New Zealand
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"*Make we mery bothe more and lasse*
For now ys the tyme of Crystymas."

—BALLIOL MS.: RICHARD HILL, 1500-35.

Vol. XI. Tuesday, December 17, 1935. No. 23

The New Attorney-General and His Task.

IN common with the whole of the profession in the Dominion, we congratulate the new Prime Minister, Hon. Mr. Savage, on his selection of one of their practising members as Attorney-General and Minister of Justice. We are all happy in the thought that the Prime Minister has shown appreciation of the fact that the two offices should be held by one who, by training and practical experience, is well-fitted for his task.

In welcoming the Hon. Mr. Mason as titular leader of the Bar, we can assure him that the profession generally has confidence in him. They know he is a man of high ideals, and that the honour of the profession is safe in his leadership. His record, both academically and as a practical administrator, has prepared him for his high office. But, in addition to these qualifications, his fellow-lawyers welcome him as one who has experienced the vicissitudes of a general practice, and who knows that there is much to be done in the interests of the public at large in giving effect to the suggestions of the profession as to the revision of a number of our statutes, a task that has been neglected too long through no fault of those engaged in the profession of the law in this Dominion.

As was recently said in these columns, the law is not static, but dynamic, and it has developed as a social system and will continue so to develop. It is not an exact science: as an eminent Judge, Lord Darling, once said, it is not like chemistry. We are becoming more conscious every day that it is a social science, and there must be modification and progress, as time goes on, owing to modern experience in a changing world, and recent knowledge. This is no new discovery. In the middle of the seventeenth century, Lord Hale in his *Pleas of the Crown* pointed out that men grow to greater learning, judgment, and experience in the process of time, and so rectify the mistakes of former ages and judgments. This progressive spirit is at work in our own day and generation: in this regard we have only to point to the work of Lord Hanworth's Committee on Law Revision and the legislative effect already given to its interim reports. We refer to the Law Reform (Miscellaneous Provisions) Act, 1934 (Eng.), which amends the existing law as to the effect of death in relation to causes of action, thereby abolishing the *actio personalis* rule, and as to the awarding of interest in civil proceedings; and the Law Reform (Married Women and Tortfeasors) Act, 1935 (Eng.), which alters the basis of a married women's liability in contract, making it personal, quite apart from her husband, and not dependent on the possession of separate property. This means that the form of judgment in *Scott v. Morley* is now obsolete in England; that a wife will be subject generally to the Bankruptcy Law and not only as a trader, and that her husband will not be liable for her torts; and the restraint on anticipation is to go. Moreover, the Act enables one tortfeasor to obtain contribution from another. Unfortunately, in these as in numerous other directions, New Zealand has lagged behind: and this through no fault of the Judges, the legal profession generally, or the New Zealand Law Society, as we can show.

The new Attorney-General brings to his official duties an open and progressive mind. He has a stout heart, and we feel that he will not be overwhelmed by the number of matters which await his attention. These have been brought forward during past years, but were merely "received." Whatever may be the reason for official inertia in this connection, the fact remains that no legislative action was taken.

From time to time, members of the Judiciary have drawn attention to necessary amendments of our statutes. This topic is dealt with in an article, "Legislative Lapses," on another page, written before the new Attorney-General took office.

The New Zealand Law Society has hammered away for many years in regard to improvements in our law. It is notorious that we are gradually becoming estranged from the English case-law, which, in recent years, has dealt with statutory provisions that have been enacted to suit modern conditions, but which are unknown to our own statute-book. At times, the Ministers concerned have given favourable replies to the representations made to them, and have promised early legislation to cure obvious anomalies. A perusal of the following list, which is not exhaustive, will show that the Society has acted in the public interest in making recommendations for statute-amendment, but the legislative part has been left undone by the authorities to whom it proposed the improvements it considered to be necessary.

Among the recommendations made by the Council of the New Zealand Law Society, reference was made to the Attorney-General for the time being in regard to:

Amendment of s. 20 of the Administration Act, 1908, so as to enable the representative of a deceased executor to make application for remuneration in a proper case, and to empower the Court to apportion the amount of remuneration between executors, where there are more than one (July, 1930); and so that an executor or administrator shall be authorized to make application for commission, either with or without the concurrence of a co-executor or co-administrator who declines to join in proceedings for the purpose (October, 1930).

Amendment of the Motor-vehicles Act, 1924, for the taking of evidence on commission in cases under that statute, by reason of the fact that the hearing often takes place at a distance from the residence of the defendant or that of a material witness, there being no machinery available in such cases for the taking of evidence in the place where the defendant or the witness resides (Second recommendation: March, 1931).

Amendment of s. 79 of the Rating Act, 1925, to require existing judgments to be registered against the land affected within three months of the passing of the amending statute, and that future judgments should be made subject to the provisions of the Statutory Land Charges Registration Act, 1928 (March, 1931; July, 1932; and again in June, 1933).

Amendment of the Hawke's Bay Earthquake Act, 1931, and Reg. 22, Second Schedule, War Regulations Continuance Act, 1920, to provide that judgments should be enforceable without affidavits regarding the status of the judgment debtor, wherever in the Dominion he may be, under the former Act, and under the regulation mentioned; but that debtors wishing to claim the privilege of those statutes should be required to raise the objection themselves (July, 1932; June, 1934; September, 1935).

Amendment of s. 70 of the Death Duties Act, 1921, and s. 43 of the Valuation of Land Act, 1925, owing to the possible grave injustice that may result to beneficiaries in deceased persons' estates from the defects of the present system of valuation, where the estate's assets consist of land in whole or in part (July, 1932).

Avoidance of the confusion and inconvenience caused by the practice of amending various statutes through the medium of Finance Acts, and by the resultant "buried amendments" (June, 1933).

Amendment of the Bills of Exchange Act, 1908, to incorporate the provisions of the Bills of Exchange (Time of Noting) Act, 1917 (Imp.) (March, 1934).

Amendment of the Trustee Act, 1908, to incorporate the provisions of s. 2 of the Trustee Act, 1925, Eng. (September, 1934).

Amendment of the Chattels Transfer Act, 1924, to remedy the contradictions therein respecting book-debts (September, 1933).

In addition, the New Zealand Law Society unanimously expressed by resolution and notified its willingness to assist the Attorney-General in considering any amendments to the existing law which he might wish to refer to the Society. In particular, it advised him of the practice in England in this regard, as exemplified by the Law Revision Committee set up by the Lord Chancellor. The Attorney-General thanked the Society for "its very generous offer." But there it remained.

For the last seven years the profession as a whole has attempted to remedy another anomaly by effecting a reform that would amend the Crown Suits Act, so that the recovery of debt or damages by or against a Government Department should be placed on the same footing in all respects as the recovery of a debt or damages against private individuals. In broad outline, the purpose of this revision of the law is so to alter the Crown Suits Act and the law generally that actions by or against a Government Department may be instituted by or against such Department in the name of the Department and not in the name of the King. Before the Legal Conference of 1929, at which Mr. R. L. Ziman read a paper, "The Crown in Business; Considered from the Constitutional and Legal Viewpoints," the then Attorney-General had been approached on the subject. Since then, the Law Society has brought the matter forward again and again. In addition the principle of a Bill drafted by Mr. Ziman was approved by the District Law Societies, and it was sent forward as a concrete attempt to meet the objections to the present law and practice in relation to actions of the nature mentioned: see NEW ZEALAND LAW JOURNAL, Vol. 5, p. 62; Vol. 9, pp. 230, 248, 258.

The profession in 1930, at the last Legal Conference, discussed the advisability of having made available to the parties concerned or to their counsel in any proceedings or inquiries the statements of witnesses taken by the Police in investigating running-down accidents. The New Zealand Law Society took up the matter, but so far no satisfaction has been received from the authorities concerned. In the interests of common justice between man and man, this matter should receive urgent attention. The conservatism of a Government Department can vanish like the morning mists on the initiative of a progressive Minister. A definite rule in regard to the production of such statements in Court in civil proceedings is needed, and considerable assistance can be had from Mr. A. K. Turner's illuminating article, *Ante*, pp. 229, 245, 257.

Other recommendations of the Conference included the introduction of legislation to abolish the liability of a husband for his wife's torts, thus anticipating the English Law Revision Committee's recommendations of this year and the resulting legislative effect given to them. Also ignored by the framers of our legislation was the constructive suggestion of the Conference that the Admiralty rules of apportioning damages should be applied to collisions on land, so that damages would be payable according to the degrees of fault in running-down cases.

From the ranks of the profession, other suggested amendments and removal of anomalies have been made unavailingly. For example, take the Public Works Act, which has been amended and consolidated again and again since attention was first drawn to the provision—s. 45 of the 1928 Act—which drastically limits the time within which claims for injurious affection must be made. It is only necessary to refer to the remarks of Edwards, J., in *Lyttle v. Hastings Borough*, [1917] N.Z.L.R. 910, 918, to illustrate what injustice can be perpetuated by this limitation. His Honour there repeated what he had said in 1901, in *Palmerston North Borough v. Fitt*, 20 N.Z.L.R. 396, 405-406, as to amendment of the statute "by materially extending the period within which a claim may be preferred, or by making the period of limitation run from the first serious actual damage and not from the completion of the public work," and he referred to the remarks of Stout, C.J., to the like effect in *Farrelly* v. *Pahiatua County Council*, (1903) 22 N.Z.L.R. 683, 684. Then there is the favoured position of local bodies in regard to costs in contested claims under the Public Works Act, ably dealt with by our learned contributor, Mr. W. J. Sim, last year (10 N.Z.L.J. 216), when he made a plea that our practice should be brought into line with English or Australian practice with regard to claims of this nature.

Another long-delayed reform, which the profession has advocated, is the revision of the Land Transfer Act, so as to bring it up to date, to clear up many doubtful points as to the effect and priority of equitable and unregistered interests and the rights of the parties thereunder; the abolition of s. 63 of the Property Law Act 1908, providing no land shall be charged by deposit of title-deeds, which is the solitary exception to the practice of the rest of the Empire in this matter; and the inclusion in the Act itself of all legislation past and present affecting land under the Act. The need for reform may be exemplified by reference to the judgment of Hosking, J., in *Taylor v. Commissioner of Stamp Duties*, [1924] N.Z.L.R. 399, but the effect of the most frequent of unregistered instruments, *viz.*, an agreement for the sale and purchase of land, is still undetermined; and, more recently, by reference to the remarks of the learned Chief Justice of Australia (*Ante*, p. 310) at the first Australian Legal Convention, which are as applicable to our law as to the law of the Commonwealth.

The New Zealand Law Society has considered and recommended the passing of legislation to abolish the *actio personalis* rule and to empower the Courts to award interest on debts and damages, thus bringing our law into line with that of England: Law Reform (Miscellaneous Provisions) Act, 1934. This is a subject to which we particularly direct the attention of the new

Attorney-General. In 1931, His Honour the Chief Justice in *Public Trustee v. Queensland Insurance Co. Ltd.*, [1931] G.L.R. 400, 401, drew attention to the anomaly caused by this rule in respect to the Motor-vehicles Insurance (Third-party Risks) Act, 1928—a rule which is "of obscure origin and uncertain meaning," as the English Law Revision Committee pointed out in 1934, when it recommended reform of this part of the law as "a matter of most urgent national importance." Nothing has been done.

