited to the estate which the testator was vesting in his executors, and did not embrace a fund over which his sole function was to nominate among a class.

Re McMaster, Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd. v. McMaster, [1916] N.Z.L.R. 56; **Chisnall v. MacFarlane,** [1923] N.Z.L.R. 558; **Brown v. Brown,** [1924] N.Z.L.R. 427; and **In re Holmes, Beetham v. Holmes,** [1911] 1 Ch. 206, referred to.

Rolleston, for the plaintiffs; **Loughnan,** for the defendants.

Solicitors: Tripp and Rolleston, Timaru, for the plaintiffs; **Izard and Loughnan,** Christchurch, for the defendants.

NOTE:—For the Death Duties Act, 1921, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Public Revenue and Expenditure,* p. 354.

Adopted Children: Can they be Issue?

Some Further Considerations.

By J. H. CARRAD.

I read with some surprise the article on *Adopted Children: Can they be "Issue"?* (p. 29, *ante.*). The failure of the New Zealand Act to make provision of the same nature as that by subs. 2 of s. 5 of the English Act is a grave defect in the New Zealand Act; and a very real question (which should be the subject of amending legislation) arises where, for instance, there is a gift to A. (giving him the whole beneficial interest in the subject of the gift) followed by a divesting provision should he die without issue and A. has adopted or afterwards adopts a child. Legally, the child is undoubtedly issue of A., for s. 21 of the Infants Act says that

> "*for all purposes, civil and criminal,* and *as* regards *all legal* and equitable liabilities, *rights,* benefits, privileges, *and consequences* of the natural relation of parent and child, the adopted child is to be deemed in law to be the child born in lawful wedlock of the adopting parent."

The exceptions provided in subs. 1 of s. 21 make it clear that the provisions quoted are not to apply merely *as between the adopting parent and the adopted child,* for they clearly do not apply solely to the devolution of property from the adopting parent to the adopted child. Moreover, subs. 2 of s. 21 emphasises my contention. The marginal note (which, of course, cannot be referred to in interpreting the section) is "Adopting parent to have legal status of natural parent" and the subsection enacts that "the adopting parent shall *for all purposes,* civil, criminal, or otherwise, be deemed in law to be the parent of such adopted child. . . ."

The use of the words "for all purposes, civil and criminal," in both subsections of s. 21 is a clear indication that the intention of the New Zealand Legislature in passing the section was radically different from the intention of the English Parliament in passing the English Act of 1926. At the foot of the first column of p. 30 of the JOURNAL Lord Hanworth, M.R., is quoted as saying,

> "The section does *not* simply say that the child shall be deemed to be a child of the adopter *for all purposes.*"

The New Zealand Act says exactly that (with exceptions), and, in fact, uses the words "for all purposes." (One would think the learned Master of the Rolls had the New Zealand section before him when he wrote those words.)

The English Act was clearly intended to give the adopted child merely a very limited status. This is clear from the discussion of *Ward v. Dorman Long and Co., Ltd.,* in an article in the *Law Times* of December 30 last at p. 507, which states that

> "It would seem that Parliament in framing the 1926 Act left a *casus omissus,* for, by s. 5 subs. 5, it provides that the adopter was to be deemed to be the parent of the child for the purposes of certain statutes relating to friendly societies, collecting societies, and industrial assurances, but is silent as to the Workmen's Compensation Act."

The article further states that as a result of the decision in the last-mentioned case steps were being taken to widen the section so as to make an adopted child a child for the purposes of the English Workmen's Compensation Act. In New Zealand, it has already been decided that an adopted child is a child for the purposes of the New Zealand Workers' Compensation Act.

The JOURNAL article states that:

> "It must be pointed out that some very recent authorities were not reported when the judgment in *Peddle's* case was delivered,"

but it surely will not be contended that the New Zealand Act, which is in widely different terms from those of the English Act and which was first passed forty-five years before the latter Act, must be interpreted having regard to the decisions upon the very different phraseology and provisions of the latter Act.

The contention in the article referred to, that an adopted child cannot be "issue," is based on the interpretation placed by the English Courts on the English Act; but the argument appears to me to be to the contrary; for, if it was necessary to include in the English Act the express provision of subs. 2 of s. 5 of that Act, surely the same provision should have been included in the New Zealand Act, and its absence from the latter Act must, of course, affect the interpretation of such Act! If this be not so, then one is driven to conclude that the inclusion of subs. 2 of s. 5 in the English Act is unnecessary; and that the subsection means nothing, and could have been omitted without affecting the interpretation to be placed upon the English Act. You will surely not agree to such a conclusion.

No doubt, the draftsman of the English Act had before him the New Zealand Act and the cases thereon when drafting the English Act. I must confess he has made a better job of his Act than our draftsman did of the New Zealand Act. I have often wondered whence the framework of the New Zealand Act was derived. Parts of it read as if they were copied from an American or Australian Act. The language used becomes almost unintelligible in the final words of subs. 2 of s. 21:

> "except the right of the child to take property *as heir or next-of-kin of his natural parent directly or by right of representation.*"

How can a child take property *of his parent* as heir or next-of-kin *by representation*? See hereon *In re Taylor, Public Trustee v. Lambert,* [1932] N.Z.L.R. 1077.