This JOURNAL, as well as the New Zealand Law Society by unanimous resolution, has supported the introduction "In the Interests of Decency" (as we expressed it) of legislation on the lines of the Judicial Proceedings (Regulation of Reports) Bill of 1934, which fell stillborn from the legislative machine.

We also draw attention to the unsatisfactory means provided to deal with claims under the Workers' Compensation Act, when the Court of Arbitration is functioning normally. In 1931, we dealt at length with this matter in our columns, and our conclusions were supported by counsel prominent in this branch of litigation, on the employers' and workers' sides, and by eminent medical opinion. In addition, our views on what was referred to as "a serious fault in our compensation system," were approved by the metropolitan Press editorially. It was stated that the delays in hearing claims by workers had become "a scandal in the administration of justice." The amendment, in 1932, of the Industrial Conciliation and Arbitration Act had the effect of turning the Court of Arbitration into almost a Workers' Compensation Court, and thus the delays in settlement of Workers' Compensation claims were for the time being overcome. The new Government has stated that it proposes to restore the Court of Arbitration to the full powers which were vested in it by the Industrial Conciliation and Arbitration Act, before its amendment in 1932. We suggest, therefore, that, in order to avoid the scandalous delays of the past, the new Attorney-General may consider whether the hearing of Workers' Compensation claims should not be removed from the jurisdiction of the Court of Arbitration lest the old order should automatically return, with all its glaring defects, on the Court's resumption of its former duties under the Industrial Conciliation and Arbitration Act. We refer, in support of our suggestion, to the JOURNAL (1931) Vol. 7, pp. 221, 229, 237, 248, and 249.

Finally, so that this recital of legislative necessities shall not become tedious, though we have by no means exhausted the possibilities of law revision which await the attention of the new Attorney-General, we draw his attention to the need for the bringing up to date of the Arbitration Act, 1908. This reform is supported by the business community as well as by the legal profession, and it is made apparent in recent English legislation. In our next issue, we propose giving our readers the opportunity of detailed consideration of this matter in a very able paper which a learned contributor has prepared for us.

We know that simplification of the law and a business-like method of amending statutes are favoured by the new Attorney-General. This has been already put into practice in Great Britain. During the discussion of the Law Reform (Miscellaneous Provisions) Bill, in the House of Lords, Lord Hanworth drew attention to the inconvenience of having a series of statutes making amendments of the law on different subjects and all bearing the same title; and his parentage of the Bill being revealed, the Lord Chancellor said to him, in effect, "Name this Bill"; whereupon Lord Hanworth named it "The Law Reform (Married Women and Tortfeasors) Bill," and by that name it was sent to the House of Commons. Again, there is an oft-expressed need for simplification of the method of approach to the Supreme Court—a subject to which we propose to give special attention at an early date.

We trust that we have not overwhelmed the newly-appointed Attorney-General with material for his consideration. It is refreshing, however, to know that we are speaking in terms which the Chief Law Officer of the Crown understands. We have no doubt as to his willingness to give these, and any other statutory matters calling for rectification, his prompt and painstaking consideration.

There now remains for us the pleasing duty of expressing our seasonable greetings to all engaged in the profession of the law in this Dominion, and to our contributors and readers overseas. In this, the last number of the JOURNAL for 1935, we express the hope that a very happy and re-invigorating vacation will be spent by Their Honours the Judges, the learned Magistrates, and members of the profession generally. For the last-named, we hope for a prosperous and successful New Year, and, to the new Attorney-General, whom, in their company, we have felicitated on his appointment, we wish a pleasant and fruitful tenure of office. We cannot close the present volume of the JOURNAL without expressing our thanks to all our contributors who, in adorning its pages, have greatly assisted us and provided useful and enlightening material for their fellow-practitioners during the year now closing.

Summary of Recent Judgments.

SUPREME COURT
New Plymouth.
1935.
Nov. 11, 14, 15.
Reed, J.

COMMISSIONER OF CROWN LANDS v. MILLS.

Land Acts—Subdivision of Land as a Town—Approval of Plan before Disposal of any Part thereof—"Every person . . . being an owner of any such land"—Whether Lessee included—When Costs of Appeal given against a Government Official—Land Act, 1924, s. 16 (1), (3).

The word "owner" in s. 16 (3) of the Land Act, 1924, means the owner of the freehold and does not include a lessee.

Where a Government official appeals unsuccessfully from the decision of an inferior Court, the costs of the appeal should be given against him (to be paid out of the public funds), as he is not charged with the duty of procuring that adjudication to be reviewed by a higher tribunal.

Bowden v. Box, [1916] G.L.R. 443, and **Harvey v. Barling,** [1930] N.Z.L.R. 225 (as to costs), approved and followed.

Counsel: R. H. Quilliam, for the appellant; **Billing,** for the respondent.

Solicitors: Crown Solicitor, New Plymouth, for the appellant; **Billing and Little,** New Plymouth, for the respondent.

NOTE:—For the Land Act, 1924, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 4, title *Land Settlement*, p. 622.

COURT OF APPEAL
Wellington.
1935.
Dec. 4.
Smith, J.
Johnston, J.
Fair, J.

IN RE CATHERINE ROBINSON (DECD.)

Practice—Probate and Administration—Intestacy of Married Woman—Application by Brother of Deceased—Next-of-kin of Deceased Husband (who survived Wife) Abroad if Alive—Whether more Beneficial that Estate should be Administered by the Public Trustee—Public Trust Office Act, 1908, s. 14—Code of Civil Procedure, R. 531C.

C.R., a married woman, died intestate, leaving her surviving three brothers and one sister and her husband, who died intestate nine days after her at the age of eighty-three, having been born in England and come to New Zealand over fifty years previously, and who believed that his relatives were all dead. If her husband's next-of-kin were alive, it appeared that they were abroad. No application had been made by any person for letters of administration of the husband's estate. A brother of C.R. applied with the consent of his brothers and sister for a grant of letters of administration, but the Supreme Court refused him a grant and dismissed the notice of action on the grounds that enquiries should be made for the husband's next-of-kin, and the Public Trustee asked to administer the estate.

On appeal from this refusal,

S. A. Wiren, for the applicant,

Held, allowing the appeal, 1. That R. 531c of the Code of Civil Procedure did not apply.

2. That in the circumstances there was no sufficient ground for requiring notice of the brother's application to be given to possible next-of-kin of the husband.

3. That notice should be given to the Public Trustee of the application, and administration be granted to him if he applied for it, as this was a case where it would be more beneficial that the estate should be administered by him. If he did not, then a general grant of administration should be made to the brother applying, who would then be under a duty to find the husband's next-of-kin, if they existed.

The principle enunciated in **In re Dickens (deceased),** (1912) 32 N.Z.L.R. 374, and **In re Trimble,** (1913) 16 G.L.R. 345, applied.

Solicitors: S. A. Wiren, Wellington, for the applicant.

NOTE:—For the Public Trust Office Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 8, title *Trusts and Trustees,* p. 922.

SUPREME COURT
Hamilton.
1935.
Dec. 5.
Reed, J.

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

Family Protection—Jurisdiction—Condition in Will—Life Interest to Widow "during her lifetime so long as she remains my widow"—Order made during widowhood giving Widow increased Benefits—Re-marriage—No Jurisdiction to Vary Order Governed by Original Restriction in Will—Family Protection Act, 1908, s. 33.

The Court has no jurisdiction under the Family Protection Act, 1908, to vary a condition made by a testator that the benefits to his widow accruing under his will should terminate on her re-marriage. Hence, any order made during her widowhood giving her increased benefit must be deemed to be governed by the original restriction, and should be discharged on her re-marriage.

Winder v. Public Trustee, [1931] G.L.R. 459, referred to.

Counsel: de la Mare, for the Public Trustee; **Turner,** for the plaintiff; **Strang,** for D. E. L. Collett.

Solicitors: de la Mare and Jackson, Hamilton, for the Public Trustee; **Johnston, Coates, and Fee,** Auckland, for the plaintiff; **Strang and Taylor,** Hamilton, for D. E. L. Collett.

NOTE:—For the Family Protection Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Family Protection,* p. 292.

SUPREME COURT
Wellington.
1935.
Sept. 19; Nov. 25.
Blair, J.

IN RE IZARD (DECEASED), WATKINS AND ANOTHER v. IZARD AND OTHERS.

Will—Construction—Shares of Residue—Advances in lifetime of Testator—Hotchpot—Power to Postpone Conversion—Principle for ascertaining Income pending distribution.

A testator who in his lifetime had made advances to all his sons, by his will, after certain specific legacies, devised and bequeathed the remaining real and personal estate to trustees upon trust for sale and conversion and upon further trust to invest and hold for testator's children in equal shares as therein provided. The share of one son and all the daughters' shares were settled.

In *Izard and Others v. Maxwell and Others,* (1905) 25 N.Z.L.R. 117, it was held that the sons whose shares were not settled were not entitled to their shares absolutely but that each of such shares was defeasible on death leaving issue.

The will contained the following hotchpot clause:—

"I direct and declare that notwithstanding the trusts hereinbefore contained the share of each of my sons in my trust estate be respectively reduced by the amount of all moneys which have been advanced or shall hereafter be advanced by me during my lifetime to such son together with simple interest calculated at the rate and from the dates hereinafter mentioned that is to say" (then follow provisions as to the commencing dates for calculation of interest and also provision for ascertaining the amount of advances) "And I further declare that the sum of £2,000 agreed to be paid by me under a certain marriage settlement dated the 28th February 1899 on the intended marriage of my daughter Ella Margaret (Mrs. Pharazyn) shall be deducted from her share in my estate under this my will in accordance with the provisions contained in such marriage settlement And I further direct that in the division of my trust estate all such deductions shall be made from the shares of each of my said sons and my said daughter Ella Margaret as shall be necessary for carrying the foregoing provisions into effect."

The will contained provisions giving the trustees a power of postponement of sale and conversion "so long as they shall in their uncontrolled discretion think fit" and also a power to lease for any term not exceeding twenty-one years.

Upon an originating summons for the interpretation of the will,

Counsel: J. B. F. Stevenson, for plaintiff trustees; **C. A. L. Treadwell,** for Stella Margaret Izard; **D. Perry,** for Henry Stratton Izard; **Weston,** K.C., and **Matthews,** for Ernest Battersby Izard, Claire Mary Vivian, and Violet Stedman; **W. H. Cunningham,** for executors of Herbert Crawford Izard and also for Mary Clara Wood; **Broad,** for Public Trustee as executor of Arnold Woodford Izard; **A. T. Young,** for Nancy Margaret Bennett and Eileen Ella Palmer; **James,** for Betty Stratton Izard, Charles Hayward Stratton Izard, and Pamela Margaret Izard; **D. R. Richmond,** for children born and unborn of Claire Mary Vivian and Violet Stedman.

Held, That the method of paying and distributing income to be adopted by the trustees—the only question on which the case is reported—was that adopted in *In re Poyser, Landon v. Poyser,* [1908] 1 Ch. 828, *viz.*:

1. (*a*) that interest on advances at 5 per cent. per annum should be added to the actual income of the estate and the aggregate income so arrived at then divided by the number of shares and distributed accordingly, but subject to deduction, in the case of children who have had advances, of the interest on such advances,

and not that adopted in *Re Hargreaves, Hargreaves v. Hargreaves,* (1902) 86 L.T. 43; on app. (1903) 88 L.T. 100, and that the same interpretation applied in the case of the provisions of the will and codicil as to Mrs. Pharazyn and to the share of the son that was settled.

In re Poyser, Landon v. Poyser, [1908] 1 Ch. 828, followed.

Re Hargreaves, Hargreaves v. Hargreaves, (1902) 86 L.T. 43; on app. (1903) 88 L.T. 100, distinguished.

Solicitors: Izard, Weston, Stevenson, and Castle, Wellington, for the plaintiffs; **Treadwell and Sons,** Wellington, for Stella Margaret Izard.

Case Annotation: *In re Poyser, Landon v. Poyser,* E. & E. Digest, Vol. 44, p. 1248, para. 10768; *Re Hargreaves, Hargreaves v. Hargreaves, ibid.,* para. 10767.

COURT OF APPEAL
Wellington.
1935.
Sept. 20; Dec. 4.
Myers, C.J.
Reed, J.
Smith, J.
Johnston, J.
Fair, J.

WILTON COLLIERIES, LTD.
v.
CONNEW.

Workers' Compensation—Jurisdiction—Contracting-out Agreement—Interpretation of Agreement made by Worker that no Compensation payable by Employer in respect of Incapacity or Death due to Named Disease—Death of Worker before entering on his Service under such Agreement—Hypothetical Case—No Jurisdiction in Supreme Court or Court of Appeal—Workers' Compensation Act, 1922, s. 17—Declaratory Judgments Act, 1908, ss. 3, 9.

Section 17 of the Workers' Compensation Act, 1922, should be interpreted in the same way as any other substantive provisions of that statute have been interpreted, *viz.*, by decisions of the appropriate Court upon claims made by workmen or their representatives before that Court.

The Supreme Court should refuse to make declaratory orders on questions arising under the statute unless at the request of the Court of Arbitration upon a case stated dealing with specific facts in an actual case. Before the Court can be asked to consider, under the Declaratory Judgments Act, 1908, an interpretation of a provision such as s. 17 of the Workers' Compensation Act, 1922, there must be an agreement which is still in force; there must be specific questions; and these questions must be raised on admitted facts which are sufficient to enable the questions to be answered satisfactorily.

So Held by the Court of Appeal (*Myers*, C.J., *Reed*, *Smith*, *Johnston*, and *Fair*, JJ.), dismissing an appeal from and setting aside the declaratory order of *Ostler*, J., reported [1934] N.Z.L.R. 1039, where the facts sufficiently appear.

Wellington Harbour Ferries, Ltd. v. Wellington Harbour Board, (1910) 29 N.Z.L.R. 729, and **Parapara Iron-ore Co., Ltd. v. Barnett,** (1913) 32 N.Z.L.R. 1112, referred to.

Counsel: Richmond, for appellant on both appeals; **Strang,** for respondent on both appeals.

Solicitors: Buddle, Richmond, and Buddle, Auckland, for the appellant; **Strang and Taylor,** Hamilton, for the respondent.

COURT OF ARBITRATION
Auckland.
1935.
Nov. 14.
Page, J.

PEACOCK v. MARTHA GOLD-MINING CO. (WAIHI), LIMITED.

Workers' Compensation—Abrasion of Foot—Employers' Rule requiring Notice of Wounds, Abrasions, etc., however slight, and Use of Ointment provided at First-aid Station—Notification of Refusal to pay Compensation upon Failure or Neglect of Observance of Rule—Employee suffering Abrasion but not using Ointment—Neglect to give Notice not Occasioned by Mistake or other Reasonable Cause—Workers' Compensation Act, 1922, s. 26.

While working in defendant's mine, P. received an abrasion of his foot on July 23, 1935, and on August 3 he was compelled by reason of the wound's becoming septic to cease work, with resultant incapacity for seventeen days.

Owing to the water in defendant's mine having become impregnated with chemicals and other substances likely to induce and foster sepsis in cuts and even the most trifling abrasions, defendant, subsequently to the decision in *Heath v. Waihi Gold-mining Co., Ltd.*, *Ante*, p. 67, made further efforts to cope with this danger of sepsis, and posted up a new warning notice which ordered the employees, in the event of any one of them meeting with wounds, abrasions, etc., however trivial they might appear to be, to report to the nurse at the dressing-station before leaving the mine-works and to wash the wound and apply the ointment there provided.

Plaintiff reported his abrasion to his immediate superior, but did not use the ointment provided or report to the dressing-station, or give the notice required by s. 26 (2) of the Workers' Compensation Act, 1922.

On a claim for compensation in respect of his injury,

P. J. O'Regan, for the plaintiff; **Richmond,** for the defendant,

Held, giving judgment for the defendant, That plaintiff having had personal notice of the danger and of the defendant's requirements in case of accident, had ignored them, and had prejudiced the defendant by his failure to give notice of his injury, which failure was not occasioned by mistake or by any other reasonable cause.

Solicitors: P. J. O'Regan and Son, Wellington, for the plaintiff; **Buddle, Richmond, and Buddle,** Auckland, for the defendant.

SUPREME COURT
Nelson.
1935.
Nov. 29.
Northcroft, J.

RE HALL (A PRISONER).

Criminal Law—Reformative Detention—Summary Conviction—Sentence of Imprisonment and Detention for Reformative Purposes—When Power to Order Reformative Detention should be Exercised—Whether Nature of Offence or Offender's Record should affect imposition of Longer Term of Imprisonment by Reformative Detention—Crimes Amendment Act, 1910, ss. 3, 5.

The power given by s. 3 of the Crimes Amendment Act, 1910, to apply reformative detention to a person where

"the Court or Judge thinks fit, having regard to the conduct, character or associations, or mental condition of such person, the nature of the offence or any special circumstances of the case,"

should be employed to order detention in excess of the prescribed maximum periods of imprisonment only in exceptional circumstances, and where there is the strongest reason to anticipate beneficial results for the offender.

Reformative detention should not be resorted to for the imposition of a longer term of imprisonment than the prescribed maximum because the offence is a bad one or because the offender has a bad record.

Quaere, Whether s. 5 of the Crimes Amendment Act, 1910, is authority for the setting-aside of a Magistrate's sentence of reformative detention and for its replacement by a sentence of imprisonment with hard labour.

Counsel and Solicitor: W. C. Harley, Nelson, for the prisoner.

SUPREME COURT
Napier.
1935.
Nov. 22, 28.
Smith, J.

CORNFORD AND ANOTHER
v.
GOWER AND ANOTHER.

Executors and Administrators—Mortgage—Memorandum of Extension in which Executors Covenant jointly and severally—Whether an Extension of Original Mortgage or a Novation—Whether Executors Empowered to Extend Mortgage of Testator—Administration Act, 1908, s. 5.

By an extension of the term of a second mortgage the executors of a deceased mortgagor and the purchaser of the equity of redemption covenanted jointly and severally to pay the moneys secured by the Memorandum of Mortgage extended and to observe the covenants, etc., of the mortgagor.

H. R. Cooper, for the plaintiffs; **W. A. McLeod,** for the defendants,

Held, That the document was an extension of the original mortgage and not a new contract effecting a novation.

Semble, 1. The power given by s. 5 of the Administration Act, 1908, to an administrator to mortgage the testator's real estate for the payment of his debts in the ordinary course of administration is sufficient to include a power to extend the term of a mortgage if he is unable for the time being to find the money necessary to pay the debt in cash.

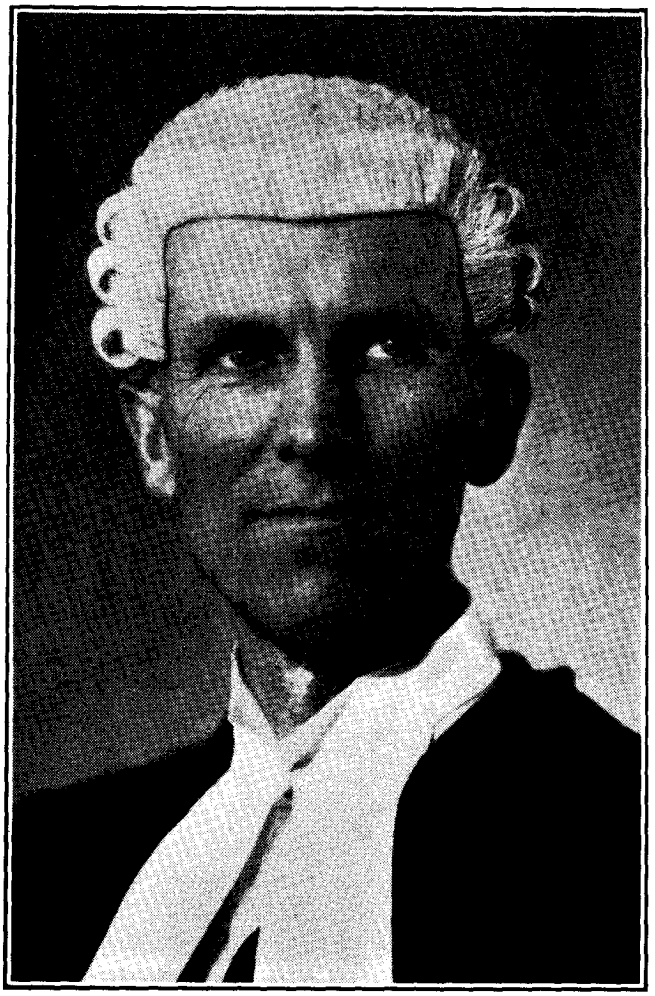
2. But if the executors had no legal authority to execute an extension, then the extension was a nullity and the executors were liable under the mortgage unextended.

Solicitors: Cooper, Rapley, and Rutherfurd, Palmerston North, for the plaintiffs; **Humphries and Humphries,** Napier, for the defendants.

The New Attorney-General

THE HON. H. G. R. MASON, M.A., LL.B., M.P.

In *Reg. v. Comptroller-General of Patents, Ex parte Tomlinson*, [1899] 1 Q.B. 909, 913, Lord Justice A. L. Smith said: "Everybody knows that the Attorney-General is the head of the English Bar. We know that he has had from the earliest times to perform high judicial functions which are left to his discretion to decide." He then gave examples, and proceeded to say: "There are other cases to which I could refer found in old and recent statutes, but I have said enough to show the judicial functions which the Attorney-General performs." Again, the Rt. Hon. Sir Edward Clarke, K.C., in *The Story of My Life*, in telling of his six years as one of the Law Officers of the Crown, outlined "the great duties and great responsibilities" of the Attorney-General in England; and, he said, "the office is not in itself essentially political, but its duties are very varied and very important."



S. P. Andrew Studios

The Hon. H. G. R. Mason.