The decision in *Peddle v. Beattie* had reference to the rights of a child adopted before the date of the execution of a deed of trust to share under the deed under a divesting provision in favour of the children of the person who adopted such child: Exception (*a*) to subs. 1 of s. 21 provides that an adopted child cannot as a child of his adopting parent acquire any interest under a deed, will, or instrument executed before the date of his adoption. The clear intention of the Act is that such a child should take such an interest if adopted before the date of the deed or will (unless, of course, the deed or will expressly provides to the contrary); otherwise, why was the exception expressly limited to a "deed, will, or instrument prior to the date of" the adoption order? Can it seriously be contended that, having regard to those words, an adopted child was not intended by the Legislature to take under a disposition made, subsequently to the date of the adoption order, in favour of the children or issue of the adopting parent? The prior words of s. 21 are extremely wide—wide enough indeed to place the child legally in exactly the same position as a child born of the body of the adopting parent—and accordingly the section proceeds to limit

the effect of such words: as, for instance, by providing that the child shall not

> "take property expressly limited to the heirs of the body of the adopting parent."

The tragedy is that the exceptions were not made more extensive: *Hinc illae lachrymae.* The plain fact is that the Act should be amended. Where the dispositions of the will or instrument contain alternative provisions as, for instance, in the case of a will containing a gift to the issue of A. should he die leaving issue followed by a gift to other persons should A. die without issue, and A. leaves him surviving only an adopted child, then no difficulty would arise if the adoption took place before the date of the will or instrument; for the child would, I contend, clearly take under the first gift. Where, however, the adoption took place after the date of the will or instrument, the adopted child could not take—exception (*a*) of subs. 1 of s. 21—and accordingly the word "issue" in the gift to A.'s issue must be interpreted as "issue not being issue by adoption after the date of the will." The same interpretation of the word "issue" would then, I submit, be placed on the word "issue" in the alternative gift to take effect in the event of A. dying without issue. No such "own dictionary" interpretation could be adopted where the gift was to A. followed by a gift-over should he die without issue.

Sir Francis Bell deserves our thanks for pointing out the grave defect in the legislation as to the effect of an adoption order. The gravest defect is the failure to provide for cases where there is no disposition under which the adopted child could share; yet the plain intention of a testator may be defeated after his death by the adoption of a child by a person, on whose death without issue property is given over, the property remaining in and forming part of the estate of such person. It is surprising that a disposition of this nature has not come before the Court long since. If the Act is amended in this regard, it should also be amended in other respects, not forgetting its effect as regards dispositions in a will to which s. 33 of the Wills Act may apply. I suggest that the English Act should be taken as the model in amending the Act.

The Judicial Committee.

Its "Paid Hands."

Sir Lancelot Sanderson, K.C., has been a member of the Judicial Committee since 1926; he was Chief Justice of Bengal in India and his unpaid tenure of office on the Committee was secure. Why, then, is it announced that His Majesty has approved of his appointment to be a member of the Judicial Committee of the Privy Council in succession to Sir George Rivers Lowndes? The reason is that Sir George Lowndes had one of the two posts in respect of which, by the Act of 1929, a salary is paid.

Section 1 (7) of the Appellate Jurisdiction Act, 1929, while repealing s. 30 of the Judicial Committee Act of 1833 (3 and 4 William IV, c. 41) and s. 4 of the Act of 1887 (50 and 51 Vict., c. 70) preserves the right of any person who under these sections was entitled, at the passing of the Act of 1929, to attend or receive payment of the allowance (£400 to each of two persons or £800 to one) which they were then receiving.

Under s. 30 of Lord Brougham's Act the £400 is paid "during every year in which they shall so attend as aforesaid, as an indemnity for the expense which they may thereby incur." Presumably a sort of allowance for travelling and lodging away from the "East Indies or any of H.M. dominions beyond the seas." Sir John Wallis is the recipient of this emolument at the present time.

By enacting that if there should be only one member appointed under s. 30 of the Act of 1833, he might receive both allowances, the Appellate Jurisdiction Act, 1887 (50 and 51 Vict., c. 70), cheered the heart of Sir Richard Couch, who was the first member of the Judicial Committee to receive the total sum—call it what you will—paid to the Judges of the Judicial Committee, as such. £2,000 a year from the Consolidated Fund, and perhaps another £2,000 from India, is the yearly salary of each of the two members appointed under the Act of 1929. And it may be hoped, if the Judicial Committee is to continue, that the matter will not end there. Why should they receive the statutory reward, while other members of the Committee go empty away?