In 1932 in these pages, a strong case was made out by a member of the Bar for reconstruction of the office of Attorney-General by the appointment of a practising barrister to that office, which was held at that time by the Hon. W. Downie Stewart, himself a qualified practitioner, but only as an appendage to the onerous portfolios of Minister of Finance and Customs. Later on, when the Hon. Mr. Downie Stewart resigned from the Cabinet, and the office of Attorney-General became vacant, it was announced that it would be held by the Prime Minister (the Rt. Hon. G. W. Forbes) temporarily. Some time later, in April, 1934, the JOURNAL pointed out the anomaly of this important legal office's being held by a layman; but the suggestions then made in a spirit of helpfulness and not of criticism, while endorsed by the opinion of the profession throughout the Dominion, did not avail; and the office remained in effect vacant until the appointment of Mr. H. G. R. Mason, M.P., senior partner of the firm of Messrs. Mason and Mason, of Auckland, as Attorney-General and Minister of Justice in the first Labour Cabinet on December 6.

The Hon. Mr. Mason was born in Wellington in 1885. He attended the Clyde Quay School there, and afterwards received his secondary education at Wellington College, where he was head of the school in 1902. What is probably a record for the British Dominions lies in the fact that five Judges—His Honour the Chief Justice (Rt. Hon. Sir Michael Myers, K.C.M.G.), three Judges of the Supreme Court (Hon. Mr. Justice Blair, Hon. Mr. Justice Smith, and Hon. Mr. Justice Northcroft), and the Judge of the Court of Arbitration (Hon. Mr. Justice Page)—and the Attorney-General are former students of the same school.

The Attorney-General has lived the life of the law from his early years. At Victoria University College, he had a fine academic career. He obtained his Master of Arts degree, with honours in Mathematics and Mathematical Physics, and his Bachelor of Laws degree. While studying for his examination, he was serving his articles with Messrs. Kirk and Wilson, of Wellington, during the years 1903 to 1908. He went to Eltham on appointment as managing clerk to Messrs. Wake and Gow, and was admitted as a solicitor in March, 1909, and as a barrister in the following year. In 1911, he commenced practice on his own account at Pukekohe. There he carried on a general practice of the usual kind; and in this period he went through the usual experiences of the young practitioner which assures his ready sympathy with the ideals of the profession as a whole, and an understanding of the difficulties of its members in the ranks. In 1924, Mr. Mason commenced practice in Auckland with his brother, Mr. Spencer R. Mason. The partnership still remains, its chief office being in Auckland with branches at Pukekohe and Waiuku.

The Attorney-General began his public life with his election to the Mayoralty of Pukekohe in 1915, and he retained that office until 1919. In 1926, at the by-election necessitated by the appointment of Sir James Parr to the High Commissionership, Mr. Mason was elected Member of Parliament for Eden. In 1928 that electorate was changed by the readjustment of boundaries, and he was elected for Auckland Suburbs, a seat which he has held with increasing majorities ever since. Since April, 1931, he has been a member of the Auckland Transport Board, and at present he is its Chairman.

In Parliament, Mr. Mason has been a hard-working member, and a careful and active critic, and, over many years, he has given valuable service in the Statutes Revision Committee. Moreover, his analytical mind has been a great asset to his Party. In addition, he has shown constructive ability in the promotion of legislation: in fact, he has the reputation of being the most successful private member in this regard who has ever sat in the House of Representatives. Wherever the subject of any Bill promoted by him touched the general law, he sought the co-operation of the Law Society and worked in close harmony with it. Among these Bills which are now on the statute-book, the Divorce and Matrimonial Causes Amendment Act, 1930, and the Magistrates' Courts Amendment Act, 1930, may be mentioned. It is clear, therefore, that the new Attorney-General is no novice in initiating and effecting legislation.

One who has known the new Attorney-General intimately for many years, informs the JOURNAL that the Hon. Mr. Mason takes some knowing: "He is not effusive, or one who wears his heart upon his sleeve: a reserved man, rather. First and foremost, he is a very clear and logical thinker; and on difficult and technical matters he has the rare faculty of expressing himself so as to be understood by the uninitiated. His ability in this respect was well displayed in his presentation from time to time of the case for monetary reform. His bills on national credit and currency were admirably drawn—the Parliamentary Law Draftsman could scarcely have improved upon them—and Mr. Mason's exposition of these measures was always clear and convincing. His legal training was an asset to him in his Parliamentary work; and, indeed, any legal Member of Parliament has an advantage over most lay members.

"Another characteristic of the new Minister is his courage. Once he has beaten out in his own mind a line of action, then, whether it be strange or unpopular—and most strange things are unpopular—he takes no heed of such hindrances, but advocates pointedly and unyieldingly the new course, the new Bill. In this respect, he may be said to have influenced at times the thought of his own Party. Mr. Mason is undoubtedly one who takes pride and satisfaction in the task of developing and shaping the lines of a new social and economic order, and his zeal to this end makes him somewhat intolerant of men who would move slowly and cautiously and who are inclined to shrink from too sudden a break with the past. The new Attorney-General is radical to the backbone, and is unrelentingly hostile to conservatism in the ordinary narrow meaning of the word. It is perhaps this characteristic which causes him to be misunderstood on occasions and also detracts from any general or easy popularity.

"Loyalty to principle and to party is another feature of the man. There are odd sections in the Labour movement, becoming less and less as the years go by, in which the Labour lawyer is regarded with a certain amount of suspicion; but no suspicion seems ever to have been aroused over 'Rex'—as the Attorney-General is known to his friends—or his activities; and it is doubtful whether he would be perturbed if such were to arise. He is a self-contained man, little dependent upon others, and with a confidence in his own powers and ability to think and plan wisely.

"Mr. Mason is well worth his place in the new Cabinet, and he may be relied upon to act fairly and squarely in the ordinary work which his portfolio involves, as well as to take a definite and bold part in shaping the new legislation necessary to implement the declared policy of the Labour Party."

Message to the Legal Profession from The Attorney-General.

Office of the Attorney-General,
Wellington, December 12, 1935.

UPON my appointment to the honourable office of Attorney-General, I avail myself of the courteous offer of the Editor of the LAW JOURNAL to address a brief message to the legal profession of New Zealand.

I gratefully acknowledge the kindly encouragement, congratulations, and offers of assistance from members of the Bench, Law Societies, and many old friends in the profession. I share the belief I hear expressed on all sides that there is much waiting to be done which calls for the active interest of an Attorney-General.

A profession whose daily work is the administration of the law is naturally moved by a desire to see its administration made as just as human fallibility will permit. Most suggestions for improvement in the law naturally come from the knowledge and experience of the legal profession. No arm-chair philosophy can take the place of what is impressed upon one's brain through the course of daily employment. It is through the Attorney-General that the profession normally seeks to make its experience available to the Government and the country to the end that the standard of law and justice may be maintained at the highest level. There are doubtless anomalies the removal of which may not be easy to attempt, and which may involve differences of opinion. On the other hand, there is much as to which there is general agreement in the profession.

The profession has already been generous in its offers of assistance in the work. In my turn, I assure the profession of co-operation to the best of my ability in all those things which the profession is entitled to expect from an Attorney-General.

H. G. R. Mason

Attorney-General.

From the foregoing, it will be seen that the hopes of the profession that the office of Attorney-General should again be held by a practising barrister have been realized; and, further, that the Ministry of Justice is also properly combined with the Attorney-Generalship to the exclusion of any other offices. Both facts are very gratifying to the profession, and the New Zealand Law Society was prompt, in extending its good wishes, to express to the Hon. Mr. Mason, both on personal and on official grounds, its satisfaction with his appointment and the nature of the duties confided to him.

It will be seen that the Attorney-General is a man of ideals. He aims high in his idealism, but it is a practical idealism for all that. In these characteristics he should find a kindred spirit, and in his task an able coadjutor, in the person of the Solicitor-General (Mr. H. H. Cornish, K.C.), who has won golden opinions during his tenure of office from those with whom his duties have brought him into contact. The Hon. Mr. Mason thus comes well-equipped, both personally and officially, to his office, and he has the profession's best wishes for success.

Legislative Lapses.

Judicial Comments on New Zealand Statutes.

By I. D. CAMPBELL, LL.M.

The recent case of *In re Ainge (deceased)*, *Wheeler v. Bank of Australasia*, [1935] N.Z.L.R. 691, gives renewed prominence to the question of the relationship between the Legislature and the Judiciary in the construing and amending of difficult or defective enactments.

It will be recalled that last year, in the case of *In re Tremain (deceased)*, *Tremain v. Public Trustee*, [1934] N.Z.L.R. 369, the Court of Appeal adversely commented upon the framing of s. 3 of the Life Insurance Amendment Act, 1925. A typical view was expressed by Herdman, J., when he said: "No matter how we may turn and twist s. 3 an intelligent meaning cannot be extracted from its provisions." It was this section that led to the difficulties in *Ainge's* case, where the Court of Appeal, by methods which the Chief Justice characterised as "Procrustean," succeeded in giving some meaning to the clause. The Chief Justice, at p. 707, adds:

> "It is perhaps unfortunate that the difficulty in this case was not overcome by an appropriate amendment after it was pointed out in *Tremain's* case."

It is interesting to review some of the occasions upon which our Supreme Court and Court of Appeal have considered it appropriate to remark upon the nature of the legislation before them, and to see when and to what extent, as the apparent consequence of such comment, legislative action has followed.

In 1903 there was the outstanding group of cases reported under *Corby v. Mc Arthur*, (1903) 23 N.Z.L.R. 419, arising out of the Newtown Licensing Poll. Argument turned on the meaning to be given to s. 3 of the Alcoholic Liquors Sale Control Act Amendment Act, 1895. Stout, C.J., said:

> "To give full effect to the section will, no doubt, create many anomalies; but if full effect is not given there will also be anomalies. . . . There are anomalies, and, it may appear, absurdities, if either view is taken."

A serious situation was revealed by the special circumstances of this poll, and the Chief Justice concluded,

> "The questions that have been raised show the necessity of amendments both in the various Licensing Acts and in the Regulation of Local Elections Act, 1876."

More terse was the comment of Denniston, J.:

> "I will not speak of the existing state of the law as a scandal, for such language would not be respectful, and legislators are not more infallible than Courts."

If the Court could not with the aid of the context and of the rest of the Act avoid the conclusion that there had been an omission, it could not on account of the consequences take upon itself to supply the omission by reading into the Act what it might think Parliament would have done had its attention been drawn to the omission. "But we are justified," he says,

> "in concluding with confidence that no Legislature will hesitate, when the omission and its serious consequences are pointed out by the body whose duty it is to interpret the law, to supply the omission, and, as far as possible, to correct and avert such consequences."

His Honour's confidence was not misplaced. The following year the Acts concerned were drastically amended.

The unfortunate wording of the Government Railways Superannuation Fund Act, 1902, led the Court of Appeal in 1906 to resort to the *reductio ad absurdum* method of judicial construction. In the case before the Court, *Government Railways Superannuation Fund Board v. Fastier*, (1906) 26 N.Z.L.R. 1174, it was suggested that in passing this enactment the Legislature had been under a mistake of law due to the judgment in *Coker v. The Queen*, (1896) 16 N.Z.L.R. 193. The reasoning adopted by the Court in elucidating the difficulty appears from the following portion of its judgment, delivered by Edwards, J.:

> "The purpose of the statute is benevolent, and if any other construction were adopted subsections 3 and 6 would be absolutely meaningless. . . . Therefore, either the Legislature had an enacting purpose in the provisions of s. 16 of the Act of 1902, or it must be deemed to have knowingly enacted them as a mockery and a sham, which is impossible."

The reader of the report will no doubt mentally add the customary "Q.E.D." As the decision gave an adequate interpretation to the section, no further legislation on the point appears to have been considered necessary.

Edwards, J., whose name has just been mentioned, was to be the unhappy victim of more than one of these statutory enigmas. In 1908 he wrestled first with the Surveyors Act and the Land Transfer Act, then with the Native Land Court Act. In 1909 he strove to reconcile an amazing contradiction brought to light in the Consolidation of Statutes of the preceding year concerning the depasturing of cattle. And still again, in 1916, we find him confronted with apparently conflicting provisions in the Education Act, 1914.

In the first of these cases, *Stubbing and Page v. Barnett*, (1909) 28 N.Z.L.R. 810, the difficulties were overcome by reliance on the maxim, *Generalia specialibus non derogant*. Without the application of this rule it was impossible to give clear meaning to the general enactment without making the special enactment meaningless; and, as His Honour felt necessary to repeat, "some meaning should, if possible, be given to every legislative enactment." The Acts, so construed, remained substantially unaltered on this point for many years.

Resort was again made to the *reductio ad absurdum* method in the Court's speculation as to the intention of the Legislature in *In re The Native Land Court Act, 1894, and The Native Land Laws Amendment Act, 1895*, (1908) 28 N.Z.L.R. 646. Edwards, J., remarks:

> "It is extremely unlikely that the Legislature intended to deprive the ordinary civil tribunals of their jurisdiction in respect of matters which must be decided upon the ordinary principles of the general law of the Dominion, and to relegate those matters to a Land Court, whose Judges are gentlemen not necessarily possessed of any expert knowledge of the law."

From the absence of any amending legislation after the decision, presumably the speculation was correct.

A more extraordinary case was that of *Shearman v. Kay*, (1909) 29 N.Z.L.R. 540, in which Edwards, J., made a very cautious statement on the construction of statutes. It appeared that the Public Works Act, 1884, the Police Offences Act, 1884, and the Impounding Act, 1884, all dealt, *inter alia*, with the depasturing of cattle on the highway, but were all inconsistent. And surprisingly enough the conflicting provisions were all re-enacted in the 1908 Consolidation. The Court declared:

> "If, as appears not unlikely, two inconsistent enactments, contradictory at all points, and both dealing in all respects with the same subject, are found, the Court may be driven to say in so many words that one of them is law and the other not, because the one faithfully reproduces the law as it was prior to the legislation of 1908, while the other reproduces an enactment which had been repealed prior to that legislation."

His Honour added, however, that the present case could be decided without being driven to so heroic a principle of construction, by reference to the maxim quoted earlier as to the application of general and special Acts.

Annotators continue to point out the exception created by the Impounding Act in the other Acts referred to; but it has not been expressly acknowledged in the Police Offences Act, 1927, or in the Public Works Act, 1928.

The year 1884 was indeed the *annus mirabilis* for mystifying legislation. It was in that same year that the Land Boards Act Amendment Act was passed, itself precipitated, it appears, by the case of *Higgins v. Land Board of Otago*, and passed while an appeal from that decision was actually pending: *Otago District Land Board v. Higgins*, (1884) N.Z.L.R. 3 C.A. 66. In the lower Court, Williams, J., had remarked that the Land Boards Enquiry Act, 1883,

> "bears on the face of it the marks of having been hastily put together, and there is no wonder if it fails to carry out whatever may have been the precise intention of its framers."

If the restrictions imposed by the Act were insufficient to carry out the policy of the Act, that was an omission of the Legislature, and the Court could not insert restrictions under pretext of "interpretation." This implied suggestion of amendment the Legislature accepted, but in doing so failed to speak unequivocally on the question whether the Amendment would apply retrospectively to a case such as Higgins's. In the view of the appellant, the Act passed *pendente lite* had reversed a judgment of the Supreme Court, and deprived the respondent of a vested right of property by the imputation of a default which (as the Court had held) had never occurred. Delivering the judgment of the Court of Appeal, Richmond, J., said:

> "Such a purpose is not to be imputed to the Legislature except under compulsion, so to speak, of the plainest and most direct terms—and where in this Act of 1884 are such terms to be found? . . . It is preferable to impute to the Legislature the use of a tautological expression—a supposition to which the most ingenious are sometimes driven in the interpretation of the language of the Acts of Parliament—rather than to adopt the conclusion to which the appellants would lead us."

It is significant that the existing legislation was replaced by a new Land Act in 1885.

Two other cases of more recent date will be referred to. The first is *Auckland City Council v. R. and W. Hellaby, Ltd.*, [1924] N.Z.L.R. 964. Section 27 of the Slaughtering and Inspection Act, 1908, was under review. The section itself was variously characterised as "this very badly drafted section" and "ill-drawn and ambiguous." Salmond, J., spoke of "this mysterious Statute." Mr. Justice Stringer declared that the effect of the construction he felt compelled to place upon the second proviso to the section was undoubtedly to frustrate the object it was intended to effect. In spite of this, the section remained unamended until 1927, and then only one of the Court's criticisms was disposed of, and its major difficulties were given no legislative solution.

Lastly one may refer to *Findlater v. Public Trustee and Queensland Insurance Co., Ltd.*, [1931] G.L.R. 403. Dealing with s. 10 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, His Honour the Chief Justice, at p. 407, said:

> "My conclusion has been arrived at with much reluctance because I appreciate the anomaly of the result. It may be that the draftsman of the Act intended to abrogate what I call the second branch of the *actio personalis* rule. If so, then, if I am right, there is an omission which only the Legislature can cure."

The judicial reconstruction of the Life Insurance Amendment Act has already been noted, and further illustrations (such as the history of s. 18 of the Divorce and Matrimonial Causes Act, 1928) are readily at hand. From the cases adduced above it is possible, however, to indicate a clear division between the cases in which the Legislature has followed with amending legislation, and those in which it has not. With few exceptions, it has always intervened when the Court has indicated an omission which it was powerless to cure; but has not legislated in any case where the Court has been able to put an adequate interpretation on the Act concerned, whatever the difficulties encountered by the Court in the actual process of construing.

Two major weaknesses are inherent in such a system. In the first place, the absence of simple amendments leaves the law in many instances in a most inadequate form, with the advantages of neither statute nor common law and the disadvantages of both. Secondly, necessary amendments are, in the exceptional cases, delayed or forgotten, perpetuating injustices pointed out by the Court but ignored by the Legislature. The present status of legislation on the protection of life insurance moneys and on third-party insurance presents outstanding examples of these two situations.

The remedy would seem to lie along lines such as have been adopted in England. The work of the Law Revision Committee in reporting upon anomalies in the law and putting forward practical and constructive recommendations offers, it is believed, the most hopeful solution of the present difficulties. This Committee was appointed by the Lord Chancellor to reconsider in the light of modern knowledge some of those doctrines which have become anachronistic and out of harmony with views now generally prevailing. As the *Solicitors' Journal* remarked last year, "the results already achieved bear eloquent testimony to the expedition and efficiency with which the Committee is accomplishing its allotted tasks." Needless to say, the proposals of such a Committee, however diverse its constitution, will not in all cases be acceptable to the Legislature, which on grounds of policy may on occasions deliberately elect to leave the law as it is. But when all necessary concessions have been made, it still remains beyond question that a body such as the Law Revision Committee would be invaluable.

An alternative course is open in the event of this proposal not being favoured. That is, to adapt the organisation of the Crown Law Office or the Justice Department to perform similar functions as part of its regular work, but the duties of both Departments in this respect are not clearly defined, and consequently their functioning as regards law reform tends to become haphazard.

Lawyers will readily appreciate this comment from Lord Macmillan:

> "It is consoling to reflect that the increasing intervention of Parliament in the life of the people by means of imperfectly-framed statutes will, at any rate, save many lawyers from swelling the ranks of the unemployed."

But, even so, they will hardly deny the advantages of reform, and will probably concede this contention: that a change of first-rate importance will be made when one of the Government Departments is specially adapted to act as the necessary intermediary between the Judiciary and the Legislature; or, better still, when an independent Law Revision Committee is established whose specific function shall be to prepare recommendations designed to cure the vagaries and omissions of legislation.

Australian Notes.

By Wilfred Blacket, K.C.

Defaulting Husbands.—In the Victorian Parliament the Maintenance and Alimony (Imprisonment) Bill seems likely to establish a precedent in legislation relating to its subject-matter. It provides that husbands who are in arrears in their payments of alimony and maintenance money shall not be imprisoned if they are "honestly unable" to pay up. Introduced by a private member, and opposed by most of the Ministry, it has so far had large majorities in its support at every stage. Fortunately for those who desire that imprisonment should be retained, a Tasmanian gentleman had recently, as it was said, won a very large prize in a sweep and yet refused to pay for the maintenance of his wife and children; but supporters of the Bill seemed to think he was a "hard case," whose example should not be used to support a bad law.

Cats and Dogs.—At Grafton, New South Wales, a lady sued a defendant for that his dog had killed her cat, a pure Persian, whose frequently-recurring offspring had theretofore sold readily for very satisfactory prices. It was proved that the dog, a greyhound, had previously killed another cat, and the plaintiff's counsel relied upon the fact to prove that the dog had mischievous propensities concerning cats. But Bliss, P.M., decided that the lady could not recover the £15 sworn to be the value of this useful cat, for the definition of "animal" in the local Dog and Goat Act does not include cats, and at common law there is, as he held, no liability, for the dog was only following the ancient canine custom of killing cats whenever opportunity permitted. In this case, however, the dog went on to plaintiff's premises in order to kill the cat; that is within the law that governs cats and dogs, but is it not also within the law that governs torts committed by trespassers? A retriever's natural propensity is to chase ducks, but if he chases ducks on my pond his owner may well expect to pay my damages.

Concerning Statutory Declarations.—Chief Justice Jordan of New South Wales was greatly grieved to hear that a Justice of the Peace appearing as a witness in a case then on trial had witnessed a statutory declaration without being satisfied that the declarant understood it. "You should go through it with him," said the Chief Justice, "and see that he understands it. That is your bounden duty. Before a Justice of the Peace allows anyone to make a statutory declaration, he should read it through, and see that he understands what he is saying. That is what you are for." Quite naturally there was a loud outcry when this *dictum* was noised abroad, and newspaper correspondents being Justices of the Peace asserted that they regarded the contents of a statutory declaration as being as sacred as the contents of a will, and that their practice was to ascertain the identity of the declarant and accept and witness his declaration. Thereupon the Chief Justice very prudently "kept on saying nothing" but the Minister for Justice rushed to his aid with an official statement that the "Chief Justice referred only to the case of a declaration being made by a person who was in such a condition that he could not talk, and apparently was not able to read the declaration through for himself," an explanation that fits the *dictum* just about as well as gum-boots would fit a new-born babe; and the explanation itself is open to serious question, for, if a man is in such a condition that he cannot talk, it seems unlikely that he will be able to declare anything, and if he is apparently "not able to read the declaration through for himself" the proper course would be to tell him to call again when he had sobered up.