There was a time when more money was paid to the Judicial Committee. By the Judicial Committee Act, 1871 (34 and 35 Vict., c. 91), the Queen was empowered to appoint four persons with a salary of £5,000 a year each. But five years later the Appellate Jurisdiction Act, 1876 (39 and 40 Vict., c. 59), ended this race of Judges by providing that as they died or retired they should be replaced by additional Lords of Appeal, two members of the Judicial Committee being treated as the equivalent of one Lord of Appeal. Thus the Lords of Appeal, then two in number, were increased in time to four.

The Act of 1871 was remarkable also in this: that it very nearly brought disaster to Mr. Gladstone's Government.

Two of the four paid Judgeships had, under the Statute, to be held by Judges or ex-Judges of one of the Superior Courts. One was accepted by Sir Montagu Smith; the other was offered to four Judges in succession and refused by all. Sir Robert Collier, A.-G., in order to help the Lord Chancellor out of his difficulty, offered to fill the breach. Lord Hatherley gratefully accepted the offer, appointed the Attorney-General to the Judgeship then vacant in the Common Pleas; and Sir Robert, thus qualified, was in a few days transferred to the Judicial Committee. The simple device aroused a storm of protest.

Inflamed by the protests of Cockburn and Bovill, C.JJ., who strongly disapproved of the scheme or device, the House of Lords all but carried a motion of censure on the Government, and in the Commons they were saved only by the narrow margin of twenty-seven votes.

Compare and contrast this admirable manifestation of Parliamentary spirit with the ignoble apathy and futility displayed on the current and much more vital issue of the judicial status, as damaged by the Government in the famous "storm" of 1931.

The Right Hon. Sir Francis Dillon Bell, P.C., G.C.M.G., K.C.

Sixty Years at the Bar.

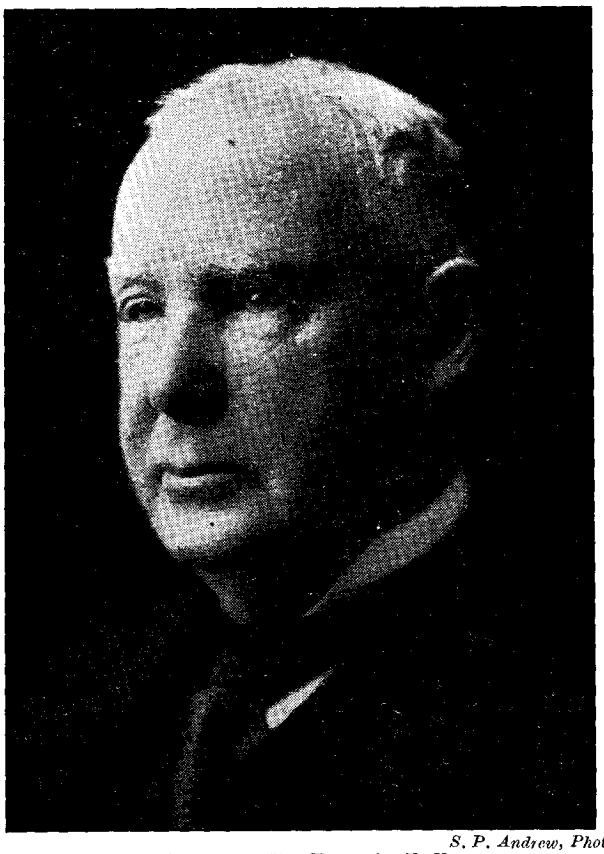
In this JOURNAL on March 16, 1926, when Sir Francis Bell was on the point of leaving to represent this Country at a Conference of the League of Nations at Geneva and on his contemplating retirement from active practice, opportunity was taken to refer to his exceptionally illustrious career at the Bar and as a public servant.

On that occasion, the hope was expressed that he would enjoy many years of good health and contentment in his retirement from active practice. The retirement which he then proposed did not eventuate, and, to the pleasure of his friends and the profit of his clients, he decided to continue to wear the harness of his profession. To-day he is as vigorous and acute as when we wrote of him eight years ago.

The fact that this great lawyer has now completed sixty years of active practice is being seized upon by his fellow practitioners as a suitable opportunity to do him honour and to express to him the respect and affection in which the profession holds him.

A record of sixty years in active practice is of itself a notable performance, but to have been in the forefront of the profession during that period is a remarkable and unprecedented performance. Yet that simply states Sir Francis Bell's career since he returned from England in 1875 and entered into partnership with Mr. C. B. Izard.

Nor was it preferment, special advantage, or wealth that placed him in the select company of leaders during the whole of his career. "The force of his own merit makes his way," said the Duke of Norfolk in Henry VIII in referring to the Cardinal of York; and the comment applies with singular appositeness to the subject of this reference. For it was purely by his ability, industry, and integrity that he immediately assumed and always retained a place in the front rank.



S. P. Andrew, Photo.

Rt. Hon. Sir Francis Bell.

The detailed steps of Sir Francis's career have been already recorded in this JOURNAL, but some of the main facts then related should now be repeated to do honour to him whose illustrious career is being acclaimed by the profession.