Puny Salaries for Puisne Judges.—New South Wales has an inveterate habit of waking up every five years to take notice of the fact that His Majesty's Justices of the Supreme Court are scandalously underpaid. Having noticed the scandal, the community becomes oblivious to it for another five years. We have had the awakening recently, and now I fear that the usual period of sound slumber has begun. The facts are that under the New South Wales Constitution Act of 1854 the salaries of Supreme Court Justices were permanently fixed at £2,600 per year and charged upon the Consolidated Revenue. Life-tenure of office was also conferred upon them. Since that date Parliament has reduced their tenure of office by providing for compulsory retirement at the age of seventy, and their salaries have been reduced by about £700 a year by income-tax exactions. The Chief Justice gets £3,500 a year, but his salary also is liable to similar taxation. The Justices of the Supreme Court and the Judges of the District Court, who have been on the £1,500-a-year mark, less tax, for over sixty years, have only about twenty votes altogether, so the necessity of doing justice to them has never come within the range of practical politics.

The late G. H. Maxwell, K.C., M.H.R.—Forty-four years a barrister, eighteen years a member of the Federal Parliament, he died at the age of seventy-six. For many years past he was the leader of the Criminal Bar in Victoria, and yet for the last decade and more of his practice absolutely blind, and for years before that his sight was so defective as seriously to handicap him in his work. But he had a great heart, a marvellous memory, and a devoted daughter; and, aided by that strange instinct of perception that comes to the blind, he was to the last enabled to satisfy and gratify both his clients and his constituents. He was handsome of feature, and his brilliant eyes indicated the activity of his mind, although they could transmit nothing to his brain. His was a splendid example of courage triumphant over all difficulties.

A Partly Honest Living.—Alfred Hughes, of Melbourne, when arrested at 4 a.m. had 11s. 6d. in his overcoat pocket, which he said he had collected from the milk-jugs of the confiding residents of South Yarra. He informed the Bench, on his trial, that he had intended to collect £3 in this way, so that he could buy socks at 6d. and sell them at 1s. a pair. "It was the only way I knew of making an honest living," he added. The Magistrate sent him to gaol for a month, so that he might have a chance of thinking out a better way. His weird inconsistency of intention and performance recalls the case of the Mexican gentleman who with great enthusiasm established a branch of the Society for the Prevention of Cruelty to Animals, and raised money for the Society's good work by means of a bull-fight.

"**What Oh!**"—In the Victorian Assembly Mr. Eager strongly opposed the proposal to deprive Justices of the Peace of their right to sit in maintenance cases. He said that this was a "jurisdiction to which they were eminently suited," but what he meant is not at all clear.

A Prince in the Dock.

A Morning in a London Police Court.

By Graham Crossley, LL.M.

I decided this morning to study the working of an English Police Court, and so made my way at 11 a.m. to Great Marlborough Street, where the "daily presentation of prizes" was in full swing.

A large placard announced that the Distinguished Strangers' Gallery was full. That was because anyone who goes voluntarily to Great Marlborough Street qualifies for admission to that section. So I proceeded till I came within sight of the arm of the law who guarded the entrance to counsel's enclosure, and then I walked on as though I were Sir Stafford Cripps. However, my appearance must have been too good to be true, for the constable said, "Who are you?" I replied, "I am a barrister from New Zealand." This was rather an unusual one for P.C. 1406, and it gave me an initial advantage, but he decided to proceed according to regulations. "Have you any papers to show that you are?" This equalized the score, and I searched my wallet for the incriminating evidence. All I could discover were two wretched printed slips of paper of a kind not commonly associated with the ancient profession. The practised eye of P.C. 1406 lit on these documents of title, and my chances of getting into the Court through that door were instantly ruined.

What to do now? A reporter swept past me, carrying a sheaf of notes for the midday edition. I secured four sheets of foolscap, and, perusing them intently, I passed unnoticed into the Press benches.

A number of lags were being treated for obstructing highways with their costermongers' barrows. The law on this offence appears to be as follows: first appearance, no charge; first recall, 2s. 6d.; and each subsequent performance 5s., up to 15s. if the policeman was hurt.

The Magistrate was a typically reliable Englishman, and he seemed to know the law just as well as the lags themselves did, so that very few of them got off. But the power behind the throne in an English Police Court is the Clerk.

The Clerk reads the charge, takes the plea, and tells everyone in the Court what to do next. What he hates most of all is a plea of "Guilty," because that automatically introduces the next case without giving him any opportunity to tell anybody to do anything. The Magistrate frequently refers to him, very confidentially, sometimes at the beginning of the case and sometimes at the end. My lip-reading never was prodigiously accurate, but if the conversation was at the beginning of the case I fancy the Magistrate used to say, "Is it a hard one?"; and if it was at the end, "What's the answer to that, Watson?"

At 12.30 p.m. the supply of barrows which magically moved themselves to illegal but lucrative positions, to the profound annoyance of their protesting owners, came to an end, and a few stray "solicitors" were dealt with on the information of a policewoman. She gave her evidence "manfully," and everything happened just as if she had been P.C. 1406, except that the Magistrate smiled benignly and encouragingly at her. The girls' story that they were in Piccadilly just to meet a friend, although not devoid of possibility, failed to raise a doubt in the knowledgeable mind of the Bench.

The next case was against Peter Carl McKay, a Danish citizen. This name did not convey anything to me, but the public gallery became very excited. Suddenly there appeared in the dock an almost unbelievable figure. The like of it had never been seen since "Barnum" entered London. It was, to give it its own title, Prince Monolulu. His Christian name was that most un-Christian word, Rass. A negro gypsy, 6 ft. 6 in. tall, marvellously proportioned, and clad in a really original and imaginative style. Red knickerbockers, richly covered with gold brocade; leggings of red leather similarly encrusted; silk shirt, half royal blue and half white like a soccer international's; a tartan cummerbund so gloriously polychrome that the legendary chameleon which merely burst when placed on the saintly MacDonald pattern would have completely dissolved on this; a red, white, and blue cape and collar embellished with stars, crescents, soup, and a coat of arms on the back. His motto was, "I've got a," and this motto surmounted a horse rampant, with a jockey on its ears. Pessimistically, he carried an outsize tartan umbrella with a shooting-stick handle. He stood erect and defiant, and the garish ensemble was crowned with a head-dress of red, white, blue, and green cassowary feathers which raised the stature of the apparition to 8 ft. Such, briefly, was the appearance of Prince Monolulu, racing tipster and Hyde Park orator. I only wish he had been present at Warren Hastings' trial, and the pen of Macaulay could have done him justice.

He was charged with using indecent expressions last Sunday while addressing some five hundred men and women in the Park. The Clerk inquired for the plea, and the crafty Prince answered, "Not guilty, My Lord." After casting this delicate sop to Cerberus, the unreal McKay maintained a regal silence till the end.

If the constable in his evidence used no more imagination than his sturdy physiognomy suggested that he possessed, the offence was well and truly proved. Apparently, the trouble all started over a story about Mae West. And the increasing acclamation of a rapidly growing crowd deceived His Highness to descend lower and lower.

In vain counsel pointed out his client's pacific intentions, and his natural excitement over the Abyssinian question which was to have been the subject of his speech. The Magistrate was desperately firm. Counsel admitted that perhaps the remarks were not in good taste, and might not be used in a drawing-room, and that some of them came very near the border-line. "They are a long way over," vehemently interjected the Magistrate, who all along had been trampling the royal colours in the dust. I respectfully agreed with the interjection, and things were looking gloomy indeed for Monolulu P.

Counsel said he could only submit that the expressions complained of were doubtful, but not a breach of the regulations. While my learned friend was seeking to expand this submission, the devil which malevolently lurks in men's tongues led him unfortunately to repeat the very phrase which the Magistrate had so recently and violently discounted—I mean the bit about being near the border-line. When the smoke had cleared away counsel was able to hear the *ultima verba* of the Bench, which, if I heard aright, would increase the princely overdraft by some £10.

And the Prince in his native tongue said unto his counsel what Milo said to the equally unsuccessful Cicero,—

"*Sic transit pecunia tua.*"

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Grant of Right of Support of one Building by Another Adjoining.

Under the Land Transfer Act, 1915.

Memorandum of Transfer by Way of Grant of Right of Support.

WHEREAS A.B. of etc. (hereinafter called "the transferor") is registered as proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in ALL THAT etc. (hereinafter called "the servient tenement").

AND WHEREAS C.D. of etc. (hereinafter called "the transferee") is registered as proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in ALL THAT etc. (hereinafter called "the dominant tenement").

AND WHEREAS the (*southern*) boundary of the servient tenement corresponds with the (*northern*) boundary of the dominant tenement

AND WHEREAS there is erected upon the servient tenement a (*three*) storey building the (*southern*) wall whereof extends uniformly along the said boundary so that the external face of the said wall is co-incident with the said boundary for (*the full length*) thereof

AND WHEREAS the transferee being about to erect on the dominant tenement a (*two*) storey building for (*the full length*) of the said boundary and having a height of approximately (*thirty*) feet has requested the transferor to grant to the transferee the right to support the roof of such intended building by inserting rag-bolts and other supports into and fastening corbels upon the said (*southern*) wall of the building on the servient tenement and to use the said wall for the purpose of enclosing the said intended building on the dominant tenement on its (*northern*) side

AND WHEREAS the transferor has agreed to grant such rights for the consideration hereinafter appearing NOW THEREFORE IN PURSUANCE of the premises and IN CONSIDERATION of the sum of £ paid by the transferor to the transferee (the receipt whereof is hereby acknowledged) the transferor DOTH HEREBY TRANSFER AND GRANT unto the transferee (as and in the nature of an easement imposed upon the servient tenement and appurtenant to the dominant tenement) the full and free RIGHT LIBERTY AND LICENSE at all times hereafter to use that portion of the said (*southern*) wall of the building on the servient tenement throughout its whole length up to a height of (*thirty*) feet from the present ground level or the like portion of any wall from time to time erected in substitution therefor as a support for the roof and ceiling of the said intended building on the dominant tenement or any similar substituted building AND the further right to insert into the said (*southern*) wall of the building on the servient tenement such rag-bolts and other supports and to build and fasten on to the same such corbels as the transferee may consider reasonably necessary for the purposes of supporting the said roof and ceiling and for the purpose of flashing the said roof thereto or thereon AND the right to fix or attach to or on to the said (*southern*) wall such boards plaster and other lining materials as the transferee shall think fit.

AND IT IS HEREBY MUTUALLY COVENANTED AGREED AND DECLARED by and between the parties hereto as follows:

1. The transferee shall provide and maintain a proper gutter for the conveyance of storm-water off the said intended building.

2. The transferee shall not do or permit to be done anything whereby the premises of the transferor shall in any way be rendered unstable or unsafe and the transferee shall not extend his said intended building to any height greater than (*thirty*) feet as aforesaid.

3. The transferee shall repair amend and renew and make good in proper and workmanlike manner all damage to the said building on the servient tenement caused by fire or any cause originating on the dominant tenement or through the erection repair or maintenance of the said intended building or by the acts of the servants workmen or agents of the transferee.

4. The transferor shall have the right liberty and license from time to time and at all reasonable times to enter upon the dominant tenement with or without architects or workmen for the purposes of inspecting the said (*southern*) wall and to do all things which may appear reasonably necessary for the maintenance support and repair thereof and the cost of all work done through the default of the transferee under the next preceding clause hereof shall be a debt due by the transferee to the transferor and shall be paid by the transferee upon demand.

5. The transferor shall keep and maintain the said (*southern*) wall of the building on the servient tenement in good repair order and condition.

6. Nothing herein contained shall be considered to prevent the transferor from making excavations on the servient tenement for the purposes of laying foundations for any buildings which the transferor may hereafter erect on the servient tenement or extensions to the said (*southern*) wall thereof (which excavations might but for this proviso be a derogation from the transferor's own grant) so long as the transferor provides sufficient artificial means of support to the buildings on each and both of the servient tenement and dominant tenement both during the progress and after the completion of any such work.

7. All disputes or differences arising between the parties hereto touching the operation of this grant or the construction thereof shall in every case be referred to two arbitrators and their umpire in accordance with the provisions of the Arbitration Act 1908 and any amendment thereto or any enactment in substitution therefor for the time being in force.

IN WITNESS etc.

SIGNED etc.

SIGNED etc. Correct etc.

Its Own Petard.—The N.S.W. Egg Board acting under its statutory powers made a regulation that "any person" who sold cold-storage eggs without branding them with words indicating their regrettable past history should be liable to a fine. Then it did that very thing, and a resentful trader prosecuted it under its own regulation. The Board contended that it was not a "person," and not liable under its own regulation; but Mr. Justice Bavin said it was. Hence these tears!—W. B.

Illegal Opinions.

By Iulius.

In re Solomon: Sheba v. Solomon.

King Solomon was a very wise man. King Solomon had seven hundred wives. But for his wisdom, he might have had instead seven hundred breach of promise cases—the comparative expense of a breach of promise case and a wife depending on the counsel engaged in the former.

This leads us to the problem submitted for illegal solution: Did the Queen of Sheba have a right of action for breach of promise against King Solomon, and if so, what damages?

The Queen of Sheba was very beautiful and rich. King Solomon was rich, and, if the illustrators are correct, wore a beard. The Queen of Sheba travelled far to listen to King Solomon and to appraise his wisdom and, no doubt, his reported wealth. She showered presents on him. And then she went away and the shawms and the sackbuts and phylacteries and things failed to play a single bar of the *Tannhauser Wedding March*. This could have been nobody's fault but Solomon's; a beautiful woman does not travel far and give away gold for the sake of a few professorial platitudes from a bearded tyrant.

What evidence is there then to support Sheba's case? Was there a contract and was the breach of it Solomon's?

It would be as well perhaps to state the law as to breach of promise cases. The one essential is a defendant sufficiently affluent to pay the costs of an expensive action; if he has an additional sum for any damages allowed, so much the better. Given such a defendant, it is next necessary to find as plaintiff a young woman who combines guile and simplicity, tears and charm, bashfulness and intrepidity, bucolic plainness and hoydenish beauty, modest prudence and assertive coyness in equal proportions. This is easy. There will be no difficulty in finding counsel for such a plaintiff and success should be assured. But it is sometimes advisable to be able to prove a fact or two to palliate any juryman with a conscience and not to have all the law against you—every Judge being the reservoir of all the law.

The action is called a breach of promise action because the defendant is supposed to have made a promise and to have broken it, and the jury has to be able to guess that the promise was a promise to marry.

In such an action it will not be necessary to subsidise any of the daily papers in order to obtain headlines in large type. Sensationalism and advertising are the only things needed in modern journalism—and it takes brains to write good advertisements.

Were the necessary elements present in the Queen of Sheba's case?

The facts referred to above certainly prove nothing, but they could be made to sound good to a jury and there are other arguments which could be proved in the same way. Solomon wrote a few things in his time. Take this phrase for instance: "How beautiful are thy feet with shoes, O prince's daughter!" Note the "with shoes"; such a left-handed compliment is only possible either to a wife or to a lady of whom the writer is beginning to tire. That phrase is almost enough; but there is one more damning. It will be remembered that in the leading case of *Bardell v. Pickwick*, P.P. cap. xxvi, the phrase "chops and tomato sauce" landed the defendant in gaol. Following this precedent it is difficult to see any explanation which can exonerate the author of "the voice of the turtle is heard in the land." If chops land a defendant in Fleet Prison, no penitentiary could be too hard for the epicure who licks his pencil at the anticipation of turtle soup.

The case in fact is proved to the hilt, or at least as far towards the hilt as a jury should require, but there remains to consider the question of damages. How should damages be assessed? They are generally assessed by guesswork, but this practice need not stifle a statement of the principle that damages should be some attempt to make good the loss which Sheba suffered by remaining single. In other words: What was Solomon's husbandry worth?

Solomon was no ordinary husband: not even the greatest star in filmdon could be compared with Solomon in all his marital glory. Seven hundred wives! What a husband! The most popular film actor (if there are any actors for the films) is satisfied with two or three or half a dozen wives at the most, and no ordinary husband could hope to achieve the success of Solomon.

Solomon was truly wise; by having so large a number of wives he must have saved hundreds of pounds a year as all of the seven hundred of them could support themselves by taking in the washing of the other six hundred and ninety odd. No money could repay the loss of such a husband. And this apart from his wealth, a wealth still in evidence in the world in the banking institutions of his descendants.

Such would be the Queen of Sheba's case. But—*audi alteram partem*, which is the lawyer's way of saying that a jury is entitled to two guesses.

Granted that Solomon's riches were untold, and that his wisdom was greater than riches—and the latter hypothesis is very doubtful so far as it concerns husbands—could a breach of promise, such as the Queen of Sheba, ask for more than a seven-hundredth part of them as damages? A man who expected to be loved, honoured, and obeyed by seven hundred wives, would not have much spare affection for the Queen of Sheba. The market value of a husband is not what it was; it never was, even in Solomon's day. But a jury of husbands, presided over by a Judge who is also happily married, will never believe that.

We may assume, therefore, that the Queen of Sheba's damages would be measured with a theodolite rather than with a microscope and the costs of the action would be paid and all would live happily ever afterwards.

King Solomon, let it be stressed again, had seven hundred wives and the Queen of Sheba threw herself at this most married of men. There are no King Solomons to-day. But the Queens of Sheba can cope with any emergency.

A Cocktail King.—A reader of the Journal has suggested that it may interest his fellow-readers to know what our London friends do in their spare time. In the Amateur Cocktail Competition for the British Empire, the first prize was won by Mr. Sidney H. Lamb, whose chambers are at 2 Hare Court, Temple, London. In case anyone is seasonably interested in the winning recipe, it is as follows: 25% Aurum, 25% Grand Marnier, 25% Booth's Gin, 25% Kina Lillet, with squeezed orange peel.

Practice Precedents.

Originating Summons by Trustees for Determination of Questions Arising out of Will.

By virtue of s. 98 of the Trustee Act, 1908, it is lawful for the trustee of a deceased person, who at the time of his death was engaged in or carrying on a business, trade, or occupation, to continue to carry on the same as long as the trustee considers necessary or desirable, and in so doing to employ part of the deceased's estate, with power from time to time to increase or diminish the part of the estate so employed. Such a trustee must apply to a Judge of the Supreme Court in Chambers for an order sanctioning such carrying-on of the business, and such Judge may make such order, or such other order, in the case as he thinks fit.

Where the deceased's will specifically empowers the trustee to carry on the business, there is no need for any application to the Court under s. 98 of the Trustee Act, 1908. But, where the terms of the trust are not sufficiently definite to serve as a specific authority to the trustee to determine the intention of the testator in circumstances which may not have been in the testator's contemplation when he executed his will, the trustee should apply to the Court for interpretation of the will. This is done by originating summons for a declaratory order determining any question as to the construction of such will upon which the trustee is in doubt: Declaratory Judgments Act, 1908, s. 3. In the absence of specific direction by the testator, the Court must be asked to declare the testator's intention: in *Upton v. Brown*, (1884) 26 Ch.D. 588, where there was apparently no intention to the contrary, the Court held that losses must be made good out of future profits, and in *Gow v. Forster*, (1884) 26 Ch.D. 672, where there were indications to the contrary, the losses were charged to capital; see also *Re Millichamp, Goodale, and Bullock*, (1885) 52 L.T. 758, *In re Lees*, (1908) 28 N.Z.L.R. 126, 128, *Re Jackson*, [1927] G.L.R. 396, *In re Mountain, deceased, Public Trustee v. Robson*, [1934] N.Z.L.R. 399, 412, followed in *In re Nairn, deceased, Logan v. Nairn*, [1935] N.Z.L.R. s. 134. In *In re Mountain, deceased, Public Trustee v. Robson* (*supra*), where there was a trust for conversion of a mixed residuary fund of realty and personalty, the applicability of the rule in *Howe v. Earl of Dartmouth*, (1802) 7 Ves. 137, 32 E.R. 56, is discussed.

The following forms contemplate a testator, who by his will has devised and bequeathed to his trustees all the residue of his real and personal estate upon trust for sale and conversion with power in their discretion to postpone sale and conversion, and upon further trust to invest and pay the income to his wife during her life, with direction that the net income from the unconverted estate should be paid to the person or persons entitled to the income after conversion as if such conversion had actually been made. Deceased's adult children are the remaindermen. The trustees, having carried on the deceased's business in the hope of the lifting of the depression and consequent higher land-values, have made losses in some years and profits in others. They desire to ascertain the intention of the testator as to whether the life-tenant or the remaindermen shall bear the losses. The trustees are plaintiffs, the widow the first defendant, the testator's adult children the second defendants, and his infant children the third defendants.

(ORIGINATING SUMMONS.)

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE MATTER of the Declaratory Judgments Act 1908

AND

IN THE MATTER of the Trustee Act 1908

AND

IN THE MATTER of the will of A.B. late of in the district of farmer deceased.

BETWEEN of solicitor and of farmer Plaintiffs.

AND

Defendants.

LET all the above-named defendants who claim to be beneficiaries under the will of the above-named A.B. deceased attend before the Supreme Court at on the day of 19 at o'clock in the forenoon or so soon thereafter as the parties may be heard UPON THE APPLICATION of the above-named plaintiffs being the trustees of the will of the said A.B. deceased for an order determining the following questions arising upon the interpretation of the said will namely:

1. Whether the trustees of the said will are entitled to set off the net profits made or to be made from farming operations carried on by the trustees pursuant to the said will against losses heretofore or hereafter to be made by the trustees out of such farming operations or whether such profits are payable without deduction to the first defendant pursuant to the said will.

2. If the answer to the foregoing question is to the effect that the trustees are so entitled to set off profits against losses heretofore or hereafter to be made then whether the trustees may pay to the first defendant notwithstanding any accumulations of losses during the minority of her children a sum not exceeding £ per annum to enable her to educate such children.

3. If the answer to question 2 is in the affirmative then is such payment to be made out of capital or out of income and upon what terms is the same to be made.

4. How the costs of and incidental to this application should be borne.

Dated at this day of 19 .

Registrar.

To the above-named defendants.

.....

.....

THIS Summons was taken out by of the city of solicitor for the above-named plaintiffs whose address for service is at the offices of in the city of .

THIS summons is to be served on:—

1. The first and second defendants personally.

2. On the third defendants (being the infant children of the aforesaid deceased) by serving Mr. barrister and solicitor.

Registrar.

NOTE:—Usually where there is a direction to serve in a representative capacity an order is sealed. Sometimes an independent petition for the appointment of a guardian *ad litem* is filed.