Sir Francis is a true son of New Zealand. He was born in Nelson in 1851, being the eldest son of Sir Francis Dillon Bell. His father was himself a distinguished statesman in the early days of the Colony, and occupied the Speaker's Chair in the House of Representatives. As Agent-General, too, Sir Francis Dillon Bell served his Country with distinction for ten years.

Sir Francis as a boy went first to the Auckland Grammar School and later to the Otago Boys' High School. He completed his classical and legal education at St. John's College, Cambridge; was called by the Middle Temple, and then returned to New Zealand to begin, in 1875, that career which is a shining example for his successors to emulate.

Sir Francis was really the first man to organise Law Reporting in New Zealand. To him, more than to any other person is due the creation of the Council of Law Reporting. On his arrival in New Zealand in 1875, he with four other barristers began the Law Reporting which is recorded in a volume known as the *Colonial Law Journal*, the first attempt to produce a journal for New Zealand lawyers. Mr. F. H. D. Bell was its editor for the Wellington District, while his colleagues represented the other three districts. The venture proved premature, and the *Journal* ran for one year only. The solitary volume, to be seen in the larger Law Libraries, is well worth perusing. The serious reporting occupied the first two-thirds of the pages, while the remainder was devoted to news and articles, and shows by its type of humour and its quaint literary style how times have changed in the methods of journalism.

Sir Francis, with Messrs. F. M. Ollivier and W. Fitzgerald, a few years later collected a number of legal arguments and decisions of our Appeal and Supreme Courts into a volume which is popularly known to the profession as "O.B. & F."

At the Bar the work that attracted him most was that to be found in the Court of Appeal and in Banco. *Nisi prius*, although he had a large share of this work, did not interest him. The jury was not a tribunal which attracted his talents. Legal argument suited his type of mind rather than soaring to heights of eloquence, or attempting to wrest verdicts from juries by any appeal to their emotions. No one could say of Sir Francis:

> "When he spoke, what tender words he us'd,
> So softly, that like flakes of feather'd snow,
> They melted as they fell."

Yet many a fine verdict has the jury returned his client, attracted and impressed by the manly and dignified address uttered in loud tones by that advocate. Deadly logic expressed clearly will often wrest a verdict in the teeth of sublime eloquence.

Sir Francis Bell's success in the Court of Appeal and in Banco was due to the fact that his cases were

prepared with skill and care and presented forcibly and convincingly by a barrister whom the Bench trusted implicitly. He was given the patent of King's Counsel when the patent was first granted to the Bar in New Zealand.

It might be inaccurate to describe Sir Francis Bell during his career as a popular man in the sense of being "Hail-fellow-well-met." Yet he was popular in a better sense. He was respected, all his contemporaries liked him, many shared their confidences with him. He played their games; he had a hundred varied interests outside the profession, and he was ever anxious to help the less successful or less instructed.

His manner was in some respect distant. He insisted on being a leader, his talents qualified him for such rank, and his fellow-practitioners ceded him that place.

Leadership is lonelier than being merely in the ranks. The determination to succeed—the pushing ahead and not waiting for others to catch up—contrived to give Sir Francis that appearance of aloofness which was more apparent than real.

During the sixty years of his career Sir Francis had appeared in many of the most famous and important cases, and led in most of those in which he held a brief. Never was it said that he entered the forum unprepared, or pleaded a cause ineffectively. Of his ability and success the profession knows well.

In handling a witness in cross-examination his method was rather to find the faulty link in the story as told "in chief" by the cold relation to logical inferences rather than by the tricks and artifices of a more subtle mind. At times, however, his method of raising his voice to a great volume of indignation terrified many a lying witness into confessing the truth. In Court, one may say Sir Francis was always in deadly earnest.

It seems almost superfluous to mention that in the course of his career he was by the popular vote of his fellow lawyers President of the Wellington District Law Society on many occasions. Likewise he was President of the New Zealand Law Society for many years.

Altogether Sir Francis's career and interest in New Zealand is without parallel, not only for its length of years, but for the commanding position he has always occupied; a position gained, as already mentioned, not of good fortune but by sheer merit.

That a man who has talents beyond the average and owes his education and success to his Country should repay that debt by public service is a tenet for which Sir Francis properly stands. His record of public service connotes material sacrifice. However, to have earned and received the gratitude of one's native land is the highest honour an individual can receive. That recognition has been generously accorded Sir Francis for public service of a high character. To serve no one save one's self and one's dependents, is selfishness. For a man endowed with the attributes natural in a leader, to ignore the proper demands upon his time that society justly makes in the interest of mankind is unpardonable selfishness.

The qualities of leadership that were Sir Francis Bell's were readily given for the benefit of good government. First in local government as Mayor of Wellington his advice and service have had lasting and good effect. Had his advice been taken on one occasion the City would have possessed public play-grounds and reserves to meet its requirements for all time. He realized that a healthy people means a happy and contented people. Sir Francis Bell broadened his public service in 1883 by entering Parliament as a Wellington representative. He was a member for only one Parliament. He did not choose to stand again. Later, he was elevated to the Upper House, where his talents during the trying War days and afterwards were of incalculable advantage to the Government, of which he was a member. The legislation he furthered is well known. His improvement of the land tenure will ever be a monument to his sagacity.

His Majesty the King recognised his faithful and devoted service by knighting Sir Francis in 1915, and, in 1923, after eight further years of devoted service in the public interest as Attorney-General and Leader of the Legislative Council, he was decorated with the Grand Cross of St. Michael and St. George.

In the profession which he served and adorned, in the public service, in local and general government, and, in the many social and sporting activities to which he devoted time, Sir Francis showed himself a keen, generous, broad-minded man, throwing himself wholeheartedly into the matter engaging his attention. He was never merely a passenger.

One other matter should be mentioned. For many years to help and encourage him in all his undertakings, he had a devoted and talented wife. The success which he has achieved could not have been gained had it not been for her devotion and encouragement. The loyalty and affection of their children, too, must have played a large part in helping him along the road to ultimate success.

One sacrifice should be mentioned. The greatest of all his sacrifices, and the one in which Lady Bell and he shared equally, was the loss of their eldest son, Captain W. H. D. Bell, a brilliant barrister, who, as a gallant soldier, fell with his face towards the foe in the cause of Truth and Liberty.

It was said once of a great English Lord Chancellor, and it may be said of Sir Francis Bell, "His life was not only long in years, but full of achievement, for of much of what he had seen he could say '*quorum pars magnum fui*'; but long days and high achievement are not everything, and from what he saw and what he did we look beyond, to the man himself and what he was; a highly gifted but simple-hearted, industrious, plain living, quietly devout, cheerful and kindly English gentleman, typical of his race and time."

Those lines were written in a review of the life of a Lord Chancellor who had gone. We are in a happier position, for Sir Francis can still say with the Duke Vincentio "I am still attorney'd at your service," and we can say that still strong in vigour, mental and physical, may Sir Francis look forward for many years yet of endeavour, and he may reflect with a quiet conscience that his life in the past has been fine and worthy, and his brethren with confidence trust, with us, that he may be spared many years to enjoy with Lady Bell, in the evening of their lives, good health, happiness, and contentment.

He has an excellent precedent to follow, and he is used to precedents, for the Lord Chancellor with whom he has just been compared passed on at the ripe old age of ninety-eight, and he was full of vigour till just before he answered the call.

"We live in deeds, not years; in thoughts not breaths,
In feelings, not in figures on a dial.
We should count time by heart throbs:
He most lives
Who thinks most, feels the noblest, acts the best."

—C. A. L. TREADWELL.

Australian Notes.

WILFRED BLACKET, K.C.

A Burning Question.—*Webber v. Hazlewood* in the Supreme Court, at Sydney, was a case of far-reaching importance. The defendant, a farmer, had lighted a fire on his land on February 18, 1933, for the purpose of burning off 100 acres of stubble, and the fire on that day did no harm, but a stump ignited, then continued to smoulder, and on the 20th idem some sparks flew from it on to a neighbour's land and started a fire there which spread to the plaintiff's farm doing damage to the extent of £569. At the trial two questions were left to the jury, as follows: 1 Was the fire caused by the defendant's negligence; and 2 Was it caused by an act of God? (The relevance of the second question is far from obvious: from all that appears in the report the jury might as well have been asked whether it had been caused by an Act of Parliament.) The jury answered both questions in the negative, and a verdict was entered for the defendant.

On the plaintiff's appeal to the Full Court the sole question in argument was whether the act of burning off an area of 100 acres was a "normal use" of the land, or whether the case was within the rule of *Rylands v. Fletcher*. *Winfield's case*, 18 C.L.R. 606, was much in consideration, but the judgment of the Court was for the plaintiff. Jordan, C.J., in delivering the judgment said: "I think that no user of land can be regarded as "natural" or "normal" (within *Rylands v. Fletcher*) if it involves the deliberate bringing upon, or bringing into existence upon, the land of something of a kind inherently dangerous to neighbouring land, unless the dangerous thing is introduced in such quantities and under such conditions that there is no substantial risk of its escape in such a way as to cause damage, in the absence of negligence. I think that it is quite impossible to treat this as 'natural' or 'normal' use of the land, in the sense in which the phrase is used by the authorities, however common the making of such fires for the purpose may in fact have been in the district. When fire had been set loose in such quantities as is admitted on the evidence, it had, in my opinion, gone altogether beyond anything which could be said to be incidental to the natural, ordinary, or normal user of the land." His Honour went on to say that sheep and fowls are inherently dangerous to crops, but what the inherently harmful hen has to do with *Rylands and Fletcher*, or what *Rylands and Fletcher* has to do with her, I am not now able to determine.