(AFFIDAVIT OF IN SUPPORT OF ORIGINATING SUMMONS.)

(*Same heading.*)

I of solicitor one of the above-named plaintiffs make oath and say as follows:—

1. That the above-named A.B. died at on or about the day of 19 leaving a will bearing date the day of 19 whereof he appointed of solicitor and of farmer to be the executors and trustees and probate of the said will was on the day of 19 granted out of the Supreme Court of New Zealand at to the said and the said .

2. That annexed hereto marked "A" is a true copy of the will of the said A.B. deceased.

3. That the said A.B. (hereinafter called "the testator") left him surviving a widow namely (being the first defendant herein) two children and both of whom are over the age of twenty-one (21) years (being the second defendants herein) and three other children ,

and all of whom are under the age of twenty-one (21) years (being the third defendants herein).

4. That in and by his said will the testator after making certain bequests to his wife gave devised and bequeathed to his trustees all the residue of his real and personal property upon trust for sale and conversion with power in their discretion to postpone such sale and conversion and upon further trust to invest the same and to pay the income thereafter to arise therefrom to his said wife during her life (subject to defeasance in the event of remarriage and to certain other trusts in such event) and after her death in trust for his children in equal shares.

5. That the principal part of the testator's estate consisted of a farm of approximately acres situated at aforesaid and pursuant to the discretion and powers vested in them by the said will the trustees have since the death of the testator carried on the business of farming.

6. That during the years ended 19 and 19 substantial profits were made from the said farming operations and the same were paid to the first defendant.

7. That during the succeeding years the following losses and profits were made as a result of the said farming operations—

.....

The excess of losses over profits for the above years amounts to £ and until these losses have been made good out of subsequent profits the trustees have been advised that pursuant to the terms of the said will or without an order of this Court they cannot make any payments whatsoever to the first defendant and consequently no payments have been made to her out of the said estate other than the profits for the years 19 and 19 .

8. That the eldest child of the testator namely is in employment and is earning his own living the second child is undergoing training as a teacher and is not able at present to earn her own living the third child is years of age and is a student at College aged years is a student at a private school for girls and aged years is a student at school a private school for boys. The two youngest children are totally dependent on their mother and the second and third children are partially dependent.

9. That I am informed and believe that the first defendant has a private income of £ per annum from a marriage settlement trust out of which she has to pay unemployment-tax and income-tax.

10. That I am satisfied it is impossible for the first defendant to maintain herself and to maintain and educate her children out of her own income. The trustees have no power under the said will to advance moneys out of the children's expectant shares for the maintenance and education of the children and can only make such advances for the "advancement preferment or benefit" of such children.

11. That the first defendant has applied to the trustees to make her an allowance during the minority of her children of £ a year out of the said estate to enable her to maintain and educate her children and has offered to allow the trustees to retain the whole future income from the trust estate until they have repaid to the estate the present arrears of income (as set out in paragraph 7 hereof) and also so much of the said allowance of £ a year as may from time to time have been paid out of capital.

12. That the trustees are willing to make the suggested payment to the first defendant provided this Honourable Court will authorise the payment to be made and they have made arrangements for the bankers of the estate to find the money as required.

13. That I am informed and believe that the second defendants have consented to such an order being made.

14. That in the opinion of the trustees the present is not an opportune time to sell a large farm and in our opinion the residuary legatees under this estate will benefit by the continuation of farming operations until a better price can be obtained for farm lands.

SWORN etc.

MOTION FOR DIRECTIONS AS TO SERVICE.

(*Same heading.*)

Mr. of counsel for plaintiffs to move in Chambers before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Courthouse on day the day of 19 at o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER directing service of the originating summons sealed herein upon the first and second defendants personally and upon the third defendants by serving the same upon a solicitor to be appointed to represent such defendants UPON THE GROUNDS that the defendants herein are the beneficiaries in the estate of A.B. deceased AND UPON THE FURTHER GROUNDS appearing in the affidavits filed herein.

Dated at this day of 19 .

Certified pursuant to the rules of Court to be correct.

Counsel moving.

Reference: Section 98 of the Trustee Act, 1908; section 3 of The Declaratory Judgments Act, 1908; *In re Mountain, deceased, Public Trustee v. Robson*, [1934] N.Z.L.R. 399, 412.

AFFIDAVIT IN SUPPORT OF MOTION FOR DIRECTIONS.

(*Same heading.*)

I of solicitor make oath and say as follows:

1. That I am one of the trustees of the will of the above-named A.B. deceased.

2. That I was well acquainted with the said A.B. before his death and am well acquainted with his widow and children.

3. That the said A.B. left him surviving his widow (the first defendant herein) and five children two of whom are over the age of 21 years (being the second defendants herein) and three of whom are under the age of 21 years (being the third defendants herein).

4. That of the children who are under the age of 21 years was born on the day of 19 and is now years of age was born on the day of 19 and is now aged years and the third was born on the day of 19 and is now aged years.

5. That apart from the widow and children there is no person interested in the estate of the said or likely to be affected by these proceedings.

SWORN, etc.

ORDER AS TO PAYMENT OF PROFITS.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the originating summons sealed herein and the affidavits filed in support AND UPON HEARING Mr. of counsel for plaintiffs Mr. of counsel for the first and second defendants and Mr. of counsel for the third defendants (having duly undertaken to appear for such third defendants pursuant to the order of this Honourable Court appointing him to represent the said third defendants) IT IS ORDERED that the net annual profits made or to be made from farming operations carried on by the plaintiffs as trustees of the will of the above-named A.B. deceased pursuant to the said will are payable without deduction to the first defendant AND IT IS ORDERED that the costs of all parties as between solicitor and client be taxed by the Registrar and paid out of the capital of the estate of the said A.B. deceased.

By the Court

Registrar.

Legal Literature.

The Law of Defamation, by PROFESSOR R. M. ALGIE, Dean of the Faculty of Law, Auckland University College. This is Bulletin No. 28 (Journalism Series, No. 2) of the College, published by the College Council and the New Zealand Journalists' Association. It is the text of a lecture by Professor Algie, surveying legal rules and principles in regard to defamation, with particular reference to New Zealand, to give journalists a working knowledge of the law of libel. It is popularly written, and gives the substance of leading cases of newspaper libel in breezy terms. While not a text-book for practitioners, it is bright and interesting in matter and treatment. Pp. 24; price 9d., postage 2d. extra; obtainable from New Zealand Journalists' Association, P.O. Box 1541, Auckland.

Recent English Cases.

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BANKRUPTCY AND INSOLVENCY.

Deed of Assignment—Construction—Rissir *In re* (Ch.D.).

A deed of assignment for the benefit of creditors on trust to pay creditors "rateably according to laws of bankruptcy, the debts due to the creditors" does not entitle the creditors to interest.

As to deeds of assignment generally: see HALSBURY, 2nd Edn., 2, para. 586 *et seq.*; DIGEST 5, p. 1180 *et seq.*

Deed of Assignment — Non-assenting creditor — Preferential Claim—Shenton *In re*; Bates & Harris (Ch.D.).

A Trustee under a deed of assignment may under sec. 15 (f) of the Trustee Act, 1925, compromise or otherwise settle a claim of a person claiming to be a preferential creditor.

As to compositions and arrangements apart from the Bankruptcy Acts: see HALSBURY, 2nd Edn., 2, para. 583 *et seq.*; DIGEST 5, p. 1056 *et seq.*

Bankruptcy—Security for Costs of Appeal—A Debtor *In re* (C.A.).

Where Receiving Orders have been made in two separate Courts and appeals are presented against each, the Court of Appeal will in a proper case dispense with security for costs in one of the appeals.

As to security for costs on Bankruptcy appeals: see HALSBURY, 2nd Edn., 2, para. 548; DIGEST 4, p. 534.

Bankruptcy — Voluntary Settlement — Provision Enabling Settlor to Raise Capital—*Re* Baker (Ch.D.).

A voluntary settlement made more than two years before bankruptcy containing power for the settlor to raise a sum which is more than sufficient to pay his debts when the settlement is executed is not void under sec. 42 of the Bankruptcy Act, 1914.

As to the avoidance of settlements on bankruptcy: see HALSBURY, 2nd Edn., 2, para. 486 *et seq.*; DIGEST 5, p. 837 *et seq.*

COMPANIES.

Company — Compulsory Winding-up — Just and Equitable —*Re* Davis & Collett, Ltd. (Ch.D.).

Where a company's affairs are so conducted as improperly to give one director control, it may be just and equitable to wind it up compulsorily.

As to grounds for compulsory winding-up: see HALSBURY, 2nd Edn., 5, para. 882, *et seq.*; DIGEST 9, p. 817.

CONTEMPT OF COURT.

Contempt of Court—Injunction granted by Court of Appeal—Enforcement—Pott & Stuteley (Ch.D.).

The appropriate court of first instance is the proper tribunal to enforce injunctions granted by the Court of Appeal.

As to enforcement of orders made by the Court of Appeal: see HALSBURY, 2nd Edn., 7, para. 77; DIGEST 16, p. 72.

DISTRESS.

Distress—Pound-breach—Permission to Use Chattels—Effect of—Bevir *v.* British Wagon Co., Ltd. (K.B.D.).

Permission to use vehicles which have been seized under a distress does not justify a pound-breach.

As to pound-breach: see HALSBURY, 2nd Edn., 10, para. 731 *et seq.*; DIGEST 18, p. 366.

DOMINIONS, ETC.

East Africa—Leave to Appeal to Judicial Committee—Security for Costs—Bracia Czeczowiczka *v.* Markus (J.C.).

Where an Order in Council relating to appeals to the Judicial Committee provides that security for costs must be ordered, it is not sufficient to order a merely nominal amount.

As to appeals from East Africa: see HALSBURY, 2nd Edn., Vol. 11, para. 438.

EXECUTORS AND ADMINISTRATORS.

Administration—Pecuniary Legacies—Payments on Account —Interest—Appropriation to—*Re* Prince; Hardman *v.* Willis (Ch.D.).

If an executor when making payments on account of legacies does not appropriate such payments to principal or interest the payee has the right to do so.

As to interest on legacies: see HALSBURY, 2nd Edn., 14, para. 662 *et seq.*; DIGEST 23, p. 396 *et seq.*

MASTER AND SERVANT.

Breach of Statutory Duty—Contributory Negligence—Flower *v.* Ebbw Vale Steel, Iron & Coal Co., Ltd. (H.L.).

The question whether on proof of breach of statutory duty by an employee, a defence of contributory negligence can be relied on, is an open one.

As to contributory negligence by servants: see HALSBURY 20, para. 257; DIGEST 34, p. 194 *et seq.*

MISTAKE.

Mistake — Contract — Rectification — Antecedent Contract— Shipley U.D.C. *v.* Bradford Corporation (Ch.D.).

The power of the Court to rectify contracts on the ground of mutual mistake is not confined to cases where there is a binding contract antecedent to the instrument which it is sought to rectify.

As to rectification on the ground of mistake: see HALSBURY, 2nd Edn., 13, paras. 21-5; DIGEST 35, p. 92, *et seq.*

New Books and Publications.

Yearly Supreme Court Practice, 1936. Edited by P.R. Sinmer, C.B., Harold G. Meyer, etc. (Butterworth & Co. (Pub.), Ltd. Price 60/-.

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