Infant's Custody.—Some years ago in New South Wales, bedspreads and bargain sales were for a time forgotten, or at least almost forgotten, by agitated ladies who reviled Harvey, C.J.E., for having refused in *Ex parte Pollini* to give to an actress about to depart on a world-wide tour, the custody of her child. These critics may now console themselves by perusing the judgment of Long Innes, J., in *Ex parte Rooke*. In that case the mother, the applicant for custody had some time ago left her home because as His Honour found "she desired to live with her own people and run a business rather than undertake the trials and tribulations of married life." She left her child, Stanley Rooke, with its father, and then when it was two years old applied to the Court for its custody. His Honour found that the father was in every way a fit and proper person to have the custody of the child. As to the applicant he found that although she had not been guilty of any offence of a sexual nature, she had been "as false, without being immoral as any woman can be to her marriage vows." He said further: "I am satisfied that she is an emotional, neurotic, hysterical, and utterly selfish woman who will not hesitate to make any statement, however grave and however false, for the purpose of serving her own immediate ends. I am satisfied that she has sworn falsely in the box."

However, His Honour's judgment was that although the applicant had "shown complete unfitness to be a wife"—he did not add "or a witness"— she had not "shown unfitness to be a mother" and therefore was entitled to have the custody of her child; and that the welfare of the child would be best served by making the order asked for. We may therefore hope that the mother now having little Stanley in her care and culture, will teach him to avoid her own lamentable faults and weaknesses, and to cultivate the virtues of his more admirable father.

Solicitors' Infidelity.—In a detached and theoretical kind of way the men in authority in New South Wales are once more looking out upon the question of compensation to defrauded clients of defaulting solicitors. In the political shop window there is displayed a conjectured Solicitors' Fidelity Guarantee Bill which, if ever brought into being, will probably be a Chinese copy of the New Zealand Act, but at present it is a mere gesture. The only definite statement in connection with the matter is that every solicitor is to pay up £10 in order to create a fund of £100,000. The stated levy would produce about £14,000, but as solicitors within the last four years have defaulted to an extent exceeding £250,000 it is to be hoped that they will be more careful in the future and endeavour to limit their frauds to the yearly £14,000 available: try to live within our means, so to speak. The Incorporated Law Institute approves of the intended legislation but without any display of enthusiasm, and some solicitors in large practice have written to the papers saying they don't see why reputable men should have to pay up for defaulters, but one does not see anywhere any sign of the vehement determination that would be necessary to compel the enactment of such a measure.

Recently the Judges of the Supreme Court have sought to limit the extent of solicitors' defaults by means of a rule as follows: "Where a solicitor acting for a client who is not a solicitor becomes aware in the course of his practice of facts or circumstances which give rise in his mind to a reasonable suspicion that the trust funds of some other solicitor or certificated conveyancer are not in order, it shall be his duty to put the facts upon affidavits," and file it in the Supreme Court and send two copies to the Prothonotary, who may bring the matter before the Court forthwith or forward the copies of the affidavit to the Incorporated Law Institute for appropriate action." Perhaps there will be some solicitors courageous enough to act in terms of the rule, but of course there is not any penalty upon any solicitor who refuses to "lift . . . his hand against a brother." If you have a similar rule the merciful blue pencil will delete this paragraph: if you have not, then this rule is offered as a suggestion—"merely a suggestion—nothing more" as an old song says.

Practice Precedents.

Grant of Probate to Trust Company Executor.

In England while a corporation sole was deemed capable of acting as an executor: *In re the Goods of Haynes*, (1842) 3 Curt. 75, 163 E.R. 660, a limited company or corporation aggregate could not prove a will: *In re the Goods of Martin*, (1904) 90 L.T. 264, unless it had obtained special powers from Parliament. In cases where a limited company was appointed executor, letters of administration with will annexed were granted to the company's nominee or syndic, who was sworn like other executors: *In re the Goods of Darke*, (1859) 1 Sw. & T. 517, 164 E.R. 839; *In re Hunt*, [1896] P. 288; and the company executed the bond. Now in England since the Judicature Act, 1925, probate may be granted to a trust corporation but not to a syndic or nominee, either solely or jointly with another person (s. 161); but it will be noted an ordinary limited company may not receive a grant directly. In New Zealand, s. 100 of the Trustee Act, 1908, provides that "any company authorised by law to act as a trustee" may be appointed and may lawfully act as sole trustee of any will. A company is "authorised by law" to act as executor or as a trustee by a private Act of Parliament, which grants the special powers required. See, therefore, for example, Guardian Trust and Executors Company Act, 1883 (P), and Amendment Act, 1911 (L. & P.); New Zealand Insurance Company Trust Act, 1916 (P); Perpetual Trustees Estate and Agency Company Act, 1884 (P.), and Amendment Act, 1913 (P.). It has been held it is not competent for the Public Trustee of one Australian State to apply for grant of probate in another State: *Re O'Connor*, [1934] Q.W.N. 8.

When a trustee company is appointed executor or administrator, the question arises who should make the necessary affidavits, etc.: this is not always clear to practitioners. The manager of the trust company or the officer in charge of or managing the trust department of its business usually makes the affidavit leading to the grant, and a director may do so: see empowering statutes, *passim*. The Court will accept such persons as competent to make such affidavits: see also RR. 185, 186 of the Code of Civil Procedure, *Stout and Sim's Supreme Court Practice*, 7th Ed., pp. 164, 165.

The following forms provide for the application for probate where an authorised trust company is named as executor.

MOTION FOR PROBATE.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

In the Estate of A.B. of Farmer, deceased.

Mr. of counsel for the [*full name of company*] Limited the executor named in and appointed by the will of the above-named deceased TO MOVE before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Courthouse on day the day of 19 at 10 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER that probate of the last will and testament of the said deceased be granted to the [*full name of company*] Limited the sole executor therein named.

Dated at this day of 19 .

.....

Solicitor engaged in the proceedings.

Certified pursuant to Rules of Court to be correct.

Counsel moving.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I of the City of company manager make oath and say as follows:—

1. That I am the manager of the [*full name of company*] Limited duly incorporated under the provisions of the Companies Act 19 and having its registered office in Street in the City of which said company is the executor and trustee named in the last will and testament of A.B. the above-named deceased.

2. That I am informed and verily believe that A.B. of farmer, now deceased, when alive was resident or was domiciled at within this Judicial District and that the nearest Registry Office of this Court to the place where the said A.B. resided or was domiciled is at .

3. That I am informed and verily believe that the said A.B. died at on or about the day of 19 .

4. That I believe the typewritten document now produced bearing date the day of 19 to be the last will and testament of the said deceased and that the [*full name of company*] Limited is the executor therein named.

5. That the said [*full name of company*] Limited will faithfully execute the said will by paying the debts and legacies of the said deceased so far as the property will extend and the law binds.

6. That according to my knowledge and belief the estate and effects of the said deceased in respect of which probate is sought to be obtained are under the value of £ .

Sworn etc.

EXHIBIT NOTE ON WILL.

This is the typewritten document now produced and shown to (*name of deponent*) of (*town*) (*occupation of deponent*) and referred to in his affidavit to lead grant of probate to (*full name of company*) Limited as executor sworn at this day of 1934 before me:

A Solicitor of the Supreme Court of New Zealand.

[Reference: [1934] N.Z.L.J. 37.]

AFFIDAVIT AS TO DEATH.

I of the City of Public Servant make oath and say as follows:—

1. That I knew A.B. of farmer deceased when alive and that the said A.B. was resident or was domiciled at within this Judicial District and that the nearest Registry Office of this Court to the place where the said A.B. resided or was domiciled is at .

2. That the said A.B. died at on or about the day of 19 as I am able to depose from having seen his dead body after death.

Sworn etc.

PROBATE.

BE IT KNOWN TO ALL MEN that on the day of in the year one thousand nine hundred and the last will and testament of A.B. deceased who died on or about the day of 19 a copy of which is hereunto annexed has been exhibited read and proved before the Honourable [*Christian names and surname of Judge*] a Judge of the Supreme Court of New Zealand and administration of the estate effects and credits of the said deceased has been and is HEREBY GRANTED to the [*full name of company*] Limited the executor in the said will and testament named being first sworn faithfully to execute the said will by paying the debts and legacies of the deceased as far as the property will extend and the law binds.

Given under the Seal of the Supreme Court of New Zealand at this day of one thousand nine hundred and .

Registrar.

Recent English Cases.

COMPANIES.

Companies — Auditors — Duties of — Balance-sheet — "Members."—RE ALLEN CRAIG & CO. (LONDON), LTD. (Ch. D.).

The duties of auditors as to reporting to the members of a company under sec. 134 of the Companies Act, 1929, are duly performed by sending such report to the secretary of the company.

As to auditors' reports under sec. 134 of the Companies Act, 1929, see HALSBURY, 2nd Ed., 5, para. 630; DIGEST 9, p. 555.

COPYRIGHT.

Copyright—Music—News Film—Fair Dealing—HAWKES & SON (LONDON), LTD. *v.* PARAMOUNT FILM SERVICE, LTD. (Ch. D.).

The reproduction in a "news film" of the music played during the happening of the event portrayed is not a breach of the copyright in such music.

As to "fair dealing" with copyright, see HALSBURY, 2nd Ed., 7, para. 895 *et seq.*; DIGEST 13, p. 206 *et seq.*

LANDLORD AND TENANT.

Landlord and Tenant—Disrepair of Premises and Liability to Repair—Rights of Third Parties.—WILCHICK *v* MARKS AND SILVERSTONE (K.B.D.).

Where the landlord of premises has knowledge of disrepair and authority to remedy it, he as well as the tenant may be liable for any injury caused to passers-by by the want of repair.

As to liability to third persons for non-repair of premises, see HALSBURY 18, para. 989-990; DIGEST 31, p. 344.

Landlord and Tenant—Company Under-lessee—Forfeiture—Liquidation.—PEARSON *v.* GEE AND BRACEBOROUGH SPA, LTD. (H.L.).

Where a company being a lessee goes into liquidation and the lessor re-enters, relief can be granted against the forfeiture if proceedings are commenced within a year of the winding-up although the application is not heard until after the year has expired.

As to sec. 146 of the Law of Property Act, 1925: see HALSBURY, 18, para. 1048 *et seq.*, Supplement for 1933, *ibid.* p. 71; DIGEST 31, p. 487 *et seq.*

MASTER AND SERVANT.

Workmen's Compensation — Award — Enforcement of — Execution—Irregular.—BUSHELL *v.* TIMPSON (K.B.D.).

Execution on an award under the Workmen's Compensation Act is irregular unless leave to issue execution has been obtained.

As to execution on awards in Workmen's Compensation cases: see HALSBURY, 20, para. 531; Supplement for 1933, *ibid.* p. 76; DIGEST 34, p. 447.

PAWNS AND PLEDGES.

Pawnbroker—Larceny by Trick—Stolen Goods Pledged—Accepted in Good Faith—Claim for Return.—LONDON JEWELLERS LTD. *v.* SUTTON; SAME *v.* ROBERTSONS (LONDON), LTD. (K.B.D.).

Where property is obtained from the owner by a trick and is pledged with a pawnbroker, the fact that the pawnbroker acts in good faith does not affect the true owner's right to recover the property.

As to the rights of the true owner with regard to stolen goods which have been pawned: see HALSBURY, 22, para. 517 *et seq.*; DIGEST 37, p. 18.

TRESPASS.

Trespass — Police Officer — Warrant for Arrest — Entry on Premises—Seizure of Documents.—ELIAS *v.* PASMORE (K.B.D.).

Police officers who lawfully enter premises to make an arrest are not entitled to seize documents for the purpose only of examining them to see if they disclose offences by persons other than those arrested.

As to trespass to goods: see HALSBURY, 27, para. 1520 *et seq.*; DIGEST 43, p. 417.

Rules and Regulations.

Motor-vehicles Act, 1924. The Motor-vehicles (Registration-plate), Regulations, 1934.—*Gazette* No. 30, May 3, 1934.

Stock Act, 1908. Amended regulations for the Prevention of the Introduction into New Zealand of Diseases affecting Stock.—*Gazette* No. 34, May 10, 1934.

Education Act, 1914. Amended Regulations.—*Gazette* No. 36, May 17, 1934.

Government Life Insurance Act, 1908. Tables showing Premiums payable in respect of Certain Classes of Policies.—*Gazette* No. 36, May 17, 1934.

Trade Agreement (N.Z. and Canada) Ratification Act, 1932. Extension of Trade Agreement between the Dominion of Canada and the Dominion of New Zealand.—*Gazette* No. 36, May 17, 1934.

Shipping and Seamen Act, 1908. Amending Rules for the Examination of Engineers.—*Gazette* No. 36, May 17, 1934.

Poultry Runs Registration Act, 1933. Regulations as to Fees, Remuneration, and Allowances for Members or Officers of the N.Z. Poultry Board.—*Gazette* No. 38, May 24, 1934.

Poultry Runs Registration Act, 1933. Poultry Runs Registration Regulations, 1934.—*Gazette* No. 38, May 24, 1934.

Harbours Amendment Act, 1933. Regulations as to Travelling Allowances to Members of Harbour Boards.—*Gazette* No. 38, May 24, 1934.

Animals Protection and Game Act, 1921-22. General Regulations respecting Opossums.—*Gazette* No. 38, May 24, 1934.

New Books and Publications.

Local Government Law and Administration in England and Wales. Volume 1. Edited by the Rt. Hon. Lord MacMillan. (Butterworth & Co. (Pub.) Ltd.) Thick Edition, 60/-; Thin Edition, 62/-.

Legal Aspects of Industrial Disease. By C. H. Spafford, Middle Templar, Barrister-at-Law. (Butterworth & Co. (Pub.) Ltd.) Price 28/-.

Laws of the Argentina, 1934. By J. A. & E. de Marval. (Sweet & Maxwell, Ltd.) Price £5/5/-.

The Law Relating to Slaughter-houses and Unsound Food. By R. C. Maxwell, O.B.E., LL.D. 2nd Edition, 1934. (Sanitary Pub. Co., Ltd.) Price 17/6d.

Mew's Annual Digest of English Case Law, 1933. By A. J. Spencer. (Sweet & Maxwell, Ltd.) Price 27/-.

Local Government Act, 1933-1934. By H. Samuels. (Eyre & Spottiswoode.) Price 17/6d.

Procedure at and Law relating to Meetings, 1934. By Frank Shackleton, F.C.I.S. (Sweet & Maxwell) Ltd. Price 21/-.

Road and Rail Traffic Act, 1933. By E. G. Woodward. (Eyre & Spottiswoode.) Price 22/6d.

The Law as to Children and Young Persons. By E. J. Bullock. (Stevens & Sons.) Price 21/-.